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## Labour Law Research Network Conference, Amsterdam 2015

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**“Legislation as an appropriate medium for controlling industrial relations – a view from history.”**

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### **Abstract**

*Otto Kahn Freund, one of the greatest of labour lawyers, thought that ‘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.’ He also compared the voluntary system of industrial relations in Britain with the highly regulated German system and found that almost every fault that he had seen in the industrial relations of the Weimar Republic could be matched by a virtue in the British system which was based on voluntarism.*

*This paper considers the justification for the fundamental shift in industrial relations in the UK in the mid-20<sup>th</sup> century, from voluntarism and collective bargaining as the accepted tools for organizing industrial relations to ever-increasing state control in the 1960s and 70s. History had already demonstrated that legislation was a welcome addition to collective bargaining when used to temper judicial excesses in cases such as *Taff Vale Railway v Amalgamated Society of Railway Servants (ASRS)* [1901] UKHL 1 and *ASRS v Osborne* [1910] AC 87, or to provide broader coverage of employment rights to all workers in such areas as health and safety, dismissal and redundancy. However, legislative interference through the Industrial Relations Act 1971 with the rights of trade unions to bargain freely with employers was a step too far for the trade unions. The anger which this legislation caused within the trade union movement led eventually to the fall of the Government and demonstrated the strength of the Union Movement, but ironically led to successive governments using this to justify the use of legislation to weaken the trade unions to a point where voluntarism and collective bargaining were mere shadows of their former selves.*

*The Royal Commission on Trade Unions and Employers’ Associations, chaired by Lord Donovan, reported in 1968 and was the catalyst, but not the cause of this shift from voluntarism to increased state control. It was commissioned to consider the role of the law*

*in industrial relations, and concluded that, in general, the law could act to bolster employment rights, but that collective bargaining was the best means of organizing and regulating industrial relations. Despite the extensive research and expertise that went into the resultant Report, the British Government attempted to restrict the power of the trade union movement with catastrophic results, changing the face of industrial relations in the UK forever.*

Industrial relations moved from voluntarism to increasing state control from the 1960s onwards, and this paper considers the justifications for this fundamental shift from collective *laissez-faire* as the appropriate government policy immediately after the Second World War, when there was little governmental control of industrial relations, through to a realization that such a position was no longer tenable. Industrial relationships were governed by collective bargaining, and employers and employees had the autonomy to regulate their own working relationships through non-legal means. However, the arrival of almost full employment in the 1950s and a poorly-performing economy made it necessary to reconsider the non-interventionist position. The incidence of increased numbers of unofficial strikes was seen to have an adverse effect on the already weakened economy, Thus, the Donovan Commission was required to consider the right normative order for industrial society for the future, and the role that law should play in that order. The changes that were to occur would be brought about mainly by legislation and the Royal Commission Report was central to that revolution, but this paper argues that legislation is not the most appropriate vehicle for trade union reform. Legislative enactments would regulate both the individual contract of employment and the relations between employers and trade unions, but both would be in furtherance of, or expressions of, government policies, a fundamental shift away from the voluntarism which had characterized labour relations in the past.

The legislature had already employed the law to support workers where unions were weak, to act as a counterbalance to the threat to union autonomy from the courts, and would now be used to control those unions whose very strength threatened the economic health of the nation. The various uses to which legislation was put will demonstrate that legislation *can* be an appropriate measure for controlling industrial relations in certain circumstances, but that it should be used with some caution.

The place and function of the law in industrial relations has been the topic of study for labour lawyers in Britain and the rest of Europe for over a century. Otto Kahn Freund, one of the greatest labour lawyers, thought that '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.' He considered that the solutions to that problem in one country could be of interest to other countries and should not be dismissed as purely theoretical. In Britain collective regulation was traditionally a matter of autonomy for the unions, taking place outside the law, and he put this down to the fact that, while in Germany and France the political labour movement preceded the trade union movement, in Britain the reverse was true by at least half a century. The unions were well and truly established before politicians considered it necessary to regulate them through legislation, and rules had been developed internally through consensus and a process of custom and practice – a concept that Kahn-Freund admitted was hard for lawyers to grasp.

He explained that British laws, unlike those of Germany, 'do not have a systematic, codifying character, but are intended to deal with abuses.' There has never been an attempt to provide a code of practice in Britain that would regulate industrial relations and union activities; instead, successive governments have identified a problem when it arises and passed legislation to deal with it. The Donovan Commission, appointed in 1965, was the fifth Royal Commission in one hundred years to inquire into questions of industrial relations, its terms of reference requiring it to consider the role of the law in particular. The resultant proposals were largely replicated and extended in the Government White Paper, *In Place of Strife*, which consisted of light legislative regulation. These proposals were, in part, unacceptable to the TUC which represented the main trade unions, and was the last opportunity to accept minimal regulation before the Tory governments under Edward Heath and Margaret Thatcher changed the face of industrial relations forever by bringing unions under strict central control. Although Heath's attempt to bring in stringent measures affecting a broad range of trade union freedoms in one go was short-lived, Thatcher was able to learn from his mistakes and was successful in introducing similar restraints in a series of legislative measures that would herald a hitherto unprecedented reduction in the rights of trade unions to self-governance without state interference. The Donovan Commission Report was arguably the first step on the long and tortuous road to reform of industrial relations, but the parlous state of those relations and of the economy generally were the catalysts for the call for a Royal Commission in 1965 to examine the whole area of voluntarism which characterized British industrial relations at the time.

Kahn-Freund compared the voluntary system of industrial relations in Britain with the highly regulated German system and found that almost every fault that he had seen in the industrial relations of the Weimar Republic could be matched by a virtue in the British system. He considered that the obligations and liabilities of the British method 'do not lend themselves to enforcement by state-created legal machinery.' He had a preference for the system of voluntarism in Britain and thought that 'legal norms and sanctions are blunt instruments for the shaping of intergroup relations which have developed into a higher community.' Nevertheless, this attitude was to soften with his membership of the Donovan Commission, and Hugh Clegg, himself a member of the Commission, attributes this to the evidence of key witnesses to the Commission. One of these was Allan Flanders, whose evidence was subsequently published as *Collective Bargaining: Prescription for Change*.

Flanders separated the 'voluntary principle' of industrial relations, or 'voluntarism', into three features. First was the preference for collective bargaining over state regulation for settling wages and other conditions and terms of employment. Second was the preference for voluntary, non-legalistic types of collective bargaining. Third was the partiality of the bargaining parties for complete autonomy in their relations, and it is this third feature which, he argued, should be 'consigned to the rubbish bin of history', since a commitment to a national productivity, prices and incomes policy inevitably places some restraint on the freedom to bargain collectively. To do otherwise, he thought, would be to leave everything to the market which would mean advocating a return to the nineteenth century.

He highlighted two legislative measures - the *Redundancy Payments Act 1965* and the *Industrial Training Act 1964* – which pointed the way to the type of measures that would be needed increasingly in modern industry. One set minimum standards on terms and conditions of employment while the other set up institutions to solve urgent planning problems with an industrial training content. Neither undermined voluntary collective bargaining. Flanders also advocated limited legislative measures to strengthen collective bargaining. Rather than general legal enforcement of procedural collective agreements, he could see a place for selective use of legal support for substantive agreements relating to wages.

Flanders did, however, advocate retaining the non-legal standing of collective agreements as permitting flexibility and encouraging responsibility which together 'induced a greater readiness to compromise and to stand by whatever compromise was reached.'

The fact that industrial activity changes day by day, that technology and markets are constantly in flux, means that it cannot be directed with a sensitive regard for the manifold and diverse interest of those involved by a regime of strict external law and outside regulation. Fixed codes of rights and obligations, rigid notions of justice and equity, are not applicable to industrial relations.

He considered that 'the legal enforcement of procedural agreements would completely change the character of collective bargaining and force the actual conduct of negotiations and the process of dispute settlement into a restrictive legal form'. However, he did see a role for the law, and suggested that legislation was 'an important means of stimulating the negotiation of agreements and retains its importance as a spur to their observance.' The method which he advocated, therefore, was 'to use state regulation to set minimum conditions, while allowing the parties to opt out of legal enforcement when and where they negotiate agreements with not less favourable terms.'

Kahn-Freund's attitude towards legislative interference was also influenced by the evidence of a decaying system which was undermined by the development of uncontrolled unofficial strikes. He hoped that reform of collective bargaining would reduce the size of the problem but would not rule out the possibility of further legislative interference if those reforms did not bring about substantial improvement. He, like Flanders, could see the benefits of legislative control over selected areas of industrial relations, and in fact authored Chapter 9 of the Royal Commission Report on 'Safeguards for Employees against Unfair Dismissal' and Chapter 10 which proposed the establishment of labour tribunals to deal with this and other employment-related issues. Kahn-Freund was demonstrably in favour of legislation to ensure that dismissals were done fairly, a protective measure that went beyond union members and which has protected all employees since 1971. However he maintained the belief in the importance of the strike as the 'necessary ultimate sanction, without which collective bargaining cannot exist' and that law could make no contribution to the solution of the problem. He admitted, though, that the freedom to strike could be in danger of being lost if the unions did not do something about the problem themselves, a change of heart that may have been prompted by the shift in the pattern of strikes in Britain, with the growth in large-scale strikes, both official and unofficial, by public sector workers.

Lord Wedderburn also noted that Kahn-Freund and Hugh Clegg convinced the majority of the Commission's members that direct legal regulation was not the correct answer to the

problems of unofficial strikes, and pointed out that two other chapters of the Donovan Report were the *locus classicus* of the argument against invoking the law to repress unofficial strikes or to enforce collective agreements. Wedderburn was convinced that most workers want nothing more of the law than that it should leave them alone.

Andrew Shonfield, economics editor on the *Observer*, wrote about 'wage-earners and the unpaternal State' in his book, *Modern Capitalism*. He considered that 'the most striking illustration of the persistence of the traditional British attitudes is to be found in the legal framework of the rights of labour in relation to their jobs.' What he was referring to was the general *lack* of any legal framework in this 'unpaternal State' and the extreme lengths to which the government took this principle. In 1963, for instance, when the International Labour Organization (ILO) had agreed that all countries should move towards a forty-hour week, Britain was the sole dissenter, believing that such matters were to be left to independent collective bargaining. Yet the British Government was in fact beginning to move away from the principle of non-intervention. The *Contracts of Employment Act 1963* had provided for fixed periods of notice according to length of service, but Shonfield felt that 'the political implications of the change were evidently not grasped at once: he clearly foresaw a time when the legislature would have a much firmer hold over individual and collective employment matters. This legislation was brought in as a result of the unions' own intransigence, holding 'rigidly to the principles of permanent employment, the traditional notion that the only form of protection for a wage-earner is to insist that he keeps on working in the particular job which he happens to occupy. He blamed the unions for clinging to an older ideology based on a scarcity of jobs, and a failure to demand the right to financial compensation for the inconvenience associated with the loss of paid employment. In comparison with France, where the union movement was much weaker, the law provided much greater protection, for example in terms of paid holidays, notice periods and damages for an unfair dismissal. Germany also had legislation to protect workers from being unfairly dismissed, but British workers were still reliant on organized labour to prevent unfair dismissals. Shonfield rightly made the point that those workers in industries or occupations with weak or non-existent organisation had little or no protection from an unfair dismissal, and thereby made a strong argument for the role of law, with its wider remit and application, to supplement or replace the role of the trade unions in determining the rights of workers. He cites Frederic Meyers, an American authority, who noted that neither the employer nor the wage-earner had a clear idea of his rights, resulting in a lack of formal procedure for judging a case which made it more difficult for

British employers 'than for their American counterparts to establish and maintain standards of industrial discipline or to dismiss when good cause in fact can be shown.' Only centrally imposed legislation would be capable of addressing that problem – it could not be achieved through collective bargaining alone.

Shonfield also pointed to the transformational ability of legislation to alter deeply entrenched mindsets, in the form of the *Industrial Training Act 1964*. The apprenticeship system, with no test of competence and a simple requirement of working with a skilled master in one's youth, led to bottlenecks in industrial expansion caused by shortages of skilled workers. The act gave a power to impose a compulsory levy on industry to finance training, and 'the introduction of official representatives of the government into the boards to be set up to supervise training in each industry. The State was already moving from a non-interventionist, non-paternal position to a less traditional role, directly addressing the problems that were plaguing British industry. Shonfield would later make clear his support for this transition in his Note of Reservation in the Donovan Report: 'It seems inconceivable in the long run that in a society which is increasingly closely knit ... trade unions will be treated as if they had the right to be exempt from all but the most rudimentary legal obligations.

Eric Wigham, Labour editor on *The Times*, wrote *What's Wrong with the Unions?* in 1961, in which he identified 23 separate criticisms of the union movement, and made 26 suggestions for improvement. He proposed the introduction of legislation to restrict legal privileges of trade unions to those which registered with the Chief Registrar of Friendly Societies, who would have responsibility for ensuring that the rules were observed. He further suggested that the conciliation machinery of the Ministry of Labour should be transferred to the Industrial Court which should also be responsible for ensuring a consistent wage policy. Wigham also called for an inquiry to be held into the implications of making collective agreements legally binding, and proposed that the apprenticeship system should be remodelled to eliminate its narrow craft basis. The latter was indeed achieved through legislation, and more of Wigham's calls for state control would be included in the Donovan Report and eventually in the *Industrial Relations Act 1971*.

The role of the law was possibly the most controversial aspect of growing concerns over trade union activities. The Inns of Court Conservatives had produced a leaflet in 1958 entitled *A Giant's Strength*, calling for a new legal framework for industrial relations, including the loss of all legal privileges if a union were to strike in defiance of union rules.

This pamphlet would influence Conservative policy in the 1960s and lead to a demand for greater legal control over union activities.

It is notable that all of these writers seemed to be in favour of some sort of legislation either to control the way in which unions were organised or to bolster the rights of workers in areas where the unions could not do so effectively. Even Kahn-Freund's antipathy towards the law would soften through his membership of the Commission and the evidence that was presented. Legislative interference in industrial relations was not a new phenomenon, but these calls for restraining union action would take legislation in an entirely new direction and away from the voluntarist position that had characterized industrial relations for many decades.

### *The Industrial Relations Act 1971*

Although the Labour Government under the premiership of Harold Wilson failed to persuade the unions to accept the light regulation proposed in *In Place of Strife*, at least the union movement was made to face up to the disorder within their own ranks, and the TUC General Council made a 'solemn and binding' undertaking which set out the lines on which it would intervene in the case of serious unconstitutional stoppages. However, there was a change of government before the legislative measures were put in place, and the incoming Conservative Government wasted no time in legislating.

The *Industrial Relations Act 1971* effectively swept aside the method of collective laissez-faire that had worked more-or-less to the satisfaction of both sides of industry for decades. It attempted to use legislation and legislative bodies as the preferred method of settling disputes. The Act itself was an ambitious monolithic piece of legislation that set out to bring within the law a whole raft of collective bargaining procedures, hitherto left to private agreements. Its aim was to revolutionize the basis of industrial relations and to address some of the problems with tort law where they impinged on industrial relations. However, the Act's authors had failed to listen to the warnings voiced during the passage of the Bill through Parliament that this method was simply unworkable. The Donovan Report had repeatedly affirmed the belief that legislation was appropriate only in limited areas of industrial relations.

The TUC acted in outright defiance of the Act, refusing to recognize the authority of the National Industrial Relations Court, set up under the Act, and refusing to register. The resulting mayhem led to a massive increase in the number and severity of strikes, and

some union members who had been picketing outside other workers' workplaces – now an 'unfair industrial practice' according to the Act – were jailed for contempt of court when they failed to desist from the practice.

The Act was short-lived and was immediately repealed by the incoming Labour Government by the *Trade Union and Labour Relations Act 1974*. Nevertheless, voluntarism and collective *laissez-faire* were never again reconstituted in their pre-1971 form. Legislation would in future play a much bigger part in industrial relations. This was not entirely a negative result: as Flanders had argued, complete autonomy in industrial relations should be confined to history. Legislation had a part to play in underpinning and supporting negotiation, and those who worked in organizations which were not unionized were able to take the benefit of legislation which protected all workers, such as the *Equal Pay Act 1970* and other anti-discrimination legislation. Those who worked in unionized industries were ensured a democratic vote ahead of industrial action, and lightning strikes became a thing of the past. Nevertheless, the Conservative-led Government 2010-2015 was beset with strike action from many areas, particularly the public sector, and proposed that in future no industrial action would be lawful unless 40 per cent of its membership voted in favour of it, and has included this in their Election Manifesto 2015. This would effectively remove the right to strike altogether, since these levels of voting are almost never achieved, and could not be tolerated under any circumstances. If this were to happen, it would not be beyond the realms of possibility that this country could see a return to the kind of adverse union reaction to legislation seen in the 1970s.