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# Wedderburn and the Theory of Labour Law: Building on Kahn-Freund

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## Abstract

This paper aims to assess the nature and significance of Lord Wedderburn's contribution to the elaboration of a theory of labour law. Noting the extent to which Wedderburn was influenced, in this respect as in others, by the work of Otto Kahn-Freund, it focuses on the question of whether Wedderburn ever developed a theory of labour law that was clearly distinguishable from Kahn-Freund's. Were there significant differences in the two scholars' expositions of abstentionism, or *collective laissez-faire*? Through a close reading of Wedderburn's work, it is suggested that Wedderburn was a strong proponent of the principle of collective laissez-faire, in his early as well as his later writing. In the changed political context of the 1980s and 1990s, he undertook the important task of seeking to update or restate the principle as an expression of social-democratic values in the field of work and working relationships.

## I. Introduction

In his approach to scholarship, and in terms of the substance of his position on the theory of labour law, there can be little doubt that Lord Wedderburn (1927-2012) was strongly influenced by the work of Otto Kahn-Freund (1900-1975).<sup>1</sup> This is hardly surprising given the time at which Wedderburn began researching and teaching the subject. The two were contemporaries, but Wedderburn was firmly the more junior, both in years and as a scholar of labour law. When he first became fellow of Clare College Cambridge in 1951, Kahn-Freund had been 15 years in post at the London School of Economics, with additional years of scholarship and legal practice

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\* School of Law, University of Glasgow. I'm grateful to the Editor for the invitation to contribute to this issue and to Bob Hepple, Mark Freedland, Paul Smith, Alan Bogg and Hugh Collins for very helpful comments on an earlier draft. The subtitle is taken from Lord Wedderburn, J Lewis, R Clark (eds), *Labour Law and Industrial Relations: Building on Kahn-Freund* (Oxford 1983).

<sup>1</sup> B Hepple, 'Wedderburn's *The Worker and the Law*: an Appreciation' (2013) 34 *Historical Studies in Industrial Relations* 215-27, 218 FN 24: Wedderburn 'emulated' the 'method that Kahn-Freund imbibed' from Sinzheimer.

behind him in the Weimar Republic.<sup>2</sup> When Wedderburn first devised a course on ‘industrial law’ in Cambridge in 1961, the writings of Kahn-Freund, including the famous 1950s collective laissez-faire trilogy, were prominent amongst the materials available to draw on.<sup>3</sup> Most importantly perhaps, Kahn-Freund’s writing – both the substance of his analysis and his methodology or approach – fitted well with Wedderburn’s existing political convictions and trade union sympathies. Emulation of the older scholar’s method allowed him to make the kinds of argument that he wished to make.

The central aim of this article is to address the question whether it is possible to identify a theory of labour law in Wedderburn’s work that is clearly distinguishable from Kahn-Freund’s. In order to identify and assess Wedderburn’s position, the article focuses on his exposition of the notion of abstentionism, or collective laissez-faire, exploring the question of differences in the thinking of the two scholars.<sup>4</sup> In a third section, extended consideration is given to the recommendations of the Bullock Committee as a matter over which they famously disagreed.<sup>5</sup>

In the course of the article, it is suggested that in his earlier writing, Wedderburn followed the teachings of Kahn-Freund closely, adopting the principle of collective laissez-faire with enthusiasm as a framework through which to present an analysis of labour law as a single, coherent legal discipline. In places, he appeared to express a degree of scepticism, even, regarding the value of law as a means of furthering the interests of workers. Citing Kahn-Freund with approval, he suggested that the British system was best understood as ‘abstentionist’, straightforwardly understood in terms of a withdrawal of the state from the arena of industrial relations. In later writing – in particular on the question of the desirable response of scholars to

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<sup>2</sup> Kahn-Freund was appointed to a lectureship at the LSE in 1936 and promoted to Professor in 1951: M Freedland, ‘Otto Kahn-Freund’ in J Beatson and R Zimmermann (eds), *Jurists uprooted: German-speaking émigré lawyers in twentieth-century Britain* (Oxford 2004).

<sup>3</sup> O Kahn-Freund, ‘Legal Framework’ in A Flanders and H A Clegg, *The System of Industrial Relations in Great Britain* (Oxford 1954); O Kahn-Freund, ‘Intergroup Conflicts and their Settlement’ (1954) 5 *British Journal of Sociology* 193-227; O Kahn-Freund, ‘Labour Law’ in M Ginsberg (ed) *Law and Opinion in England in the 20<sup>th</sup> Century* (Stevens 1959).

<sup>4</sup> As is explained in the course of the paper, Wedderburn tended, in his early work, to use the terms ‘abstentionism’ and ‘collective laissez-faire’ interchangeably, emphasising, like Kahn-Freund, the degree to which the British state had chosen to ‘abstain’ from involvement in the field of industrial relations. In later work, he sought to restate or redefine collective laissez-faire so as to divorce it from the notion of state abstentionism.

<sup>5</sup> ie The Committee of Inquiry on Industrial Democracy, chaired by Lord Bullock, which reported in 1977. See section III below.

the policies and legislation of the Conservative governments of the 1980s and 90s – Wedderburn was arguably more optimistic than Kahn-Freund had been regarding the capacity of legislation to effect positive change, though he did not ever lose or revise his scepticism regarding the capacity of the ordinary courts to decide industrial disputes in a truly objective manner. Focusing on what he now presented as the core ‘values’ underpinning the notion of collective laissez-faire, he advocated the continued use of the principle as a means of countering the increasingly hegemonic free market ideology of Friedrich Hayek and others: of defending collectivism and free trade unionism as necessary for the achievement of social justice. While it might be difficult to argue, then, that Wedderburn ever developed a theory of labour law that was wholly distinguishable from collective laissez-faire, he did undertake the very important task of explaining, expanding upon, and updating the principle as an expression of social-democratic values in the field of work and working relationships.

## **II. *The Worker and the Law***

*Most workers want nothing more of the law than that it should leave them alone.*<sup>6</sup>

In the very significant body of work published by Wedderburn in the field of labour law over the course of a long career, the three editions of the textbook *The Worker and the Law* occupy a central position. The first edition of the text appeared in 1965, and the second and third in 1971 and 1986, each substantially revised and progressively longer. Extending by the last of these to over 800 pages, the texts today offer numerous valuable insights, not only into the state of the law and industrial relations at the time, but also into the thinking of the author as it developed during more than two decades.

As Bob Hepple has argued, expressing his ‘appreciation’ of the work in 2013, the first edition of *The Worker and the Law* made a major contribution to labour law scholarship in the UK by providing *for the first time* a comprehensive account of the whole field: demarcating boundaries

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<sup>6</sup> KW Wedderburn, *The Worker and the Law*, 1<sup>st</sup> ed, (Harmondsworth 1965). 1

with other legal disciplines, and analysing ‘all’ of the relevant law.<sup>7</sup> Other textbooks then available failed to present labour law as a single, coherent subject, offering instead only a rather limited, black-letter analysis of a sometimes seemingly disparate collection of legal rules – the common law of master and servant, for example, and the factories and mines legislation.<sup>8</sup> Any discussion of collective bargaining in legal textbooks tended to be most notable by its absence, or brevity.<sup>9</sup> By 1965, Kahn-Freund had, of course, published a number of works which lent coherence to the field by way of the elucidation of the principle of collective laissez-faire.<sup>10</sup> It is presumably to these works that Wedderburn referred in the *Preface* to the first edition, when he stated that there had, ‘been created in this decade a new recognition of the coherence of Labour Law as a subject of study’.<sup>11</sup> Kahn-Freund had not attempted to write a comprehensive textbook, however, nor anywhere otherwise to analyse the field in its entirety. Here was the gap, then, that Wedderburn intended to plug.<sup>12</sup>

The second great strength of *The Worker and the Law* identified by Hepple was the clarity with which it explained its subject matter. By its own assertion, the text was intended for ‘the general reader and student of our social and legal system’, rather than for the academic community, or legal practitioners.<sup>13</sup> Its aim was to provide ‘a *simple* account of the relationship between British workers and the law’; ‘a *general* guide to the impact of law on the field of employment’,<sup>14</sup> and it did so, in the words of Bill McCarthy, with the help of a ‘profusion of diagrams and quite a few jokes’.<sup>15</sup> Following a discussion of the ‘Foundations’ of the subject, the text provided an analysis of *inter alia* the contract of employment, collective bargaining, compensation for injury at work, industrial conflict, and the relationship between trade unions and their members. For McCarthy, it achieved a ‘comprehensiveness and lucidity ... that professionals respected and

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<sup>7</sup> Hepple, 219; *Worker and the Law*, 1<sup>st</sup> ed, Preface: Wedderburn claimed to provide a simple account of the subject ‘for the first time’.

<sup>8</sup> Hepple 217

<sup>9</sup> Hepple 217

<sup>10</sup> Especially: Kahn-Freund, ‘Legal Framework’; Kahn-Freund, ‘Intergroup Conflicts and their Settlement’; Kahn-Freund, ‘Labour Law’.

<sup>11</sup> *Worker and the Law*, 1<sup>st</sup> ed, Preface

<sup>12</sup> *Worker and the Law*, 1<sup>st</sup> ed, Preface

<sup>13</sup> *Worker and the Law*, 1<sup>st</sup> ed, Preface

<sup>14</sup> *Worker and the Law*, 1<sup>st</sup> ed, Preface, my emphasis.

<sup>15</sup> B McCarthy, Lord Wedderburn of Charlton Obituary, *The Guardian*, Monday 12 March, 2012

novices could follow'.<sup>16</sup> Hepple recalled that, 'one could safely recommend the 1<sup>st</sup> and 2<sup>nd</sup> editions to intelligent shop stewards or managers who wanted an overview of labour law'.<sup>17</sup>

As to the theory of labour law presented in *The Worker and the Law*, it seems quite clear that – in this respect, as in others – Wedderburn followed the teachings of Kahn-Freund quite closely. In his analyses of British labour law published in the 50s, Kahn-Freund had emphasised the extent to which collective bargaining had developed and proceeded, in the UK, autonomously of the state.<sup>18</sup> Attempts to regulate industrial relations by means of statute had tended to aim at encouraging, rather than compelling, the parties to bargain with one another, and the state had not taken steps to influence directly the outcomes of the bargaining process: the specific terms of collective agreements.<sup>19</sup> On the basis of this analysis, Kahn-Freund had characterised the British system as 'abstentionist', or 'non-interventionist'; as guided by the principle of 'collective laissez-faire'.<sup>20</sup> In places, and especially where he sought to compare the UK with other jurisdictions, he had come close to suggesting that the state, and 'state' law, had been insignificant in the development and practice of British industrial relations: 'Trade union "recognition" was achieved in this country by purely industrial as distinct from political and legislative action... The proud edifice of collective labour regulation was built up without the assistance of the "law"'.<sup>21</sup>

In *The Worker and the Law*, Wedderburn embraced this vision of trade unions, and a system of collective bargaining, proudly independent of the state. Each of the three editions opened with the memorable claim that, 'Most workers want nothing more of the law than that it should leave them alone'.<sup>22</sup> The defining characteristic of British industrial relations, when compared with

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<sup>16</sup> McCarthy, Obituary

<sup>17</sup> Hepple 219

<sup>18</sup> Kahn-Freund, 'Legal Framework'; Kahn-Freund, 'Intergroup Conflicts and their Settlement'; Kahn-Freund, 'Labour Law'

<sup>19</sup> See further R Dukes, 'Otto Kahn-Freund and Collective Laissez-Faire: an Edifice without a Keystone?' (2009) 72 *Modern Law Review* 220-46

<sup>20</sup> See eg 'Legal Framework' 123; 'Labour Law' 224

<sup>21</sup> O Kahn-Freund, 'Collective Agreements under War Legislation' (1943) 6 *Modern Law Review* 112-43, 143. See also 'Intergroup Conflicts', 44; 'Labour Law', 224; P Davies and M Freedland (eds), *Labour and the Law*, 3<sup>rd</sup> ed (London 1983). 52-3

<sup>22</sup> *Worker and the Law*, 1<sup>st</sup> ed, 9.

those of other democracies, was that they were ‘so little regulated by law’.<sup>23</sup> And the history of labour law in the UK was best recounted as an answer to the question, why that should have been the case: why was it that the system which emerged from the nineteenth century ‘expressed ‘non-intervention’ by the law’?<sup>24</sup> In the Preface to the first edition, Wedderburn recorded his gratitude to ‘Professor O. Kahn-Freund, to whom I, like every other student of our Labour Law, owe a great debt’. In all three editions, he referred to Kahn-Freund explicitly and always with approval, as the ‘leading authority of the post-war era’.<sup>25</sup> So, for example, according to Wedderburn, collective agreements were “‘intended, as it is sometimes put, to be ‘binding in honour’ only”’;<sup>26</sup> on the labour side, power was collective power.<sup>27</sup> Where Kahn-Freund wasn’t directly cited, there were nonetheless strong echoes of his analysis and his vocabulary. The British system, Wedderburn explained, was informed and underpinned by notions of freedom and democracy.<sup>28</sup> The worker’s freedom to combine in ‘autonomous’ associations was essential so as ‘to alleviate his subordination’.<sup>29</sup> ‘Autonomous collective bargaining’ was paramount, and collective bargaining assumed ‘freedom for workers to organize in independent trade unions, to bargain independently and effectively with the employer’.<sup>30</sup> Little effort was made by Wedderburn to depart from, or to critique, Kahn-Freund’s theory of collective laissez-faire. His aim appears rather to have been to communicate and to explain that principle as a ‘useful rationalization’ of the field – as that which lent the field coherence – and thereafter to use it as a framework through which to offer a comprehensive analysis of the law, filling in some of the detail thus far omitted by Kahn-Freund and other scholars.<sup>31</sup>

Closely linked to the idea of collective laissez-faire as developed by Kahn-Freund and articulated by Wedderburn was a particular approach to labour law scholarship.<sup>32</sup> In the law textbooks otherwise available in the late 1950s and early 1960s, the scant attention paid to collective

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<sup>23</sup> Here, Wedderburn cited Phelps-Brown rather than Kahn-Freund: H Phelps-Brown, *The Growth of British Industrial Relations* (1959), 355. Cited *Worker and the Law*, 1<sup>st</sup> ed, 9.

<sup>24</sup> Lord Wedderburn, *The Worker and the Law* 3<sup>rd</sup> ed (Harmondsworth 1986), 16

<sup>25</sup> *Worker and the Law*, 3<sup>rd</sup> ed, 5

<sup>26</sup> *Worker and the Law* 1<sup>st</sup> ed, 107, citing Kahn-Freund, ‘Legal Framework, 57-8

<sup>27</sup> *Worker and the Law*, 3<sup>rd</sup> ed, 7. Here Wedderburn omits the citation: *Labour and the Law*, 3<sup>rd</sup> ed, 49

<sup>28</sup> *Worker and the Law* 3<sup>rd</sup> ed, 7

<sup>29</sup> *Worker and the Law* 3<sup>rd</sup> ed, 7

<sup>30</sup> *Worker and the Law* 3<sup>rd</sup> ed, 7

<sup>31</sup> *Worker and the Law* 3<sup>rd</sup> ed, 18; *Worker and the Law* 1<sup>st</sup> ed, Preface; Hepple, 223

<sup>32</sup> Lord Wedderburn, ‘Otto Kahn-Freund and British Labour Law’ in Wedderburn, Lewis, Clark, *Labour Law and Industrial Relations*, 29-31

bargaining could be understood to follow, almost as a matter of course, from the positivistic or black-letter style of legal analysis favoured by their authors.<sup>33</sup> Concerned only to explain the text of the relevant statutory provisions and judicial authority, these authors quite naturally devoted only a few short passages to collective bargaining: to the rules contained in the Trade Disputes Act 1906, and the one or two court decisions pertaining to their interpretation. Schooled, in contrast, by Hugo Sinzheimer to consider the historical and sociological significance of the law in addition to its terms – the ‘real’ rule as well as the ‘formal norm’<sup>34</sup> – Kahn-Freund, and Wedderburn after him, accorded a much greater measure of importance to collective bargaining.<sup>35</sup> Taking inspiration most likely from the Webbs, Sinzheimer, Kahn-Freund, and Wedderburn each studied the terms of collective agreements in addition to those of the relevant cases and statutes.<sup>36</sup> Collective agreements and union rule books were included in Wedderburn’s 1967 *Cases and Materials on Labour Law*.<sup>37</sup> In the Preface to the first edition of *The Worker and the Law*, he thanked, in addition to the scholars Kahn-Freund and Paul O’Higgins, the solicitor Brian Thompson and trade unionist Jim Mortimer: ‘for discussions on practical points of law and trade union affairs that brought me into closer touch with them’.<sup>38</sup>

Of course, the articulation of collective laissez-faire by Kahn-Freund, and later Wedderburn, was also closely informed by the political convictions of the two scholars. Both began their analyses of labour law and industrial relations from a recognition of the existence of conflicts of interest between labour and capital; the workforce and management; the employee and employer.<sup>39</sup> Recognising the inevitability and the universality of conflicts of interest, each scholar was concerned too with questions of power: with inequalities of power, and with the vulnerability of the worker in his relationship with the employer.<sup>40</sup> The subordination of the worker to the employer (of labour to capital) was understood, with Sinzheimer and the Webbs, to be contrary

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<sup>33</sup> Hepple 217-8; Wedderburn ‘Kahn-Freund and British Labour Law’, 31

<sup>34</sup> O Kahn-Freund, ‘Hugo Sinzheimer’ in R Lewis and J Clark, *Labour Law and Politics in the Weimar Republic* (Oxford 1981). 98

<sup>35</sup> See further R Dukes, *The Labour Constitution* (Oxford 2014), esp. 197-200

<sup>36</sup> According to Kahn-Freund, Sinzheimer was ‘very much influenced by the Webbs’: O Kahn-Freund, ‘Postscript’ in Lewis and Clark, 196. Wedderburn refers to the Webbs frequently in the first edition of *Worker and the Law*.

<sup>37</sup> (Cambridge 1967), cited Hepple, 218

<sup>38</sup> *Worker and the Law*, 1<sup>st</sup> ed, Preface

<sup>39</sup> *Worker and the Law*, 1<sup>st</sup> ed, 340; Kahn-Freund, *Labour and the Law*, 26-8

<sup>40</sup> *Worker and the Law*, 1<sup>st</sup> ed, 32



to the principle of democracy.<sup>41</sup> Industrial democracy demanded the empowerment or emancipation of the worker, and collectivization and collective bargaining were the best means of achieving it. Embodied in the principle of collective laissez-faire was advocacy of the collectivization of labour, and of respect for the autonomy of trade unions and collective industrial relations.

In the case of Kahn-Freund, a preference for a wide measure of union autonomy was evident already in work written in the 1920s and 30s on Weimar labour law, and appears to have been linked to his adherence to a form of liberalism that involved a deep-seated mistrust of too great a measure of state intervention in industrial relations.<sup>42</sup> ‘I always regarded myself as a liberal’, he reflected in later years, ‘more in the American than the German sense, with a small ‘l’. The idea of individual freedom had greater weight for me than for my more strongly Marxist-oriented friends at that time’.<sup>43</sup> In the Weimar Republic, as in the England of the 1950s, Kahn-Freund believed that the government should not ‘interfere’ directly with collective bargaining or collective dispute resolution, and that courts should not be entrusted with the task of adjudicating industrial disputes.

Wedderburn, too, emphasised, time and again, the importance of trade union autonomy, and the inappropriateness of law courts as a forum for the resolution of industrial conflicts. His firmly held belief was that the judiciary tended, almost as a matter of course, to be guided in their decision-making by a wish to further the interests of their own – employing, capital-owning – class.<sup>44</sup> It was for that reason that trade unions wished industrial disputes to be kept out of the courts;<sup>45</sup> and, it was for that reason that a wider social consensus had emerged that this should be so.<sup>46</sup> ‘Judges, employers, unions, and the legislature have combined to agree on one point, namely that, whatever else was done about industrial conflict and labour relations, the lawyers

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<sup>41</sup> *Worker and the Law*, 1<sup>st</sup> ed, 342

<sup>42</sup> Dukes, ‘Otto Kahn-Freund and Collective Laissez-Faire?’

<sup>43</sup> O Kahn-Freund, ‘Autobiographische Erinnerungen an die Weimarer Republik. Ein Gespräch mit Wolfgang Luthardt’ (1981) 14 *Kritische Justiz* 183-200, 189, my translation.

<sup>44</sup> *Worker and the Law* 1<sup>st</sup> ed, 341

<sup>45</sup> *Worker and the Law* 1<sup>st</sup> ed, 20

<sup>46</sup> See eg Lord Scrutton writing in 1920, cited 1<sup>st</sup> ed, 20; Winston Churchill speaking in 1911: ‘It is not good for trade unions that they should be brought in contact with the courts, and it is not good for the courts’, cited: Kahn-Freund, ‘Labour Law’, 15

must be kept out'.<sup>47</sup> As presented by Wedderburn in *The Worker and the Law*, the abstentionist tradition in British industrial relations meant, above all, the keeping of disputes out of the courts.<sup>48</sup>

In later work, as we shall see, Wedderburn was mildly critical of Kahn-Freund's tendency to over-emphasise, at times, the extent to which the state had truly 'abstained', and did truly abstain, from the sphere of industrial relations. The suggestion inherent in the idea of abstention of no or only limited law (and extralegal state intervention) was misleading: what was singular about the British system was the character rather than the quantity of labour law.<sup>49</sup> In making this point, Wedderburn readily convinced. To suggest that British trade unions achieved recognition by reason of their industrial might alone was greatly to underemphasise both the importance of state support for the construction of collective bargaining machinery, and the significance of employer preferences in shaping state policy.<sup>50</sup> As Wedderburn must have been aware, however, the criticism that he made of Kahn-Freund could equally have been levelled at some of his own statements and claims in *The Worker and the Law*, especially the first edition of the text.<sup>51</sup>

[O]n some occasions the foreign observer looks in vain for what he would recognize as 'Labour Law' in Britain... Writers on the subject face the paradox that their subject has, until recently, been thought by most lawyers not to exist at all.<sup>52</sup>

In the third edition of *The Worker and the Law* – in recognition, in part, of the significant changes to the legal framework and to society that had occurred by that time – the discussion was a little more nuanced.<sup>53</sup> But Wedderburn remained capable of overstating his case, and of

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<sup>47</sup> *Worker and the Law* 1<sup>st</sup> ed, 25

<sup>48</sup> *Worker and the Law* 1<sup>st</sup> ed, 342

<sup>49</sup> See further part II below.

<sup>50</sup> KD Ewing, 'The State and Industrial Relations: "Collective laissez-faire" Revisited' (1998) 5 *Historical Studies in Industrial Relations* 1; A Flanders, 'The Tradition of Voluntarism' (1974) 12 *British Journal of Industrial Relations* 352-70; C Howell, *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890-2000*, (Princeton 2005).

<sup>51</sup> See p 5 above. Is there a hint of an admission of guilt in his 1995 explanation of the importance to British labour law of compulsory arbitration, a fact, he then suggested, that had been 'widely undervalued by us all'? : 'Change, Struggle and Ideology in British Labour Law' in Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law* (London 1995). 11

<sup>52</sup> *Worker and the Law* 1<sup>st</sup> ed, 9

<sup>53</sup> Compare *Worker and the Law* 1<sup>st</sup> ed, 9 with 3<sup>rd</sup> ed, 1, and the discussion in 3<sup>rd</sup> ed, 846-7

endorsing the overstatements of others: for example, when he cited with approval the claim that, compared with the rest of Europe, British industrial relations had ‘a state-less structure’.<sup>54</sup>

An explanation for the tendency to exaggerate or over-simplify the discussion of the role of the state in industrial relations can perhaps be found in the intention that Wedderburn had had in 1965 to provide a ‘simple account’, or ‘introduction’, for ‘the general reader’, avoiding ‘technical detail’.<sup>55</sup> Perhaps it owed something, too, to the novelty of the ideas at the time and to Wedderburn’s enthusiasm for them: to the perception that the subject of labour law had been born in the UK with the 1950s contributions of Kahn-Freund, with the exposition of the principle of collective laissez-faire, and the demonstration of the benefits of an historical and sociological approach to the study of the field. ‘How heartening it was’, wrote Wedderburn years later, ‘to read an analysis giving a shape to a system which conventional lawyers were still wont to describe as ‘the law of contract and tort’, if not ‘master and servant’’.<sup>56</sup> The prevailing mood has been captured by Hepple, recalling his own experience of reading Wedderburn’s early work: he felt, he explained, ‘like Keats when first looking on Chapman’s Homer ... “Like some watcher of the skies/When a new planet swims into his ken”’.<sup>57</sup> This was not the time for too great a measure of caution.<sup>58</sup>

### III Reflections on Collective Laissez-Faire

*The crucial question is not ‘how much’ [law] but: of what sort and to what end?’<sup>59</sup>*

In other work, Wedderburn reflected more directly, and at length, on Kahn-Freund’s scholarship and the meaning of the principle of collective laissez-faire.<sup>60</sup> In 1981, he wrote a lecture in

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<sup>54</sup> *Worker and the Law* 3<sup>rd</sup> ed, 848

<sup>55</sup> *Worker and the Law* 1<sup>st</sup> ed, Preface, my emphasis

<sup>56</sup> ‘Change, Struggle and Ideology’, 24

<sup>57</sup> Hepple, 217-8

<sup>58</sup> CF Wedderburn’s reference to Kahn-Freund’s ‘more extreme formulations’ written ‘in the first flush of his grand design’: ‘Change, Struggle and Ideology’, 25

<sup>59</sup> *Worker and the Law*, 3<sup>rd</sup> ed, 860

<sup>60</sup> Discussion here focuses on ‘Kahn-Freund and British Labour Law’, and on the 1995 chapter, ‘Change, Struggle and Ideology’

honour of Kahn-Freund and Sinzheimer, which took the form of a review of Kahn-Freund's contribution to labour law, organised chronologically.<sup>61</sup> As was no doubt appropriate in that context, the lecture was highly complimentary. Kahn-Freund had 'revolutionized the study, the teaching, and the *very character* of labour law in Britain'.<sup>62</sup> Collective laissez-faire was 'a scholarly feat of genius', encapsulating 'a brilliant and compelling intellectual judgment'; Kahn-Freund was a 'giant among scholars'; his passing a 'tragedy' for labour law.<sup>63</sup> Did Wedderburn risk the charge of exaggeration, or even puffery, with these remarks? Certainly he appeared to overstate, in places, the originality of Kahn-Freund's arguments; for example, in the course of his discussion of the contractual force of collective agreements under UK law.<sup>64</sup> The suggestion there was that Kahn-Freund had deduced for himself the answer to the question, why such agreements were never enforced as contracts between the parties, and had been the first to explain the matter to others.<sup>65</sup> In fact, Kahn-Freund's classification of collective agreements as not contractually binding followed, in the words of Hugh Clegg, the 'generally accepted account of the working of British collective bargaining at that time'.<sup>66</sup> In as early as 1929, Walter Milne-Bailey had written that:

'The Agreement itself ... is a 'gentlemen's agreement' only. It is not legally binding, as such, though its terms may expressly or by implication become the terms of the individual contract of employment.'<sup>67</sup>

And in his 1959 article on 'Intergroup Conflicts', Kahn-Freund had cited Milne-Bailey as authority for the point.<sup>68</sup>

When it came to the identification of the principle of collective laissez-faire as a rationalization for the legal unenforceability of collective agreements together with further characteristics of the law, the ascription of originality to Kahn-Freund was likely rather more warranted.<sup>69</sup> In turning

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<sup>61</sup> The Sixth Hugo Sinzheimer Memorial Lecture, published as 'Kahn-Freund and British Labour Law'

<sup>62</sup> 'Kahn-Freund and British Labour Law', 29

<sup>63</sup> 'Kahn-Freund and British Labour Law': 38, 45, 47, 67, 69-70

<sup>64</sup> 'Kahn-Freund and British Labour Law', 43

<sup>65</sup> 'Kahn-Freund and British Labour Law', 43

<sup>66</sup> H Clegg, 'Otto Kahn-Freund and British Industrial Relations' in Wedderburn, Lewis and Clark (eds), 24.

<sup>67</sup> W Milne-Bailey, *Trade Union Documents* (London: Bell & Sons, 1929). 212; Cited: Kahn-Freund 'Intergroup Conflicts', 210, note 68

<sup>68</sup> Kahn-Freund, 'Intergroup Conflicts' 210, fn 68

<sup>69</sup> Though cf Sinzheimer's discussion of 'collective liberalism': 'Die Reform des Schlichtungswesens', in H Sinzheimer, *Arbeitsrecht und Rechtssoziologie* (Europäische Verlagsanstalt, 1976). 243

to address the meaning of the principle, Wedderburn departed, to some extent, from the picture painted in the first edition of *The Worker and the Law* of a system of industrial relations developing and functioning largely independently of the state. He charted a progression in Kahn-Freund's thinking from a description of the 'attitude of the law' in 1954 as 'one of abstention and neutrality', to a preference already in 1959 for the terms 'non-intervention' and 'collective laissez-faire'.<sup>70</sup> The progression was to be approved, Wedderburn suggested, because the latter terms more clearly reflected what was most significant about the British system: the historical emergence of the 'method of Collective Bargaining' as the primary means of governing industrial relations.<sup>71</sup> He then identified a distinction, returned to in later work, between the 'descriptive' and 'prescriptive' aspects of the principle.<sup>72</sup> Collective laissez-faire, he suggested, was 'primarily descriptive of [that] historical process and its bequest to a particular era', but it also implied Kahn-Freund's approval of the relative unimportance of legal *sanctions* in the UK (note that the reference was not, now, to the law more generally): a sign of the maturity of British industrial relations.<sup>73</sup>

If, for the moment, Wedderburn was content to endorse both the descriptive and prescriptive aspects, it was also the case that his discussion of changes to the legal framework during the 1970s and early 1980s focused less on the 'significance of legal sanctions' to industrial relations than it did on the principles or 'values' that could be said to underpin the notion of collective laissez-faire.<sup>74</sup> Paramount among these was the principle of respect for free and autonomous trade unionism. It was by attacking autonomous trade unionism that the 1971 Industrial Relations Act had constituted a – temporary – end to voluntarism, and by restoring respect therefor that the legislation of 1974-76 had ushered in a return of the collective laissez-faire system.<sup>75</sup> To make that claim, of course, was to suggest that the principle of collective laissez-faire had been respected by the Labour governments of the 1970s notwithstanding their institution of 'a vastly expanded' floor of individual legal rights dealing with unfair dismissal, redundancy, discrimination, and maternity, and a set of collective rights including a statutory

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<sup>70</sup> 'Kahn-Freund and British Labour Law', 40

<sup>71</sup> 'Kahn-Freund and British Labour Law', 40, citing the Webbs: *Industrial Democracy* (1902) Part II, chapter II

<sup>72</sup> 'Kahn-Freund and British Labour Law', 41-2

<sup>73</sup> 'Kahn-Freund and British Labour Law', 41

<sup>74</sup> Kahn-Freund, *Legal System*, 43-4, cited 'Kahn-Freund and British Labour Law', 41. Wedderburn refers explicitly to the values underpinning collective laissez-faire at 68-9

<sup>75</sup> 'Kahn-Freund and British Labour Law', 53-4

recognition procedure.<sup>76</sup> The suggestion, in other words, was that the existence of a significant body of statutory labour rights, individual and collective, was *not* inimical to respect for collective laissez-faire.

In the last sections of the lecture, Wedderburn turned to the question of the future development of labour law in the politically polarised context of 1981, following the death of Kahn-Freund in 1979. If it could quite quickly be concluded that many of the old arguments and ways of thinking – the ‘old charts’ – had lost their currency, it was equally clear that the values which ‘lay behind’ collective laissez-faire were as important then as they had been in the 1950s.<sup>77</sup>

These were:

a passionate belief in democratic values, alongside a clear vision of the subordination and injustice to which the worker is committed by the very act of selling his labour. From that very subordination springs the moral right of ordinary men and women to associate together, to speak freely, and to act collectively.<sup>78</sup>

The task now for labour law scholars, Wedderburn suggested, was ‘ceaselessly to re-examine the place of law not only abstractly in society, but also concretely in the lives of ... millions of working men and women’, holding on, always, to the ‘rich gifts’ that Kahn-Freund had bequeathed to them.<sup>79</sup>

In the course of the 1980s, a number of prominent scholars of UK labour law took up the theme of the outdatedness of ‘the old charts’ for navigating the subject, developing it in ways which would not meet, ultimately, with Wedderburn’s full approval. In their 1983 editors’ introduction to the third edition of Kahn-Freund’s *Labour and the Law*, Paul Davies and Mark Freedland expressed their dissatisfaction with the principle of collective laissez-faire as a means of explaining the primary policy concerns and objectives of government.<sup>80</sup> In implying that the main focus of scholarly endeavour should lie with voluntary collective bargaining, the principle encouraged scholars to take their eye off the ball of what had, in fact, been *the central concern* of

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<sup>76</sup> ‘Kahn-Freund and British Labour Law’, 54

<sup>77</sup> ‘Kahn-Freund and British Labour Law’, 68

<sup>78</sup> ‘Kahn-Freund and British Labour Law’, 69

<sup>79</sup> ‘Kahn-Freund and British Labour Law’, 70

<sup>80</sup> A version of the introduction was published in 1982 as: P Davies and M Freedland, ‘Labour Law and the Public Interest: Collective Bargaining and Economic Policy’ in Wedderburn and Murphy (eds), *Labour Law and the Community: Perspectives for the 1980s* (London 1982)

a succession of governments in the postwar era: the control of inflation and the maintenance, at the same time, of high levels of employment.<sup>81</sup> If labour law, as an academic discipline, was to ‘maintain its credentials as offering an explanatory framework of the legal regime within which the employment relation operates’, Davies and Freedland argued, scholars of the subject ought to re-orientate their studies and their writing to reflect more accurately these policy priorities and strategies, and to take account of legislation and government activity aimed at their implementation.<sup>82</sup> In 1987, Hugh Collins developed a more sustained critique of the ‘abstentionist tradition’, identifying what he understood to be the need for ‘greater legal intervention’ in labour relations to secure respect for the values of democracy, the Rule of Law, and fairness.<sup>83</sup> As a basis for his critique, Collins defined abstentionism, or collective *laissez-faire*, as having at its core both a concern for the promotion of industrial democracy – to be achieved by means of the guarantee of a right to strike, and the institution of collective bargaining – and an ‘insistence of the impotence of law’ to achieve those aims.<sup>84</sup> So defined, abstentionism and its proponents could be criticised for overestimating the capacity of collective bargaining to realize the ‘ideals of democracy’, and for grossly underestimating the significance and potential usefulness of legislation in shaping and directly regulating such relations.<sup>85</sup>

In 1995, Wedderburn took the opportunity to mount a sustained defence of collective *laissez-faire*.<sup>86</sup> The main thrust of the defence involved the claim that those who criticised the principle did so on the basis of a flawed understanding of it. In order to make this claim, Wedderburn drew the most nuanced picture yet of its meaning, suggesting again that the values at the core of collective *laissez-faire* remained relevant notwithstanding the changed political and economic conditions of the time. Indeed, this was the primary argument of the piece as set out in its introduction:

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<sup>81</sup> Labour and the Law, 3<sup>rd</sup> ed, 3-4

<sup>82</sup> Labour and the Law, 3<sup>rd</sup> ed, 5

<sup>83</sup> H Collins, ‘Against Abstentionism in Labour Law’ in J Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence*. Third Series (Oxford 1987)

<sup>84</sup> Collins, ‘Against Abstentionism’ 83-4

<sup>85</sup> Collins, ‘Against Abstentionism’ 91, 84-100

<sup>86</sup> ‘Change, Struggle and Ideology’

Any ‘dialectic of progress’ needs to eschew hubris and learn from past societies at all levels. And proponents of a new labour law cannot afford indiscriminate discardment of lessons from the past.<sup>87</sup>

What were the still valuable lessons of the past? Wedderburn was now quite emphatic that these did *not* include a blanket rejection, or disapproval, of state intervention in industrial relations, legal or extra-legal.<sup>88</sup> The term collective laissez-faire had been coined by Kahn-Freund to describe, and to signal approval of, the ‘primacy’ of voluntary collective bargaining in British industrial relations, especially as compared with other countries.<sup>89</sup> While it could be understood broadly to imply a specific kind of non-intervention or neutrality on the part of the state, it was certainly not synonymous with state abstentionism straight-forwardly understood.<sup>90</sup> Collective laissez-faire meant that the state should – and did, for the most part – remain neutral as to the outcomes of collective bargaining and arbitration procedures.<sup>91</sup> It captured well the existence of a preference on both sides of industry for voluntary collective bargaining, and for forms of dispute resolution that did not involve the courts. And it described and advocated a system of industrial relations which involved, or reflected, state respect for those preferences.<sup>92</sup> But it did not mean that there should be, or had been in the UK, no labour law.<sup>93</sup> The picture painted by Kahn-Freund of British industrial relations, even in the 1950s, had *not* been one of ‘unrelieved ‘abstention’; the ‘gloss’ on voluntarism which we saw added by legislation was on the contrary intervenient’.<sup>94</sup> As had been explained by Kahn-Freund in his 1950s publications, a variety of legislative provisions and mechanisms had then existed which acted as a prop or support to collective bargaining. And compulsory arbitration of one form or another had remained a central feature of British labour law from the 1940s until 1980, ‘in war and peace’.<sup>95</sup> Taking all this into account, Wedderburn concluded that it was perhaps regrettable that Kahn-Freund had ever used

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<sup>87</sup> ‘Change, Struggle and Ideology’, 3

<sup>88</sup> This point is made repeatedly throughout ‘Change, Struggle and Ideology’, at eg 8, 22

<sup>89</sup> ‘Change, Struggle and Ideology’, 6-7

<sup>90</sup> ‘Change, Struggle and Ideology’, 10, 21

<sup>91</sup> ‘Change, Struggle and Ideology’, 11, 15

<sup>92</sup> ‘Change, Struggle and Ideology’, 22

<sup>93</sup> ‘Change, Struggle and Ideology’, esp. 22

<sup>94</sup> ‘Change, Struggle and Ideology’, 10.

<sup>95</sup> ‘Change, Struggle and Ideology’, 11



the term ‘abstention’, since this had allowed for the erroneous interpretation and premature rejection of collective laissez-faire by scholars such as Collins.<sup>96</sup>

In developing his argument, Wedderburn now drew a distinction between *three* aspects of collective laissez-faire: the descriptive, prescriptive, and the ideological. He approved the first of these, describing Kahn-Freund’s claim that the ‘proud edifice of collective labour regulation’ had been ‘built up without the assistance of the law’ as ‘historically undeniable’.<sup>97</sup> The critical distinction, for both authors, appears to have been the fact that in the UK the Trade Disputes Act of 1906 created statutory immunities for trade unions, whereas elsewhere, they had been guaranteed positive legal rights, including rights to recognition.<sup>98</sup> When it came to Kahn-Freund’s ‘prescriptive’ characterisation of the British trade unions’ purported self-reliance as the ‘distinguishing mark’ of a ‘mature’ system of industrial relations, however, Wedderburn was now more critical.<sup>99</sup> Such characterisation was rash, he suggested, because it involved an overstatement of the insignificance of the state to the emergence and persistence of the British system.<sup>100</sup> In any case, the most important aspect of collective laissez-faire was the third: that which offered ‘an understanding and justification of collective organisation in general, and in particular the need and right of workers to form, join and act in combination through autonomous trade unions, free from control by employers or by the State’.<sup>101</sup> *These* were the core values which underlay the principle of collective laissez-faire, and which ought not to be too quickly dismissed by the current generation of labour law scholars. As ideology, collective laissez-faire did not imply a rejection of the potential usefulness or importance of state – and statutory – interventions. When considering routes to law reform which respected the ‘spirit of collective laissez-faire’, the question to be addressed by scholars was , ‘how the law can intervene

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<sup>96</sup> ‘Change, Struggle and Ideology’, 21-22. Wedderburn refers to Collins at 22, footnote 133. He discusses Davies and Freedland’s use of the term and analysis of the labour law of the 1950s at 8-11.

<sup>97</sup> ‘Change, Struggle and Ideology’, 25, citing Kahn-Freund, ‘War Legislation’, 143

<sup>98</sup> For Wedderburn the existence of immunities rather than positive rights was ‘the key point’: ‘Change, Struggle and Ideology’, 24. He cited with approval Kahn-Freund’s distinguishing of the British system on the grounds that: ‘No Wagner Act, nor Weimar Constitution, no Front Populaire legislation has imposed upon British employers the duty to enter into negotiation with trade union representatives’. ‘Change, Struggle and Ideology’, 25, citing Kahn-Freund, ‘War Legislation’, 143

<sup>99</sup> ‘Change, Struggle and Ideology’, 28. Cf fn 74 **Error! Bookmark not defined.** above and associated text.

<sup>100</sup> ‘Change, Struggle and Ideology’, 28, 25

<sup>101</sup> ‘Change, Struggle and Ideology’, 28

productively, directly or indirectly'.<sup>102</sup> The search now for an alternative labour law would likely 'on some occasions invoke methods of autonomous collective bargaining, on others the methods of enactment, usually the two together as has so often been the case'.<sup>103</sup>

In this later work, then, Wedderburn expressed the view quite unambiguously that a programme of law reform could be developed in the 'spirit of collective laissez-faire', which involved the introduction of new and strengthened statutory rights, individual and collective. It remained the case, in his opinion, that disputes involving employees and employers, unions and management, should be kept out of the ordinary courts, and for that reason he advocated the development of a system of labour courts with jurisdiction to decide all such cases.<sup>104</sup> With that proviso, he referred to, among other things, the institution of new forms of worker participation and the strengthening of statutory rights to employment protection as possible elements of a programme of law reform.<sup>105</sup> In making these points, Wedderburn presented his own understanding of collective laissez-faire as the orthodox one: as that which could be gleaned from the most accurate reading of Kahn-Freund's work, and its relation to historical fact. Where he did admit of significant points of disagreement between himself and the senior scholar – for example, in respect of the question whether the introduction of a 'floor' of individual statutory rights signalled the end of the era of collective laissez-faire – he explained these with the suggestion that *Kahn-Freund* had departed from or contradicted the principle!<sup>106</sup>

#### **IV Bullock and the Land of Industrial Democracy**

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<sup>102</sup> 'Change, Struggle and Ideology', 36

<sup>103</sup> 'Change, Struggle and Ideology', 39

<sup>104</sup> '[H]owever liberal its judges try to be, the common law cannot escape from its class ideology': 'Change, Struggle and Ideology', 31. Labour courts are discussed at 30-1.

<sup>105</sup> 'Change, Struggle and Ideology', 39

<sup>106</sup> Regarding the authors' different reactions to the recommendations of the Bullock Committee, for example, Wedderburn suggested that Kahn-Freund had 'struggled against his own progeny when he opposed 'worker participation' in decision making': 'Change, Struggle and Ideology', 23. Further points of disagreement are listed at 'Change, Struggle and Ideology', 37

*The conjunction of unity and conflict – the ‘conflictual partnership’ – which we see as characteristic of collective bargaining, is likely to be the hallmark of board-level relations.*<sup>107</sup>

As an advisor to the TUC and as a Labour Party peer, Lord Wedderburn was directly involved in formulating recommendations for law reform over a period of several decades.<sup>108</sup> In some instances, he succeeded in influencing the development of the common law, as for example when he persuaded the court in the *Ford Motor Company* case, acting as counsel for the trade union defendant, to follow Kahn-Freund’s teaching that collective agreements were not usually contractually binding.<sup>109</sup> If we can infer from such endeavours a belief that an appropriate objective of legal scholarship was to influence government policy, legislation, and legal precedent, then this was another conviction that he shared with Kahn-Freund, and with Sinzheimer before him.<sup>110</sup> Whereas Kahn-Freund, as a member of the Donovan Commission, had famously advocated the maintenance, in essence, of the existing voluntarist system, however, the recommendations and proposals authored or co-authored by Wedderburn in later years often involved the taking of more interventionist steps by government.<sup>111</sup> In the mid-1990s, for example, with a realistic prospect at last of a Labour Party victory in the next general election, he assisted the TUC in the compiling of a report, *Your Voice at Work*, which recommended the introduction of a fairly comprehensive statutory framework creating new rights to representation: individual representation in meetings with an employer, consultation, and recognition.<sup>112</sup> As member of the Bullock Committee from 1975-77, he participated in the development of proposals for the instatement of worker directors on company boards.<sup>113</sup>

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<sup>107</sup> P Davies and Lord Wedderburn, ‘The Land of Industrial Democracy’ (1977) 6 *Industrial Law Journal* 197-211, 198

<sup>108</sup> McCarthy, Obituary

<sup>109</sup> *Ford Motor Company v AEUW* [1969] 2 QB 303. ‘Kahn-Freund and British Labour Law’, 44

<sup>110</sup> *Worker and the Law* 3<sup>rd</sup> ed, 856-61; Dukes, *Labour Constitution*, chapters 5 and 8

<sup>111</sup> ie the *Royal Commission on Trade Unions and Employer’s Associations*. For an account of Kahn-Freund’s participation on the Commission see HA Clegg, ‘Otto Kahn-Freund and British Industrial Relations’ in Wedderburn, Lewis and Clark

<sup>112</sup> S Veale, ‘A Legislative Prompt? The TUC Perspective on the 2000 Recognition Procedure’ in S Moore and S McKay, *Statutory Regulation and Employment Relations* (Basingstoke 2013). 43

<sup>113</sup> Prior to his participation on the Committee, Wedderburn drafted a private members’ bill on industrial democracy, introduced to the House of Commons in 1975: J Phillips, ‘UK Business Power and Opposition to the Bullock Committee’s 1977 Proposals on Worker Directors’ (2011) 31-32 *Historical Studies in Industrial Relations* 1-30, 11-2

New legislation to allow for the board-level representation of workers was first proposed by the TUC in 1974, and included in the Labour Party manifesto for the general election of that year. Reporting in January 1977, the Committee of Inquiry on Industrial Democracy, chaired by Lord Bullock, recommended in outline that trade union worker-directors be appointed to the boards of private-sector companies with at least 2000 employees, subject to approval by all employees in a secret ballot.<sup>114</sup> In the face of quite vehement opposition to the proposals on the part of the CBI, the Conservative Party, and multinational business leaders, and of explicit threats of heightened industrial action and economic destabilization, the Labour government did not ever legislate to implement them.<sup>115</sup> On the question of their merits, Kahn-Freund and Lord Wedderburn famously disagreed. Writing in anticipation of a white paper, each detailed his arguments in a pair of articles published in this journal in 1977.<sup>116</sup>

Kahn-Freund opposed the Bullock proposals on a number of grounds. In explanation of his opposition, he referred to the original, ‘ineffective’ provisions for employee representation on company boards contained in the Weimar labour statutes of the 1920s.<sup>117</sup> With the aim of undermining the potential influence of the employee representatives appointed by virtue of the statutes, company boards in the Weimar Republic had developed the practice of transferring decision-making powers to committees to which no employees were admitted.<sup>118</sup> Kahn-Freund’s general ‘scepticism’ towards employee representation in organs of corporate governance dated, he explained, from that time: ‘how difficult it is, at an advanced age to abandon firm views formed in the past’!<sup>119</sup> It was also informed – as is quite clear from the nature of his arguments – by his firmly pluralist understanding of industrial relations:<sup>120</sup> his long-held belief in the

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<sup>114</sup> *Report of the Committee of Inquiry on Industrial Democracy* (1977) Cmnd 6706

<sup>115</sup> Phillips

<sup>116</sup> O Kahn-Freund, ‘Industrial Democracy’ (1977) 6 *Industrial Law Journal* 65-84; Davies and Wedderburn, ‘Land of Industrial Democracy’

<sup>117</sup> Kahn-Freund, ‘Industrial Democracy’, 72, 83

<sup>118</sup> C Dartmann, *Re-distribution of Power, Joint Consultation or Productivity Coalitions? Labour and Postwar Reconstruction in Germany and Britain, 1945–1953* (Bochum 1996). 26

<sup>119</sup> Kahn-Freund, ‘Industrial Democracy’, 83-4

<sup>120</sup> ‘I consider ‘pluralism’ as a method of explaining what happens in a non-totalitarian society – not as an ‘ideology’.’ O. Kahn-Freund, *Labour and the Law* (London: Stevenson, 2nd ed, 1977) 15, note 30

inevitability and universality of conflicts of interest between the two sides of industry, and his deeply held scepticism regarding the possibility of eradicating them.<sup>121</sup>

The first objection raised by him to the Bullock proposals was, quite straightforwardly, that the new mechanisms were unlikely to be effective. Given the different interests of the employee and shareholder representatives, the board would operate as an ‘institutionalised coalition’, quite unsuited to the day-to-day management of the company.<sup>122</sup> Consequent to the appointment of worker-directors, it would likely become restricted in its functions, with the role of senior management expanded accordingly.<sup>123</sup> A second, closely related, concern arose by reason of the legal duty that was to be placed upon boards, according to the proposals, to represent ‘the company’s’ interests.<sup>124</sup> This was problematic, Kahn-Freund thought, because, while the so-called ‘interest of the company’ was always coincident with an interest of the shareholders, situations could arise where it would be wholly opposed to the interests of the workers.<sup>125</sup> Simply positing a unitary set of ‘company’ interests could not solve the underlying problem of the existence of conflicts of interests arising between employees and shareholders. By reason of the imposition of the legal duty, then, the employee representatives would be exposed ‘to a conflict of duties *which is simply insoluble*’, representing simultaneously the interests of the workforce, and the so-called ‘interest of the company’.<sup>126</sup>

A third objection related to the absence in the British system of a lower tier of worker representation – a ‘substructure’ – functionally equivalent to the works councils of the (postwar, more effective) West German system.<sup>127</sup> While the Bullock committee had recognised the importance of a robust substructure – ‘changes at the board level are not themselves sufficient to ensure an extension of industrial democracy ... a sufficiently well developed structure of participation below the board is clearly vital’ – it had concluded that existing, voluntary,

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<sup>121</sup> Kahn-Freund, *Labour and the Law*, 27. For a very useful discussion of Kahn-Freund’s pluralism, see A Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart 2009). chapter 1

<sup>122</sup> Kahn-Freund, ‘Industrial Democracy’, 79-80

<sup>123</sup> Kahn-Freund, ‘Industrial Democracy’, 80, 66-7

<sup>124</sup> Kahn-Freund was no doubt struck here by the parallels between the Bullock proposals and Weimar labour legislation which had obliged works councilors to act in the interests of the workers and the ‘workplace’: Dukes, ‘Otto Kahn-Freund and Collective Laissez-Faire’.

<sup>125</sup> Kahn-Freund, ‘Industrial Democracy’, 76-7

<sup>126</sup> Kahn-Freund, ‘Industrial Democracy’, 77, my emphasis

<sup>127</sup> Kahn-Freund, ‘Industrial Democracy’, 80-3

arrangements in the UK were robust enough.<sup>128</sup> The committee had in any case been restricted in terms of its remit to consider the problem of *board*-level representation, and the TUC had rejected any possibility of a ‘statutory substructure’ on the grounds that it might pose a threat to union organisation at plant level. In Kahn-Freund’s opinion, the failure to formalise or institutionalise a system of worker representation at plant level was problematic. In existing systems of codetermination, including the German, the plant was the real focal point: the site most proximate to workers, where the issues of most importance to workers were decided.<sup>129</sup> Key to the effectiveness of the German system, in Kahn-Freund’s opinion, was the wide range of statutory rights that works councils enjoyed to codetermination in matters of job security, dismissals, the transfer of ownership of plants.<sup>130</sup> To be effective, he wrote, an edifice of statutory participation had to be built from the bottom upwards.<sup>131</sup>

Writing together with Paul Davies, Wedderburn responded to each of these objections. The first and most important argument put forward by the two related to Kahn-Freund’s concerns regarding conflicts of interests between employee directors and shareholder directors. In Davies’ and Wedderburn’s opinion, it was quite simply wrong to suggest that the Bullock Committee had proposed that such conflicts be ignored or suppressed; that it had assumed a ‘unity of interest between employer and employee’.<sup>132</sup> To the contrary, the proposals were directed precisely at facilitating the introduction of a mechanism of corporate governance that would allow for the expression and resolution of conflicts.<sup>133</sup> The reference in the proposals to the ‘interests’ of the company was not intended to imply, as Kahn-Freund had understood, the existence of a ‘self-perpetuating entity ... whose “interests” transcend those of any of its component elements’.<sup>134</sup> As would fall to be clarified quite explicitly within the new legislation, the phrase ‘the company’s best interests’ was meant rather as a shorthand way of referring to two sets of (quite possible competing) interests, those of the employees, and those of the shareholders.<sup>135</sup> It followed that the crucial question for the board of directors would be that of how to strike a

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<sup>128</sup> Kahn-Freund, ‘Industrial Democracy’, 68, citing Bullock Report, ch 6, para 3.

<sup>129</sup> Kahn-Freund, ‘Industrial Democracy’, 79

<sup>130</sup> Kahn-Freund, ‘Industrial Democracy’, 81

<sup>131</sup> Kahn-Freund, ‘Industrial Democracy’, 82

<sup>132</sup> Davies and Wedderburn, 197

<sup>133</sup> Davies and Wedderburn, 198

<sup>134</sup> Davies and Wedderburn, 199, citing Kahn-Freund, ‘Industrial Democracy’, 76

<sup>135</sup> Davies and Wedderburn, 199

balance between the two.<sup>136</sup> Kahn-Freund had been quite wrong, Davies and Wedderburn concluded, to draw a distinction between collective bargaining and board level worker representation on the basis that the first proceeded ‘on the pluralistic pattern’, and the second ‘on the unitary pattern’.<sup>137</sup> In practice, board level representation implemented in line with the Bullock proposals was likely to function quite similarly to collective bargaining as a ‘conflictual partnership’ between the representatives of each side of industry.<sup>138</sup>

On the question of ‘substructure’ – workplace codetermination or representation – Davies and Wedderburn understood Kahn-Freund to be concerned specifically with the absence of a statutory framework in the British system. His argument or assertion, as they understood it, was that ‘only a *legally created* substructure [would] be able to carry the weight of employee representation on the board’.<sup>139</sup> With this, they disagreed. It was certainly true that a well-developed substructure would be important to the effectiveness of any system of company board worker representation, as the Bullock Committee had acknowledged:

Not only does participation begin with issues close to the daily concerns of employees and progress gradually from these to longer-range, more complex questions, but the people who represent their fellow employees begin by contributing to the solution of day-to-day problems and thereby gain experience and skill that can be progressively applied to more difficult questions.<sup>140</sup>

But it was equally the case that a well-developed substructure, involving participation for workers in deciding a wide range of questions, and strong links with board-level representation, could develop and function quite happily without ‘statutory help’.<sup>141</sup> Recent survey evidence suggested that the existing system of shop steward representation in the UK was well-developed indeed, involving ‘a greater degree of joint regulation than could be found in all works councils systems ... with the possible exception of the German system’.<sup>142</sup> For Davies and Wedderburn,

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<sup>136</sup> Davies and Wedderburn, 202

<sup>137</sup> Davies and Wedderburn, 203, citing Kahn-Freund, ‘Industrial Democracy’, 76

<sup>138</sup> Davies and Wedderburn, 203

<sup>139</sup> Davies and Wedderburn, 209, my emphasis

<sup>140</sup> Davies and Wedderburn, 209, citing Commission on Industrial Relations, *Workplace Industrial Relations 1972* (1974) [Bullock Report], 41

<sup>141</sup> Davies and Wedderburn, 209

<sup>142</sup> Davies and Wedderburn, 210, citing Bullock Report, 30

then, the statutory nature or otherwise of the participative machinery below board level was not a matter of any significance.<sup>143</sup>

Given Kahn-Freund's reputation as the architect and chief proponent of the principle of collective *laissez-faire*, and his often-voiced scepticism regarding the likely efficacy of statutory interventions in industrial relations, the nature of the criticism levelled at him by Davies and Wedderburn is rather surprising: that, on this occasion, he doubted the strength and substance of the existing British system of workplace representation on the very grounds that it was voluntary *and not statutory*. An alternative, and arguably more convincing, interpretation of Kahn-Freund's argument is that he questioned the adequacy of shop steward representation in the UK on the basis that it was not sufficiently formalised or institutionalised, *either* by statute *or* by collective agreement, sectoral, or cross-sectoral.<sup>144</sup> A statutory system of board representation would not sit happily, in his opinion, upon an informal, voluntary system of workplace representation because, without some method of formalisation, there would be no clear articulation of the relationship between decision-making regarding the 'daily concerns of employees', on the one hand, and the 'longer-range, more complex questions' on the other, to use the terms of the Bullock Report.<sup>145</sup> In the conclusion to his article, Kahn-Freund emphasised, again, his general scepticism regarding the efficacy of statutory "frameworks" for collective labour relations'.<sup>146</sup> If implemented, he wrote, the Bullock proposals would 'introduce at a sensitive point of these relations a measure of legalism which may be excessive'.<sup>147</sup> Board level representation could only work if the unions and management together wished it to work: legislation could *not* be relied upon to engender the 'measure of understanding' between the two sides necessary to the success of such an innovation.<sup>148</sup>

On the basis of this alternative reading of Kahn-Freund's article, it might be argued that it was, after all, Davies and Wedderburn who placed greater weight on the significance of statute in the context of board-level representation, and greater faith in the likely efficacy of a new legislative

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<sup>143</sup> Davies and Wedderburn, 209

<sup>144</sup> In Sweden, as Kahn-Freund noted, workplace representation was instituted and regulated not by statute, but by 'interindustrial' collective agreement: Kahn-Freund, 'Industrial Democracy', 69.

<sup>145</sup> Bullock Report, 41, cited Davies and Wedderburn, 209

<sup>146</sup> Kahn-Freund, 'Industrial Democracy', 83

<sup>147</sup> Kahn-Freund, 'Industrial Democracy', 83

<sup>148</sup> Kahn-Freund, 'Industrial Democracy', 83



framework. All three authors agreed on the question of the existence of conflicts of interest between employees and shareholders. In Kahn-Freund's opinion, such conflicts would likely constitute an insurmountable hurdle to a board consisting of representatives of each side of industry in its efforts to decide matters relating to the day-to-day management of the company, and of greatest significance to the workforce. In Davies' and Wedderburn's opinion, in contrast, the redefinition, in statute, of the interest of 'the company', and the duties of board members in acting in furtherance of that interest, might well be sufficient to engender the institution of a 'conflictual partnership', involving the directors in a constant and beneficial balancing of competing interests.

Support for this interpretation of the authors' responses to Bullock can be found in the series of lectures delivered by Kahn-Freund the following year, and in Wedderburn's reaction to them.<sup>149</sup> In light of the experience of the miners' strikes of 1972 and 74, and the mass picketing involved, Kahn-Freund expressed a deep-seated concern in the course of the lectures regarding what he understood to be the changed nature of industrial action, its 'social effects', and the likely consequences for the labour movement.<sup>150</sup> His fear was that the new forms of action caused harm directly to consumers, who were also workers; that if they continued to be prevalent, they might prove 'suicidal' for the trade unions.<sup>151</sup>

[T]he strike as a social institution – once considered as the supreme example of working class solidarity – may have been dialectically transmuted into its opposite: groups of workers seeking advantages at the expense of others.<sup>152</sup>

Responsibility for the increased use of such action lay, in his view, with the rank and file: with forms of 'direct democracy' within British trade unions, which meant that 'irrationally motivated action' was an 'omnipresent danger'.<sup>153</sup> There was an urgent need to bring greater order to industrial relations: greater *discipline*, though he did not use that term, to the labour movement. As in the case of the Bullock proposals, he was again sceptical regarding the likely effectiveness

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<sup>149</sup> O Kahn-Freund, *Labour Relations, Heritage and Adjustment* (Oxford 1979), discussed: 'Kahn-Freund and British Labour Law', 57-69.

<sup>150</sup> See also: O Kahn-Freund, 'The Industrial Relations Act 1971 – Some retrospective reflections' (1974) 3 *Industrial Law Journal* 186

<sup>151</sup> Kahn-Freund, *Heritage*, 73

<sup>152</sup> Kahn-Freund, *Heritage*, 78

<sup>153</sup> Kahn-Freund, *Heritage*, 26

of legal intervention.<sup>154</sup> The solution could only lie, he suggested, with the development of more centralized forms of collective bargaining. The TUC and the CBI should take greater control of their members, imposing order through the mechanism of centrally negotiated collective agreements.<sup>155</sup>

As Wedderburn later remarked, there was continuity between Kahn-Freund's concerns and proposals, and the diagnosis and recommendations of the Donovan Committee ten years previously.<sup>156</sup> Then, and in his response to Bullock, and now to mass picketing, Kahn-Freund perceived the problem, or potential problem, to lie with a lack of coordination between the shopfloor – the 'substructure' – and the union leadership; with the 'informality' of the former. Then, as now, the solution proposed was shaped by his continued belief in the potential of the collective parties to regulate industrial relations autonomously: specifically, through the introduction of a greater degree of coordination between the levels of industrial organisation. In 1981, Wedderburn disagreed in the strongest of terms.<sup>157</sup> By then, he suggested, the idea that the trade unions could save pluralist society by engaging in centralised collective bargaining had become 'not so much Utopian as laughable'.<sup>158</sup> The election of the Conservative Government in 1979 had laid bare what had always been the case: that the significant conflicts of interest in capitalist society existed between labour, on the one side, and capital on the other, and not between different groups of workers as Kahn-Freund had seemed to suggest.<sup>159</sup>

## V Conclusion

*No scholarship is possible without conviction, without a view of the totality.*<sup>160</sup>

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<sup>154</sup> Kahn-Freund, *Heritage*, 77-9

<sup>155</sup> Kahn-Freund, *Heritage*, 80-4

<sup>156</sup> 'Kahn-Freund and British Labour Law', 57

<sup>157</sup> 'Kahn-Freund and British Labour Law', 57-69. Discussed Hepple, 226

<sup>158</sup> 'Kahn-Freund and British Labour Law', 66

<sup>159</sup> See also 'Change, Struggle, Ideology', 37: Wedderburn suggests that Kahn-Freund had a tendency to take class out of the analysis.

<sup>160</sup> H Sinzheimer, 'Philipp Lotmar und die deutsche Arbeitsrechtswissenschaft' (1922) 9 *Arbeitsrecht* 587-600, cited O Kahn-Freund, 'Hugo Sinzheimer' in Lewis and Clark, 102. Cited with approval by Wedderburn: 'Change, Struggle, Ideology' 28

Lord Wedderburn's scholarship in the field of labour law was deeply and unashamedly political.<sup>161</sup> It was informed, above all, by his socialism: his concern with democracy, social justice, and inequalities between the social classes. And it was directed, quite explicitly, at the advocacy of particular interpretations, or amendments, of the law: he made no secret, in his writing, of where his political sympathies lay. He was a fantastic writer and communicator; invariably a joy to read.

In his early writings on labour law, Wedderburn adopted the framework of collective laissez-faire enthusiastically because it fitted with his existing political convictions. It fitted too with his preferred approach to scholarship, which was broadly socio-legal and historical; what came to be referred to as a 'law in context' approach. As Hepple has noted, Wedderburn came to labour law originally through a study of labour history.<sup>162</sup> In the first edition of *The Worker and the Law*, the influence of the Webbs was manifest, and of the historians Eric Hobsbawm and Henry Phelps-Brown. As we have seen, Wedderburn accorded significance in his early analyses of the field to collective bargaining and collective agreements as well as to the letter of the law. His intention, always, was to analyse the terms of the law *as experienced by actors*. The purpose of scholarship, in his view, was to assess the consequences for workers of particular laws and social arrangements with a view to influencing the formation of legal policy, legislation, and legal precedent. 'Projects for new labour laws must be tested in concrete terms by their effect upon real people, the condition and quality of their lives, their prosperity and their – real, not theoretical – liberty'.<sup>163</sup>

Is it possible to identify in Wedderburn's scholarship a theory of labour law that is clearly distinguishable from Kahn-Freund's? From the time of the first edition of *The Worker and the Law*, Wedderburn placed great emphasis, in his explanations of the evolution of the British 'system' of labour law and industrial relations, on the trade unions' wish, broadly accepted by society, to keep industrial disputes out of the courts. In later interpretations of the meaning of collective laissez-faire, and in his 1995 defence of the principle, he emphasised the importance of

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<sup>161</sup> *Worker and the Law*, 1<sup>st</sup> ed, Preface; *Worker and the Law* 3<sup>rd</sup> ed, 856-61; Hepple, 219; *Worker and the Law*, 1<sup>st</sup> ed, 339

<sup>162</sup> Hepple, 223

<sup>163</sup> *Worker and the Law* 3<sup>rd</sup> ed, 860

this preference again: collective laissez-faire was not so much an expression of a rejection of *legislative* intervention in industrial relations, he now explained, but of scepticism regarding the capacity of the ordinary courts to decide industrial disputes objectively. In line with such scepticism, he advocated time and again the development of specialist labour courts, writing, famously, on the question of the ‘autonomy’ of labour law from the common law: ‘the autonomy of labour law has a broader sweep than the autonomy of the industrial parties’.<sup>164</sup>

Like Kahn-Freund, Wedderburn often stated his belief in the importance of autonomous trade unions, as a matter both of historical fact and of political principle. If the two scholars differed in respect of their theories of labour law, however, they did so here, regarding their understanding of what trade union ‘autonomy’ entailed or should entail. Wedderburn, it seems, did not understand trade union autonomy to be threatened by interventions of the legislature in quite the way that Kahn-Freund did. For Wedderburn, though not for Kahn-Freund, the creation of a statutory floor of rights, individual and collective, was not contradictory of the principle of collective laissez-faire; trade unionists could act as company directors within a legally-framed system of corporate governance without compromising their independence from the employer or the government; legislation might well prove an effective means of encouraging the institution of productive ‘conflictual partnerships’ between the trade unionists and the other directors on the board.

All that said, it would be a mistake, I think, to overstate the differences of opinion that separated the two scholars on the question of the rightful role of the state in industrial relations.<sup>165</sup> It ought to be borne in mind that Kahn-Freund’s views also changed throughout the course of his life; that in later work, he advocated a wider measure of direct government intervention than might have been suggested by his exposition of collective laissez-faire in the 1950s, giving consideration, for example, to the introduction of stricter controls of the closed shop and secondary picketing by way of legislation.<sup>166</sup> Even in the works of the 1950s, he expended much pen ink describing and analysing, with approbation, the various ways in which the law circumscribed and supported the

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<sup>164</sup> Lord Wedderburn, ‘Labour Law: From Here to Autonomy? A Franco-British Comparison’ (1987) 16 *Industrial Law Journal* 1, 4

<sup>165</sup> Cf Alan Bogg in this issue.

<sup>166</sup> Dukes, ‘Kahn-Freund and Collective Laissez-Faire’ 240

collectivist system of industrial relations.<sup>167</sup> As we have seen, Wedderburn himself did not often admit of significant points of disagreement with the older scholar. Where he did criticize Kahn-Freund, in rather strong terms, was in respect of the latter's proposed solution to the challenges faced in British industrial relations in the 1970s: coordination of the different levels of industrial organisation through the increased use of centralized collective bargaining. In Wedderburn's view, this involved both a misdiagnosis and an unhelpful prescription: there was little evidence that 'direct democracy' was to blame for increased levels of industrial action, for example, and little chance that the collective parties could succeed in sorting things out for themselves, *without* the intervention of government. Kahn-Freund was quite wrong to adhere still to his long-held view that the collective parties were capable of regulating industrial relations autonomously as they ought to be regulated, in furtherance of the public good.

In the political context of the 1980s and 1990s, such differences of opinion were important because they allowed Wedderburn to construct a convincing argument in favour of the continued usefulness of collective *laissez-faire* as a framework for the scholarly analysis of labour law. In the decades following Kahn-Freund's death, the primary task for scholars, in Wedderburn's view, was to identify ways of challenging the increasingly hegemonic free market ideology of Friedrich Hayek and others, so influential in shaping Conservative government policy and, by 1995, even, common understandings of industrial relations. ('There are young people', he wrote with a touch of black humour, 'who believe that in the winter of 1979 not a single corpse was buried in England'!<sup>168</sup>) Much of the Conservatives' policies and legislation had been aimed, ostensibly, at allowing the common law back into industrial relations. Cleansed of collective resistance, however, 'free market' conditions, like the common law, could serve only to disempower individuals, in the name of individualism.<sup>169</sup> In the face of such an attack on social justice, the value of collective *laissez-faire* was that it allowed for the continued expression of demands for free trade unionism as a necessary element of an equitable society. If the postwar social consensus in favour of a system of industrial relations designed to achieve a balance of social forces had broken down – if British society was now characterised by 'class injustice' – it

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<sup>167</sup> In Kahn-Freund, 'Legal Framework', there is discussion in particular of compulsory arbitration (83-101), of a range of statutory provisions intended to make the terms of collective agreements legally binding (58-65), 'Minimum Wage legislation' (65-75), fair wages clauses (75-83).

<sup>168</sup> 'Change, Struggle, Ideology', 35

<sup>169</sup> 'Change, Struggle, Ideology', 40

was clear that respect for collective laissez-faire would require much more from (a Labour) government than abstentionism, however understood: positive legal guarantees of the rights of workers in a way, always, which supported rather than undermined free trade unionism.<sup>170</sup>

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<sup>170</sup> 'Change, Struggle, Ideology', 33. At 11, he emphasised that legislative interventions, including compulsory arbitration, were not at all objectionable in principle, 'so long as [they are] balanced against the values of autonomous trade unionism, which are at the core of collective laissez-faire'.