The Promise of Kantian Ideas of Citizenship for the Labour Law Project

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1 INTRODUCTION

Labour law has consistently struggled with its indeterminate position on the public/private divide. On the one hand, labour law may be presented as an element of private law, concerned with inequalities of bargaining power between employers and employees. The law steps in to correct these inequalities and provide protection to workers. The problem is that this private element of employment law does not represent the entirety of its function. The focus in labour law on (the regulation of) collective bargaining points towards an understanding of the importance of the role of public institutions in the redistribution of political power amongst workers. Decisions about the regulation of employment contracts are also made on instrumental grounds; employment regulation may be viewed as supporting the efficient and productive operation of economies through its influence on market function. Most recently, the rise in the application of human rights discourse and practice to the labour law field marks another dimension in the ‘publicness’ of labour law. These human rights instruments are ‘public’ in the sense of being directed towards all persons and in the sense of representing a set of ‘fundamental’ rights upon which all citizens can agree.

At first blush, the discourse of citizenship does not provide significant help in the determination of the public/private divide in employment or labour law. One of the most influential discourses has been Marshall’s concept of ‘industrial citizenship’.1 According to Marshall, industrial citizenship described the position under which civil rights (particularly freedom of association) translated into social rights through the operation of trade unions. He described how in 20th century Britain, collective bargaining allowed workers to improve their social and economic plight. However, for Marshall, this was only a transitory situation, as it was only the state which could fully guarantee social rights to its citizens.2 Indeed, industrial citizenship largely occurred outside of the boundaries of state action, as its function was to attempt to remedy the failure of non-intervention of the state in the labour law field. This distinctiveness of the industrial relations system from other ‘public’ regulation meant that its usefulness as a theoretical basis for labour law was necessarily limited, particularly in the face of increasing trends towards the juridification of employment relationships. Since Marshall’s work, there have been other attempts to incorporate notions of citizenship into the labour law project, but these have tended to

2 T H Marshall, Citizenship and Social Class (Cambridge 1950) 68
work at the margins of the project. By way of example, citizenship discourse has been used to challenge the boundaries set by labour law, and direct labour law towards more inclusive imaginings. It has been used as a way to widen the economic focus of labour law and force it to include consideration of broader notions of identity and political participation. However, the potential of citizenship for the labour law project has not yet been truly identified.

In this article, it is argued that the notion of citizenship is of central importance in the reimagining of the labour law project, precisely because of the possibilities it affords to reconsider the relationship between the public and private elements of labour law. The article takes as its starting point the work of Immanuel Kant, in particular because at every stage, Kant’s analysis of citizenship is informed by the relationship between private and public rights. It describes how private rights can only be legitimate if circumscribed by a system of private enforcement which respects the equal freedom of all citizens. Likewise, the system of public right depends on an agreed system of private rights to function properly. It is only because of the agreed system of private rights that the public system gains its particular characteristics (the guarantee of adequate opportunities and resources to all). The notion of citizenship becomes the precursor and mediator of the operation of the legal system, and this ensures that the law works in the best way for everyone. Kant’s discourse is particularly interesting in the way in which it explains the relationship between inequalities and citizenship, as the regulation of inequality is central to labour law discourse. It explains how the assignment of rights creates a responsibility and a duty on all citizens to achieve a level of redistribution, and that this redistribution is achieved through state action.

2 CITIZENSHIP AND LABOUR LAW

A discussion of citizenship has not featured prominently in the labour law literature. Where it has been considered, the starting point has tended to be the work of Marshall in designating categories of citizenship. Marshall presents three main categories of citizenship (political, civil and social) but also refers to a ‘secondary’ category of industrial citizenship. Marshall concentrates on the rights which attach to different categories of citizenship. On Marshall’s scheme, industrial citizenship allowed civil rights (in particular freedom of association) to be translated into the economic sphere. This process provided a procedural framework through which workers could boost their economic and social position. Through trade unions, workers could not only take part in the determination of labour standards, but could also take a certain level of control over their work environment. This participation was a sign of the maturity of citizenship and allowed progression towards the guarantee of social rights by the State. To Marshall, industrial citizenship was a transitory feature of the progress of citizenship, and was largely theorized as autonomous of state action. Although Marshall argued that industrial citizenship was important in boosting social rights for workers, he argued that social rights could only properly be guaranteed by the state. Trade union institutions therefore acted outside the bounds of the state, in

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5 Marshall (n 2) 10
order to fill in the gaps before full state action: ‘Trade unionism has, therefore, created a secondary system of industrial citizenship parallel and supplementary to the system of political citizenship’.

Marshall’s scheme resonates to a considerable extent with the work of Kahn-Freund. In a similar way to Marshall, Kahn Freund viewed the industrial system as functioning outside of the confines of the state. Kahn Freund referred to the fact the development of trade unions in Britain had occurred outside of the Parliamentary franchise and state guarantees in the form of legislation. Both unions and employers had come to see regulation as state interference in their processes of bargaining and autonomous norm creation. According to Kahn Freund, the free negotiation of trade unions and employers through collective bargaining allowed both the aims of employees and employers to be met. On the one hand, workers achieved a certain power (autonomy) through their involvement in the negotiation process. On the other hand, collective bargaining allowed redistribution from employers to workers. This ensured that workers achieved moral dignity. It also guaranteed a level of industrial peace to the benefit of employers. For Kahn Freund, law, in the sense of state law could never be as effective as a properly functioning system of industrial relations. He was particularly scathing about the possibilities for the common law in the protecting workers. According to Kahn Freund, the courts could only deal with the ‘marginal, the exceptional, the abnormal’, and they could not represent the general public interest. The law was very much a secondary system, a temporary phenomenon to be replaced by collective bargaining once a decent bargain was struck.

In a sense then, Marshall and Kahn Freund disconnect state from industrial action. For Marshall, industrial action was only a transitory phenomenon leading to the achievement of social rights through state action. Kahn Freund saw state action as only temporary and transitory leading to the better fulfilment of the demands of the industrial relations system. Either way, both of these authors saw trade unions acting autonomously of the state in order to achieve worker goals. This view has informed the historical backdrop to theorizing about labour law; that ‘the largest, and arguably most important, part of labour law is not exclusively or primarily state law’. However, the translation of this view into the modern workplace faces a number of problems. Both Marshall and Kahn Freund’s writing was historically specific. It reflected the social compromise in existence in Britain in the middle of the 20th century. At this time, the ‘Fordist’ model of industrial production (large industrial enterprises engaged in mass production based on a narrow specialization of skills and a clear management hierarchy) and the male-dominated nature of the workforce, supported the ‘standard employment relationship’, which because of its dominance, became the foundation of an occupational status around which labour law and other social institutions were established. The upshot was a ‘core of social stability’ which both protected workers and also provided a basis for economic growth and stability.

However, there are a number of economic and (related) social processes which have undermined this standard employment relationship and its institutions. The economic processes are cited in the

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6 O Kahn Freund, Labour Law: Old Traditions and New Developments (Clarke, Irwin and Company Limited 1968) 7-8
9 H Arthurs, ‘Labour Law Without the State?’ (1996) 46 UTLJ 1, 2
literature as: technological innovation (in the fields of information technology), increased competition stemming from ‘globalisation’, and the considerable increase in the dominance of the service sector over that of manufacturing. Social changes have included ageing societies and changing consumer demand, as well as the ‘crumbling’ of the gender contract (male head of the household working for his family’s living). The buzz-word of both industrial and social organisation has therefore become not ‘stability’ but ‘flexibility’. Companies have come to organise themselves on a more flexible basis to meet the demands of increased competition, employing ‘dislocating strategies’ such as outsourcing, networking and subcontracting. At the same time, the organisation of work has changed significantly. There has been a dramatic increase in more flexible forms of work, which both meet the needs of capital to enhance ‘competitive advantage’, and also the need of workers to combine work and family responsibilities in the light of the increased labour market participation of women. These more flexible forms of work are often referred to as ‘non-standard’ or ‘atypical’ and include: part-time work, fixed-term work, temporary agency work, homework and self-employed or economically dependent work.

The increasing fragmentation of the labour market has created significant problems for trade unions. Work is no longer organised in a way which is conducive to the development of union membership. Indeed, in the UK, trade union density has almost halved since its peak in 1979. The increase in service jobs means that workers interact more directly with clients, patients or customers, rather than reporting directly to a single ‘employer’. This complicates the ‘us and them’ basis of union organisation. Furthermore, the vertical integration of the firm in the Fordist mode of industrial organisation has broken down and been replaced by smaller and more decentralised work units. This has undermined the clear identification of the ‘bargaining unit’ upon which traditional trade unionism relies. The second problem faced by trade unions is that both economic and social change has meant an increase in the diversity of interests represented by workers. The question is whether unions are equipped to deal with this diversification, or can maintain their attractiveness to all workers, given their traditional association with only a narrow set of interests.

At the same time, there has been an increasing juridification of the employment relationship. It is no longer possible to represent labour law as functioning outside of state action. To a large extent, this move has been driven by the increasing recognition of the ‘fundamental’ status of worker rights,

11 L Vosko, Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment (Oxford University Press 2009) 81
13 Ibid 46
14 Vosko (n 11) 1
17 Ibid 70
18 A good example here is the relationship between trade unionism and domestic workers. Traditionally, unions ignored such workers because of the dominant vision of the status of domestic work and the work of women, and the fact that domestic work posed no competitive threat to male workers.
particularly at supranational level, and the codification of those fundamental rights in a series of international and supranational instruments. In a sense, this codification may be seen as representative of the evolution to social rights predicted by Marshall. However, there are a few things to note about this assertion. First, labour rights were largely mentioned as existing outside of the social right of citizenship. He argued that those labour rights in existence prior to the advent of the welfare state could not be social citizenship rights because they excluded bands of citizens from their treatment (the Factory Acts) or social rights were delivered outside the bounds of citizenship (the Poor Laws). Second, Marshall was ambivalent about the legal status of social rights. He supported the absence of a clear legal framework for social rights, preferring bureaucratic mechanisms of redistribution. Finally, there are underlying tensions between social and industrial citizenship rights in Marshall’s scheme, and it is unclear exactly how they might correlate. For Marshall, industrial citizenship concerned ‘active’ rights whereas social rights were ‘passive’: labour standards appear in the list of social citizenship rights rather than industrial citizenship. This brings into question whether reliance on industrial rights is supposed to achieve objectives similar to social rights (eliminating class differences) or whether they are supposed to support social rights themselves. The latter appears unlikely given Marshall’s conviction that the state is best placed to deliver those rights.

Therefore, there remains a troubling disconnect in the context of the regulation of labour between citizenship on the one hand and legal rights on the other. The achievements of labour are largely theorized to take place outside the bounds of law. In the next section, I discuss an alternative version of citizenship introduced by Immanuel Kant. According to this version, citizenship is bound up with law and cannot exist without it. Rights rely on the consensus of citizens for their operation, and a body of citizens is predicated on the operation of a logically coherent system of rights. It is argued that this version of citizenship has considerable promise for the labour law project. For a start it can work with, rather than against the juridification process that are a current and prevalent feature of modern day labour law. At the same time, it recognizes the importance of active participation in the design and function of labour law. However, this participation is bound up with the law, and does not rely (solely) on action outside of the boundaries of law.

3 Kant’s Version of Citizenship

For Kant, citizenship is intimately connected with the whole (social) system of rights, and is necessarily circumscribed by law. Kant’s system of right exists in three stages: innate right, private right and public right. At each stage of right, there is a concern with (personal) freedom, and how that freedom can be upheld. At the level of innate right, there is a understanding of the equality of all beings which must be respected if the freedom of all is to be maintained. The notion of private right is concerned with the idea of obligations: how the freedom of one person coexist with the freedom of another. This coexistence of rights underscores Kant’s determination of private law: the law of contractual obligation for example. Under Kant’s scheme, these private rights are deemed to have their own internal logic of correlative

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20 Marshall (n 2) 69. Marshall states that ‘Rights are not a proper matter for bargaining. To have to bargain for a living wage in a society which accepts the living wage as a social right is as absurd as to have to haggle fora vote in a society which accepts the vote as a political right’.

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obligation. They can exist provisionally outside of public adjudication. However, a system of public right is required in order that the operation of private rights does not collapse into the law of the strongest. Without external processes of adjudication, those with greater resources will be able to enforce their will on others, such that there would be an interference with the choice and freedom of the weaker party. What is therefore required is a system of publicly authorized courts to deal with these contradictions. These institutions are public in the sense of being available to all, but they essentially guarantee and are founded on the operation of private rights.

Citizenship is important in this scheme because public right can only operate where it is designed by the ‘omnilateral’ will of the people. This requires a body of citizens to be ‘united in giving law’. Citizens have both the freedom and equality represented in the first two stages of right. Their most important quality however is independence. That civil independence is necessary for citizenship because it determines that a person is not constrained by the ‘choice of another among the people’ and therefore is able to make decisions about laws which further that independence (and therefore the omnilateral will based on the doctrine of right). Only where persons are unconstrained by others can they make decisions in ‘community with others’, and hence make decisions which further that community. This idea of citizenship is interesting for the purposes of our argument because it directly associates power with legal position, and suggests that the negotiations amongst labour market groups which were previously consigned to the ‘social’ field in Marshall and Kahn Freund’s imaginings can also take place at the level of the law. It also imbues law with a kind of responsibility, and that responsibility is to ensure the independence of all. In order that law maintains its public character, and does not become the law of the strongest, it must be subject to limits which make its enforcement consistent with independence and equal freedom. Otherwise it does not operate as a public right. This lays the foundations for the suggestion that redistribution can be part of a system of public right. Indeed, it is a precondition of that system that there are adequate resources and opportunities for all, in order to fulfil the state’s claim that each person can exercise their private rights (to equality and freedom) as citizens.

The difficulty in Kant’s work comes with the attempt to delineate different citizenship categories, and particularly the suggestion that certain groups are not citizens at all. One particularly objectionable assertion is that a quality of citizenship is the ‘natural one’, such that women and children cannot be citizens according to this scheme. He also suggests that there is a distinction between ‘active’ and ‘passive’ citizens according to the level of independence that each individual has. In the Metaphysics of Morals, Kant explains that ‘active’ citizens are those who have the right to vote and to create law (which he refers to as ‘civil personality’). They have these rights because they are not dependent on the will of others private persons for their decisions. This freedom from other private wills means that these citizens can vote in accordance with their innate right and in the interests of others, and therefore can adequately represent the general will. By contrast, ‘passive’ citizens do not have the right to become involved in the management of the state. They do not have this right because they ‘do not owe their existence and preservation’ to ‘their own rights and powers’. They therefore are unable to participate directly in the making of law and remain ‘passive’.

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23 I Kant The Metaphysics of Morals (Cambridge University Press, Mary Gregor trans 1996) 6:314
24 Ibid
Despite creating these categories, Kant admits that it is somewhat difficult to determine what is required in order to be able to claim the rank of a human being who is his own master. The divisions that Kant makes certainly appear rather arbitrary. He suggests that an apprentice and a domestic servant, as well as a ‘woodcutter I hire to work in my yard’ are passive citizens because they lack the level of independence required for civil personality.\(^{25}\) Likewise, private tutors and tenant farmers are ‘mere underlings of the commonwealth’ because they have to be under the direction and protection of other individuals. By contrast, the ‘carpenter or blacksmith who can put up the products of his work up as goods for sale to the public’, school teachers, civil servants and leasehold farmers have sufficient levels of independence from private wills to be trusted in the management of the state.\(^{26}\) There are also further problems with this categorization, and that is that the categorization conflicts with the conceptualization of innate right; that each person has ‘independence from being bound by others’ and each human being has the ‘quality of being his own master (sui iuris) as well as being a human being beyond reproach’\(^{27}\). Indeed, in the later sections of the Metaphysics of Morals, Kant discusses citizenship in universalistic terms. For example he refers in his discussion of dignities, to the fact that ‘no human being can be without any dignity, since he at least has the dignity of a citizen’.\(^{28}\) He also suggests that a country’s inhabitants are citizens ‘without having to perform any special act to establish the right’.\(^{29}\) This suggests a certain confusion in his concept of citizenship.\(^{30}\)

Perhaps Kant’s most important contribution in this regard is the suggestion about what state action should involve in face of different levels of citizenship status. Kant is concerned that social inequalities between private parties can create relationships of dependence which exclude individuals from actively participating in the creation of law as citizens. This is contrary to both innate rights and the universality of equality and freedom required by this innate right. It is also a problem for public right. It is a problem for public right because it means that the public right is not functioning to guarantee equal freedom to all. It is therefore in danger of losing its legitimacy, which stems from its ability to represent all the people. As a result, Kant argues, that citizens should ensure that positive laws allow everyone the opportunity to ‘work his way up from this passive condition to an active one’.\(^{31}\) This is the only way in which democracy could truly function; other forms of organization do not allow citizens of the state to also be its subject. Kant does not work out in precise forms the nature of the positive law which would allow passive citizens to be ‘active’. The potential implications of Kant’s work for labour law will be discussed in the next section.

### 4 Kant, Citizenship and Labour Law

In his discussion on citizenship, Kant addressed many of the tensions which still beset the employment law discourse. The notion of passive and active citizens is interesting because it attempts to investigate

\(^{25}\) Ibid
\(^{26}\) Ibid
\(^{27}\) Ibid 6: 238
\(^{28}\) Ibid 6:329
\(^{29}\) Ibid 6:337
\(^{30}\) I Storey, ‘Kant’s Dilemma and the Double Life of Citizenship’ (2012) 4 Contemporary Readings of Law and Social Justice 65, 76
\(^{31}\) Kant (n 23) 6: 315
the relationship between those who make the law and those who are beneficiaries of that law. This accords, in employment law with the idea of status: that certain groups display a dependency which means that they are worthy of special treatment. The tension of course within this idea is that it creates an insider/outside scenario based on group categorizations which appear arbitrary. The categorization of different ‘groups’ as insiders/outside is beset with difficulty, not least because group status depends on historical conditions which undoubtedly change. At the same time, a ‘universal’ approach to status raises the concern that the inequalities which exist in fact are not sufficiently addressed: a selective approach is required in order that those in need of protection receive it. Indeed, Kant himself recognizes that tension, in suggesting that the question of status is not just related to group membership but is also determined by the quality and quantity of work. Although this approach is perhaps admirable in theory, it is notoriously difficult to work out in practice.

On the one hand, Kant’s work may be viewed as an endorsement of the idea that those individuals in dependent relationship are deserving of (labour law) protection. Those in dependent relationships are forced into a passive citizenship role which must be addressed by law. In labour law, dependence is usually considered in terms of the ‘subordination’ of one individual to another. Indeed, this legal categorisation (of subordination) has been used to justify the distinction between those who are in need of protection (i.e. dependent employees) and those who are outside the need for legal protection (independent contractors). The argument is that for those in subordinate relationships, market failures will mean that they will have to live with terms and conditions of work that society finds unacceptable. As a result they are vulnerable and deserving of legal protection. By contrast, ‘independent contractors’ are capable of achieving contracts with employers which are socially acceptable as a result of their increased market power. They therefore do not require the protection of the legal system as they can ‘take care of themselves’. This appears in Kant’s specific examples, in which he states that independent contractors are active citizens because they do not depend for their existence on the choice and will of another. On the other hand dependent workers (domestic servants, apprentices, private tutors) are passive and therefore in need of protection.

The difficulty is that the categorization put forward by Kant appears arbitrary in modern day terms. For example, civil servants are not viewed as dependent because they are reliant on the state for their existence rather than other private wills. It is certainly true that in many judical systems, public employees are seen as existing in a special category (although that special category often meant more rather than less protection). However, recently that special categorization has been dismantled, with public employees attributed the same dependency as other workers. Indeed, the whole idea that ‘independent contractors’ are less dependent than other workers has caused controversy. First, independent contractor status in employment relationships may be deliberately constructed by the stronger party in order to avoid employment protection. Second, many ‘atypical’ workers are deemed to be ‘independent contractors’ as they bear many of the risks of economic dependence (such as the unavailability of work) and may not be subject to the ‘controls’ associated with employment status. They therefore fall outside the scope of labour law protection, despite their vulnerability in fact to both

33 Ibid 359
34 S Fredman ‘Women at work: the broken promise of flexicurity’ (2004) 33(4) ILJ 299, 300
oppressive employment terms and the vagarities of the market.\textsuperscript{35} This situation is compounded by the contractual nature of employment rights, even those laid down in statute.\textsuperscript{36} Those with atypical contracts therefore find themselves unable to rely on the terms of their contract to guarantee protection (as these contracts are temporary, poorly constructed or exclude protection), as well as struggling to fulfil statutory criteria regarding the nature of their employment relation. The lack of legal protection for these marginal workers, it is argued, has created an incentive to firms to accelerate the vertical disintegration of production in order to avoid the costs associated with labour law, which in turn has led to greater worker insecurity and vulnerability.\textsuperscript{37}

Indeed, Kant himself did recognize the potential difficulties of this rigid categorization system of ‘active’ as opposed to ‘passive’ citizens. Such rigid categorisations presented a problem with the idea of universal citizenship and the need for passive citizens to be able to move to an active state. Therefore in later passages of the \textit{Metaphysics of Morals}, Kant argues that the question of categorization of status should rest on the quantity and quality of work. Relationships of dependence could therefore vary between the different ‘groups’ that he identifies earlier in his work. This approach appears to accord more with the modern ‘purposive’ approaches to the determination of employment status. On a number of occasions, the courts have been willing to look beyond the contractual agreement (to independent contractor status) to determine what actually happens on a day-to-day basis between the parties. It could be argued that this is particularly important in the context of modern ‘flexible’ contracts where standard form contracts entered into by the parties at the beginning of the employment relationship are not adequately representative of the ‘bureaucratic’ power exercised by the employer in the determination of the activities of the employee.\textsuperscript{38} However, there remains great inconsistency in court decisions in this area,\textsuperscript{39} and certain status positions do remain determinative.\textsuperscript{40}

Of course, even if employment status is guaranteed, there remain the problems of how employment law should be designed to promote ‘active’ citizenship. Essentially, two approaches can be taken. The first approach responds to Kant’s selective approach to citizenship, according to passive or active status. It takes the idea of legislating for passive citizens from the ‘top-down’ in order to give those citizens the opportunities and rights which will reduce their independence. This approach is not solely charity: these rights and opportunities are necessary in order that the whole private/public law system of rights is sustained. The second approach responds more to the ‘universal’ idea of citizenship, that all are citizens by virtue of their humanity. This implies that even ‘passive’ citizens in dependent relationships can have a level of activation and can assert and challenge their passive position. This reflects a more ‘bottom-up’ method of legislative action. Instead of guaranteeing (passive) citizens a set of human or social rights, the bottom-up method guarantees to those citizens a set of procedures through which they can


\textsuperscript{36} B Hepple, ‘Restructuring Employment Rights’ (1986) 15 (1) ILJ 69, 69-70

\textsuperscript{37} Collins (n 35) 374

\textsuperscript{38} H Collins, ‘Market Power, Bureaucratic Power and the Contract of Employment’ (1986) 15 ILJ 1, 1.

\textsuperscript{39} A comparison can be made here between the decision in \textit{Massey v Crown Life Insurance Company} [1978] ICR 590 (CA) and \textit{Ferguson v John Dawson & Partners (Contractors) Limited} [1976] IRLR 346 (CA). In both cases the parties agreed to self-employment status (and took advantage of this status in terms of the payment of tax), but whereas this was deemed to reflect the reality of the situation in the former case, this was not so in the latter case.

\textsuperscript{40} For example in the case of agency work, contracts will not be implied other than where ‘necessary’ to do so. See \textit{James v Greenwich London Borough Council} [2008] ICR 545
challenge dominant power relations and set their own rights. On this scheme, then, even passive citizens can be ‘united for giving law’ in their own way. The question then appears whether these two approaches are mutually exclusive, or whether the tension ‘universal’ citizenship on the one hand and how to cater for unequal relationships within the citizenship project on the other can be reconciled. This will be discussed in the final part of this section.

Although Kant can be positioned at the centre of the discursive tension between ‘selective’ and ‘universal’ citizenship, that is not the case in terms of the tension between ‘human’ and ‘social’ rights which exists in much other citizenship literature. This tension is certainly present in Marshall’s work, in which a distinct separation was made between civil, political and social rights. Whilst the ‘civil’ elements of rights corresponded to individual freedoms, social rights were about the restriction of those freedoms and the penetration of social justice into the market. Social rights implied a level of redistribution of resources which were difficult to reconcile with the liberal compromise surrounding human rights. Indeed, a number of authors have argued that the incorporation of human rights instruments into the industrial sphere has a detrimental impact on the achievement of social rights. For example, Arthurs argued that the increasing dominance of the Canadian Charter of Rights and Freedoms in the adjudication of employment disputes was detrimental to workers. This Charter reflected a set of individualistic and liberal human rights which conflicted with the values of the Canadian welfare state. When applied to the labour sphere, and particularly the process of arbitration, it acted to formalize and legalise the interaction between the social actors, and to subject them to external constitutional human rights principles which did not aid their social compromise or further their social rights.

By contrast, Kant advocates the importance of the existence of both human and social rights to the adjudication of employment disputes. In terms of human rights, Kant argues that dependence in employment relationships can reach the level of slavery. This offends against both the inherent dignity of the person and also his scheme of rights. Holding property rights in another person means that one person is subject to someone else’s will. One person becomes dependent on another for setting the purpose and direction of his/her life. This violates a person’s autonomy and choice and strips that person of humanity (it is contrary to their innate right upon which the whole Kantian scheme of rights depends). That person becomes a thing rather than a being, something with a price to be traded, rather a being with inherent dignity who is able to make independent choices about his/her life direction. According to Kant, this kind of ‘slavery’ cannot form the basis of any contract. An employment contract based on slavery simply cannot be valid because ‘[N]o one can bind himself to this kind of dependence, by which he ceases to be a person, by a contract, since it is only as a person that he can make a contract’. It follows, that if the system of rights is to be maintained, then positive law must aim to eradicate this process of slavery. In modern terms, this law has appeared under the auspices of human rights.

41 Marshall illustrates this with the illustration that the creation of a universal right to real income as a matter of social right is not proportionate to the market value of the Claimant. Marshall (n 2) 47
43 Kant (n 23) 6:330
44 In the case of Silliadin v France (73316/01) (2006) 43 EHRR 16 (ECHR) a domestic worker claimed that she had been subject to slavery under article 4 European Convention on Human Rights (ECHR). The Claimant had been required to work seven days a week and was not paid for the work carried out. She was at the disposal of her employers because they withheld her passport and the Claimant feared arrest if she did not continue to work. That
At the same time, Kant advocates a set of social rights for workers. He argues that in order for employment relationship to be consistent with the operation of the doctrine of right, they must be within circumscribed limits. These limits relate not just to the quality of the contract (i.e. the categorisation of the contractual structure) but also to its quantity. In the absence of these limits, a person may become a ‘passive’ citizen in the sense of being too dependent on the will of another to be able to take part in making rights. It may also be considered a violation of his/her humanity in line with the characterisation of citizenship as universal. 45 Although Kant does not prescribe specific substantive rights that must be available to counteract these negative effects of excessive dependence, it would seem that restrictions on working time set by law, and the setting of minimum wage standards would be consistent with this approach. These standards would be consistent with the innate right to humanity, and would also be consistent with Kant’s scheme of right. They would also be consistent with the idea expressed in his writing on citizenship that laws need to be set on behalf of passive citizens which can allow them to move from a passive to an active state (circumscribing time and resources spent in the execution of labour mean the release from dependence).

Kant’s mixing of human and social rights in this way is interesting in the current literature. It suggests that denial of social rights can become a human rights issue, and also that human rights ultimately can achieve social ends. The two sets of rights can act in a mutually reinforcing way to benefit citizens. Given the persistence of the human rights mechanism, this consideration of the coincidence of human and social rights may be a more fruitful path for improving the plight of workers than work in either one regime. Indeed, this is the suggestion of recent work on the development of capabilities in employment relationships. This suggests that labour rights as ‘social rights’ should not be rejected on the basis that they are a drain on economic functioning (unlike civil/political rights). 46 Instead, these rights should be viewed as supporting both individual workers and economic development. The idea is that workers are vulnerable because they do not achieve their economic potential, which results from a lack of ‘capabilities’. This is both a personal problem for workers, and also an economic problem, because it highlights the absence of (economic) institutions which can further individual and economic progress. In order for individuals to reach that potential, they require a set of social rights to complement their human rights position. This includes expanding the ambit of discrimination law so that it guarantees both a level of substantive freedom and formal freedom, where market circumstances allow. 47

It appears then that there is some potential in Kant’s version of citizenship for resolving some of the tensions around the split between human and social rights in their application to labour law. It is suggested that Kant’s work may also be relevant to a reconsideration of the tensions present in another area of labour law: namely the involvement of the law in participation rights. Traditionally, there was skepticism amongst labour lawyers as to the usefulness of law in aiding the promotion of democracy in

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45 Kant (n 23) 6:330
the labour field. For example, Kahn Freund was particularly skeptical of the ability of the law to help the spread of democracy. The spread of democratic processes relied on the adjustment of power relations which the legal system was ill-designed to promote (precisely because it depended on ‘top-down’ rights enforcement). To Kahn Freund, regulation could only be ‘secondary’ to the power of workers organized in trade unions in improving the position of workers. 48 However, the view that the operation of the trade union system occurs somehow outside the law has been questioned; it has been suggested that even ‘autonomous’ trade union systems require a favourable judicial environment in practice. 49 At the same time, this (artificial) separation has served to undermine the trade union movement as the individual rights culture has become pervasive. The results has been that participation rights and the ‘law’ have existed in tension and this has undermined worker protection.

In Kant’s work, it is fundamental to the doctrine of right that democratic processes are in place throughout the structure of citizenship. According to the Kantian scheme all persons, and indeed all workers, are essentially political beings, and their independence is essential for the proper functioning of the industrial system and the state (and indeed the law). The implication is that workers should be free to establish their own independence as part of the industrial system: that system should be imbued with public norms of democracy and citizenship. This would be compatible with a strong system of rights to collective bargaining for example (whether inside or outside of the traditional trade union system). It would also be compatible with strong rights to information and consultation in the workplace. In this scheme, there is no dramatic separation between ‘social’ and ‘legal’ processes. The ‘state’ is not somehow seen as separate from the action of workers, and the promotion of worker autonomy, but is directly implicated in it. Indeed, the greater and more protective state action in this regard, the more legitimate the state will be. This position opens up the possibility for a consideration of how participation rights can be strengthened within the law rather than outside it, and indeed the coincidence and reinforcing nature of participation rights and the institutions which enforce them.

This position may be helpful in considering certain participation rights, such as rights to information and consultation in the workplace. As currently constructed, the rights to information and consultation are individual, and are the subject of individual remedy, but they occur through a set of ‘employee representatives’. In the case of collective redundancies, employers must consult with appropriate representatives about redundancies ‘in good time’ according to a statutory framework. Although the process involves the transfer of information, the involvement of employee representatives ensure that there is also active consultation about ways of avoiding dismissals, reducing the number of employees to be dismissed, and mitigating the consequences of those dismissals. The legislation specifically provides that this process of consultation should be a two-way matter and undertaken with a ‘view to reaching agreement with the appropriate representatives’ about the process of redundancies. 50 Similarly in relation to transfers of undertakings, consultation on redundancies should take place ‘with a view to seeking agreement to the intended measures’. 51 However, recent reforms in the UK have the potential to undermine the activation potential of these rights. For example, under new rules, a new regulation provides that businesses with fewer than 10 employees do not have to elect representatives

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48 P Davies and M Freedland, Kahn-Freund’s Labour and the Law (Stevens 1983) 19
49 Dukes (n 7) 246
50 Section 188(2) Trade Union and Labour Relations (Consolidation) Act 1992
51 Regulation 13 (6) Transfer of Undertakings (Protection of Employment) Act 2006
for the purposes of consultation if no existing agreement is in place. They must only ‘consult’ with individual representatives. The danger of course is that without any representation by the workers, this ‘consultation’ process becomes merely a passive sharing exercise and not a true activation process.

OF course, there are a number of difficulties from a theoretical perspective, in using Kant’s work to promote activation rights. Kant did not talk specifically about the role of trade unions or ‘information and consultation’, but only put forward general propositions about the best functioning system of right. There is also the difficulty of the tension in his work between the universal and specific nature of citizenship. Activation rights can be presented a consistent with the universal nature of citizenship in allowing all workers to be involved in the democratic processes. There is more difficulty with activation rights in terms of their fit with the divide between ‘passive’ and ‘active’ citizens. It is possible to argue that activation rights allow ‘passive’ citizens to move towards ‘active’ states. However, if activation rights are properly held, then this suggests that ‘passive’ citizens as workers are not entirely dependent on their employers, and are able to assert their individual wills. If they are able to assert their individual wills, then they do not qualify as ‘passive’ citizens who must be ‘entirely’ dependent on their existence on the will and choice of another. Perhaps all that can be said is that just the existence of activation rights does not guarantee active citizenship because those activation rights are imperfectly constructed. It is only when these rights are perfectly designed and implemented that all citizens can be united for giving law (and that is a process which is by no means complete).

5 Conclusions

Kant’s version of citizenship is useful as it allows a reconsideration of the distrust of the law within industrial citizenship literature, and distrust of collective bargaining mechanisms amongst state actors. On Kant’s scheme, worker autonomy and independence is not a threat to the state’s (economic and social) system. Collective bargaining and other mechanisms which promote autonomy increase the legitimacy of the state through an increase in active citizenship. They ensure that the maximum contingent of citizens is actively involved in making law in accordance with the doctrine of right. Second, worker autonomy does not derive spontaneously from the operation of the capital markets. It derives from state action which creates the conditions from which workers can achieve (a level of) independence for themselves. The question is how to use state action to ensure that all can take an active part in citizenship. That will involve both ‘top-down’ and ‘bottom-up’ mechanisms for the furtherance of worker rights. Furthermore, those rights will not be limited to either ‘human’ or ‘civil’ rights in contradistinction to social rights. All of these rights may be enacted where they further the dignity and autonomy of all.

However, Kant does not manage to escape the ever present tension within the citizenship literature (and labour law literature more generally) between the universalism of rights, and the specificity of individual inequalities. On the one hand, Kant argues that there are social inequalities which affect citizenship. These inequalities, which are often present in the industrial sphere, create ‘passivity’ and dependence amongst workers. These passive workers become excluded from both social and legal processes as a result of this dependence. It is therefore the role of ‘active’ citizens to act on their behalf

\[\text{Regulation 13A Collective Redundancies and Transfer of Undertakings (Protection of Employment) Regulations 2014}\]
to ensure that there are sufficient human/social rights to ensure that they are able to move from a passive to an active state and achieve full citizenship. On the other hand, Kant denies that citizens are unequal, and states that all persons living within a nation state are citizens. The roots of this argument lie in the assumption that all persons have an innate equality which social position cannot take away. On this scheme, it seems unconscionable that ‘active’ citizens may be the only ones able to make law, because this suggests a hierarchy of will which should not exist. The problem is of course that this argument takes away the argument for employment rights at all: if all citizens are ‘active’ then there is no need for activation rights.

There are a number of ways of suggesting a reconciliation of this tension which still makes Kant’s work useful. First, there must be a recognition of social inequalities in order for these social inequalities to be tackled. These inequalities take a number of different forms and can only be tackled with a combination of both social and human rights. Second, in the design of activation rights, innate rights should be respected. It is only when those innate rights are respected that passive citizens can move from an active to a passive state. Ultimately then, Kant’s work can contribute to the discussion of the most beneficial forms of public and private interaction for the regulation of the employment relation. It suggests that the implication of public standards does not undermine the interaction of private persons; rather that interaction is promoted and sustained by state action which recognizes the importance of the dignity and autonomy of private parties.