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A Forward-Looking History of the German Works Constitution

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tradizione è ricorrente, ma soprattutto risponde a strategie discorsive di volta in volta diverse; inoltre lo stesso approccio formalistico tedesco è a sua volta retto proprio dall'invenzione di una tradizione, quella romanistica. Sarebbe, dunque, interessante valutare il rilievo dei diversi usi del passato e del suo portato giuridico, nella soluzione del problema della sostenibilità della legge.

Ci sono poi altri percorsi che fuoriescono dall'oggetto nel libro ma che proprio quest'indagine stimola a considerare. Si pensi al ruolo giocato dalla creazione della giurisdizione costituzionale e delle Corti costituzionali (tratto, per altro, comune a Italia e Germania). Si pensi inoltre alla possibilità di un allargamento dell'analisi comparativa ad altre realtà, (ad esempio la Spagna), la cui storia costituzionale, come quella italiana e tedesca, conosce una fase di involuzione dittatoriale nel Novecento e nelle quali lo stesso processo di convergenza nel formato monistico della legalità durante il XIX secolo, ha avuto uno svolgimento complesso.

Nuovi temi possono emergere a partire dalla lettura di questo volume. Anche in ciò esso offre un contributo allo sviluppo del dibattito storiografico.

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Ruth Dukes

A Forward-Looking History of the German Works Constitution*

Rendered into English, the term »works constitution« may require some explanation. It is not a term of art in English or American law, nor is it immediately obvious – except, perhaps, to someone with pre-existing knowledge of German labour law – to what it might refer. Clues can be found in the work of the pioneering sociologists and scholars of *Industrial Democracy* (published 1897), Beatrice and Sidney Webb, who described freedom of association and factory legislation at the end of the 19th century as a »constitution« for the industrial realm. To wage labourers, they wrote, »the uncontrolled power wielded by the owners of the means of production, able to withhold from the manual worker all chance of subsistence unless he accepted their terms, meant a far more genuine loss of liberty, and a far keener sense of personal subjection, than the […] far-off, impalpable rule of the king.«[1] The legal recognition of collective bargaining and the gradual elaboration of a labour code signified the concession of a »Magna Carta« to the entire wage-earning class, and the extension of the values of liberty and equality from the political into the industrial sphere. A close reader of Otto Kahn-Freund's classic chapter on the *Legal Framework* of industrial relations may recall the passage wherein he writes of »the legal constitution […] if one may use that term« of the »factory or mine, office or workshop«. In England, where the law was silent at the time on worker representation and worker »voice« at the level of the single workplace, the legal constitution was »still that of an absolute monarchy to the rule of which its members have submitted by contract«.[2]

The works constitution is, then, the complex of legal rules and institutions which together serve to ensure that workplace decision making (or, at least, some specific types of decision making) proceeds *democratically*: with the participation of the workforce, rather than unilaterally by management. In Germany, the principal institution of the works constitution is the *works council*, representative of all workers at a particular place of work without any requirement for them to »sign up«, and regard-

* Wolfgang Däubler, Michael Kittner, Geschichte der Betriebsverfassung, Frankfurt am Main: Bund-Verlag 2020, 621 p., ISBN 978-3-7663-6934-5

1 Beatrice Webb, Sidney Webb, Industrial Democracy, London 1897, 841.

2 Hugh A. Clegg, Allan Flanders (eds.), The System of Industrial Relations in Great Britain, Oxford 1954.

less of the matter of their membership, or non-membership, of a trade union. »Works« – *Betrieb* – has been defined by the courts as »the organizational unit within which an employer, alone or with its employees with the help of technical and immaterial means, pursues over time certain work-related purposes that are not limited to the satisfaction of personal needs.« In plainer English, this denotes, as Kahn-Freund put it, the single factory or mine, office or workshop. According to the law, the works council has a suite of rights which ensures its participation in decision-making concerning a wide range of matters from working hours to health and safety. The term »works constitution« appears in the title of the statute that regulates the creation and functioning of the works councils: the *Betriebsverfassungsgesetz*, or Works Constitution Act. Dating back in its original form to 1952, the statute has a predecessor in the Works Councils Act of 1920, which itself had antecedents in the wartime legislation of 1914–1918 and the 19th century.

Publication of this new *History of the Works Constitution* has been timed to coincide with the centenary of the Works Councils Act on 4 February 2020. The authors' motivation in writing it was not only to mark that centenary, however, but also to give extended consideration to matters that have been at the centre of political conflict at several important junctures in Germany's history. Already in the Frankfurt Parliament of 1848, for example, workplace worker representation was debated in the context of proposals to institute new forms of economic democracy as well as political democracy. The establishment of committees was permitted in a draft law, but the Parliament was dissolved before the law could be implemented. Following the coalminers' strike in 1889, demands were made for the formation of works committees to be rendered obligatory in law. In line with Bismarck's plans for the curbing of socialist influence, Kaiser Wilhelm II agreed to these demands and provision was made in statute for the establishment of workplace worker committees (*Arbeiterausschüsse*), albeit not on a compulsory basis. In the face of employer opposition, the provision made little impact. During the First World War, the introduction of obligatory workplace worker committees was the cause of deep-seated conflict between the majority Social Democrats and leadership of the trade unions, on one side, and the left-wing opposition on the other – a conflict which continued to play out for the entire duration of the Weimar Republic. Following the November Revolution of 1918, the revolutionary workers' councils were for a short while symbolic of the fundamental question concerning the constitution of a new democratic Germany: should it involve a form of »council« (soviet) democracy, or should it be based upon parliamentary democracy? In 1945, immediately after the war had ended, a large number of works councils were created spontaneously by workers as an expression of a general will to create a new kind of democracy, one which would take precedence – this time – over the economy. The Works Constitution Act of 1972, which significantly extended the rights of the works councils and strengthened the role of trade unions in the workplace constitution, was the expression of a democratic awakening the like of which the Federal Republic was never to see again (6). What all this goes to show is that the works constitution is not a niche topic in Germany, something of interest only to specialists. It occupies a central position in the economy and in society, and forms an integral element of German history (6).

As they specify in their introduction to the volume, the authors' intention in presenting the history of the works constitution is to identify threads or pathways which indicate the route forward. A great deal of attention is devoted by them to the pre-history of the 1920 Act and they well demonstrate, too, that 19th-century developments in respect of workplace worker representation had forerunners in the self-help – we might say »mutual« or »friendly« – societies created by craft journeymen and coalminers in previous centuries. The book ends with consideration of the current challenges posed to the works constitution in an era of globalisation and digitalisation, when working relations are becoming ever more precarious. History teaches us above all, they write, that the old saying remains valid: »don't expect help from anyone but yourselves!« (7). An effective workplace constitution which makes work more humane can only endure when it is experienced by as many as possible of the affected actors as »theirs«. Despite the many setbacks, this has been achieved to some extent even in a globalised economy. To achieve it, still, in an age of digitalisation is one of the biggest challenges of our time.

Given the identity of the two authors it will come as no surprise that this is a very good book indeed. Wolfgang Däubler is Professor of German

and European Labour Law, Civil Law and Economic Law at the University of Bremen. Michael Kittner is emeritus Professor of Economic, Labour and Social Law at Kassel University and was for many years standing counsel to IG Metall and director of the Otto Brenner Foundation. For several decades now, they have been and remain two of the most prominent scholars of labour law in Germany. In this *History*, they adopt an interesting and fruitful approach to the analysis and storytelling which blends legal analysis with legal history and the sociology of work and the workplace. The starting point for their analysis is the observation that the workplace constitution is the expression of particular political and economic power relations that are shaped not only by the law but by the widely varying practices of different workplaces. The statutory rules and courts' interpretation of those rules comprise only one small part of the bigger picture. Legal rules are supplemented by many informal norms, which guide the actual behaviour of workplace actors. Given the impressive breadth of coverage in the book, and the authors' ambition to identify and explain long term trends and developments, the analysis is not always very detailed; however, thorough referencing provides helpful signposts for anyone who would like to know more.

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Leticia Vita

Teoría Pura del Derecho y filosofía del derecho en el siglo XXI*

Pensar a la Teoría Pura del Derecho como programa y como enfoque específico del derecho, es la propuesta principal de esta obra que reseñamos y que debe ser leída en sintonía con otras tres recientes publicaciones: la de los tomos 6 (*Veröffentlichte Schriften* 1920–1921) y 8 (*Veröffentlichte Schriften* 1922) de la obra completa de Kelsen (*Hans Kelsen Werke*), ambos editados por Matthias Jestaedt y el Instituto Hans Kelsen de Viena en 2020, y la de *Hans Kelsen in seiner Zeit* (Hans Kelsen en su tiempo), editado por Clemens Jabloner, Thomas Olechowski y Klaus Zeleny en 2019. Todas ellas demuestran que el interés por Kelsen y su teoría sigue absolutamente vigente.

Los 24 trabajos que integran esta obra fueron presentados a fines de 2018, en el encuentro de la sección alemana de la Asociación Internacional de Filosofía del Derecho y Filosofía Social (*Internationale Vereinigung für Rechts- und Sozialphilosophie*) en la ciudad de Freiburg. Sus editores son Matthias Jestaedt, profesor de la Albert-Ludwigs-Universität Freiburg im Breisgau y, como señalamos, editor de la monumental obra *Hans Kelsen Werke*; Ralf Poscher, director del Instituto Max Planck de Derecho Penal Extranjero e Internacional en Freiburg y Jörg Kammerhofer, profesor en la Facultad de Derecho de la Albert-Ludwigs-Universität y miembro del grupo de investigación Hans Kelsen.

El prólogo de esta obra destaca un aspecto no tan revisado de la obra de Hans Kelsen: el de su extensa resonancia en otras comunidades académicas. Existe un vínculo muy claro entre la vida de Kelsen, su destino como exiliado y la expansión de su obra en otras latitudes. Recordemos que Kelsen nació en Praga en 1881 y se mudó, a los pocos años, con su familia a Viena, donde vivió la mayor parte del tiempo hasta que se radicó definitivamente en Alemania en 1925. Con la llegada de Hitler al

* Matthias Jestaedt, Ralf Poscher, Jörg Kammerhofer (eds.), Die Reine Rechtslehre auf dem Prüfstand / Hans Kelsen's Pure Theory of Law: Conceptions and Misconceptions. Tagung der Deutschen Sektion der Internationalen Vereinigung für Rechts- und Sozialphilosophie vom 27.–29. September 2018 in Freiburg im Breisgau, Stuttgart: Franz Steiner Verlag 2020, 427 p., ISBN 978-3-515-12568-0