Labour Law and Industrial Relations

Building on Kahn-Freund

Edited by
Lord Wedderburn,
Roy Lewis,
and Jon Clark

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Preface

When Otto Kahn-Freund died in 1979 we were among the many who felt not only grief at the loss of a friend and mentor but a new determination to learn from his life of scholarship. Indeed the months following his death saw a notable increase in the frequency with which scholars in the field of labour law met one another. They were drawn together from all over the world by his very absence. For most of them it was the first time they had joined in an international gathering on labour law and industrial relations without his participation; but always—as he would have applauded—their attention moved through him to his work and through that work to the urgent problems of industrial relations and the law.

We were privileged to participate in two such conferences. The first took place in Siena in December 1980 on the theme of 'Otto Kahn-Freund and the Evolution of Labour Law'. A book based upon the proceedings of that conference will be published in 1982 as *Kahn-Freund e l'evoluzione del diritto del lavoro*, edited by Professors Guido Balandi and Silvana Sciarra. Then, in February 1981, we were invited by Professor Spiros Simitis to discuss similar themes at the University of Frankfurt with a number of our West German colleagues; this gathering took place on the day following the delivery of the Sixth Hugo Sinzheimer Memorial Lecture, the text of which forms Chapter 3 of this book. (A book by our German colleagues will appear in the near future as *Arbeitsrecht–Theoriegeschichte und Rechtsvergleichung–Otto Kahn-Freund zum Gedächtnis*.) Chapters 4 and 5 of this book are also based upon papers given at the Siena and Frankfurt conferences.

To understand Kahn-Freund it is necessary to cross boundaries, both national boundaries for comparative inquiry into the laws and practices of other countries, and disciplinary boundaries to set the law in the crucible of society and to see it in action. But, as he always insisted, comparative research cannot have as its objective, and only rarely will have as its reward, the direct importation of foreign laws for the solution of domestic problems. The comparative scholar must rest content with a

wider understanding leading, if he is lucky, to new insights and questions as well as to new ways of looking at problems that await him at home. So too the sociologist cannot provide the answer to legal problems. But the lawyer who ignores the insights into the problems of industrial relations offered by colleagues in the social sciences will never make, by the standards which Kahn-Freund set, a labour lawyer worthy of the name.

Many students of labour law and industrial relations in Britain now take these precepts almost for granted; yet they represent an enormous leap when compared with the character and climate of teaching and research in British industrial relations and labour law only three decades ago. During this post-war period Kahn-Freund became the foremost labour lawyer on both the national and international stage. However, shortly before his death, it was becoming increasingly clear that the decade which was to follow would bring with it, both in Britain and in the world, problems of a kind scarcely imagined even in 1979. In 1982 one of the most significant questions for the future is the place and the function of law in industrial relations, and the wider relationship between labour law and society as a whole.

These are the origins of this book. The first chapter is a translation of one of Kahn-Freund's last pieces, the special introduction which he wrote in 1978 to the German translation of the second English edition of his book *Labour and the Law*. Professor Hugh Clegg's chapter provides the perspective of one of his colleagues on the Donovan Commission. It is well known that they were both highly influential in shaping large parts of the Commission's Report, and all subsequent work in the field of industrial relations and labour law owes many debts to both of them.

The theme of the book—'Building on Kahn-Freund'—highlights the use which we have attempted to make of Kahn-Freund's insights, analysis, and method in the pages that follow. Nevertheless it would be no tribute to him to turn his work into a monument rather than a foundation. Events of the last three years have themselves rendered it necessary to venture beyond even his last tentative conclusions. Few in 1979 foresaw that within three years Britain would contain three million people who were unemployed. Few could have pre-

dicted that Poland would experience the rise and repression of an independent trade union movement. Such events inevitably challenge one's interpretation of the function and meaning of independent trade unionism.

It is indeed no accident that one of our chapters stems originally from research into the works of Kahn-Freund in the final period of the Weimar Republic; and that another discusses the role of ideology in Kahn-Freund's work. The politicization of labour law at a time of economic and social crisis is not just a theme of the past few years in Britain, but a persistent theme of twentieth-century history. In Britain in the eighties there is a need to reassess the role of the law, not of law in the abstract, but of Parliament, courts, practitioners and legal advisers, the civil service and magistrates. We must examine anew the place of the law in the fabric of industrial relations and describe more clearly the different patterns likely to be fashioned by the threads of various policies offered for its renovation. Above all, these are the laws which directly affect ordinary people. They concern them at the point where most of them spend the major part of their lives—at work. Kahn-Freund always insisted that this simple truth should never be forgotten. The reality of the transaction through which men and women are 'employed' was constantly before his mind. That is cause enough to build further research on labour law and industrial relations upon his work.

This is an appropriate place to acknowledge with thanks the permission of Elisabeth Kahn-Freund and Professor Michael Kittner of the Otto Brenner Stiftung to publish the translation of Kahn-Freund's introduction to the German edition of *Labour and the Law*. For their help and encouragement in the preparation and writing of this book we also wish to record our deep thanks to Elisabeth Kahn-Freund, Frances Wedderburn, Annette Benda, Jenny Pardington, Spiros Simitis, Bob Simpson, Norma Griffiths, Catherine Swarbrick, Angela White, Jonathan Wedderburn, Guido Balandi, Silvana Sciarra, Mariolina Freeth and Gino Giugni, and to our publishers the Oxford University Press.

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* References in Chapter 6 have been amended to include the Employment Act 1982.

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Chapter 1

Labour Law and Industrial Relations in Great Britain and West Germany*

Otto Kahn-Freund

This book, whose first English edition appeared in 1972 and whose second edition appeared in 1977, arose from a series of public lectures which were directed not only at lawyers but also at a general audience. They formed the twenty-fourth series of the Hamlyn Lectures, which are intended to provide a bridge between the lawyer's view of the world and the interest of a broader public.

The problems of collective labour law discussed here—the system of collective bargaining, trade unions, industrial disputes—are of general interest. The part played by the law in the regulation of relations between employers and their organizations on the one hand and trade unions on the other is problematical everywhere. The problems of industrial relations and collective labour law in the developed capitalist countries of Western Europe are, however, similar everywhere, although of course the solutions are often different. This means, though, that the knowledge of these solutions in one of these countries is of much more than theoretical interest to every other country. For instance, it is important for the Federal Republic of Germany to see how the problems are seen and formulated in other countries, above all in other member countries of the EEC. Naturally one must always seek to distinguish between the effects of those economic, social, and also political factors which are broadly common to all Western European countries, and the influence of national traditions, customs, convictions, and prejudices. Differences in formulations should not mislead us into failing to recognize common problems, nor should the

* This is a translation by Jon Clark of the 'Preface' written in 1978 by Otto Kahn-Freund especially for the German edition of *Labour and the Law* (*Arbeit und Recht*, Cologne and Frankfurt, 1979). The title and footnotes have been supplied by the editors. Editorial additions to the text are in square brackets.

deceptive semblance of similarities mislead us into a blurring of contrasts.

This book places greater emphasis on problems than on solutions. The general problem of the distribution of power in the relations between capital and labour, which is a prominent theme of the book, may differ in certain details in the Federal Republic and in Great Britain, but in its basic structure it revolves around the same problem. The sources of the regulation of these relations are—if we disregard exceptions such as the German works agreement—essentially the same, but the balance between the different types of regulation is different. There is much talk in the Federal Republic about 'bargaining autonomy' (*Tarifautonomie*)—the expression is virtually untranslatable into English and has in Britain no juridically construable meaning. Nevertheless a German reader of this book will probably gain the impression that in social reality the autonomy of the collective bargaining parties forms the core of industrial relations in Britain. Many Germans will ask themselves whether in the reality of things this autonomy does not go further than in the Federal Republic—and very many Britons ask themselves whether it does not go too far. This autonomous regulation of collective and also individual industrial relations takes place traditionally in Britain outside the sphere of state-established and state-enforced law. This is still largely the case today, even if—and this is one of the main themes of the book—the law has a far greater significance today than it did even twenty years ago. The explanation of the extra-legal nature of such a large part of industrial relations can be found partly in the third chapter [on purposes and methods of collective bargaining]—to give a more adequate explanation it would be necessary to write a history of British industrial relations. Above all it would be necessary to show the significance of the fact that the Industrial Revolution (roughly between 1770 and 1850) took place at a time when the working class did not yet have the right to vote, which it obtained only through the suffrage laws of 1867 and 1884. It would be necessary to explain that in large parts of industry, particularly amongst skilled workers and in mining, the trade unions already possessed great power at a time when their members were still without any political influence. The development of the British trade union movement preceded the political labour movement by at least half a century—the Labour Party developed ultimately largely

out of the trade unions. With a degree of simplification one could say that the reverse was true for Germany (as well as for France)—first came the political, then the trade union movement—one needs only to think of the role of Lassalle.[1] This is crucial for the attitude towards 'autonomy' and the law. By nature trade unions are everywhere and at all times conservative in a non-party-political sense: a way of behaving and thinking created by external circumstances easily becomes a tradition. The tradition of extra-legal autonomy may owe its origin to the historical factors we have touched upon and moreover also reflect the heritage of the 'guild system' which plays such a large role in the whole of British society, particularly in England. It may have much to do with a reaction of the working class to the anti-trade union attitude of the courts, especially in the nineteenth and early twentieth century. Whatever its origin may be—the fact that the law stands aside, the tendency (of the employers as well) to get by with a minimum of law, is unmistakable, even if, as we have said, it is nowhere near as clear today as it still was shortly after the Second World War.

In this special edition for German readers this must be particularly stressed because of the peculiarities of German industrial relations and German labour law, which are just as difficult to understand for a British observer as the corresponding British phenomena are for a German observer. For what is characteristic in this area for Germany is the opposite of the British situation, namely the hypertrophy of legal thinking, the central importance of the law for the relations between capital and labour. If this was already extensive at the time of the Weimar Republic, is it not still more extensive in the Federal Republic? How many problems must the Basic Constitutional Law (*Grundgesetz*) solve? How many things are read into and read out of the text of the statute by representatives of employers and employees, and above all by professors? Seen in the light of day is not this notion of a gigantic corpus of legal norms, hidden from view and needing to be dug out like buried treasure by a series of laborious intellectual operations, much more incomprehensible than 'custom and practice', which admittedly is difficult for lawyers to grasp (does that matter?), but not for those people, whether employers or employees, who have grown up in it.

Here, in the nature of the sources of regulation, lies the great

difference between industrial relations in the two countries. What is more, the practice of the courts has until recently played a subordinate role in the regulation of individual (as opposed to collective) industrial relations. The reasons are touched upon in the first part of the second chapter [on the sources of regulation]: this needed explaining to the British reader, who is accustomed to the dominant role of judicial decisions in contract and commercial law in particular. German readers need only to be reminded that institutions similar to the German labour tribunals were established as late as 1964 and only became really important at the beginning of the 1970s. The role of judicial decisions in the development of British labour law is therefore now in a process of rapid change. It must also be realized that in general—but this is also changing—British laws do not have a systematic, codifying character, but are intended to deal with abuses. This is a crude generalization, but what is said in the second chapter about the changing character of legislation must be understood in this light.

In the chapters concerned with the system of collective bargaining the reader will repeatedly come across comparative legal references, among others to German law. If the collective bargaining law of the Federal Republic is to be explained to a British specialist, then it is necessary above all to show that, and why, in the Federal Republic of today the content of Chapter IV [promoting negotiation] plays no role, the content of Chapter V [promoting agreement] a modest role, and the content of Chapter VI [observance of agreements] a central role. The world has learnt since 1935 from the United States, that is since Franklin Roosevelt's New Deal, that the problem of achieving a willingness to bargain is part of collective bargaining law (the willingness to bargain is something quite different from the willingness to agree). This is now also understood in Great Britain, and the problem of 'recognition' stands in the centre of things since the beginning of the rapid growth of white-collar trade unions. That the problems of arbitration have a special character in Germany will be understood by everyone who knows of the extent to which compulsory arbitration in the Weimar Republic prepared the way for the national-socialist destruction of the collective bargaining system.[2] It is not only in Britain that the power of the past over the present is great. This must be felt by everyone concerned with the enforcement of collective agreements: the German reader must appreciate how

far the obligatory effect of collective agreements is a German (and also a Scandinavian) phenomenon, even though it does find a counterpart in quite different circumstances on the other side of the Atlantic (but not on the other side of the North Sea).

Without any doubt it is the complete absence of a statutorily regulated system of employee representation at plant and company level [the so-called 'works constitution'] which represents the most fundamental difference between British and German industrial relations. Seen in a European context, the absence of any kind of legislation on works councils in Great Britain is an almost unique phenomenon. What is still more remarkable, and at first sight more difficult to understand, is the fact that the British trade unions not only do not demand the introduction of a statutory system of works councils but categorically reject it. If there are any serious aspirations in this direction at all, then they exist in employer circles. In the present book, which was originally intended for British readers, there is no detailed discussion of the causes of these developments, which diverge so strongly from continental reality; but some intimations are given in Chapter III, especially in the context of the 'level' of bargaining. In large and continually expanding areas of the British economy there is extensive trade union organization at plant level, and to a lesser but growing extent at company level. This means that the trade unions have their plant representatives, members of the work-force, elected by the trade-union organized employees of the plant (often by acclamation) and accredited by the trade union leadership. These shop stewards play a central role in working life. Above all, and the German reader must constantly keep this in mind, a very large part of what is called 'collective bargaining' takes place at plant level, where the trade unions are represented by the shop stewards, even if at the same time they can also be represented by full-time officers.

It must be appreciated that the trade unions are obviously afraid that the shop stewards would be weakened by the introduction of a statutory system of works councils, perhaps on the pattern of the German Works Constitution Act. In trade union circles it is emphasized, not without reason if at times a little exaggeratedly, that the function of the German works councils is fully carried out by the shop stewards without—from the British point of view—the oppressively gigantic legal apparatus of the works council system. Seen from Britain, the choice

between the shop steward and the works council is the dilemma of choice between democracy and bureaucracy. Of course this is also an exaggeration, but at bottom it has some justification. The German system of works councils, with its systematic organization of election procedures regulated down to the finest details, and its clear definition (subject to the strictest legal control) of the rights and duties of the works councillors, is perhaps the supreme example of that hypertrophy of the law and of the influence of lawyers and bureaucracy which, seen from outside, is the central characteristic of German industrial relations. On the other hand, though, this bureaucratization and 'juridification' has great advantages: it offers certain guarantees of a regulated conduct of day-to-day affairs and leads to the avoidance of frictions. In other words: it has all the advantages and all the disadvantages of administrative routine.

In Britain there is a tendency (particularly in trade union circles) grossly to overestimate this feature of the German system of works councils and moreover to ignore the extent to which the works councils are the 'extended arm' of the trade unions. Likewise, though, there is a tendency in Germany to overrate the 'anarchic' element in shop steward organization. In general it functions on the basis of a routine, not laid down by law, but nevertheless now supported by certain obligations on the employer which help to facilitate the activities of shop stewards and to protect them against discrimination, particularly against discriminatory dismissal. It is also often not realized (largely because of the nature of reporting in the mass media) that very frequently shop stewards promote industrial peace rather than industrial conflict, even though naturally the opposite can also happen. Nevertheless shop steward organization has quite obvious disadvantages compared with the German 'works constitution'. Only organized employees are represented by the shop stewards and, more seriously, a shop steward represents only his union. Since there is no systematic structure of industrial unions it is usual for the work-force of a particular plant to belong to two, three or even more unions; in a chemical factory, for example, the fitters belong to the Metal Workers' Union and not to the Chemical Workers' Union, and the typesetters in a printing works are not members of the same union as the bookbinders. To a certain, and indeed ever-

increasing, extent this evil is overcome by the creation of joint shop steward committees. Nevertheless it remains ultimately ineradicable.

However there are good, if usually not articulated, reasons why, in spite of all these disadvantages, there is scarcely a thinking trade unionist who would advocate the introduction of works councils on the German pattern in place of (or alongside) the shop stewards. The inestimable advantage of the system of shop stewards is that they counteract the 'alienation' between the trade union and its members, or (which amounts to the same thing) that they are, in Rudolf Smend's sense, an 'integration factor'.[3] The big unions (the Transport and General Workers' Union has two million members) are mass organizations; from the standpoint of the individual member the trade union leadership is extremely remote, and even the local branch leadership may frequently appear to the individual to be in an exalted position far removed from the shop-floor. But shop stewards are 'on the spot'. You see them every day, you can confide in them, and (this is very important) you can swear at them. In spite of all so-called 'trade union democracy' the bureaucratic element must prevail in the day-to-day administration of large and medium-size unions and even in the formation of their basic decisions. Whether offices are filled by election or appointment is of secondary importance. It is of fundamental importance, though, that an element of 'senior lay administration' (or, to use Max Weber's terminology, *Honoratiorenverwaltung*)[4] is carried into the bureaucracy of trade union organization by the shop stewards, and that the full-time trade union bureaucracy is constantly forced to come to terms with this 'lay' element. If British trade unions perhaps provide better guarantees against ossification than the unions of many other countries, then this may be due to a considerable extent to the existence of shop stewards. In a nutshell, shop stewards are today a mainstay of democracy in trade unions, and any attempt to place them on a 'legal' footing could be detrimental to this their most crucial function. The German reader of this book, who is acquainted to some extent with the history of Germany over the last half century, will not need to be reminded of the immense general political significance of the maintenance of internally active trade unions.

Perhaps the German reader will now understand why there is hardly any mention of 'co-determination' in this book. Whereas co-determination in the German sense relates to those things which are in the domain of the works councils, it has its British equivalent largely in the functions of the shop stewards, which are based on 'custom and practice'. This means that it is not guaranteed by law or not remotely to the extent of the Federal Republic. Consequently co-determination is not an 'achievement' which you possess in black and white and can safely take home with you, but something which must be fought for and secured by daily vigilance and activity. Vigilance, runs an English proverb, is the eternal price of freedom. *Jura vigilantibus scripta sunt*, it was once said, and 'jura' does not only mean rights in the legal sense. Trade union 'co-determination', though, comes about to a large extent through the making of collective agreements and the supervision of their administration. It takes place, even when there is no question of a formal collective agreement, through negotiation. But as a negotiating partner of the employer, the trade union remains outside the enterprise. This applies, for example, to questions of rationalization and its consequences, to extensions, reductions and transfers of plant, changes in methods of production and distribution, and so on. The statutory provisions concerning the obligations of the employer to disclose information to trade unions on matters of importance to collective bargaining are relevant in this context, however imperfect they may be. The same applies to the regulations based on EEC Directive No. 75/129, which requires employers to consult with the recognized trade unions in advance of any dismissal caused by a reduction in plant, irrespective of whether the employees concerned are members of these unions.

All these are minimum standards. There are, perhaps to an increasing extent, companies in the private sector which, quite voluntarily and often as a result of an understanding with the trade unions, establish joint consultative committees in order to promote mutual understanding and co-operation. They have an extra-legal basis, and obviously have nothing to do with the statutory corporate organs established under company law. In the public sector, on the other hand, for instance in the steel industry and in the Post Office, there are the beginnings of the participation of trade union representatives, partly established

by law and partly by administrative practice, in the strategic organs of public corporations.[5]

But the question of the representation of the trade unions (or of employees) in the organs of private companies is hotly disputed, and by no means only between the employers' and the employees' side. On this issue neither the trade unions nor the employers are of one view—on both sides the differences of opinion are great, but above all inside the trade unions. Moreover the problem is a matter of top-level party politics. Following the publication in May 1978 of the White Paper *Industrial Democracy* (Cmnd. 7231), it is highly unlikely that there will even be a parliamentary Bill, and it is clear that such a Bill would not contemplate the introduction of 'parity co-determination' in the foreseeable future. The most fundamental parts of the *Report of the Committee of Inquiry on Industrial Democracy*, published in January 1977, the so-called 'Bullock Report', will clearly not be put into practice. Whatever happens, I think no one can avoid the impression that this problem does not remotely play the role accorded to it in the Federal Republic.

In contrast there is another problem in Britain which has been almost completely overcome in Germany, namely the problem of trade union structure. Industrial trade unions of the kind which have existed in the Federal Republic since the Second World War are not unknown in Great Britain: the prime example is the National Union of Mineworkers. Thus there are industrial unions, but alongside these there are still also numerous craft unions (e.g. in the textile industry) and above all 'general unions', which cover many branches of industry and many categories of employee. The three largest unions are the Transport and General Workers, the General and Municipal Workers, and the Amalgamated Union of Engineering Workers (which originally developed out of the craft union of skilled metal workers). In addition there are in both the public and private sectors a number of white-collar unions whose significance has grown extraordinarily quickly and which play a major role today. (Neither in Britain nor in the USA is there a special category of 'civil servants' (*Beamte*)[6]—in Germany they are a legacy from the absolutist period.) To give one example: in the railway industry there are three unions, the 'general' National Union of Railwaymen (NUR), the 'special-