LEGITIMACY OF CAPTIVE AUDIENCES IN GERMANY

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I. CONCEPT

This essay deals with the question of whether German law permits an employer to address his employees on issues like unionization, politics, and social policies during mandatory meetings. While in the United States these "Captive Audiences" or "Compulsory Assemblages" are typically used by employers to prevent employees from joining unions, such speeches are rarely being practiced in Germany. However, the question of their legitimacy under German law will arise at latest, once companies originating from the United States start to induct them in their German operations. Since the motivation to hold captive audiences originates from the animosity of employers toward any external interference with their businesses, this essay shall start with a brief examination of the types of employee involvement in Germany. Employee involvement in Germany appears in two different types: employee participation in works councils, which is optional; and employee representation on the supervisory board, which is mandatory.

II. THE GERMAN SYSTEM OF EMPLOYEE PARTICIPATION IN WORKS COUNCILS

According to section 1 Betriebsverfassungsgesetz (BetrVG), the German Works Constitution Act, the employees of each establishment with more than five employees are entitled to elect a works council; exclusively made up of employees. However, this does not mean that every establishment with more than five employees has a works council, in several establishments no works council exists at all. According to a recent survey of the Institut der deutschen

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Wirtschaft, a private research institute, in 2007 only 7% of establishments with between 5 and 50 employees did have a works council, but 89% of establishments with more than 501 employees had them.[1] This research also shows, that only 46% of the German workforce work in establishments that have a works council.[2] The size of the works council depends on the size of the establishment, ranging between one member in establishments with between 5 and 20 employees and 35 members in establishments with between 7001 and 9000 employees.[3] In establishments with more than 9000 employees for each additional 3000 employees two more members will be elected to the works council.[4] Those employees who are elected to the works council do not have to be members of a union, but as a matter of fact, around 80% of the works council's members are members of a union. Moreover, unions are granted certain rights under the Works Constitution Act, the most important being their controlling and participating functions. Therefore, representatives of unions that have members in the establishments' workforce are entitled to access the establishment.[5] The works councils' most important function is to participate in social, personnel, and economic affairs. Depending on the subject of the employer's action, the works councils' rights range from a right of information on actions the employer intends to take to the right of codetermination.[6] Codetermination means that the employer cannot take action without the approval of the works council, i.e., the works council has the right to veto against decisions of the employer. Every quarter the works council has to hold a works meeting to inform the employees on its activities, to these meetings the employer has to be invited and is entitled to give a speech to the participants.[7] Once a year, the employer has to give a report on personnel and social affairs, on the economic condition and development of the establishment and on the establishments' measures concerning environmental protection.[8] The question of whether or not the employer is also entitled to communicate his views

1. Institut der deutschen Wirtschaft, *Pressemitteilung* No. 22/2007 Inst. Der deutschen Wirtschaft, Jun. 7, 2007.

2. *Id.*

3. Works Constitution Act 1972, 9.

4. *Id.* at 9.

5. *Id.* at 2.

6. For a detailed description of the works councils' competences see MANFRED WEISS & MARLENE SCHMIDT, LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY, margin no. 490 et. seq. (1st ed. 2000).

7. Works Constitution Act 1972, 43.

8. Works Constitution Act 1972, 43(2).

on unionization, politics, and social policies will be dealt with in this essay.

III. THE GERMAN SYSTEM OF EMPLOYEE REPRESENTATION ON THE SUPERVISORY BOARD

Under German law, employee representation not only takes place in works councils on the establishment level but also on supervisory boards on the enterprise level. Unlike employee representation in works councils, employee representation on the supervisory board does not depend on the will of the employees to elect representatives, but on the legal structure of the company, its industry line, and its size. Thus employee representation on the supervisory board cannot be avoided by manipulating those employees entitled to vote. If the owner of an enterprise would like to avoid employee representation on the supervisory board, one way of achieving this goal would be transforming the legal structure of the enterprise into a form of a partnership (*BGB-Gesellschaft, Offene Handelsgesellschaft, Kommanditgesellschaft*) or a sole proprietorship, which do not have supervisory boards. Changing of the industry line or the number of employees as other possibilities of avoiding employee representation would be even more difficult, so these measures are out of the question. Therefore, this essay will focus on the issue of employee representation in works councils.

IV. THE LEGAL SITUATION

Since captive audiences are far from being a common phenomenon, there are no regulations dealing with captive audiences specifically, so the corresponding law has to be derived from statutory law and court decisions. Generally speaking, the German Constitution, the Basic Law (*Grundgesetz*, abbr. GG) that stands on the top of the hierarchy of the sources of German law, contains rather broad provisions that are specified by the provisions of the ordinary legislation. Considering this, it is easy to understand that every interpretation of the ordinary legislation has to keep in mind the constitutional provisions.[9] Interpretation of the ordinary law becomes

9. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 19, 1993, 567/89 Arbeitsrechtliche Praxis [AP] (F.R.G.); GRUNDGESETZ [GG][Constitution] art. 2 no. 35 (F.R.G.); BVerfG [Federal Constitutional Court] Nov. 16, 1993, 258/86 Arbeitsrechtliche Praxis [AP] (F.R.G.); Bürgerliches Gesetzbuch [BGB][Civil Code] § 611a No. 9; BVerfG[Federal Constitutional Court] Apr. 7, 1997, 11/96 Neue Zeitschrift für Arbeitsrecht (F.R.G.); Manfred

relevant in cases where it contains vague notions or general clauses. These vague notions and general clauses are numerous, since the constitutional provisions, with only one exception, are not applied directly between private individuals, but between the state and private individuals. Also, interpretation of the ordinary law becomes necessary once there are loopholes in the law, which is exactly the case concerning captive audiences. Therefore, the crucial constitutional provisions shall be examined first. In the second step, the focus shall be on the relevant ordinary legislation and the court decisions based thereon, which, as already indicated above, are influenced by the relevant constitutional provisions.

A. The German Constitution (GG)

In the case of captive audiences, constitutional rights of both the employer and the employee are affected. On the part of the employer these are the right of free expression accordant to Article 5 GG, the right of occupational freedom accordant to Article 12 GG and the right of ownership accordant to Article 14 GG. On the employees' part the constitutional rights involved are the freedom of personality accordant to Article 2 paragraph 1 GG and the right of freedom of association accordant to Article 9 paragraph 3 GG. These constitutional provisions are only violated if the scope of protection is affected without being justified.

1. Freedom of expression, Article 5 paragraph 1 GG

A speech of the employer to his employees about his personal opinion on unionization, politics, and social policies, as an expression of his opinion belongs to the scope of protection of this constitutional provision and certainly this scope of protection would be affected if these kind of speeches were prohibited. However, Article 5 paragraph 2 GG allows the limitation of the scope of protection among others by general laws. General laws pursuant to Article 5 paragraph 2 GG are laws that are not directed against the expression of opinion itself but intend to serve the protection of a comprehensive legally protected interest.[10] For instance, Article 5 paragraph 1 GG does not allow an employer to force his speech on others against their

Weiss, *The Interface Between Constitution and Labor Law in Germany*, 73 COMP. LAB. L. & POL'Y J. 181, 181–98 (2005).

10. BVerfG [Federal Constitutional Court] July 14, 1994, 1595/92 & 1606/92 Neue Juristische Wochenschrift, 184 et seq. (F.R.G.); BVerfG [Federal Constitutional Court] Apr. 28, 1976, 71/73 Arbeitsrechtliche Praxis (F.R.G.); Works Constitution Act 1972, 74(2).

will.[11] However, the possibility of affecting the scope of the freedom of expression by general laws enables the State to extensive interference with this constitutional provision. Therefore, according to a theory developed by the Federal Constitutional Court, the so called *Wechselwirkungslehre*, general laws themselves have to be interpreted with keeping in mind the constitutional right of freedom of expression.[12] Thus the Federal Constitutional Court limits the State's power of interfering with the freedom of speech by means of passing general laws. In the course of this essay examples of such laws and their implications will be shown.

2. Occupational Freedom, Article 12 GG

Article 12 GG protects the freedom of carrying on an enterprise.[13] This protection is only granted under the proviso of ordinary legislation (*Gesetzesvorbehalt*). Since Article 12 GG also protects the occupational freedom of the employees, the occupational freedom of the employer can be limited by ordinary legislation allowing for employee representation.[14]

3. Right of ownership, Article 14 GG

Article 14 GG protects the right of private property, within the boundaries of common welfare. Compared to the right of occupational freedom guaranteed by Article 12, which protects the acquisition of property, Article 14 protects the property acquired.[15] Since the right of private property is only protected within the boundaries of common welfare, it can be limited by legal positions of others, too. This becomes significant for example in cases where a union wants to use an employer's property to use a bulletin board for advertising purposes (for example).

4. Freedom of Action, Article 2 paragraph 1 GG

Article 2 paragraph 1 GG protects the freedom of action, as long as it does not violate any other law that itself is in accordance with the

11. BVerfG [Federal Constitutional Court] Jan. 15, 1958, 1 BvR 400/57, Neue Juristische Wochenschrift 257 et seq. (F.R.G.).

12. *Id.*

13. THOMAS DIETERICH ET AL., ERFURTER KOMMENTAR ZUM ARBEITSRECHT (C.H. Beck ed., 7th ed. 2007); Grundgesetz [GG] art. 12 margin nos. 9, 14 (F.R.G.).

14. BVerfG [Federal Constitutional Court] Ma. 1, 1979, 1 BvR 532/77, 533/77, 419/78, 21/78 AP (F.R.G.); Mitbestimmungsgesetz [MitbestG, Co-Determination Act], § 1 no. 1.

15. DIETERICH, *supra* note 13; GG art. 12 margin no. 16 (F.R.G.).

Constitution. Since it is not only a rather weak provision but also a general provision, it only becomes significant if other constitutional provisions are inapplicable. Thus the answer to the question of whether or not an employee can refuse to take part in a captive audience based on his right of freedom of action depends on whether or not the employer has a right to hold captive audiences.

5. Freedom of Association, Article 9 paragraph 3 GG

Article 9 paragraph 3 GG[16] guarantees the freedom of association. Unlike other constitutional provisions, Article 9 paragraph 3 GG not only is being applied between the state and private individuals, but also directly between private individuals.[17] Freedom of association appears as individual freedom and as collective freedom of association. The individual freedom of association guarantees employers and employees the right of joining and remaining in a collective industrial organization as well as leaving or staying away from such kinds of organizations.[18] The collective freedom of association allows collective industrial organizations to guard and promote employment and economic conditions.[19] This freedom can be limited only by other constitutional provisions but not by ordinary legislation.[20] In cases of conflicts between the freedom of association and other constitutional provisions both positions have to be balanced by concretizing or confining the conflicting legal positions.[21] Since "measures" that "restrict or seek to impair" the right of freedom of association "shall be unlawful," Article 9 paragraph 3 GG protects employees from being discriminated against or from being obstructed because they exercise their right to freedom of association. For example an employer is not allowed to make an applicant leave the union in order to be hired.[22] It is also prohibited for employers to act hostile toward unions or take sides against unions; employers have to be considerate of the unions' concerns as

16. Article 9 [Freedom of association] "(3) The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. . . ."

17. Weiss, *supra* note 9, at 181.

18. Weiss & Schmidt, *supra* note 6, at margin no. 317 et. seq.

19. *Id.* at margin no. 319 et. seq.

20. BVerfG [Federal Constitutional Court] Oct. 20, 1981, 404/78 AP (F.R.G.); TVG § 2 no. 31.

21. DIETERICH, *supra* note 13; GG [Constitution] art. 9 margin no. 44 (F.R.G.).

22. Bundesarbeitsgericht [Federal Labor Court] Ma. 28, 2000, 16/99 Neue Zeitschrift für Arbeitsrecht (F.D.R.).

long as it is reasonable.[23] For instance the employer has to grant access to union members in order for them to promote the advantages of union membership on bulletin boards in the establishment.[24] This leaves little to no room to the employers' propaganda against unionization.

B. Ordinary Legislation

As mentioned above, the provisions of the Constitution are rather vague and general and therefore are specified by the ordinary legislation. Since the ordinary law does not contain any provisions concerning captive audiences, the corresponding law has to be derived from existing legislation. The ordinary law distinguishes between establishments without a works council and those with a works council.

1. Establishments Without a Works Council

Labor contracts' regulations usually are broad, not covering the details of the daily job performance, therefore the employer has been given the right to assign tasks to his employees or to instruct them.[25] The employer can exercise this right only within the limits of the equitable discretion (*Billiges Ermessen*).[26] These limits are not violated, as long as the employer balances the essential facts and justly considers the concerns of both the employee and himself.[27] In the course of this just consideration, the employer above all has to consider the constitutional provisions in favor of the employee and the business needs of his establishment.[28] In the case of a captive audience, as already mentioned, the constitutional provisions in favor of the employee are the right of freedom of action accordant to Article 2 paragraph 1 GG and the right of freedom of association accordant to Article 9 paragraph 3 GG. Besides that, as already mentioned above, the freedom of expression accordant to Article 5 paragraph 1 GG gives the employer no right to force his opinion on

23. DIETERICH, *supra* note 13, at art. 9 margin no. 44.

24. Bundesarbeitsgericht [Federal Labor Court] Feb. 14, 1978, 280/77 AP (F.D.G.); GG [Constitution] art. 9 No. 26.

25. Gewerbeordnug [GewO, German Trade, Commerce and Industry Regulation Act], § 106.

26. Weiss, *supra* note 9, at 181.

27. Bundesarbeitsgericht [Federal Labor Court] June 23, 1993, 337/92 AP (F.R.G.); BGB [Civil Code] § 611 no. 42.

28. WOLFGANG BLOMEYER, MÜNCHNER HANDBUCH ZUM ARBEITSRECHT § 48, margin no. 42 (2d ed. 2000).

others. Therefore, in the author's opinion, the employer is not entitled by section 106 GewO to force speeches against unionization on his employees. Also, as long as the employer has no business needs to give speeches on political and social policies, which should be the majority of cases, speeches on these issues cannot be forced on the employees.

2. Establishments with Works Councils

In establishments with a works council, section 106 GewO applies too, offering a level of protection against captive audiences to employees as good as in establishments without works councils. In addition to section 106 GewO, the German Works Constitution Act (*Betriebsverfassungsgesetz*, abbr. BetrVG) is applicable. The BetrVG does not deal with captive audiences, but contains certain provisions that allow for deriving an answer to the question of captive audiences' legitimacy.

According to section 2 BetrVG, the employer and the works council shall cooperate faithfully. If union members are employed in the establishment, employer and works council shall cooperate with these unions, too. The same applies, if the employer is member of an employers' association, to the cooperation with this association, too. The obligation of faithful cooperation does not mean that the employer and the works council are not allowed to focus on opposing objectives.[29] Significantly, section 2 BetrVG prohibits the employer to disclose the cost of employee participation in his establishment without emphasizing that by law these costs have to be paid for by the employer.[30] The court argues in its decision, that the disclosure of the costs caused by the employee participation through works councils without emphasizing his legal duty to pay for these costs, would force the works councils' members to legitimate these costs toward the other employees' and thus would disturb the works councils' members performing their ordinary tasks in the works council.

According to section 43 BetrVG, every quarter of the year the works council has to hold a works meeting to inform the employees on its activities, to these meetings the employer has to be invited and is entitled to give a speech to the participants. Once a year, the employer has to give a report on personnel and social affairs, on the economic condition and development of the establishment, and on the

29. A. KRAFT, BETRIEBSVERFASSUNGSGESETZ § 2, margin no. 14 (7th ed. 2002).

30. Federal Labor Court of July 19th 1995 - 7 ABR 60/94 in *Arbeitsrechtliche Praxis* (Munich), C. H. Beck, § 23 BetrVG 1972 No. 25.

establishment's measures concerning environmental protection.[31] Moreover, accordant to section 45 BetrVG, the works meetings can deal with economical issues, collective agreement policies, social policies, and environmental issues as long as they directly affect the establishment.

In addition to the meetings of the works council, the employer is also entitled to hold meetings with the employees.[32] During these meetings, the employer is allowed to determine the course of the meetings, for instance restricting employees to written questions only.[33] Even though the employer may determine the course of these meetings, he is not allowed to use these meetings as opposing meetings to those of the works council.[34] Indicators of such opposing meetings are, for example, only short periods of time between both meetings or a boycott of the works councils' meeting by the employer.[35]

In addition to this, section 74 paragraph 2 BetrVG governs the basic principles of cooperation between employer and works council. This provision prohibits any measure of collective action between the both parties. Besides that, employer and works council are forbidden to engage in any activities that disturb business needs or the peaceful atmosphere in the workplace in addition to not being allowed to promote any political parties.

Finally, section 78 BetrVG prohibits any kind of obstruction and disturbance of those who serve on the works council.

Considering this set of rules and decisions on the cooperation between employer and works council, there is no room for American style captive audiences.

V. CONCLUSION

Even though there are no specific laws governing captive audience speeches in Germany, the possibilities of an employer to address his employees are limited. If the employer wants to address issues typically addressed in American captive audiences, there is virtually no chance doing so legally.

31. Works Constitution Act 1972, 43(2).

32. Federal Labor Court of June 27, 1989, 28/88 AP (F.R.G.); Works Constitution Act 1972, 42(5).

33. [Regional Labor Court Düsseldorf] Feb. 15, 1985, 14/85 Neue Zeitschrift für Arbeitsrecht, 294 et seq. (F.R.G.).

34. Bundesarbeitsgericht [Federal Labor Court] June 27, 1989, 28/88 AP (F.R.G.); Works Constitution Act 1972, 42(5).

35. *Id.*