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Hannes Ludyga, **Otto Kahn-Freund (1900-1979) Ein Arbeitsrechtler in der Weimarer Zeit**, Berlin/Boston De Gruyter, 2016, 110 pp, hb £37.99.

Ruth Dukes\*

The name Otto Kahn-Freund will likely be familiar to readers of this journal, if not as that of a leading scholar of law during the second half of the twentieth century, then as that of a regular contributor to the *Modern Law Review* and, from 1945, a member of its Editorial Committee.<sup>1</sup> Though Kahn-Freund published on a range of subjects, including family law, comparative law and international private law, it is for his contribution to labour law scholarship that he is best remembered. Still today, it is not unusual for scholarly consideration of a question arising in that field to begin with a recollection of what Kahn-Freund thought, or might have thought, the answer to be. Indeed, such is the continued fascination and engagement with Kahn-Freund's work that the publication of this new biography is likely to be met with some interest.

As the subtitle of the book indicates, its primary focus lies with the fourteen years of the Weimar Republic, during which Kahn-Freund matured from an undergraduate student to a judge in the Labour Courts in Berlin and finally to a refugee from Nazism, struggling together with his wife Elisabeth to build a new life for themselves in London. Its author, a Professor of Private Law at the University of Saarland, explains in the introduction that his primary motivation in writing the book was to contribute to the as yet relatively sparse body of research on the mostly Jewish scholars and artists who emigrated or fled from Germany and Austria in the 1930s; a group which includes, of course, no lesser figures than Albert Einstein, Otto Klemperer, and Sigmund Freud.<sup>2</sup> It is not intended, Ludyga explains, as a definitive biography of Kahn-Freund – and, indeed, the treatment of the subject's life in England after the end of the second world war is very brief, restricted primarily to a record of his limited engagement with German politics and scholarship in those later decades.<sup>3</sup>

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<sup>1</sup> C Glasser, 'Radicals and Refugees: the Foundation of the Modern Law Review and English Legal Scholarship' (1987) *Modern Law Review* 688-708

<sup>2</sup> Ludyga, 2

<sup>3</sup> Ludyga, 80-86

To an English-speaking readership, much of the story of Kahn-Freund's life is already known, recorded *inter alia* in a short biography by Mark Freedland, interviews with Bob Hepple, Roy Lewis and Jon Clark, and obituaries by Hepple and Lord Wedderburn.<sup>4</sup> Regrettably, perhaps, this new contribution pays almost no heed to these English language sources, nor to any of the English language analysis of Kahn-Freund's scholarly contributions before and after the second world war.<sup>5</sup> It remains of significant interest, however, firstly, as a more or less comprehensive bibliography of German language sources relating to Kahn-Freund's life and work; secondly, for the way in which Ludyga has used new archival research to bring to life Kahn-Freund's experiences in the Weimar Republic as a socialist, a scholar, and a Jew; and, lastly, for the story it tells of his political activism during the second world war. This latter story is, to my knowledge, not at all well-known,<sup>6</sup> and may hold some surprises for those who were acquainted with Kahn-Freund only in his advanced years: a 'learned, gentle and charming man', by all accounts, much enamoured of the English liberal tradition.<sup>7</sup>

*Kahn-Freund in the Weimar Republic: Jewish, Socialist, Intellectual*

I am not, and never have been, a Jew, and I will shake off the outward appearance of my Jewishness... There is one thing, however, that might weaken my resolve on this – antisemitism, which is increasingly rapidly.

In his short biography of Kahn-Freund published in 1980, Thilo Ramm juxtaposed to dramatic effect this statement, from 1918, with the opening line of a never finished autobiography, begun in the 1970s: 'The most important single fact of my life is that I am a

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<sup>4</sup> 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 – 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.

<sup>5</sup> For references, see R Dukes, 'Otto Kahn-Freund and Collective Laissez-Faire: an Edifice without a Keystone?' (2009) 72(2) *Modern Law Review* 220-246.

<sup>6</sup> Freedland refers very briefly to Kahn-Freund's having written and spoken against Nazism during the war, and to his activities in the German Division of the BBC: Freedland, 307

<sup>7</sup> Lord Hoffman describes him as such: L Hoffmann, 'The Rise and Fall of the Economic Torts' in S Degeling, J Edelman and J Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters 2011), 112.

Jew.<sup>8</sup> Born into a liberal, cosmopolitan, ‘bourgeois’ family, the young Kahn-Freund’s first instinct was to assimilate, to be simply German. With its guarantees of freedom of conscience, belief and religion, the Weimar Constitution appeared to hold the promise of a future in which he could do just that: participate fully in civic and social life without threat of unequal treatment. In his description of Kahn-Freund’s youth, Ludyga suggests that anti-Semitism must nonetheless have been witnessed or experienced by Kahn-Freund from an early age.<sup>9</sup> As support for Nazism grew, throughout the 1920s and early 30s, Kahn-Freund’s 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. The significance of this element of his story can hardly be overstated. As Ludyga emphasises, when introducing his aims in the book, the Holocaust casts a long, dark shadow over German-Jewish history and legal history, before and after 1945.<sup>10</sup> Kahn-Freund escaped Nazi Germany himself only to learn eventually of the murder of 6 million Jews, among them countless relatives, friends and acquaintances.<sup>11</sup>

The broad sweep of the narrative of Kahn-Freund’s Weimar years has already been sketched above. Born in Frankfurt-am-Main in 1900, he attended the Goethe *Gymnasium*, a grammar school in that city with a cohort of largely similarly-minded, intellectually curious young men, many of them also Jewish.<sup>12</sup> While still a school boy, he attended a peace rally in the summer of 1917, at which he heard Hugo Sinzheimer speak for the first time – the German-Jewish scholar, legal practitioner, and politician. By Kahn-Freund’s own admission, he was deeply impressed by the older man: ‘...unforgettable, I can still see it and hear him: Peace, Freedom, Bread. That kind of thing stays with one’.<sup>13</sup> Embarking in 1919 on the study of history, and then law, he became a member of a close circle of friends under the political and intellectual mentorship of Sinzheimer.<sup>14</sup> Following graduation in 1923, he completed a PhD under Sinzheimer’s supervision, and a legal traineeship in Sinzheimer’s chambers. In 1928, he became a judge in the Charlottenburg district court in Berlin, and from 1929, in the Berlin labour court.<sup>15</sup> There he worked until 1933, when he was forced to flee what was by then

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<sup>8</sup> T Ramm, ‘Otto Kahn-Freund und Deutschland’ in F Gamillscheg (ed), *In Memoriam Sir Otto Kahn-Freund* (Munich 1980). xxi, my translation

<sup>9</sup> Ludyga, 10-11

<sup>10</sup> Ludyga, 2

<sup>11</sup> Ludyga 75; ‘Autobiographische Erinnerungen’, 195

<sup>12</sup> Ludyga, 10

<sup>13</sup> Ludyga 19, citing O Kahn-Freund, ‘Autobiographische Erinnerungen an die Weimarer Republik. Ein Gespräch mit Wolfgang Luthardt’ (1981) 14 *Kritische Justiz* 183-200, 185. My translation.

<sup>14</sup> ‘Autobiographische Erinnerungen’, 185

<sup>15</sup> Freedland, 304

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.

To this familiar story, Ludyga adds some fascinating detail. The Goethe University in Frankfurt, where Kahn-Freund studied as an undergraduate and doctoral student, was liberal and modern by the standards of the day; nonetheless, Sinzheimer, an honorary professor there, was the victim of anti-Semitic and right-wing attacks. His inaugural lecture was disrupted by far-right activists, and it was only with the help of ‘democratically-minded’ students, including Franz Neumann, that he made it to the podium.<sup>16</sup> Together with Ernst Fraenkel, a life-long friend, Kahn-Freund kept in touch with Sinzheimer by letter until the latter was forced into hiding in Amsterdam in 1940. When the war ended, they hoped to provide him with financial and moral support so that he might recover from the stresses and deprivations of the years underground.<sup>17</sup> Tragically, he died of exhaustion shortly after VE Day. After the Nazis came to power in January 1933, Kahn-Freund was himself the victim of appalling treatment. In March 1933, 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.<sup>18</sup> In fact, as Ulrich Mückenberger has surmised, 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, 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?<sup>19</sup>

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

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<sup>16</sup> Ludyga, 13-14

<sup>17</sup> Ludyga, 7

<sup>18</sup> 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

<sup>19</sup> Mückenberger, 10

politically ‘unreliable’ civil servants be dismissed.<sup>20</sup> None of his colleagues on the bench protested.<sup>21</sup> 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*).<sup>22</sup> Together with the financial losses suffered by reason of the transferal of property overseas, this meant that the Kahn-Freunds arrived in England without very much money. 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 (73).

For the most part, Ludyga’s account follows a straightforward chronological order. Before we learn of the horrors of the 1930s, then, there are much pleasanter indications of the exhilaration Kahn-Freund must have felt in the first years of the Republic, a young man in a young country. As a member of the ‘Sinzheimer circle’, he entered a singularly exciting milieu of socialist lawyers and intellectuals. Sinzheimer’s ‘disciples’ included Fraenkel and Neumann, Carlo Schmid (later a minister in the Federal Government of West Germany) and Hans Morgenthau. Through Sinzheimer or otherwise, Kahn-Freund also became acquainted with Franz Oppenheimer, Otto Kirchheimer, and Hermann Heller. 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.<sup>23</sup> From 1922, he 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*). It was here, perhaps, that he met Elisabeth, one of the Academy’s first students.<sup>24</sup> As a judge, from 1928, he was conscious that his political leanings put him in a small minority amongst the otherwise deeply conservative judiciary.<sup>25</sup> For friendship, and political and intellectual debate, he turned again to Fraenkel and

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<sup>20</sup> Ludyga, 48

<sup>21</sup> Ludyga, 52

<sup>22</sup> Ludyga, 57

<sup>23</sup> Ludyga, 26

<sup>24</sup> Ludyga, 22

<sup>25</sup> Ludyga, 31-33

Neumann, among others, the former working together by then in Berlin as trade union lawyers.

Even after he became a judge, Kahn-Freund continued to engage in scholarly analysis of the law.<sup>26</sup> Two of his most important publications are known to an English-speaking readership, having been published in translation in 1981 in a volume edited by Lewis and Clark. These were *Das Soziale Ideal des Reichsarbeitsgerichts*, a short monograph from 1931, and ‘Der Funktionswandel des Arbeitsrechts’, an article from 1932, translated as ‘The Social Ideal of the Reich Labour Court’ and ‘The Changing Function of Labour Law’.<sup>27</sup> In ‘The Social Ideal’, Kahn-Freund analysed the decisions of the national labour court, demonstrating through his analysis that the ‘social ideal’ which underlay judicial practice was a fascist one – fascist in the Italian, rather than the Nazi, sense. In the hands of the court, labour law, originally ‘an instrument to assist the rise of the suppressed class’, had been transformed into ‘an instrument of the state to suppress class contradictions’.<sup>28</sup> In the Lewis and Clark volume, there is a brief mention of the controversy which this argument caused.

To the embattled officials of the SPD and the trade unions, who were at the time being pilloried from all sides for their policy of ‘toleration’ towards the authoritarian Brüning regime, Kahn-Freund’s critique must have seemed too close to that of the hated KPD [Communist Party]. Clemens Nörpel, the leading specialist on labour law in the ADGB [*Allgemeinen Deutschen Gewerkschaftsbund*, or German trades union congress], was particularly vitriolic in his response, and even tried to enlist the support of Sinzheimer, Flatow, Fraenkel and Neumann to suppress the publication.<sup>29</sup>

An exchange of letters between Nörpel and Kahn-Freund is reproduced by Lewis and Clark in English translation, as an appendix to their volume. From Ludyga, we learn now that Nörpel was likely motivated, at least in part, by anti-Semitism; that no lesser figure than Heller attempted to intervene to have the book published as originally agreed; that by reason of Nörpel’s intervention, Kahn-Freund did not take up a position, promised to him, as a consultant (*Referent*) with the Prussian Board of Trade. In the aftermath of this episode, Kahn-Freund distanced himself from the ADGB for good.<sup>30</sup>

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<sup>26</sup> Ludyga 34; *Autobiographische Erinnerungen*, 183

<sup>27</sup> In Lewis and Clark (eds), *Labour Law and Politics in the Weimar Republic*

<sup>28</sup> *ibid* 152

<sup>29</sup> *ibid.* 50

<sup>30</sup> Ludyga, 38-40

## *Political Activism during the Second World War*

It is already well known that the break which the Kahn-Freunds made with Germany in 1933 was a permanent one. As Kahn-Freund explained in interview with Lewis and Clark:

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.<sup>31</sup>

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'.<sup>32</sup> He was expatriated from Germany in April 1939 and in June divested of his PhD from the Goethe University in Frankfurt. After more than a year's statelessness, he was granted British citizenship in June 1940.<sup>33</sup>

Thanks principally to the archival research undertaken by Ludyga, especially at the *Archiv der sozialen Demokratie* of the Friedrich Ebert Foundation, it has now come to light that Kahn-Freund's decision to desist involving himself in German matters was not made immediately on arrival in London. During the second world war, he undertook a range of activities with other German and Austrian emigrants aimed at hastening the defeat of Nazism, and paving the way towards the creation of a new socialist state in Germany. As a British citizen, he was never interned.<sup>34</sup>

From early 1940, Kahn-Freund chaired the so-called 'Gillies Committee' together with his colleague at the LSE, Charlotte Lütken.<sup>35</sup> Named after William Gillies, then head of the international department of the Labour Party, the committee existed to advise the Party on propaganda matters, with the ultimate aim of preparing for a left-wing government in Germany. Committee members included Walter Auerbach, Hilde Meisel and Fritz Eberhard. For Kahn-Freund, questions concerning the 'role of the trade unions in a future Germany' and the 'political and political-economic pre-conditions of their existence' were of particular

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<sup>31</sup> Lewis and Clark, 201

<sup>32</sup> Lewis and Clark, 200

<sup>33</sup> Ludyga, 60-61

<sup>34</sup> Ludyga, 63

<sup>35</sup> Ludyga, 61-62

importance.<sup>36</sup> During 1940, the same group of emigrants developed plans to set up a ‘black’ radio station to transmit socialist propaganda into Germany.<sup>37</sup> The station began broadcasting on 7 October 1940, with the words:

You are listening to the European Revolution Broadcasting Station! We speak for all who are condemned to silence! We call the masses to political and social revolution! We fight for a Europe of Peace!<sup>38</sup>

Financed and supervised by the British secret service, it 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. It argued 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. There was no alignment here with the Soviet Union, however, and Stalin was openly criticised by the station as a brutal dictator.<sup>39</sup> Indeed, Soviet hostility towards the station was one of the factors which influenced its shutting down; another was its waning significance after the entry into the war of the USA.<sup>40</sup> In the early part of the war, Kahn-Freund also had some involvement with the BBC. He spoke several times on the radio, and chaired a committee which assessed programmes transmitted by the Germans.<sup>41</sup>

After the Gillies Committee was dissolved, in 1941, Kahn-Freund co-authored a short book with Eberhard, Auerbach, Meisel and Kurt Mandelbaum: *The Next Germany: a Basis of Discussion on Peace in Europe*.<sup>42</sup> Ludyga discusses the content of this book only briefly, mentioning that its title was suggested to the group by Harold Laski, and the text translated from German into English by Kahn-Freund.<sup>43</sup> In fact, the work is recognisably Kahn-Freund’s in places, for example, where he quotes, without reference, the phrase of Sinzheimer’s that he had found so memorable: ‘Peace, Freedom, Bread’.<sup>44</sup> Wishing at the time to remain anonymous, neither he nor his co-authors were credited anywhere in the book, which bears the name only of the contributor of a short Foreword, Louis de Brouckère,

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<sup>36</sup> Ludyga, 62, citing a letter from Kahn-Freund to Auerbach 25.9.1940.

<sup>37</sup> Ludyga, 63-67

<sup>38</sup> Ludyga, 63 citing D Nelles, *Widerstand und internationale Solidarität. Die Internationale Transport-Föderation im Widerstand gegen den Nationalsozialismus* (Essen 2001). 341

<sup>39</sup> Ludyga, 65

<sup>40</sup> Ludyga, 66

<sup>41</sup> Ludyga, 67

<sup>42</sup> L de Brouckere. *The Next Germany. A Basis of Discussion on Peace in Europe*. (Penguin 1943)

<sup>43</sup> Ludyga, 67-68

<sup>44</sup> *The Next Germany*, 35

Member of the Belgian Senate. Writing with one voice, as a ‘small circle of socialists’, the 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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup>

In a letter to Auerbach, cited by Ludyga, Kahn-Freund seemed to confirm that the argument of the book reflected his own personal opinion: the aim, he believed, should be ‘socialist revolution’ in Germany, and the whole continent, as a means of achieving a unified Europe.<sup>50</sup> At the war’s end, he 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.<sup>51</sup>

With Eberhard, Auerbach, Meisel and others, Kahn-Freund also worked to set up the organisation, *German Educational Reconstruction*.<sup>52</sup> Following a first meeting in September 1943, the organisation eventually had between 140 and 150 emigrants working for it, expert in adult education, publicity, politics, propaganda and resistance. Its aim was to assist

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<sup>45</sup> *The Next Germany*, 6

<sup>46</sup> *The Next Germany*, 38-40

<sup>47</sup> *The Next Germany*, 62-8

<sup>48</sup> *The Next Germany*, 55-8

<sup>49</sup> *The Next Germany*, 56

<sup>50</sup> Ludyga 69, citing a letter from Kahn-Freund to Auerbach, undated.

<sup>51</sup> Ludyga 68, citing a letter from Kahn-Freund to Auerbach, 13.12.1945

<sup>52</sup> Ludyga, 69-72

teachers and social workers with preparing for the work of reconstructing Germany. 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. In *The Next Germany*, the authors explained the centrality of education to the project of reconstruction.<sup>53</sup> The Nazi system had involved an attempt to remould the thoughts and emotions of a whole nation, with a view to making it an ‘instrument of conquest’.<sup>54</sup> The task of eliminating the evil effects of that attempt was ‘desperately urgent’.<sup>55</sup> Fulfilment of the task would require the training of a whole new generation of teachers and youth leaders, and the writing and printing of a whole new range of textbooks.<sup>56</sup> Teachers and university lecturers currently in post should be dismissed; school libraries ‘purged and replenished at once’.<sup>57</sup>

Under the auspices of *German Educational Reconstruction*, according to Ludyga, Kahn-Freund gave lectures to English trade unionists and Labour Party members using a pseudonym – ‘Richard Winner’ – so as not to put relatives in Germany in increased danger.<sup>58</sup> At the war’s end, the organisation provided classes – in history, economics, philosophy and sociology – to German prisoners of war who had shown an interest in democracy. It continued to work until 1958, focusing its efforts then on facilitating a German-English exchange of ideas. In 1951, Kahn-Freund organised a conference on *Industrial Relations in Great Britain*, with the support of the organisation and the American High Commission. He spoke at the conference on the topic of ‘the legal background of industrial relations in Britain’.<sup>59</sup> We might speculate as to whether the lecture shared many similarities with his famous chapter, ‘Legal Framework’, published only three years later.<sup>60</sup>

### *A Labour Lawyer in Weimar and in Postwar England: Socialist or Liberal?*

As a leading scholar of labour law in England in the postwar decades, Kahn-Freund was closely associated with the idea of *collective laissez-faire*. This was a term that he coined in

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<sup>53</sup> See especially chapter 7, *The Next Germany*, ‘Education for a New Society’.

<sup>54</sup> *The Next Germany*, 84

<sup>55</sup> *The Next Germany*, 86

<sup>56</sup> *The Next Germany*, 96, 99

<sup>57</sup> *The Next Germany*, 96, 99

<sup>58</sup> Ludyga, 71

<sup>59</sup> Ludyga, 71-2

<sup>60</sup> O Kahn-Freund, ‘Legal Framework’ in A Flanders and H Clegg (eds), *The System of Industrial Relations in Great Britain* (1954)

the 1950s to describe what he understood to be the particular attitude of the British state towards industrial relations throughout the twentieth century. Rather than attempting to regulate employment relations directly, successive British governments promoted collective bargaining as the preferred means of setting terms and conditions of employment and of settling industrial disputes, thus leaving it to trade unions and employers to negotiate the rules that would govern working lives and working relations. According to Kahn-Freund, it was critical that this negotiation should proceed *autonomously of the state*. While governments could rightfully act to encourage the creation of trade unions and the institution of collective bargaining machinery they ought not, as a general rule, to influence directly the outcome of the collective bargaining process, or to become directly involved in the adjudication of industrial disputes. Collective laissez-faire involved, as he pithily put it, ‘the retreat of law from industrial relations and of industrial relations from the law’.<sup>61</sup>

For many readers, Kahn-Freund’s exposition of labour law and industrial relations in the UK resonated strongly with the British tradition of liberalism, and its focus on the rights of individuals as prior and superior to the state.<sup>62</sup> Indeed, re-reading the lecture in which Kahn-Freund first used the term collective laissez-faire, it seems highly likely that this was exactly the point that he wished to make: that, contra Dicey, there was nothing ‘radical’ or foreign to the British system about collective industrial relations.<sup>63</sup> 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*.<sup>64</sup> ‘Dicey’s antithesis of laissez faire and collectivism was too simple.’<sup>65</sup>

In critiquing the principle of collective laissez-faire in 1981, 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

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<sup>61</sup> O Kahn-Freund, ‘Labour Law’ in M. Ginsberg (ed), *Law and Opinion in England in the 20th Century* (London: Stevens, 1959), 225

<sup>62</sup> See eg A Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart 2009), chapter 1

<sup>63</sup> Kahn-Freund, ‘Labour Law’, esp. 224

<sup>64</sup> 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

<sup>65</sup> ‘Labour Law’, 223

conflicting ideologies’, wrote Lewis, Kahn-Freund had postulated ‘reconcilable conflict between pressure groups’.<sup>66</sup> 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’.<sup>67</sup> For Keith Ewing, collective laissez-faire was more or less synonymous with ‘social liberalism’: its ‘essence’ 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’.<sup>68</sup> As such, the principle was wholly inadequate as an explanation of the historical development of labour law and industrial relations in the UK, where the state had in fact played a much more active and ‘legally-grounded’ role in the construction of collective bargaining and other institutions than the notion of ‘indifference’ might lead one to believe.<sup>69</sup> Characterising Kahn-Freund similarly as a dyed in the wool liberal, but to a rather different end, Collins and Mantouvalou suggested in 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.<sup>70</sup> This, in their opinion, was the lesson to be drawn from Kahn-Freund’s judgement in the 1933 radio case.<sup>71</sup>

Alternative readings of collective laissez-faire have placed greater emphasis on its socialist or social democratic intent. 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.<sup>72</sup> 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

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<sup>66</sup> R Lewis, ‘Kahn-Freund and Labour Law: an Outline Critique’ (1979) 8 *Industrial Law Journal* 202-21, 218

<sup>67</sup> *Ibid.*

<sup>68</sup> KD Ewing, ‘The State and Industrial Relations: “Collective laissez-faire” Revisited’ (1998) 5 *Historical Studies in Industrial Relations* 1-31, 5

<sup>69</sup> *Ibid.* See also KD Ewing and J Hendy, ‘New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining’ (2017) 46 *Industrial Law Journal* 23-51.

<sup>70</sup> *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*.

<sup>71</sup> See Mückenberger n 17 above.

<sup>72</sup> 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.

other countries.<sup>73</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>74</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>75</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>76</sup> But it did not mean that there should be, or had been in the UK, no labour law.<sup>77</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>78</sup> 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’.<sup>79</sup> 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.<sup>80</sup>

While there appears to be some disagreement, then, on the ‘correct’ interpretation of collective laissez-faire, it is generally acknowledged, I think, that, in later life, Kahn-Freund was less unequivocal in his advocacy of state abstentionism, or forbearance, 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 argued for the use of legislation to address what he appeared to consider 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

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<sup>73</sup> 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

<sup>74</sup> Wedderburn, ‘Change, Struggle and Ideology’, 10, 21

<sup>75</sup> Wedderburn, ‘Change, Struggle and Ideology’, 11, 15

<sup>76</sup> Wedderburn, ‘Change, Struggle and Ideology’, 22

<sup>77</sup> Wedderburn, ‘Change, Struggle and Ideology’, esp. 22

<sup>78</sup> Wedderburn, ‘Change, Struggle and Ideology’, 10.

<sup>79</sup> Wedderburn, ‘Change, Struggle and Ideology’, 11

<sup>80</sup> Wedderburn, ‘Change, Struggle and Ideology’, 21-22.

organised by unions during the miners' strike of 1972.<sup>81</sup> 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.'<sup>82</sup> 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'.<sup>83</sup> 'All this is palpably obvious', he continued, 'except for a person blinded by class hatred either way'.<sup>84</sup>

How might we square these opinions expressed by the older Kahn-Freund with what we knew already of his experiences and published work in the Weimar Republic, and of his analysis of UK labour law in terms of collective laissez-faire, and with what we learn now from Ludyga of his decidedly socialist beliefs and political engagement during the second world war? 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 Weimar writings – his criticisms then of state intervention in industrial relations – and his later elaboration of collective laissez-faire. 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.<sup>85</sup> 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, Ludyga notes, he was critical of the German

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<sup>81</sup> O Kahn-Freund, 'Trade Unions, the Law and Society' (1970) 33 MLR 241; O Kahn-Freund, 'The Industrial Relations Act 1971 – Some retrospective reflections' (1974) 3 *Industrial Law Journal* 186

<sup>82</sup> P Davies and M Freedland (eds), *Kahn-Freund's Labour and the Law*, 3<sup>rd</sup> ed. (Stevens 1983), 18, 15

<sup>83</sup> *Labour and the Law*, 66

<sup>84</sup> *Labour and the Law*, 66

<sup>85</sup> Dukes, 'Otto Kahn-Freund'

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.<sup>86</sup>

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.<sup>87</sup>

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.<sup>88</sup>

In a 1978 interview, or ‘conversation’ with the German scholar Wolfgang Luthardt (upon which Ludyga also draws extensively), Kahn-Freund considered the possibility that there may have been a shift in his political views over 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.<sup>89</sup> 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.<sup>90</sup>

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.<sup>91</sup> Clearly, his scholarship was strongly influenced by Marxist

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<sup>86</sup> Ludyga 47 citing letter from Kahn-Freund to Auerbach, 8.4.1940, my translation

<sup>87</sup> Ludyga 47 citing O Kahn-Freund, *Beiträge zum Neuaufbau des deutschen Arbeitsrechts*, London 1944, my translation

<sup>88</sup> *Labour and the Law*, 20

<sup>89</sup> Kahn-Freund, ‘Autobiographische Erinnerungen’, 195

<sup>90</sup> Kahn-Freund, ‘Autobiographische Erinnerungen’, 196

<sup>91</sup> Kahn-Freund, ‘Autobiographische Erinnerungen’, 187, 189

analysis:<sup>92</sup> his world view, or ideology, as he put it, less so.<sup>93</sup> He regarded himself as having stood a little to the ‘right’ of Fraenkel and Neumann, during their student years and later within the SPD.<sup>94</sup>

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.<sup>95</sup>

Of course, these labels have to be understood in the political context of the time, and not by today’s quite different standards. 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.<sup>96</sup> 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 transformation of pluralism into corporatism of a ‘fascist’ variety.<sup>97</sup>

### *Conclusion*

This is not, perhaps, the place to delve any deeper into the matter of Kahn-Freund’s political opinion in later life. Enough has been said, I hope, to underscore the importance of the story of the younger man in the Weimar Republic and the second world war to an appreciation of the work with which we are most familiar, written in the 1950s, 60s and 70s. With this short, but nicely written and thoroughly referenced, book, Ludyga has done us all a great service by adding to that story quite significantly, in the ways that I have outlined above: bringing to life Kahn-Freund’s experiences in the Weimar Republic as a socialist, a scholar, and a Jew; and relating the hitherto unfamiliar story of his political activism during the second world war.

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<sup>92</sup> Kahn-Freund, ‘Postscript’ 195

<sup>93</sup> Kahn-Freund, ‘Autobiographische Erinnerungen’, 189

<sup>94</sup> Kahn-Freund, ‘Autobiographische Erinnerungen’, 187, 189

<sup>95</sup> Kahn-Freund, ‘Autobiographische Erinnerungen’, 189, my translation.

<sup>96</sup> Kahn-Freund, ‘Autobiographische Erinnerungen’, 190-192

<sup>97</sup> Kahn-Freund, ‘Autobiographische Erinnerungen’, 195-6