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SIR OTTO KAHN-FREUND

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1900–1979

THE death of Otto Kahn-Freund on 16 August 1979 brought forth tributes not only in Britain but throughout the world, not merely acknowledgements of his place as one of the foremost jurists of the century, but also renewed affirmations to build upon the advances which he had made in legal scholarship. Yet he was the first to acknowledge the remarkable element of chance which had taken this German radical pacifist into a career of distinguished academic legal teaching and writing.

Born in 1900 of German-Jewish parents, after the collapse of Germany at the end of the First World War he left the army and studied history and law at three German universities. By now he was a socialist, joined the German Social Democratic Party, and plunged into the ferment of political and social debates of the time, in the intense circles of socialist intellectuals of the day. He had already had contact with England and with the United States through his mother's family—her father was an American citizen—and in 1927 and 1928 he spent long periods in these countries. It was then he made his first acquaintance with English legal studies. But his home was Germany. As he later put it, his 'Jewish origin meant at that time little to me', and he never had any positive religious beliefs. These feelings were shared by his wife, herself a socialist and a lawyer. Her partnership—at once his most stable support and his strongest defender, and at times a strong, if private, critic—was to mean much to him in the storm that was about to break.

In 1928, he had become a judge in Berlin, for the most part serving in the Labour Court, one of the largest and most conspicuous in the country. Soon after Hitler had taken over the government in 1933, Kahn-Freund had to determine the validity of the dismissal of three employees of the Radio Corporation. They had been dismissed on the ground that they were Communists and might have sabotaged Hitler's first broadcast. Kahn-Freund found no evidence of the allegations and courageously abrogated the dismissals, whether the men were Communists or not. The legal content of the judgment was of much smaller significance, no doubt, than his publications of 1931 and 1932, two scintillating works in which he had brilliantly exposed the

'fascist' tendencies of the jurisprudence of the superior Reich Labour Court and had analysed the 'function' of labour law in what he called the 'obituary notice' of the Weimar system. But the 1933 judgment brought things violently to a head. There were, he said thirty years later, 'signs that things were becoming dangerous for us'—he was removed from office in March. In 1979 he wrote: 'My wife and I left Germany for political reasons: it wasn't necessary to leave Germany at that time because I was a Jew.' They left for what they said was a holiday; but it soon became clear that return would be impossible.

They made their home in England from June 1933 onwards, captivated by the 'civilization' of its society and its stability and by the delights of its countryside, appalled by its 'obtuseness' in foreign affairs at the dangers looming in the land from which they had come. He was already fluent enough in English to lecture for the Workers' Educational Association; but, now and later, adopted a pseudonym. His father (from whom financial support was regularly forthcoming) still lived in Germany and, until he joined them in 1936 in England, Kahn-Freund was careful not to increase dangers for him. But it was at this time that Kahn-Freund found that spiritual home with which he was to be associated for thirty years—the London School of Economics.

The two Professors who had most influenced Kahn-Freund in Germany were Hans Lewald and Hugo Sinzheimer. The former aroused his interest in conflict of laws and comparative law, interests which were of primary importance for the rest of his life. The latter, who supervised his thesis and accepted him as his assistant, had opened up for him the law governing labour relations, more especially the interrelation of law and industrial relations. There were few British Law Faculties in the 1930s where comparative legal studies flourished. Of these, there was only one at which labour law was a developed and developing subject, studied not merely in the 'black letter' method of legal rules but also functionally, with a socio-legal perspective. That one was the London School of Economics.

It was then little less than a miracle that Kahn-Freund came to the one university in Britain which could understand what he had to offer. The place of the School in his life was paramount from this time on. He resumed his legal studies, obtained an LL.M in 1935, was called to the Bar a year later, and was immediately appointed to the teaching staff at LSE. More than that, he always claimed that the School caused him to become properly 'naturalized'.

The legal formalities of citizenship were completed in 1940, a

step which fortunately avoided internment; and during the war he helped to maintain the School's teaching programme on its evacuation to Cambridge, worked for the BBC's German services, and later participated in the Control Commission's legal research unit in Germany.

This period is not marked by a large number of publications. At first he taught mainly in the field of commercial law, never his first love. From it, however, there emerged a work on the 'Law of Inland Transport' which displayed his characteristic ability to dominate the legal technique whilst at the same time seeing through to the social policies and functions that lay beyond. Both were for him vital parts of the lawyer's equipment. Social policy was critical. But he never tired of telling students that they must go 'through' the law to the social policy; they were not entitled to go 'round' it. The 'law', however meant not only the case law beloved of English lawyers; it meant equally—perhaps more—legislation and the regulations of statutory instrument, for these touched the lives of ordinary men and women. This was, as he saw it, one of the besetting sins of English law, the concentration on judge-made law.

His training and predilections were of the most profound importance to his grasp and development of labour law, which William Robson wisely asked him to share in teaching at the School. There came the moment, at the end of the Second World War, when he had completed a study of British collective agreements, which he found to be so different from those he had known in Germany. He had naturally assumed at first that British agreements were of the same legal character as those elsewhere. No literature suggested otherwise. Yet the substance was very different, industrially. Suddenly he 'had a sort of Damascus'. British collective agreements *were* different. They were 'not legally binding', because that is what the parties to them 'intended'. This thesis—a brilliant and intuitive rationalization—he began to propound modestly in 1949 and to repeat in the 1950s, by now a Professor at the School. He convinced the Royal Commission on Trade Unions and Employers' Associations, chaired by Lord Donovan, of the same thesis in its deliberations of 1965–8; he saw the High Court accept it in 1969 and Parliament adopt the structure of his thinking in 1971 and 1974.

This creation and domination of a debate about the legal dimension of the central feature of British industrial relations, the collective agreement—a debate which had scarcely existed before 1949—was conducted by him with great modesty. He tended to

insert his ideas slowly, sometimes in footnotes. Around his thinking on the collective agreement, he built a framework which began to make sense of British 'labour law', giving it a shape for a legal profession which had scarcely known the subject existed. It was right that his knighthood in 1976 should be for 'services to labour law'. Although that framework changed somewhat over the years—for example, he retracted the sunny view that British safety legislation in the nineteenth century could be seen as a process of 'trial and error'—he never gave up the proclaimed belief that the law of labour relations could not be understood without an appreciation of society, without understanding that the individual employment relationship was a relationship of 'submission'. Even at the end, when his pessimism about British industrial and social developments was so great and was given expression in the British Academy lectures 'Labour Relations: Heritage and Adjustment', he still adhered to this fundamental analysis. It just seemed to him still to be true.

This refusal to depart from the truth as he saw it dominated his scholarship. The truth meant the law in context; the society as affected by and through the law; the legal system of one country as compared with others; the law as it is moulded by the 'ever-changing forces of society'. Although he sometimes said he was not interested in 'lawyer's law', contributions which he made to the conflict of laws, as in the textbook still called *'Dicey'*, or in his Hague lectures of 1968 and 1974, stand as a denial to that claim. Nor could those who worked with him on the editorial committee (since 1945) of the *Modern Law Review* believe the claim. His shrewd and humane criticisms of legal writings did not stop short of sloppy legal technique. He believed that lawyers should know their craft and he set an example.

He was in fact greatly concerned with the education of lawyers, believing that the English professions stood in need of a new generation which would be at once more accessible to its clients and (because of its training in elementary social sciences) more understanding of its society. This interest led him to lecture on the need for new methods of legal education, to join in the promotion of new series of publications on 'Law and Society', and to serve on the guiding committees of the Social Science Research Council in promoting socio-legal research. A field in which he expressed a sharp interest was that of family law. Just as labour law affected 'the basis on which the very large majority of people earn their living', so family law was an 'inescapable' area for ordinary people. He always took pride in the fact that 'family law' (not just

'divorce law', but the law as it affects family life and the social relationships around the 'family', with its ever-changing meaning) spread among English universities as a teaching subject, partly by reason of his own efforts.

But if his teaching and research in all these subjects—teaching which was unforgettable in its total commitment, wit, humanity, and zest; research which was as brilliant in its incisiveness as it was simple in its integrity—if these would have made Kahn-Freund a great scholar, his comparative learning and capacities transformed him into a giant among academic lawyers. In 1964 Oxford University had at long last lured him away from his beloved LSE, to take the Chair of Comparative Law. Previous offers, such as that by Yale Law School, though tempting, had been refused (though that had left the legacy of regular, productive visits to the United States—where he found the law schools 'broader' in outlook, but lacking in 'systematic discipline'). But he accepted the Oxford offer in order to develop his writing (he would be relatively free from teaching) and, above all, his comparative writing.

It was, in fact, remarkable that a very great proportion of his works, especially of his books, was written in the period between his departure to Oxford at the age of 64 and his death at 79 (for he took little or no notice of his formal 'retirement' at the age of 71). Indeed, some would say that after three decades of teaching, a rational university system would have found a way of giving him more time for writing at LSE. However that may be, he was accepted in the 1970s in Europe, Africa, America, and throughout the world as one of the great legal scholars of our time. In part, this was made easier by his natural bent for languages; as President of the International Society for Labour Law and Social Security he would conduct the business sessions without regard to the headphones through which others strained for the translations. But it was more than language. He so knew the concepts in different legal systems as to detect the nuance which required an unexpected translation in order to convey the equivalent juristic sense, *le mot juste* to translate not the language but the legal system. It was this rare gift which contributed to his commanding international position in comparative legal studies.

All these qualities he put at the service of practical studies. He did not believe that the scholar should isolate himself in an ivory tower. He was, for example, a member of the Committee of Experts recruited by the Council of Europe to advise on the European Social Charter. He was also emotionally and intellectually committed (almost devoted) to the European Economic

Community and he promoted, from the early 1950s, research and teaching in Community law. Both in Community studies and in separate European legal systems (especially French law, on which he published an important book just after his retirement) his was an important influence in spreading the subjects across British legal study and scholarship.

In 1978 a volume of his 'Selected Writings' was published under the auspices of the *Modern Law Review* which included a definitive bibliography of his works. This revealed the astonishing range of his contribution to various fields. It evidenced too, from the topics he chose, his belief that the law existed to serve the needs of ordinary people. Although more depressed towards the end of his life about the ways in which this object might be achieved (especially now that the 'equilibrium' which he prized most in Britain seemed to be breaking up) he remained throughout his life tolerant, stimulating, and generous. No letter ever remained unanswered. His prodigious energy meant that extensive reading and writing still left room for climbing, walking, and talking with friends, for the music that was his other passion. No-one who met him forgot the sudden, bubbling humour, the sheer enjoyment of life, the impish delight at spotting the absurd or the 'stuffy'. Nor did he fail to enjoy success. A modest man, he nevertheless had some understanding of what he had attained and of the skill and the chance that had gone into it. When he 'profoundly disagreed', he did not beat about the bush; but he never discarded courtesy; and he would test an opinion to its utmost before rejecting it.

Kahn-Freund was a man of humanity, liberal values, and democratic socialist beliefs, whose work saw the study of the law in Britain translated to a higher plane. His presence among us in that period was a remarkably fortunate *hazard*. He was a man for the moment; yet, more than that, he was an original mind, a brilliant expositor, a patient but persistent innovator, a gentle and true scholar.

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