Employee-Citizens of the Human Rights State

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Abstract

This paper considers the position of rights-bearing citizens as employees. It is argued that the rights and responsibilities of citizenship should be fully exercisable within employer organisations. Contractual terms which restrict an employee's rights should be deemed void. Furthermore, employees should have a basic right to refuse to perform any action that negatively affects their own or their fellow citizens' rights. In this way, full human flourishing will be furthered in the workplace, and corporations, in particular, will be made more accountable to the societies which enable them to exist and prosper.

Key words

Human Rights State, Human Rights, Labour Law, Citizenship, New Zealand Bill of Rights Act 1990, Human Rights Act 1993.

Introduction

In New Zealand, we are fortunate to live in a country where human rights are, in the main, taken seriously.[1] As citizens, we can enforce a panoply of civil, political, social, economic, and cultural claims against the state and those invested with public powers. Certain civil and political rights are considered sufficiently significant to be affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA). Because the judiciary is subject to NZBORA, it is plausible that the common law may be developed in accordance with human rights, thereby giving NZBORA the potential for horizontal effect.[2] Furthermore, the Human Rights Commission is charged with promoting all human rights,[3] not only the vertical rights expressly affirmed in NZBORA. Despite this legislative and institutional respect for human rights,[4] New Zealanders can be lax in upholding our rights in the face of corporate and organisational power.[5] In particular, we may find it unexceptional that a citizen's basic rights to respect for

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[1] See, for example, Geoffrey Palmer "The Bill of Rights after Twenty-One Years: The New Zealand Constitutional Caravan Moves On?" (2013) 11(1) NZJPIL 257.

[2] See Lord Cooke "A Sketch from the Blue Train – Non-Discrimination and Freedom of Expression: The New Zealand Contribution" (1994) NZLJ 10 at 11. Unlike vertical human rights, which can only be enforced by a citizen against the state, horizontal human rights can be enforced by one citizen against another citizen.

[3] Human Rights Act 1993, s 5.

[4] The lack of an entrenched, supreme law may, of course, lead to rights being subordinated to populist measures. The most egregious example of this phenomenon is the disqualification of prisoners from voting: see Electoral Act 1993, s 80(1)(d); *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791. Generally, however, the presence or absence of an entrenched, supreme law does not in itself indicate whether a country takes human rights seriously; rather the culture of respect for human rights is determinative.

[5] For convenience sake, in this paper, employers are collectively denoted corporations. Rights should apply whatever the nature and size of the employer. Thus the International Labour Organization ("ILO") says: "All fundamental rights in the labour field apply both to public employment or para-statal enterprises and to private

their dignity, freedom of expression and privacy might be curtailed by an employment agreement. Corporate culture and reporting processes may also prevent employees from honouring their civic obligations to other citizens, such as warning their fellow citizens of corporate malfeasance.[6] This paper argues against such a dilution of the rights and responsibilities of employee-citizens.[7]

This paper is at a developmental stage needing, on the one hand, significant fleshing out of legal details, and, on the other hand, the benefit of Occam's razor. A wide range of issues are broached in this paper, and, necessarily, these issues are considered at a level of basic principle; deeper and more specific analysis is intended in the future. This paper is structured as follows: the basic informing ideas are initially outlined. These are, first, the modern *Rechsstaat* (Human Rights State) is the moral and political community which guarantees rights and within which citizens claim rights and exercise responsibilities; and, second, full inclusion in the Human Rights State constitutes citizenship. It is then argued that the rights and responsibilities of citizenship should be fully exercisable within corporations. A fundamental right of refusal to comply with employer instructions unless they are conscionable[8] will, in particular, further this goal. This paper concludes that full exercise of rights and responsibilities by employees will contribute to their flourishing as human beings. Furthermore, corporations will become more accountable to the moral and political communities in which they operate.[9]

Basic Ideas

This part of the paper outlines the basic ideas which inform the subsequent arguments. The objective here is to present a sketch of the Human Rights State, and to establish citizenship as full inclusion within that moral and political community.

The Human Rights State

The common law rule of law and the civilian *Rechsstaat* are closely cognate concepts.[10] When the liberal democratic state was developing, focus for both English and Continental

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enterprise of any size, cooperatives, self-employed, own-account workers, and so on." As cited by WR Böhning *Labour Rights in Crisis: Measuring the Achievement of Human Rights in the World of Work* (Palgrave Macmillan, Basingstoke, 2005) at 19.

[6] See the section of this paper titled "Whistle-blowing" on the Protected Disclosures Act 2000.

[7] The term "employee" is used loosely here and should be read to include nonstandard workers, those being "[a]gency temporaries, independent contractors, on-call workers, contract company workers, part-timers" and so forth: see Anne Polivka, Sharon Cohany and Steven Hipple "Definition, Composition, and Economic Consequences of the Nonstandard Workforce" in Françoise Carré, Marianne Ferber, Lonnie Golden and Stephen Herzenberg (eds) *Nonstandard Work: The Nature and Challenges of Changing Employment Arrangements* (Industrial Relations Research Association, Champaign (IL), 2000) 41 at 41.

[8] According to the *Oxford English Dictionary* <www.oed.co.uk>, "conscionable" means "habitually governed by a sense of what is right" and "scrupulous". See the section of this paper titled "Responsibilities" for a discussion of virtuous employee behaviour which includes scrupulousness.

[9] For a discussion of different conceptions of accountability, see Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13(4) ELJ 447 at 447-468.

[10] See Niklas Luhmann *Das Recht der Gesellschaft* (Suhrkamp Verlag, Frankfurt am Main, 1993) (translated ed: Klaus A Ziegert (translator) Niklas Luhmann *Law as a Social System* (Oxford University Press, Oxford, 2004)) at 362-363.

constitutional theory lay with the processes of the law, rather than its substantive content.[11] Thus, for Alfred Venn Dicey, "the rule of law" meant that government should not possess arbitrary or discretionary power; the ordinary law of the land, administered by the regular tribunals, should apply to everyone; and "the general principles of law, the common law rules of the constitution ... are the consequences of rights of the subject, not their source".[12] Following the Universal Declaration of Human Rights (UDHR),[13] which was crafted principally in response to the atrocities committed during the Nazi era[14]:[15]

> …the liberal *rechtsstaat* with its emphasis on the technical nature of laws was complemented by a deep concern as to the nature of such laws … The *rechtsstaat*, declaring the supremacy of law, not only had to ensure that laws were properly passed, but also that they respected certain minimum notions of justice.

While noting it "is not a principle which would be universally accepted as embraced within the rule of law", Tom Bingham, in his interpretation of the common law conception of the rule of law today, argues "[t]he law must afford adequate protection of fundamental human rights".[16] Likewise, for Gerhard van der Schyff, the contemporary *Rechtsstaat* has:[17]

> …developed a new social dimension, not only does the focus of law rest on the organisation of the state and the accompanying political rights, but also on the quality of life within that state.

Thus, akin to the jurisprudence developed by Germany's Federal Constitutional Court (*Bundesverfassungsgericht*),[18] the South African Constitutional Court has characterised the *Rechtsstaat* as a state:[19]

> …where government is required to establish a lawfully regulated regime outside of itself in which people can go about their business, develop their personalities and pursue individual and collective destinies with a reasonable degree of confidence and security.

The South African Bill of Rights explicitly guarantees economic, social and cultural rights, along with civil and political rights,[20] but New Zealand, despite lacking such constitutional guarantees, has nevertheless committed itself to the fundamental United Nations rights

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[11] See Paul Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1997) PL 467 at 473-474. Compare with the Fuller-Hart debate on the moral content of law: see generally HLA Hart *The Concept of Law* (Oxford University Press, Oxford, 1961) and Lon Fuller *The Morality of Law* (Rev ed, Yale University Press, New Haven, 1969).

[12] See Roger Michener "Foreword" in AV Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, London, 1915) xi at xx.

[13] *Universal Declaration of Human Rights* GA Res 217A, A/810 (1948) at 71.

[14] "Without the Holocaust, then, no Declaration" says Michael Ignatieff "Human Rights as Idolatry" in Amy Gutmann (ed) *Human Rights as Politics and Idolatry* (Princeton University Press, Princeton (NJ), 2001) 53 at 81. In Roger Burggraeve's view, the motivation for declarations of rights arises from "indignation over the evil that is inflicted on vulnerable others": see Roger Burggraeve "The Good and Its Shadow: The View of Levinas on Human Rights as the Surpassing of Political Rationality" (2005) 6(2) Hum Right Rev 80 at 97.

[15] G van der Schyff "The Protection of Fundamental Rights in the Netherlands and South Africa Compared: Can the Many Differences be Justified?" (2008) 11(2) PER 17 at 18.

[16] Tom Bingham *The Rule of Law* (Penguin Books, London, 2011) at 66. Lord Bingham made a major contribution to the jurisprudence of the rule of law.

[17] Van der Schyff, above n 15, at 27.

[18] See Francois Venter "South Africa: A Diceyan *Rechtsstaat*?" (2012) 57(4) McGill LJ 721-747.

[19] *Ferreira v Levin NO* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) per Sachs J at [250].

[20] Constitution of the Republic of South Africa 1996, ch 2.

declarations and covenants.[21] In accordance with the Vienna Declaration, respect for *all* human rights must be an essential element of the rule of law.[22] Indeed, the contemporary *Rechtsstaat* or State under the rule of law may be denoted the 'Human Rights State', and will be referred to as such in this paper.

Citizenship as Full Inclusion in the Human Rights State

Thomas Marshall proposed a triadic conception of citizenship,[23] comprising of a civil element (rights necessary for individual liberty), a political element (electoral rights) and a social element (ranging from a right to basic welfare to living "the life of a civilised being according to the standards prevailing in society").[24] Citizenship in this sense contemplates a person being fully included within and, to the extent they are able,[25] participating in a discursive democracy.[26] At a fundamental level, this conception of citizenship is about membership of a community of citizens in which needs are met, capacities are realised, and, above all, equal human dignity is respected.[27] Unlike the Human Rights State, which may be a temporally and culturally-specific arrangement, it is submitted that membership of such a community as described is a universal expectation. This reservation noted, democracy does not guarantee respect for human dignity but it is currently implausible that one might have respect for dignity without democracy. The expectations of respect for dignity and a voice in the matters that affect us apply in the workplace as well as in our general lives.[28]

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[21] Notably, the UDHR; the *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976) at 49; and the *International Covenant on Civil and Political Rights* 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976). The bifurcation of UDHR rights into the different covenants is, it is submitted, a matter of practicableness, not principle.

[22] See *Vienna Declaration and Programme of Action* GA Res 48/121, A/CONF.157/23 (Vienna Declaration), as adopted by the World Conference on Human Rights on 25 June 1993, at [5].

[23] As a sociologist, Marshall presumably sought to describe a particular form of citizenship which was observable in Western countries in the forty year period after the Second World War. However, following Jeremy Waldron, Virginia Mantouvalou observes that the Marshallian model has taken on a normative quality: see Virginia Mantouvalou "Workers without Rights as Citizens at the Margins" (2013) CRISPP 366 at 368.

[24] TH Marshall "Sociology at the Crossroads" in *The Right to Welfare and Other Essays* (Heinemann Education Books, London, 1981) 74 at 74.

[25] See, generally, Bryan Turner *Vulnerability and Human Rights* (Pennsylvania State University Press, Philadelphia, 2006); Martha Nussbaum *Frontiers of Justice: Disability, Nationality, Species Membership* (The Belknap Press of Harvard University Press, Cambridge, 2006).

[26] See John Stephens "Social Rights of Citizenship" in Francis Castles et al (eds) *The Oxford Handbook of the Welfare State* (Oxford University Press, Oxford, 2012) 511 at 513. On discursive democracy, see generally Jürgen Habermas *Faktizität und Geltung. Beiträge zur Diskurstheorie und demokratischen Rechtsstaats* (Suhrkamp Verlag, Frankfurt-am-Main, 1992) (translated ed: William Rehg (translator) Jürgen Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press, London, 1997)). Critics argue that the Habermasian model of discursive democracy is, on the one hand, an unattainable ideal – indeed, an undesirable ideal – and, on the other hand, a culturally-specific project, gravid with colonial intent. Thus Chantal Mouffe says Habermas seeks "to establish the privileged rational nature of liberal democracy and consequently its universal validity": see Chantal Mouffe *On the Political* (Routledge, London, 2005) at 84.

[27] On developing human capacities, see, for example, Martha Nussbaum *Creating Capacities: The Human Development Approach* (The Belknap Press of Harvard University Press, Cambridge, 2011).

[28] See Cynthia Estlund "Working Together: The Workplace, Civil Society, and the Law" (2000) 89 Geo LJ 1.

Labour Rights as Human Rights

Labour rights are intrinsic to citizenship. For Virginia Mantouvalou, "citizenship requires respect for labour rights, as much as it requires respect for other human rights".[29] The inference to be drawn is that labour rights are tantamount to human rights, but are they?[30] Certain traditional labour rights, such as freedom of association, have been included in human rights conventions and charters, but may be instruments, rather than ends in themselves. History has taught us that without the ability to combine, workers' dignity is imperilled. And, as Aharon Barak tells us, dignity "is the source from which all other human rights are derived. Dignity unites the other human rights into a whole."[31]

Mantouvalou observes, "certain labour rights are compelling, stringent, universal and timeless entitlements, as much as rights such as the prohibition of torture or the right to privacy."[32] This argument is most plausible when labour rights directly relate to, or further respect for, human dignity. However, some rights are instrumental or procedural, albeit necessary for maintaining dignity.[33] One might then prioritise rights. Thus Roger Böhning notes:[34]

> The discussions surrounding globalization in the 1990s led to a distinction between labour rights that are fundamental [freedom of association; elimination of all forms of compulsory labour; effective abolition of child labour; and elimination of discrimination in respect of employment and occupation] and others that have lower status.

It may be tactically prudent for the International Labour Organisation (ILO) to focus on these so-called core rights. Indeed, relative to, say, child labour, workplace concerns in developed countries, such as privacy of communications, may appear to be petty "First World problems". But both child labour and denial of privacy impinge upon human dignity and should be opposed; otherwise the risk is run of the neoliberal hegemony determining the rights we may claim. Thus Robert O'Brien notes that "[w]hereas many civil and political rights resonate with the globalization trajectory, workers' rights contradict its neoliberal form

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[29] Mantouvalou, above n 23, at 379.

[30] See also Philip Alston *Labour Rights as Human Rights* (Oxford University Press, Oxford, 2005); Paul O'Higgins et al (eds) *Human Rights and Labour Law: Essays for Paul O'Higgins* (Mansell, London, 1994).

[31] Aharon Barak *The Judge in a Democracy* (Princeton University Press, Princeton (NJ), 2006) at 85 (footnotes omitted).

[32] Virginia Mantouvalou "Are Labour Rights Human Rights?" 3 Eur Lab LJ 151 at 172.

[33] For example, Stanley Fish argues that freedom of expression is an instrument for attaining other goals, not an end in itself, even though free speech is commonly seen as one of the most important human rights: see, generally, Stanley Fish *There's No Such Thing as Free Speech, and It's a Good Thing, Too* (Oxford University Press, New York, 1994).

[34] Böhning, above n 5, at 3. "Core rights", Anne Trebilcock says, "go to the essence of human dignity at work, touching upon bedrock values of freedom and equity": see Anne Trebilcock "The ILO Declaration on Fundamental Principles and Rights at Work: A New Tool" in Roger Blanpain and Chris Engels (eds) *The ILO and Social Challenges of the 21st Century: The Geneva Lectures* (Kluwer Law International, The Hague, 2001) 105 at 107, cited by Judy Fudge "The Discourse of Labor Rights: from Social to Fundamental Rights?" (2007) 29 Comp Lab L & Pol'y J 29 at 39. Following Karel Vasak's taxonomy of rights, civil and political rights constitute the first generation; economic, cultural and social rights represent the second generation; and the emerging third generation rights relate to the environment: see Karl Vasak "Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights" (1977) 30(1) UNESCO Courier 28. Vasak's taxonomy is about the historical emergence of rights claims. There is no reason why a sustainable environment should be a less pressing concern for citizen-employees than, say, freedom of speech.

and engender greater resistance".[35] Asserting social rights may be the most obvious response to globalisation,[36] but all rights must be protected and fostered.

To reiterate, the Vienna Declaration recognises that "[a]ll human rights are universal, indivisible and interdependent and interrelated".[37] This declaration may represent an ideal to be attained, rather than an empirical observation; nevertheless, it indicates the inclusiveness and interdependence of human rights. The long-term goal must be to ensure that all rights are respected, always and everywhere. Of course, if we are to move from ethical imperatives to justiciable claims, some prioritisation and strategising is necessary. For example, contemplating the guarantee of freedom of association enshrined in the Canadian Charter of Rights and Freedoms,[38] Judy Fudge proposes that:[39]

> The constitutional protection of freedom of association could, and should, be used to embed labour markets in an institutional framework that requires any derogation from the values of democracy and human dignity to be justified.

Nevertheless, sight should not be lost of the universality, indivisibility, interdependence and interrelatedness of human rights, in the community and the workplace.

Rights and Responsibilities

The principal emphasis of this paper lies with fundamental rights in the context of employment, but it is axiomatic that "human rights come with responsibilities and must be exercised in a way that respects the rights of others".[40] As responsible citizens, rights-bearing employees must exercise their rights responsibly. Following the virtue ethics of Alasdair MacIntyre, who argues that the fundamental moral and political idea is that individuals should pursue what is virtuous for them,[41] all social actors should perform their roles responsibly, that is, to do "*what anyone filling such-and-such a role ought to do*".[42] With regard to freedom of expression, for example, the role of the virtuous speaker is not to ensure that their utterances do not offend anyone but rather to inform others as best they can.

[35] Robert O'Brien "Continuing Incivility: Labor Rights in a Global Economy" (2004) 3(2) JHR 203 at 203.
[36] See Fudge, above n 34, at 29.
[37] *Vienna Declaration*, above n 22, at [5].
[38] Canada Act 1982, c 11 (UK), s 2(d); compare with NZBORA 1990, s 17.
[39] Judy Fudge "Labour Rights as Human Rights: Turning Slogans into Legal Claims" (2014) 37 Dalhousie LJ 601 at 618-619.
[40] Charter of Human Rights and Responsibilities Act 2006 (Vic), preamble.
[41] John Cornwell "MacIntyre on Money" (2010) 176 Prospect 58 at 58.
[42] Alasdair MacIntyre *After Virtue: A Study in Moral Theory* (3rd ed, Duckworth, London, 2007) at 184 (italics in original).

Employee-Citizens within Corporations

This part of the paper considers, at a principled level, the position of employee-citizens of the Human Rights State within corporations.

Responsibilities

Mark Bovens identifies five forms of active responsibility (hierarchical, personal, social, professional and civic).[43] Professional responsibility and loyalty to fellow citizens are currently the most relevant. Herbert Hart designates professional responsibility as role-responsibility, and describes it in the following terms:[44]

> …whenever a person occupies a distinctive place or office in a social organization, to which specific duties are attached to provide for the welfare of others or to advance in some specific way the aims or purposes of the organization, he is properly said to be responsible for the performance of these duties, or for doing what is necessary to fulfil them.

Duties such as these are typically "of a relatively complex or extensive kind, defining a 'sphere of responsibility' requiring care and attention over a protracted period of time".[45] A responsible person is for Hart:[46]

> …one who is disposed to take his duties seriously; to think about them, and to make serious efforts to fulfil them. To behave responsibly is to behave as a man (sic) would who took his duties in this serious way.

Likewise, MacIntyre's conception of virtue lies in performing the roles we fill in the right way.[47] The virtuous employee should, then, behave responsibly towards their employer. But employees are also – indeed, first and foremost – citizens of the Human Rights State, and must always take that role seriously.

Civic responsibility requires professional responsibility to be understood in the context of citizenship. And yet, Bovens says: [48]

> …when employees or civil servants pass through the company gate or up the steps in the morning, they lay aside their citizenship and only retrieve it at the end of the working day.

This assertion may constitute an exercise in hyperbole or may, indeed, represent an anachronism.[49] Nevertheless, it is plausible that the full exercise of rights and responsibilities

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[43] See generally Mark Bovens *Verantwoordlijkheid en Organisatie: Beschouwingen over Aansprakelijkheid, Institioneel Burgerschap en Ambtelijke Ongehoorzaamheid* (WEJ Tjeenk Willink, Zwolle (Netherlands), 1990) (translated ed: Gregor Benton (translator) Mark Bovens *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge University Press, Cambridge, 1998)).

[44] HLA Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press, Oxford, 1968) at 212.

[45] At 213.

[46] At 213.

[47] MacIntyre, above n 42, at 184.

[48] Bovens, above n 43, at 180.

[49] Since Bovens wrote, the principle of whistle-blowing, for example, has received statutory approval: see, for example, Public Interest Disclosure Act 1998 (UK); Protected Disclosures Act 2000.

within the workplace is curtailed. Such suspension of civil rights and responsibilities is incompatible with citizenship in the Human Rights State; indeed, without seeking to trivialise contractual promises made to an employer, those "civil duties and civil rights [must] set limits to one's obligations, to obedience and confidentiality" to an employer.[50]

Employees

Stephen Bottomley observes that the least considered area of the interaction between corporations and people in the human rights sphere is the position of employees within organisations.[51] Nevertheless, it is an important interaction in which the imbalance of power between people and corporations is a critical consideration. This imbalance is not simply about economic wherewithal; as John Kenneth Galbraith explains, "[t]he power in the business firm and the state that once emanated from property – from financial resources – now comes from the structured association of individuals, from bureaucracy."[52]

Imbalance in Power – What Corporations Do to Employees

Power in its various forms is a crucial consideration in the relationship between corporations and their employees. Social power, which Otto Kahn-Freund identifies as "[t]he power to make policy, to make rules and to make decisions, and to ensure that these are obeyed" is central to the employment relationship.[53] Law is therefore "a technique for the regulation of social power".[54] With particular relevance to the typically unequal employment relationship, Edgar Bodenheimer observes, if the law assumes that contracting parties have broadly equal power, "subordination and subjection" are perpetuated.[55] Within the framework of the rules which corporations create to govern their employees, Foucaultian disciplinary power, which drills down to the capillaries of domination, is also highly relevant.[56]

Bovens observes:[57]

> The inequality of power between individual employees and complex organizations and the weak position of most employees on the labour market in practice minimizes their contractual freedom. Most employees cannot afford to give up their jobs in order to regain complete command over their civil rights. De facto their position does not differ all that much from that of a citizen in an authoritarian state.

From a perspective of discursive democracy, many employer-imposed rules lack legitimacy because, as Jürgen Habermas argues, "the only regulations and ways of acting that can claim

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[50] Bovens, above n 43, at 180.

[51] Stephen Bottomley "Corporations and Human Rights" in Stephen Bottomley and David Kinley (eds) *Commercial Law and Human Rights* (Ashgate, Aldershot, 2002) at 47; Bovens, above n 43 at 158.

[52] John Kenneth Galbraith *The Anatomy of Power* (Houghton Mifflin, New York, 1983) at 48.

[53] Otto Kahn-Freund *Labour and the Law* (2nd ed, Stevens & Sons, London, 1977) at 3.

[54] At 3. Ian Smith and Aaron Baker note that cooperation rather than obedience may be a more appropriate approach to the employer-employee relationship in the contemporary workplace: see Ian Smith and Aaron Baker *Smith & Wood's Employment Law* (Oxford University Press, Oxford, 2015) 178.

[55] Edgar Bodenheimer *Power, Law and Society: A Study of the Will to Power and the Will to Follow* (Crane, Russak, New York, 1973) at 11.

[56] See Michel Foucault "Two Lectures" in Colin Gordon (ed) *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Pantheon Books, New York, 1980) at 78-108; Michel Foucault "Afterword: The Subject and Power" in HL Dreyfus and Paul Rabinow (eds) *Michel Foucault: Beyond Structuralism and Hermeneutics* (University of Chicago Press, Chicago, 1982) at 208-12.

[57] Bovens, above n 43, at 171.

legitimacy are those to which all who are possibly affected could assent as participants in rational discourses".[58] Who would freely agree to or willingly obey the draconian restriction of rights commonly incorporated into employment contracts?[59] For example, vulnerable, low-paid employees working in service stations or supermarkets are commonly required under their employment contracts to compensate their employers for theft by third parties.[60] These abuses of bargaining power may be judicially corrected or reversed following public pressure[61] but nevertheless indicate employers' assumptions about their unfettered prerogative to include stipulations in employment agreements which should be considered an unconscionable exercise of power.[62]

For Bovens:[63]

> Alongside the freedom to strike, which they have long held, employees would also have to be able to claim from their employers the protection of other civil rights, such as the freedom of religion, the freedom of speech, the freedom of association and meetings, protection of their privacy in letters, telephone and e-mail.

Freedom of expression is commonly considered primus inter pares among human rights,[64] and yet employees' freedom of expression is often restricted in numerous ways, for example:[65] views expressed on social media;[66] appearance; cultural expression, such as the display of moko; and expression of religious belief. (In contrast, corporations may be able to claim that they have rights of religious conscience in order to impose restrictions on their employees' health choices.[67]) In New Zealand, the right to privacy is evolving both in statute law and the common law.[68] Despite this evolution, privacy of personal emails and other communications sent and received on corporate systems is typically surrendered under an

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[58] See Habermas, above n 26, at 458.

[59] It may also be noted that people are more likely to disobey rules which they consider immoral: see Tom Tyler *Why People Obey the Law* (Princeton University Press, Princeton (NJ), 2006) 36-37.

[60] See, for example, Caleb Harris "Workers charged for petrol drive-off" *The Dominion Post* (online ed, Wellington, 20 November 2014).

[61] It is a moot point whether these kinds of deductions are permissible under the Wages Protection Act 1983, ss 4-6. It is clear, however, that public opinion is opposed to employers giving effect to these kinds of rights to deduct: see, for example, Caleb Harris "Angry customers call for petrol station boycott" *The Dominion Post* (online ed, Wellington, 20 November 2014).

[62] Compare with extensive protections under consumer law. Harry Arthurs' hypothetical "law of economic subordination and resistance" would protect both consumers and employees: see Harry Arthurs "Labour Law as the Law of Economic Subordination and Resistance: A Counterfactual?" (2012) 8(3) Osgoode CLPE Research Paper No. 10/2012 (Osgoode Hall Law School).

[63] Mark Bovens "The Corporate Republic: Complex Organizations and Citizenship" in Emilios Christodoulides (ed) *Communitarianism and Citizenship* (Ashgate, Aldershot, 1998) 158 at 171.

[64] See Thomas J's comments in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [152]; compare with Fish, above n 33.

[65] In principle, an employer may not regulate personal issues or out of work activities "unless it can show some special considerations bring such matters within the scope of employment": see Smith and Baker, above n 54, at 178. Of course, as writer of the employment agreement (individual, at least) an employer has licence to identify which special considerations might bring personal expression, such as facial piercings, within the scope of employment. See also Cynthia Estlund "Free Speech Rights that Work at Work: From the First Amendment to Due Process" (2007) 54 UCLA L Rev 1463.

[66] See Paul Wragg "Free Speech Rights at Work: Resolving the Difference between Practice and Liberal Principle" (2015) 44(1) Ind Law J 1.

[67] The United States Supreme Court decision in *Hobby Lobby* recognised the freedom of religious belief for a private, nevertheless economically significant, corporation: see *Burwell v Hobby Lobby Stores Inc* 573 US (2014).

[68] See review of Privacy Act 1993 and the emerging tort of invasion of privacy following *Hosking v Runting* [2004] NZCA 34; (2005) 1 NZLR 1.

employment agreement,[69] and privacy outside work may be ostensibly contracted out.[70] However, the denial of human dignity is the greatest concern. In the Kantian view, because humans uniquely possess dignified autonomy, they can never be instruments for others' ends.[71] It is, then, a radical betrayal of citizenship in the Human Rights State to be complicit in treating human beings as instruments for corporate ends. The dehumanisation of employees by treating them – rather than their labour[72] – as factors of production is far from an innovation,[73] but emerging technology enables workers to be monitored and tracked like machines or packages in a distribution centre.[74]

Recalcitrance and Virtue – What Employees Do to Corporations

Every organisation faces the problem of dissent within; hence the need for internal submission.[75] For Michel Foucault:[76]

> The power relationship and freedom's refusal to submit cannot therefore be separated. The crucial problem of power is not that of voluntary servitude (how could we seek to be slaves?). At the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the intransigence of freedom.

The ability to enjoy full rights in the workplace is, it is submitted, tantamount to experiencing the freedom which the operation of disciplinary power denies. If power is recalibrated in the employment relationship, the liberated employee should have no motivation to engage in petty acts of recalcitrance. Freedom would not, then, constitute a licence to shirk or to sabotage the enterprise. MacIntyre translates the ancient Greek equivalent of "virtue" as "excellence".[77] The responsible employee may, therefore, be expected to strive for excellence and be loyal to the organisation in accordance with their conscience as a citizen of the Human Rights State.

Virtue and Outsiders – What Employees Do to Others

Corporate actors may engage in atrocious behaviour. As Kent Greenfield observes, "the corporate form insulates individuals from responsibility".[78] Indeed, Maury Silver and Daniel Geller argue that "[t]he fragmentation of action and the need for job security explain the ease

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[69] It is a moot point whether copyright in a personal email sent from a corporate system belongs to the employee or the employer: see Copyright Act 1994, s 21(2). Certainly, copyright in an email sent by a non-employee to an employee does not belong to the latter's employer. This rule could have implications for reproduction of the text of the email, say, in disciplinary proceedings.

[70] See, for example, David Kravets "Worker Fired for Disabling GPS App that Tracked Her 24 Hours a Day" Ars Technica (12 May 2015) <www.arstechnica.com>.

[71] Immanuel Kant *Grundlegung zur Metaphysik der Sitten* (Johann Friedrich Hartnoch, Riga (Latvia, then Prussia), 1785) (translated ed: HJ Paton (translator) Immanuel Kant *The Moral Law: Groundwork of the Metaphysics* (Taylor & Francis, London, 2012)) at 30-31.

[72] See also Judy Fudge "Labour Is Not a Commodity: The Supreme Court of Canada and the Freedom of Association" (2004) 25 Saskatchewan L Rev 67.

[73] See Frederick Winslow Taylor *The Principles of Scientific Management* (first published 1911, Dover Publications, Mineola (NY), 1997).

[74] See Rory Cellan-Jones "Office puts chips under staff's skin" BBC (29 January 2015) <www.bbc.com>.

[75] See Galbraith, above n 52, at 60.

[76] Michel Foucault "The Subject and Power" in James Faubion (ed) *Power* (trans Robert Hurley et al) (The New Press, New York, 2000) 326 at 342.

[77] MacIntyre, above n 42, at 184.

[78] Kent Greenfield *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (University of Chicago, Chicago, 2004) at 73.

with which individuals will accept almost any organizational legitimation".[79] Such exculpation and isolation cannot stand. Employees must be able to exercise their rights and honour their responsibilities to other members of the moral and political community.

Executive Directors

Company law does not distinguish in principle between the roles of executive and non-executive directors.[80] Consequently, the duties of the most senior corporate employees are typically considered from the perspective of the fiduciary duties all directors owe to the company.[81] But, notwithstanding their position of power and control within a corporation, executive directors are employees in basically the same way as other staff members,[82] albeit they are employees who face particular ethical and legal challenges. Thus, in accordance with an extreme expression of shareholder primacy,[83] which is currently dominant in Anglo-American corporate theory, in order to comply with their fundamental duties, directors should cause their companies to break the law if it appears profitable to do so.[84] There is not space currently to consider directors' duties in any but the most superficial way but it is pertinent to note that, first, Corporate Social Responsibility scholars plausibly argue that directors do not owe a single duty to maximise shareholder wealth;[85] and, second, certain corporate statutes specifically mandate multi-fiduciary obligations.[86] For example, in terms of profitability and efficiency, a New Zealand state-owned enterprise (SOE) is benchmarked against privately owned companies, but also owes a statutory duty to be "a good employer" and "an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates".[87] Furthermore, in recent decades, dual charter social enterprise vehicles have proliferated.[88] These organisations contribute to the normalisation of the idea that amoral profit does not have to be the sole purpose of a corporation.[89]

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[79] Maury Silver and Daniel Geller "On the Irrelevance of Evil: The Organization and Individual Action" (1978) 34 J Soc Issues 125 at 131, cited in Douglas Litowitz "Are Corporations Evil?" (2004) 58 U Miami L Rev 811 at 841.

[80] See Companies Act 1993, s 126 on who is a director; but see also s 137(c) on the position of a director in a company in relation to their duty of care.

[81] See, in particular, the basic fiduciary duty enshrined in Companies Act, s 131.

[82] See *Lee v Lee's Air Farming Ltd* [1960] UKPC 33; [1961] NZLR 325.

[83] See generally Frank Easterbrook and Daniel Fischel *The Economic Structure of Corporate Law* (Harvard University Press, Cambridge, 1991).

[84] Frank Easterbrook and Daniel Fischel argue: "[directors] do not have an ethical duty to obey … laws just because the laws exist. They must determine the importance of these laws … [directors] may not only but also should violate the rules when it is profitable to do so". See Frank Easterbrook and Daniel Fischel "Antitrust Suits by Targets of Tender Offers" (1982) 80 Mich LR 1155 at 1177.

[85] See, for example, Thomas Donaldson and Lee Preston "The Stakeholder Theory for the Corporation: Concepts, Evidence, Implications" (1995) 20 Academy of Management Review 65.

[86] On CSR in New Zealand, see Jonathan Barrett and John Horsley "Social Justice and the Veil of Incorporation: A New Zealand Perspective" in Ivan Tchotourian (ed) *Company Law and CSR: Convergence or Divergence, a New Approach about the New Challenge of Law* (Editions Bruylant, Brussels, forthcoming).

[87] See State-Owned Enterprises Act 1986, s 4(1). Furthermore, as the principal SOE shareholder, the Crown must act in a manner consistent with the principles of the Treaty of Waitangi as established in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (Court of Appeal): see State-Owned Enterprises Act 1986, s 9.

[88] See generally Matthew Doeringer "Fostering Social Enterprise: A Historical and International Analysis" (2010) 20 Duke J Comp & Int'l L 291. The Companies Act 1993 is sufficiently flexible to allow dual charter social enterprises to operate as companies: see Jonathan Barrett "Should New Zealand Adopt Hybrid Social Enterprise Legislation?" (2013) 19 NZBLQ 253.

[89] On multi-fiduciary duties, see generally Irene Lynch-Fannon *Working within Two Kinds of Capitalism: Corporate Governance and Employee Stakeholding: US and EC Perspectives* (Hart Publishing, Oxford, 2003).

Rather than specifying the corporate stakeholders, whose presumably disparate interests directors must balance (although they all have an interest in the greater community), directors could be granted a safe harbour protection along the lines of a public policy catch all. For example: no breach of the fundamental duty of loyalty to the corporation occurs if the decision is in line with the prevailing norms of the Human Rights State. Such a rule might be considered vague, but is no less nebulous than an injunction to act in the best interests of the company,[90] a fictive legal persona.[91] This protection would represent a return to Edwin Dodd's idea that "business is permitted and encouraged by the law primarily because it is of service to the community rather than because it is a source of profits to its owners".[92]

Policy and Legal Implications

This part of the paper sketches the basic policy proposals that may inform the citizen-oriented corporation and employment law.[93] These are: rendering void certain terms in an employment agreement; establishing a general right of refusal; and reaffirming the role of whistle-blowing.

Void Terms

Any terms of an employment agreement which seek to restrict an employee's human rights or their responsibilities to other members of the community should be considered void and excisable from the employment agreement.

Employees' Rights of Refusal

Under the common law, an employer may not order an employee to perform an illegal act, and so it is not an issue of disobedience should the employee refuse to comply.[94] But we need to go further than refusing to commit crimes. Since human rights are essentially ethical in nature, despite their final expression in legal term,[95] employee-citizens of the Human Rights State must have a general right of refusal to perform any action that breaches their own rights or restricts their responsibilities to other members of the community. As Bovens explains:[96]

> …a general right of functionaries to remain indemnified against dismissal or other disciplinary measures when they refuse to carry out an assignment that in itself, or as a result of its consequences, is in conflict with important democratic or legal [or human rights] principles.

Such an indemnity should maintain "the autonomy and personal integrity of individual functionaries" but also contribute to developing "the power of morality within complex organisations".[97] Grounds for refusal would include: violation of rules and regulations;

[90] See Companies Act, s 131.
[91] As Lord Hoffmann observed in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) at 12, there is no such thing as the company, "no ding an sich".
[92] E Merrick Dodd Jr "For Whom Are Corporate Managers Trustees?" (1932) 45 Harv L Rev 1145 at 1149.
[93] The role of executive directors has been noted and the correlative need for changes in company law.
[94] See *Gregory v Ford* [1951] 1 All ER 121.
[95] See Stephen Toope "Cultural Diversity and Human Rights (F.R. Scott Lecture)" (1997) 42 McGill LJ 169 at 180.
[96] Bovens, above n 43, at 180.
[97] At 180.

substantial and specific danger to public health, safety, or the environment; abuse of power or a demonstrable and flagrant conflict with the aims of the organisation; demonstrable, large-scale waste of public funds.[98]

Bovens argues that a right of refusal:[99]

> …is a form of internal control; the functionaries of the organisation are often the first to realise that a policy of assignment is harmful or likely to have otherwise undesirable consequences…[it] emphasises, moreover, the autonomy and personal integrity of individual functionaries – even when they are but small cogs in a large machine. In this way, the development of such a right to refuse can help increase the power of morality within complex organisations. It can contribute to the emergence of bureaucratic morality in which each functionary knows that he is responsible for the consequences of the particular task he performs. The introduction of such a right therefore has an important symbolic function. It does not yet offer any direct protection nor does it lead automatically to virtuous action, but it shows that there are alternatives.

Refusal to obey an unconscionable instruction is not a manifestation of disobedience or recalcitrance.[100] But such a right would need to be exercised conscionably and responsibly. "Compulsory resignation would be appropriate if it could be proved that the refusal was groundless, negligent, or careless [or malicious]".[101]

Whistle-blowing

A consideration of whistle-blowing generally starts with Ralph Nader's definition: [102]

> …an act of a man or woman who, believing that the public interest overrides the interest of the organization he (sic) serves, publicly "blows the whistle" that the organization is involved is corrupt, illegal, fraudulent or harmful activity.

Whistle-blowing performs a critical regulatory function. As Christopher Stone explains:[103]

> The corporate work force ... in the aggregate, will always know more than the best-planned government inspection system that we are likely to finance. Traditionally, workers have kept their mouths shut about "sensitive" matters that come to their attention. There are any number of reasons for this, ranging from the intangible forces of corporate loyalty and peer group expectations, to the employee's more solid fears of being fired or getting his source of income shut down for noncompliance with some law. And there is also at work, of course, the sheer indifference that workers may feel in a huge network of different responsibility.

Whistle-blowing is disruptive; it subverts "the hierarchical principles and role-playing niceties upon which all organizations are built".[104] Consequently, organisational responses to

[98] At 184-185.
[99] At 181-182.
[100] At 182.
[101] At 189.
[102] Ralph Nader, Peter Petkas and Kate Blackwell *Whistle Blowing: the Report of the Conference on Professional Responsibility* (Grossman Publishers, New York, 1972) at vii. See also Maurice Punch and James Gobert "Whistle-Blowing and the Public Interest Disclosure Act 1998" (2000) 63(1) MLR 25.
[103] Christopher Stone *Where the Law Ends: The Social Control of Corporate Behavior* (Harper & Row, New York, 1975) at 213.
[104] At 214-215.

whistle-blowing can be harsh and disproportionate.[105] But legal structures which permit the disruption of misplaced loyalty and fealty to the corporation are necessary if a culture of rights and responsibilities is to permeate organisations. Once more, employees must act conscionably and responsibly – whistle-blowing is justified on the basis of "individual accountability and employee citizenship",[106] but is "an emergency break that is not suitable for use in routine situations".[107]

The Protected Disclosures Act 2000 does, of course, give legislative effect to the principle of whistle-blowing in New Zealand.[108] Nevertheless, the Act does not protect leaks to the media which may be the most effective and expeditious way of bringing corporate malfeasance to public attention.[109] Furthermore, a *Sunday Star-Times* investigation showed that, not only is there great public confusion about the Act,[110] but also public opinions on whistle-blowers varies from "heroes to pond life with an agenda".[111] Whistle-blowers face, among other consequences, harassment and retaliation from co-workers.[112] Indeed, it is the culture of organisations which treat whistle-blowing as betrayal that is most difficult to counter, and it is perhaps impossible for legislation to achieve this alone.[113]

Conclusion

This paper has outlined the concept of the Human Rights State, and has argued that full inclusion in that moral and political community constitutes citizenship. Being a citizen, in this sense, is not optional, partial or negotiable – citizenship cannot be 'swiped-off' at the entrance to the corporation and reassumed on exit. Employers may increasingly seek to control employees' working and non-working lives; citizenship of the Human Rights State demands an opposite momentum so that a culture of rights and responsibilities permeates the workplace.

To paraphrase Norman Kirk, what should really matter to us as citizens of the Human Rights State "is our sense of social and moral responsibility in translating material wealth into human values".[114] Corporations provide jobs and create wealth, but they are no more than a

[105] For example, leaked documents regarding a restructure of the Ministry of Foreign Affairs and Trade led to a draconian witch hunt: see Adam Bennett "Ombudsman investigating complaint against MFAT leak" *The New Zealand Herald* (online ed, Auckland, 17 June 2014).
[106] Bovens, above n 43, at 212.
[107] At 214.
[108] See Catherine Webber "Whistleblowing and the Whistleblowers Protection Bill" (1995) 7 Auckland UL Rev 933; Gehan Gunasekara "News Media Exposure, Corporate Insiders, and the Dilemmas of Whistle-blowers" (2005) NZBLQ 3.
[109] See PACE Resolution 1729/2010 on the Protection of "whistle-blowers" (text adopted by the Assembly on 29 April 2010 (17th Sitting)); Dirk Voorhoof "Whistleblowing and the Right to Freedom of Expression and Information under the European Human Rights System" (EUI Seminar, Centre for Media Pluralism and Media Freedom, Florence, 30 September 2013).
[110] The Ombudsman published a plain language guide to the Protected Disclosures Act a few weeks before the *Sunday Star-Times* article went to press: see Beverley Wakem *Making a protected disclosure – "blowing the whistle"* (3 November 2012).
[111] See Rob Stock "NZ's attitudes to whistleblowers" *Sunday Star-Times* (online ed, New Zealand, 18 November 2012).
[112] See Voorhoof, above n 109.
[113] See Jeanette Ashton "15 Years of Whistleblowing Protection under the Public Interest Disclosure Act 1998: Are We Still Shooting the Messenger" (2015) 44(1) Ind Law J 29.
[114] Cited by Margaret Hayward *Diary of the Kirk Years* (Reed, Wellington, 1981) at 180.

mechanism for enabling productive human cooperation. This paper has argued that citizenship is full inclusion in the Human Rights State. The workplace cannot be an exception to citizenship. Indeed, given the critical importance of employment for most of us, the workplace is the key space where rights and responsibilities must be nurtured and protected. The power of employers to curtail their employees' rights and responsibilities by contract must be restricted. Yet, following Bovens, even where restrictions are in place, they should be subservient to a fundamental right of refusal. Such a right would not inhibit employees from acting honestly and diligently for their employers. Employees do indeed behave virtuously when they honour the conscionable promises they have made to their employers, but giving effect to those promises must not be at the expense of employees' civic responsibilities owed to other citizens.

In workplaces where respect for human rights and responsibilities are normalised into everyday behaviour, both in the employment relationship and in dealings with the general community, exercise of a right of refusal or whistle-blowing should be a rare occurrence. Furthermore, when corporations are no longer able to gag or otherwise restrict their employees' exercise of their rights and responsibilities, they will become more accountable to the general community.