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The Liberal Socialist Tradition in UK Labour Law

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1. Introduction

Professor Sir Otto Kahn-Freund (1900-1979) was once one of the leading scholars of law in the UK, an authority on such diverse topics as comparative law, family law and international private law. Today, it is for his contribution to labour law that he is best remembered. Indeed, it is not unusual, even today, for scholarly consideration of a question arising in that field to begin with a moment's reflection on what Kahn-Freund thought, or might have thought, the answer to be. Given that such reflection must necessarily involve interpretation of written texts, this is not always a straightforward, or uncontroversial, exercise. Disagreement, mostly tacit, has arisen over the years between those who have characterised him as a liberal at heart, casting his views accordingly, and those who have sought instead to emphasise the socialist or social democratic intent that they discern in his academic endeavours. A source of particular controversy has been the principle of 'collective laissez-faire', elaborated by Kahn-Freund during the 1950s to explain what he understood to be the particularities of the British system of industrial relations and labour law throughout the greater part of the twentieth century. In substance, the system involved industry level collective bargaining and dispute resolution between trade unions and employers' associations. On the face of it, at least, the label 'collective laissez-faire' appeared to imply that these practices were somehow insulated from government intervention: that this was a sphere of action which the state left alone.

In an important article from 1998, Keith Ewing revisited Kahn-Freund's notion of collective laissez-faire, interpreting it to imply above all the relative insignificance of law, and legal sanctions, in industrial relations.[1] Ewing's central argument was that, as such, the principle provided an incomplete picture of the role of the state in that field.

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> The state has been a much more active player in the building of collective bargaining and other institutions than a concentration on legal regulation would tend to indicate, thereby reflecting the fact that legal regulation is only one method of intervention, but that there are others - sometimes less formal yet not necessarily less effective.[2]

In fact, Ewing suggested, the British system of industrial relations had been characterized by 'active and legally grounded intervention by the state', directed chiefly at encouraging the spread of collective bargaining across sectors, and at ensuring its effectiveness as a means of regulating terms and conditions of employment.[3] In order to reject collective laissez-faire in this way as offering an accurate description of the British system, Ewing first characterised it as strongly resonant with 'social liberalism' of the type expounded by Leonard Hobhouse and Ernest Barker. Its 'essence', he wrote, was 'by definition one of political indifference, in the sense that while the state may remove the impediments which prevent trade unions from operating, it is largely indifferent to the success or failure of trade union organization'.[4] As such, collective laissez-faire could be contrasted with social democratic theories of labour law and industrial relations which envisaged a much more proactive role for the state: the harnessing of state power to achieve particular political and economic ends.

In this chapter, I give extended consideration to Ewing's characterization of collective laissez-faire as more or less synonymous with 'social liberalism'.[5] My focus lies specifically with collective laissez-faire as expounded by Kahn-Freund, and with Kahn-Freund's political views, and not with more widely held notions of voluntarism or abstentionism. As an aid to interpretation of the key texts, I consider Kahn-Freund's personal experiences of living and working as a judge in the Weimar Republic, and of moving to the UK as a refugee from Nazism, building here on recent biographical research which adds important detail to our existing knowledge of those experiences.[6] I also look briefly at work written by Kahn-Freund

[1] KD Ewing, 'The State and Industrial Relations: 'Collective Laissez-Faire' Revisited' (1998) 5 *Historical Studies in Industrial Relations* 1-31 [SIR]
[2] Ewing, SIR, 2
[3] Ewin, SIR, 2
[4] Ewing, SIR, 5
[5] Drawing on previously published work, especially: R Dukes, 'Otto Kahn-Freund and Collective Laissez-Faire: an Edifice without a Keystone' (2009) 72(2) *Modern Law Review* 220-46; R Dukes, *The Labour Constitution: the Enduring Idea of Labour Law* (Oxford 2014), chapter 4; R Dukes, 'Otto Kahn-Freund: a Weimar Life' (2017) 80(6) *Modern Law Review* 1164-77
[6] H Ludyga, *Otto Kahn-Freund (1900-1979) Ein Arbeitsrechtler in der Weimarer Zeit* **(**Berlin/Boston De Gruyter).

before and after his 'collective laissez-faire' publications, and at what he himself had to say about his scholarship and his political opinion in later life.

As is the case with any writer, biographical and bibliographical knowledge are important to an evaluation of Kahn-Freund's writing. We should read him as an academic trained in specific scholarly traditions, whose interventions in contemporary issues were conditioned both by his own preoccupations and by the possibilities embodied in definite institutional forms.[7] On that understanding, I argue in this chapter that there is in fact little disagreement between Ewing and Kahn-Freund as to the nature and extent of state, and legal, intervention in industrial relations during the first decades of the twentieth century, and little to distinguish Ewing's social democracy from Kahn-Freund's purported 'social liberalism'. If the latter accorded less *significance* to state and legal intervention than Ewing shows to be justified, then this was likely due in part to his own knowledge and lived experience of industrial relations and labour law in the Weimar Republic; of their tragic fate. In describing the British system as one of 'collective laissez-faire', Kahn-Freund's primary concern was to emphasise, with approbation, the measure of autonomy from the state which trade unions (and employers' associations) enjoyed in the UK, in comparison to the Weimar Republic and other jurisdictions. There is no basis here, I suggest, for concluding that he was a liberal or even a 'social liberal'. 'Liberal socialist' might be a more accurate label, but only if it is understood in the context of the time, and as equally applicable to writers like Hugo Sinzheimer and Harold Laski.

2. Ewing, the State and Industrial Relations

In his 1998 article, 'The State and Industrial Relations: "Collective Laissez-Faire" Revisited', Ewing's main purpose was to argue that the British state's role in the institution and maintenance of a system of collectivised industrial relations was routinely underestimated. In part, this error sprang from the tendency of commentators – and especially those with legal training – to focus unduly on the relevant law and to overlook or underappreciate the extent and significance of non-legal (administrative) intervention by state bodies.[8] Taken alone, the

[7] K Tribe, *Reading Weber* (Routledge 1989), 3
[8] Ewing, SIR, 7

legal framework could indeed be interpreted as 'neutral' on questions of industrial relations: it removed common law impediments to unionization, collective bargaining and, especially, industrial action, but stopped short of creating duties on employers to participate in collective bargaining, and to desist from firing or otherwise disciplining union members by reason of their membership or participation in strike action.[9] From the time of its creation in 1916, however, the Ministry of Labour had taken a range of steps to encourage employers rather more actively to recognise trade unions for the purposes of collective bargaining. Where effective collective bargaining was not possible, it had created alternative machinery for the setting of terms and conditions of employment with application across whole sectors.[10] In consideration of the Ministry of Labour's activities throughout the interwar years, Ewing concluded, then, that:

> 'contrary to received wisdom, what we have in the British system is in fact active and legally grounded intervention by the state, which did not use legal instruments as the chosen means of intervention, though it was prepared to do so as the need arose.'[11]

In the scheme of Ewing's argument, Kahn-Freund's notion of collective laissez-faire figured as a particularly influential expression of the 'received wisdom' that required to be debunked. While analysis of Kahn-Freund's work was not Ewing's primary aim, he did refer to it specifically, characterising it, as we have seen, as representative of the 'social liberal position' on industrial relations.[12] The essence of this position, according to Ewing, was that there was an imbalance of power between employers and employees which could be addressed only by intervention on the part of the state. Such intervention could take one of two forms, the first being to accept the role of voluntary institutions which would help to redress that balance of power, and the second being to intervene in order to ameliorate its worst consequences. While legislation setting a minimum level on matters such as pay and working conditions might also be contemplated, the essence of the social liberal position – of 'collective laissez-faire' – was by definition, 'one of political indifference': workers would be accorded the freedom to join trade unions, and trade unions and employers the freedom to

[9] Trade Disputes Act 1906, discussed Ewing, SIR, 7
[10] Eg Trade Boards Acts 1909, 1918, Catering Wages Act 1943, Road Haulage Wages Act 1938, discussed Ewing, SIR,
[11] Ewing, SIR, 2
[12] Ewing, SIR, 3-5

engage in collective bargaining, but the matter of whether or not to exercise those freedoms would be regarded as one of free – 'voluntary' – choice on the part of the actors involved.[13]

On this reading of collective laissez-faire and of the relevant works by Kahn-Freund, Ewing noted three points of disagreement between the two authors. The first, already mentioned and returned to in part 3 below, was that collective laissez-faire did not provide an accurate description of the role of the state in industrial relations. Focusing unduly on the legal framework alone, Kahn-Freund had failed to recognise the progression that had taken place during the twentieth century, from government neutrality towards trade unionization and collective bargaining to active encouragement of it, in a variety of ways.

The second and third points of disagreement related to the question, *why* industrial relations and labour law had taken the form that they had in the UK: why did labour law only facilitate and not encourage or require unionization and collective bargaining? According to Kahn-Freund, it was highly significant in this respect that trade unions had developed in Britain at a point in time prior to the enfranchisement of working class men; before, therefore, those men were in a position to press for greater legal protections of their interests. As Ewing pointed out, however, at the time of the extension of the franchise in 1884 'almost all the way to universal male suffrage', only around 5% of the labour force was organized in trade unions.[14] This first part of Kahn-Freund's explanation could therefore be easily dismissed.

Ewing also doubted Kahn-Freund's suggestion that industrial relations and labour law had been shaped primarily by the strength of British trade unions, their independence from the state and their reluctance to rely on legal rights in furtherance of their members' interests. 'Trade union "recognition" was achieved in this country by purely industrial as distinct from political and legislative action', Kahn-Freund had written: 'The proud edifice of collective labour regulation was built up without the assistance of the "law"'.[15] Trade unions did not campaign to be granted positive legal rights, so the argument seemed to go, because they preferred to rely on their own industrial strength to be recognised by employers, and to negotiate with employers improved terms and conditions of employment, and methods of

[13] Ewing, SIR, 5
[14] Ewing, SIR, 12
[15] O Kahn-Freund, 'Collective Agreements under War Legislation' (1943) 6 *Modern Law Review* 112-4. See also O Kahn-Freund, 'Labour Law' in M. Ginsberg (ed), *Law and Opinion in England in the 20th Century* (London: Stevens, 1959), 224; P Davies and M Freedland (eds), *Labour and the Law* (3rd ed) 52-3.

dispute resolution.[16] When legislating to allow trade unions lawfully to engage in industrial action, the Liberal governments of the beginning of the twentieth century had agreed, apparently, that industrial disputes ought to be kept out of the courts insofar as was possible: hence the use of statutory immunities, and not positive rights, to create a freedom to strike.[17]

As Ewing argued, however, review of the historical sources revealed that this account was misleading.[18] There might be some truth to the claim that at the turn of the century some trade unionists sought a legal settlement which would keep industrial disputes out of the *courts*. But evidence also suggested that a significant section of the labour movement wished for greater legal rights as a prop to assist them in securing recognition; that they argued, for that reason, for the introduction of a legally defined system of compulsory arbitration along the lines of those in force in New Zealand and Australia.[19] Others doubted the potential of a system of collective liberalism, built upon statutory immunities, to facilitate furtherance of the common interest.[20] In 1906, of course, it was the stronger trade unions' wishes for a wide 'freedom from the law', which came to be reflected in the terms of the Trade Disputes Act. Nonetheless, the assertion made by Kahn-Freund that trade unions preferred to rely on their own industrial strength rather than state-granted legal rights was not true of all unionists, and not at all times.

A further weakness of Kahn-Freund's explanation of the emergence and persistence of the system of collective laissez-faire was its failure to give adequate consideration to employer interests and motivations. The implication was that employers recognised trade unions because the unions were in a position to require them to do so, threatening and organising strike action as necessary. Allan Flanders famously disputed such accounts of what he called 'bootstrap voluntarism', arguing, instead, that it had often served the employers' own interests to recognise trade unions: to involve the unions in managerial control, and in the regulation of work and wages, in order to gain employee consent and cooperation; or to secure the unions' assistance in reducing wage competition.[21] Governments, too, had played

[16] Kahn-Freund, Labour and the Law 53
[17] Kahn-Freund, Labour Law, 232
[18] See eg C Howell, *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890-2000* (Princeton 2007); H Pelling, 'Trade Unions, Workers and The Law' in *Popular Politics and Society in Late Victorian Britain: Essays* (Macmillan 1979).
[19] Flanders, 'The Tradition of Voluntarism' 354. See also S and B Webb, *The History of Trade Unionism* (London Longmans 2nd ed 1911). 320; Pelling, 72-8
[20] Pelling 80-1. See also S and B Webb, *Industrial Democracy* (1902) xlii ff
[21] A Flanders, 'The Tradition of Voluntarism' (1974) 12 *British Journal of Industrial Relations* 352-70, 355.

an important role in promoting union growth, not least through the impact which they had had on employer attitudes and organization.[22] '[T]he crude notion that British unions have dispensed with any external assistance in obtaining their growth' concluded Flanders, 'is greatly at odds with the facts.'[23]

3. Kahn-Freund, the State and Industrial Relations

What he called the 'principle' of collective laissez-faire was first developed by Kahn-Freund in a trilogy of works published between 1954 and 1959.[24] In his earliest writing on trade union law in the UK, he had interpreted the relevant provisions through the lens of his existing knowledge of German law, concluding that collective agreements between trade unions and employers' associations were contractual in the legal sense.[25] In the 1950s trilogy, he placed at the centre of his analysis his belated recognition that collective agreements were *not* legally binding contracts, for the reason that the parties to them routinely lacked contractual intent.[26] Though it was possible for the normative terms of collective agreements to be made legally binding through incorporation into individual contracts of employment, the matter of incorporation was consensual and non-compulsory.[27] Since they were not legally binding, the interpretation, application and enforcement of collective agreements fell to the collective parties themselves, and not to the courts or other state authorities.[28] Nor were those parties under any generally applicable legal obligation to bargain collectively with one another in the first place. At the end of the nineteenth and beginning of the twentieth century, a series of legislative steps had been taken to create a legal freedom to organise and to take industrial action. Limitations had been placed on that freedom, signifying 'the limits within which the community is willing to tolerate warfare and peacemaking by the autonomous forces of industry'.[29] In addition, as Kahn-Freund discussed at great length, a wide variety of legal and non-legal methods had been used, since the beginning of the twentieth century, to

[22] Flanders, 355
[23] Flanders, 356
[24] 'O Kahn-Freund, 'Legal Framework' in A Flanders and H Clegg (eds), The System of Industrial Relations in Great Britain (Oxford: Basil Blackwell, 1954); O Kahn-Freund 'Intergroup Conflicts and their Settlement' (1954) *British Journal of Sociology* 193-227; 'Labour Law'
[25] Kahn-Freund, 'Collective Agreements'
[26] Kahn-Freund, 'Legal Framework', 57-58
[27] Kahn-Freund, 'Legal Framework', 58-61
[28] Kahn-Freund, 'Legal Framework', 44. See also Kahn-Freund 'Intergroup Conflicts', especially 202-210
[29] Kahn-Freund, 'Intergroup Conflicts', 215

encourage employers and unions to enter into collective bargaining arrangements with one another.[30] From a comparative point of view, then, what was remarkable about British industrial relations, according to Kahn-Freund, was not that there was an *absence* of law or state intervention – he was quite clear that there was no such absence – but rather that legal intervention in the UK tended to be indirect, aimed at persuading, rather than requiring, trade unions and employers to negotiate terms and conditions of employment and to resolve disputes peacefully.[31]

While each of the three published works in the trilogy dealt with the same body of law and analysed it in a similar way, only the third actually employed the term 'collective laissez-faire': a book chapter which began life as a public lecture.[32] By way of a definition of his term, Kahn-Freund juxtaposed the notion of *collective* laissez-faire with laissez-faire approaches to economic regulation. In doing so, he seemed to wish to suggest that, contra the great English jurist AV Dicey, there was nothing 'radical' or foreign to the British legal and political system about collective industrial relations.[33] Such practices reflected well the liberal understanding of the economy as a site where individuals could meet and bargain freely with one another, resulting in the 'free play of market forces'. To develop a normative underpinning for industrial relations in the UK, all that was required was that the notion of the freedom of the *individual* to bargain be replaced with that of the freedom of the *collective* to bargain: that individual *laissez-faire* be replaced with collective *laissez-faire*.[34] 'Dicey's antithesis of laissez faire and collectivism', concluded Kahn-Freund, 'was too simple.'[35]

Reading these passages today, one can understand why Kahn-Freund's exposition of labour law and industrial relations in the UK might have resonated strongly, for some, with

[30] Kahn-Freund 'Legal Framework', 101. In '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)
[31] See eg Legal Framework 65-6. In 'Labour Law' he describes the volume of statute law and subordinate legislation passed during the first half of the twentieth century as 'gigantic', and proceeds to explain why it was nonetheless 'subsidiary' to collective bargaining: Kahn-Freund 'Labour Law', 245, 250. See also O Kahn-Freund, 'Industrial Relations and the Law – Retrospect and Prospect' (1969) 7(3) *British Journal of Industrial Relations* 301-316, in which he refers to the relevant legislative measures, institutions, and administrative practices as constituting a 'statutory framework for organized persuasion': p. 304
[32] Kahn-Freund, 'Labour Law'
[33] Kahn-Freund, 'Labour Law', esp. 224.
[34] T Ramm 'Epilogue' in B Hepple (ed), *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* (London: Mansell, 1986) 277.
[35] Kahn-Freund, 'Labour Law', 223.

liberalism of the British variety.[36] In critiquing the principle of collective laissez-faire in 1981, for example, Roy Lewis suggested that its key weakness was its failure to acknowledge the importance of class conflict, and the role of the state in mediating such conflict. In place of 'class struggles waged between movements with conflicting ideologies', wrote Lewis, Kahn-Freund had postulated 'reconcilable conflict between pressure groups'.[37] The notion that the state maintained an equilibrium between the opposed social forces through *legal abstention*, meanwhile – inherent, on Lewis' reading, in collective laissez-faire – was 'simply a myth'.[38] Characterising Kahn-Freund similarly as a dyed in the wool liberal, but to a rather different end, Collins and Mantouvalou suggested as recently as 2013 that he would likely have endorsed 'the strongest liberal position' espoused by the European Court of Human Rights in the case of *Redfearn v UK*: that the right to freedom of association for members of political parties ought to be defended against interference by an employer, even if those political parties held racist beliefs and opposed fundamental principles of the Convention.[39]

Alternative readings of collective laissez-faire placed greater emphasis on its socialist or social democratic nature. Lord Wedderburn was famously quite emphatic, in his later years, in insisting that collective laissez-faire had *not* been intended to imply a blanket rejection, or disapproval, of state intervention in industrial relations, legal or extra-legal.[40] The term 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: as a strong statement of advocacy, in other words, of trade unionism and industrial democracy.[41] While it could be understood broadly to convey 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.[42] Collective laissez-faire meant that the state should – and did, for the most part – remain neutral as to the *outcomes* of collective

[36] See eg A Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart 2009), chapter 1
[37] R Lewis, 'Kahn-Freund and Labour Law: an Outline Critique' (1979) 8 *Industrial Law Journal* 202-21, 218.
[38] Ibid.
[39] *Redfearn v UK* [2013] ECHR 1878; H Collins and V Mantouvalou, 'Redfearn v UK' (2013) 76 *Modern Law Review* 909-34. The authors' suggestion is implicit, communicated through the juxtaposition of an assertion that it was Kahn-Freund's belief that, in a democratic society, dismissal of an employee by reason of her membership of the Communist Party must be automatically unfair, with a description of the Court of Human Rights decision in *Redfearn*. See discussion of the 'Radio case' below.
[40] For an extended discussion see R Dukes, 'Wedderburn and the theory of labour law: building on Kahn-Freund' (2015) 44 *Industrial Law Journal* 357-384.
[41] Lord Wedderburn, 'Change, Struggle and Ideology in British Labour Law' in Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law* (London 1995), 6-7
[42] Ibid, 10, 21.

bargaining and arbitration procedures.[43] 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.[44] But it did not mean that there should be, or had been in the UK, no labour law.[45] 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'.[46] As had been explained by Kahn-Freund himself 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'.[47] Taking all this into account, Wedderburn concluded that it was perhaps regrettable that Kahn-Freund had ever used the term 'abstention' in his analysis of UK labour law, since this had allowed for the erroneous interpretation and premature rejection of collective laissez-faire by some other scholars.[48]

In previously published work, I have argued along similar lines to Wedderburn that collective laissez-faire was intended by Kahn-Freund to emphasize the fact that legal intervention in industrial relations in the UK tended to be indirect, aimed at reinforcing the autonomy of the collective parties in respect both of the negotiation of terms and conditions of employment and the resolution of collective disputes. If certain phrases or passages written by Kahn-Freund can seem, when taken out of context, to suggest that collective laissez-faire was intended to denote a complete absence of law or state intervention – for example, 'the retreat of law from industrial relations and of industrial relations from the law' – then these should be excused as rhetorical flourishes, intended to give force to his in fact rather more sophisticated argument.[49] Reading around these passages – reading also what Kahn-Freund wrote before and after the 1950s – we get a better understanding of collective laissez-faire as intended to emphasise what he understood to be particular, and admirable, about the British system *in comparison to others*: the degree of independence, or autonomy, from the state

[43] Ibid, 11, 15.
[44] Ibid, 22.
[45] Ibid.
[46] Ibid, 10.
[47] Ibid, 11.
[48] Ibid, 21-22.
[49] Kahn-Freund, 'Labour Law' in Ginsberg, 225

which the collective parties enjoyed.[50] As for the charge that he focused unduly on the law, this may be so – legal scholars, at the time, certainly tended to do so, and he likely saw it as his remit to explain the 'legal framework', rather than the administrative activities of the Ministry of Labour. A close reading of his work reveals that he was well aware of these, however, as he was of the indirect support afforded to trade unions and collectivization by full-employment and other economic policies.[51]

What of our finding in part 2 above, that Kahn-Freund's explanation of the emergence and persistence of the system of collective laissez-faire was not wholly borne out by the facts; that it was focused too narrowly on a postulated union preference for freedoms above rights that only ever accorded with the preferences of some trade unions in respect of some types of state intervention; that it accorded too little significance to employer and government preferences for industry level collective bargaining? Here, it must be borne in mind, I would suggest, that with his elaboration of the principle of collective laissez-faire, Kahn-Freund was writing as a scholar of law, of comparative law, and of the sociology of law, and *not* as an historian. As such, he was not immediately concerned to explain the nature of the political compromises involved in the drafting and adoption of collective labour legislation, or the policy priorities of the governments of the time. His aim was rather to analyse the provisions of the legislation then in force such that they fit with his normative vision of collectivised labour bargaining collectively with management, free from state control. Judged against that aim, the elaboration of the principle of collective laissez-faire was successful; as an account of the history of industrial relations and labour law in this country, it was less so. In what follows, I seek support for this reading of collective laissez-faire in the dramatic narrative of Kahn-Freund's life story, and in his own reflections on his work as an older man.

i) A Weimar Life

The broad sweep of Kahn-Freund's biography is well known.[52] Born in Frankfurt in 1900, he attended the *Goethe* grammar school in that city, and while still a school boy, in the summer

[50] For a similar reading of the principle of collective laissez-faire see S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford 2004). 200 ff
[51] Kahn-Freund 'Intergroup Conflicts', 202, 199
[52] M Freedland, 'Otto Kahn-Freund' in J Beatson and R Zimmerman (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain* (Oxford 2004); O Kahn-Freund, 'The Study of Labour Law –

of 1917, attended a peace rally, at which he heard Hugo Sinzheimer speak for the first time. Sinzheimer was the German-Jewish scholar, legal practitioner, and politician, who was later to become the principal architect of labour law in the Weimar Republic. Following graduation with a law degree in 1923, Kahn-Freund completed a PhD under the older man's supervision, and a legal traineeship in his chambers.[53] In 1928, he became a judge in the Charlottenburg district court in Berlin, and from 1929, in the Berlin labour court.[54] There he worked until 1933, when he was forced to flee what was by then Nazi Germany. He settled in London and embarked on a new course of study, of English law, at the London School of Economics: the first step in what was to become a long and highly distinguished second career. In 1936, he qualified as a barrister in the Middle Temple and became an assistant lecturer at the LSE, rising to Professor in 1951, and remaining there until 1964, when he took up the Chair of Comparative Law at the University of Oxford.[55] In 1976, he was knighted for 'services to Labour Law'.

Because of the times and the places in which he lived, Kahn-Freund's Jewishness assumed a significance to him that can hardly be overstated.[56] Born into a liberal, cosmopolitan, 'bourgeois' family, his first instinct had been to assimilate; to be simply German.[57] As support for the Nazis grew, however, throughout the 1920s and early 30s, his Jewishness came increasingly to define him in the eyes of others, to inform his own choices and actions, and eventually his own sense of self.[58] In March 1933, shortly after the Nazis had seized power, he bravely agreed to hear the so-called 'radio case' involving an employment law claim by three radio technicians who had been dismissed by reason of their suspected Communist Party membership and presumed readiness to sabotage a broadcast by Hitler to the nation.[59] In fact, the case was more or less thrust upon him by his colleagues:

> One or the other had perhaps thought that the judge Kahn-Freund could burn his fingers on this case as he had anyway not much to lose; as a Jew, outsider,

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Some Recollections' (1979) 8 *Industrial Law Journal* 197-201; O Kahn-Freund, 'Postscript' in R Lewis and J Clark (eds), *Labour Law and Politics in the Weimar Republic* (Oxford 1981); BA Hepple, (1979) 8 *Industrial Law Journal* 193-196; Lord Wedderburn (1979) 42 *Modern Law Review* 609–612.

[53] Kahn-Freund, 'Autobiographische Erinnerungen', 185.

[54] Freedland, 'Kahn-Freund', 304.

[55] Freedland, 'Kahn-Freund', 306-308

[56] Ludyga, *Kahn-Freund*, 75; O Kahn-Freund, 'Autobiographische Erinnerungen an die Weimarer Republik. Ein Gespräch mith Wolfgang Luthardt' (1981) 14 *Kritische Justiz* 183-200, 195.

[57] Ramm

[58] Ludyga 10-11

[59] Lewis and Clark 'Introduction', *Labour Law and Politics*, 5; U Mückenberger, 'One Last Demonstration of Judicial Independence . . .Otto Kahn-Freund's Judgment in the 'Radio Case'' (2015) *Modern Law Review* 1–14

> oppositionist, was it not the case that he would in any case sooner or later not be able to sustain his position anymore, regardless of whether he decided the radio-case or not?[60]

Having found in the technicians' favour, Kahn-Freund was interrogated and placed under surveillance by the Gestapo. His own expulsion from the judiciary followed almost immediately thereafter, pursuant to the Civil Service Restoration Act (*Gesetz zur Wiederherstellung des Berufsbeamtentums*), which provided that all 'non-Aryan' and politically 'unreliable' civil servants be dismissed.[61] None of his colleagues on the bench protested.[62] After a short stay in Frankfurt, he left Germany for good in June 1933, but not without having first been required to pay a 'tax', or fine, for 'fleeing the Empire' (*Reichsfluchtsteuer*).[63] The horror of leaving his homeland in such circumstances stayed with Kahn-Freund throughout his life. Whenever I have nightmares, he said as an old man, I find myself in Frankfurt or Berlin.[64]

Of importance, too, to Kahn-Freund's sense of self was his identification as a socialist or social democrat. As a young man, his association with Sinzheimer brought him into close contact with a number of socialist lawyers and intellectuals: Ernst Fraenkel, Franz Neumann, Carlo Schmid (later a minister in the Federal Government of West Germany) and Hans Morgenthau. Through Sinzheimer or otherwise, he also became acquainted with Franz Oppenheimer, Otto Kirchheimer, and Hermann Heller. From 1922, Kahn-Freund was a member of the *Sozialistische Partei Deutschlands*, and from 1926 of the *Reichsbanner Schwarz, Rot, Gold*, one of the first groups actively to oppose Nazism. With Fraenkel, Neumann and Oppenheimer he taught during the early 1920s at the 'Labour Academy' at the Goethe University, established by Sinzheimer and Eugen Rosenstock-Huessys to provide higher education to workers who did not have a grammar school education (*Abitur*).[65] In 1928, Heller offered him a postdoctoral position, but he decided at that point against an academic career – possibly because he was aware that his socialist political activities would have made career progression difficult.[66] As a judge, from 1928, he was conscious that his political leanings put him in a small minority amongst the otherwise deeply conservative

[60] Mückenberger, 'One Last Demonstration', n 12 above, 10.
[61] Ludyga 48
[62] Ludyga 52
[63] Ludyga 57
[64] Ludyga 73
[65] Ludyga 22
[66] Ludyga 26

judiciary.[67] For friendship, and political and intellectual debate, he turned again to Frankel and Neumann, among others, the former working together by then in Berlin as trade union lawyers.

Following his escape to England in 1933, Kahn-Freund participated in the external resistance movement, undertaking a range of activities aimed at hastening the defeat of Nazism, and paving the way towards the creation of a new socialist state in Germany.[68] From 1940 he chaired a committee which advised the Labour Party on propaganda matters, and with the same group of emigrants who constituted that committee, set up a pirate radio station to transmit socialist propaganda into Germany.[69] Financed and supervised by the British secret service, the station broadcast from London and then Bletchley until June 1942, encouraging German workers to acts of sabotage and passive resistance. Politically, its line was revolutionary socialist, agitating for an end to capitalism, militarism, imperialism and nationalism in all European nations and for their replacement with a united Europe under the leadership of the working classes. From 1943, Kahn-Freund also worked to set up the organisation, *German Educational Reconstruction*, which aimed to assist teachers and social workers with preparing for the work of reconstructing Germany.[70] It developed plans for the education of young people after the War, and informed the British public, through publications and lectures, about the current situation in Germany. At the War's end, it provided classes in history, economics, philosophy and sociology to German prisoners of war.[71]

In 1941, Kahn-Freund co-authored a short book with Fritz Eberhard, Walter Auerbach, Hilde Meisel and Kurt Mandelbaum: *The Next Germany: a Basis of Discussion on Peace in Europe*.[72] Wishing at the time to remain anonymous, neither he nor his co-authors were anywhere credited; however, the work is recognisably Kahn-Freund's in places, for example, where he quotes, without reference, a phrase that he elsewhere ascribed to Sinzheimer: 'Peace, Freedom, Bread'.[73] Writing with one voice, as a 'small circle of socialists', the

[67] Ludyga 31-3
[68] Ludyga 61-72
[69] Ludyga 61-7
[70] Ludyga 69-72
[71] Ludyga 71-2
[72] L de Brouckere, *The Next Germany. A Basis of Discussion on Peace in Europe* (Harmondsworth: Penguin, 1943).
[73] Ludyga *Kahn-Freund*, 19, Kahn-Freund, 'Autobiographische Erinnerungen', 185. My translation.

authors argued passionately for the desirability of a proletarian revolution in Germany as the most effective means of bringing a lasting end to militarism, nationalism and imperialism, and ensuring a lasting peace in Europe.[74] In the short term, they envisaged the creation, from the grassroots up, of a council-based system of democracy to be replaced eventually by a centralised national government.[75] Workers' councils should play a particularly important role in the new order, they believed, bearing a political, economic and social function both throughout the transitional period and thereafter.[76] As an only partly developed answer to the 'great issue' of the day – whether economic planning was compatible with political democracy – the circle proposed the involvement in economic planning of a number of interest associations: trade unions, peasants' cooperatives, craftsmen's cooperatives, and consumers' organisations.[77] The exercise of influence by individuals upon the decisions of a 'planning government' through the casting of a vote was 'not enough'.

> We must leave room for freely-formed social organs which operate on the spot and in the daily activities of which the citizen can take his part, and which materially influence his own well-being.[78]

At the war's end, Kahn-Freund dismissed a suggestion that the book be published in its original German language version.

> It was written on the presumption that there would be revolution in Germany. That presumption proved to be false.[79]

His position in this respect was representative of a much wider-reaching decision taken at the end of the War to desist from any further involvement in German politics or law. As he explained in an interview in the late 1970s:

> There is one thing that I have made a cast-iron principle, that in this life I shall never again interfere with anything German. I can talk about the past, but not about the present or the future… The past is too strong, the emotional influence of the past is too strong.[80]

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[74] *Next Germany*, 6.
[75] *Next Germany*, 38-40.
[76] *Next Germany*, 62-8.
[77] *Next Germany*, 55-8.
[78] *Next Germany*, 56.
[79] Ludyga, 68, citing a letter from Kahn-Freund to Auerbach, 13.12.1945.
[80] Lewis and Clark, *Labour Law and Politics*, 201.

He could never understand, as he went on to say, the decision of friends, including Fraenkel and Neumann, to return to the Federal Republic after the War's end. 'After we left Germany, I became completely immersed in English things'.[81]

ii) Socialist, Liberal, or Liberal Socialist?

While there is disagreement among scholars on the correct interpretation of collective laissez-faire, it is generally acknowledged that, in later life, Kahn-Freund argued more unambiguously for certain types of state intervention in the regulation of industrial relations. In the context of full employment and relatively high levels of union membership and industrial action in Britain in the 1970s, he advocated the use of legislation to address what he considered to be abuses of trade union power: the control by the unions of access to some sections of the labour market, and the 'flying' and mass pickets organised by unions during the miners' strike of 1972.[82] To his famous dictum – 'the main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship' – he added the arguably contradictory statement that 'the principal purpose of labour law, then, is to regulate, to support and to restrain the power of management and the power of organised labour.'[83] In discussing what he believed to be the 'inevitable' existence of conflicts of interest between labour and management, he characterised, 'management's interest in planning production and in being protected against its interruption' as the *exact equivalent* of the 'worker's interest in planning his and his family's life and in being protected against an interruption in his mode of existence'.[84] 'All this is palpably obvious', he continued, 'except for a person blinded by class hatred either way'.[85]

How might we square these opinions expressed by the older Kahn-Freund with what we know of his experiences in the Weimar Republic, his decidedly socialist beliefs and political engagement before and during the Second World War, and his analysis of UK labour law in

[81] Lewis and Clark, *Labour Law and Politics*, 200.
[82] O Kahn-Freund, 'Trade Unions, the Law and Society' (1970) 33 *Modern Law Review* 241; O Kahn-Freund, 'The Industrial Relations Act 1971 – Some retrospective reflections' (1974) 3 *Industrial Law Journal* 186.
[83] P Davies and M Freedland (eds), *Kahn-Freund's Labour and the Law*, 3rd ed. (Stevens 1983), 18, 15.
[84] Ibid, 66.
[85] Ibid.

the 1950s in terms of collective laissez-faire? It would be wrong, I think, to jump too quickly to the conclusion that he moved further to the right of the political spectrum as he got older. Notwithstanding some apparent changes of opinion over the years, there is also a deep vein of continuity, for example, between Kahn-Freund's first published work on labour law – his criticisms of the Weimar State's intervention in industrial relations – and his later elaboration of collective laissez-faire.[86] As I have endeavoured to show elsewhere, his belief that trade unions and employers' associations ought to enjoy a wide measure of autonomy in the regulation of industrial relations was formed in the Weimar Republic and continued to influence his scholarship throughout his life.[87] For him, trade union autonomy was a question of democracy: of guarding against the possibility of pernicious levels of centralised state power and the possibility, ultimately, of a descent into totalitarianism. During the 1940s, he was critical of the German trade unions and their failure to use their social power to resist Nazism, in a way which illustrates his thinking well.

> It was the fate of our Weimar trade unions that they messed around too much with labour law, allowing their fighting spirit thereby to be stunted.[88]
>
> The function of legal institutions is secondary. It is the social power of the trade unions that is primary. Social power has to do not only with mere membership figures and institutions but also with the spirited participation of the individual. This may be a truism, however, truisms have a tendency to be forgotten.[89]

There are clear echoes – or rather the anticipation – here of the opening passages of *Labour and the Law*, first published in 1972; the pronouncement that,

> in labour relations legal norms cannot often be effective unless they are backed by social sanctions as well, that is by the countervailing power of trade unions and of the organised workers asserted through consultation and negotiation with the employer and ultimately, if this fails, through withholding their labour.[90]

In a 1978 interview, or 'conversation' with the German scholar Wolfgang Luthardt, Kahn-Freund considered the possibility that there may have been a shift in his political views over

[86] See eg *Das Soziale Ideal des Reichsarbeitsgerichts*, a short monograph from 1931, and 'Der Funktionswandel des Arbeitsrechts', an article from 1932, published in translation as 'The Social Ideal of the Reich Labour Court' and 'The Changing Function of Labour Law': Lewis and Clark (eds), *Labour Law and Politics*.
[87] Dukes, 'Otto Kahn-Freund'.
[88] Ludyga, *Kahn-Freund*, 47 citing letter from Kahn-Freund to Auerbach, 8.4.1940, my translation.
[89] Ludyga, citing O Kahn-Freund, *Beiträge zum Neuaufbau des deutschen Arbeitsrechts*, London 1944, my translation.
[90] *Labour and the Law*, 20.

the years. He began with a statement of his opinion that collective labour law required a certain balance of power between the representatives of the labour movement and the employers.[91] If someone had said that to him when he was a young man, he then reflected, he would perhaps have protested that this was an indefensible position; that the working classes had to rise to a position of power. Whether he would even then have only been paying lip-service to such objections, however, he was not anymore in a position to say.[92]

It emerges from the record of the Luthardt conversation that Kahn-Freund was never a member of the communist party, in Germany or the UK. In contrast to Fraenkel and Neumann, he was never an 'orthodox' Marxist either, he explained, at least not with respect to his political beliefs.[93] Clearly, his scholarship was strongly influenced by Marxist analysis:[94] his world view, or ideology, as he put it, less so.[95] He regarded himself as having stood a little to the 'right' of Fraenkel and Neumann, during their student years and later within the SPD.[96]

> My critical starting point was not an integral-Marxist but a democratic one… I always regarded myself as a liberal, 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.[97]

When we read these remarks today we must take care to understand them in the political context of the time. In the 1930s, 'liberalism in the American sense' meant, presumably, Roosevelt and the New Deal. A further indication of what Kahn-Freund intended by identifying himself as a 'liberal' is provided by his characterization of both Sinzheimer and Laski as liberals too.[98] For each of these scholars, as for many others on the left, the 'Gretchen' question of the day was how to reconcile socialism with democracy. The answer – for Kahn-Freund, as for Sinzheimer, and Laski – lay with pluralism of a sort that would safeguard the autonomy of societal organisations from the state, and against the

[91] Kahn-Freund, 'Autobiographische Erinnerungen', 195.
[92] Autobiographische Erinnerungen', 196.
[93] Autobiographische Erinnerungen', 187, 189
[94] Kahn-Freund, 'Postscript', n 3 above, 195.
[95] Kahn-Freund, 'Autobiographische Erinnerungen', 189.
[96] 'Autobiographische Erinnerungen', 187, 189.
[97] 'Autobiographische Erinnerungen', 189, my translation.
[98] 'Autobiographische Erinnerungen', 190-192.

transformation of pluralism into corporatism of a 'fascist' variety.[99] If we are to attach the label of 'liberal socialist' to Kahn-Freund, then we must define our terms accordingly.

At the same time, of course, we ought not to overlook any differences of opinion that existed between Kahn-Freund and Sinzheimer, especially on the question of the role of the state in industrial relations. That the two were not wholly in agreement in this respect is discernible both from their writings of the late 1920s and early 30s, and from a comparison of collective laissez-faire with Sinzheimer's conception of the labour constitution.[100] Whereas collective laissez-faire posited collective bargaining as a process decidedly private to the collective parties engaged in it, the idea of the labour constitution was constructed upon an outright rejection of the 'bourgeois' notion of the economy as a private domain, and an insistence instead on the public nature of the economy. The very purpose of the labour constitution was to ensure that the economy was managed in furtherance of the common good and not in the interests of any particular individuals or interest groups. While Sinzheimer certainly emphasised time and again the importance of the autonomy of economic actors from the state, he also believed it to be undesirable that those actors should be afforded *absolute* freedom of action. The state was not only of the architect of the system of collective administration of the economy, it was also the ultimate guarantor of the public interest. A balance had always to be struck, in Sinzheimer's view, between the autonomy of the economic actors (fundamental to democracy), and state intervention. The state should not assume the task of regulating the economy, and collective actors should not be regarded as instruments of the state. Therein lay the path to totalitarianism.

In his work on Weimar labour law, it is striking that Kahn-Freund eschewed Sinzheimer's terminology of the 'labour constitution', and spoke instead of 'collectivism' as the dominant ideology.[101] Collectivism was then defined by him so as to emphasise the desirability of union and employers' association autonomy from the state:

> The characteristic feature of the collectivist ideology of law is that it transfers the main emphasis in social policy from the political to the social sphere... The state recognises as law the result of the social conflicts between collectively organised

[99] 'Autobiographische Erinnerungen', 195-6.
[100] Dukes, Labour Constitution, 23-30
[101] O. Kahn-Freund 'The Social Ideal of the *Reich* Labour Court' and 'The Changing Function of Labour Law' in R. Lewis and J. Clark (eds), *Labour Law and Politics in the Weimar Republic* (Oxford: Blackwell, 1981)

> employees and collectively organised employers, and makes available all its resources of power in order to enforce the law thus created... The state relinquishes any claim to determine the legal situation as it affects social policy; on the contrary, it gives full scope to the social development of the law and endorses its outcome at any given time.[102]

In two important publications from 1931 and 1932, Kahn-Freund directed his analysis at demonstrating how the function of the originally collectivist legislation had changed while the content of the 'written law' remained the same. For him, the principal flaw in the Weimar system of labour law was that it allowed for too great a measure of involvement of the state. Like Sinzheimer, Kahn-Freund believed that too much state intervention would result in totalitarianism. Where they differed was precisely upon the question of how much amounted to too much.

4. Conclusion

In recent work co-authored with John Hendy, Ewing has added to the historical evidence presented by him in 1998 to demonstrate the importance of government support – legal and non-legal – to the British system of sectoral collective bargaining and dispute resolution during the first half of the twentieth century.[103] While other accounts published in recent years tell a similar story to Ewing, he is probably quite correct to argue that the state's role in industrial relations was and still is routinely underestimated, especially by those who begin their analysis from the notion of 'voluntarism' or 'abstentionism'.[104] To categorise Kahn-Freund as among those who made such an error, however, is not entirely warranted. It is not warranted, in my opinion, to characterise collective laissez-faire as, 'in essence', a principle of 'political indifference'.[105] Even on the face of it, the principle of collective laissez-faire suggested the *fundamental inversion* of laissez-faire, so that it was not the individual but the collective which enjoyed freedom of action in the economic sphere. As is clear from his writing on the subject, including the key publications from the 1950s, Kahn-Freund was not only aware of the range of legal and non-legal methods used to support collective bargaining

[102] Kahn-Freund 'Changing Function', 168
[103] KD Ewing and J Hendy, 'New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining' 46(1) *Industrial Law Journal* 23–51
[104] D Brodie, *A History of British Labour Law: 1867-1945* (Hart 2003); Howell, *Trade Unions and the State*.
[105] Ewing, SIR, 5

and dispute resolution in the UK, he approved of them. He approved, in other words, of a range of measures designed specifically to override the wishes of the individual, as was necessary in any particular case, in the name of collectivization, and the furtherance of collective interests.[106] Intended quite decidedly as descriptive of such measures, collective laissez-faire was not an expression of 'political indifference', nor of 'social liberalism'.

Criticism of Kahn-Freund's account of the emergence of the British system of industrial relations seems to me, in contrast, to be justified given his understatement of the importance of government policy and action, and employer preferences, in the construction of that system. As I suggested above, this error can perhaps be explained with reference to Kahn-Freund's preoccupations as a scholar of law, rather than of history. His primary concern was to analyse the provisions of the law then in force such that they fit with his normative vision of collectivised labour bargaining collectively with management, free from state control. He was less focused, I think, on uncovering the nature of the political compromises involved in the drafting and adoption of collective labour legislation, or the policy priorities of the governments of the time. A further explanation of Kahn-Freund's hesitance to ascribe much importance to the state as the architect of collective industrial relations in the UK lies with his experience of living and working as a labour court judge in the Weimar Republic. Already, in the early 1930s, Kahn-Freund wrote about labour law in a way which revealed his growing mistrust of an over-strong state and his belief in the importance of allowing for the autonomous regulation of industrial relations by collective parties. During the 1940s and 50s, it was his mistrust of too much intervention by the state, in particular, which informed his initial admiration for English industrial relations and his development of the principle of collective laissez-faire. Kahn-Freund's preference for a wide conception of trade union autonomy, formed already by the time of his arrival in England, seemed to fit with the realities of English society as he encountered them: with the liberal preference for small government and with the English pluralist 'tradition' of allowing all interested parties a say. In his enthusiasm for 'English things', he overemphasised the extent to which the autonomy of trade unions from the state was the primary explanatory factor of the particular characteristics of British industrial relations.[107]

[106] Though see the discussion of Kahn-Freund's cautious approval of the 'individualist tradition' in UK labour law: A Bogg, ''Individualism' and 'Collectivism' in Collective Labour Law' (2017) 46(1) Industrial Law Journal 78-81

[107] Lewis and Clark, *Labour Law and Politics*, 200.

None of this would seem to me to justify the characterization of Kahn-Freund as a liberal, or even a ‘social liberal’. In his youth and midlife, he was active in socialist organisations and resistance work, campaigning from England for socialist revolution in Germany. As a legal academic, in his 50s and 60s, he continued to argue in favour of free trade unionism and a wide conception of freedom of association, which included both the right to strike and to conclude closed shop agreements. If he moved further to the right of the political spectrum as an older man (and this would remain to be established, in my opinion), then he remained nonetheless committed to free trade unionism and the collective regulation of employment relations as matters of democracy. When he described himself as a ‘liberal’ in later life, he meant, I believe, that he was – like Laski and Sinzheimer – a liberal socialist, rather than a socialist of the revolutionary or Marxist variety. Today we would likely describe him simply as a social democrat, albeit one who was particularly concerned with questions of individual as well as group freedom.