



International  
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## **Defining and regulating work relations for the future of work**

**Nicola Countouris**

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Governance  
and Tripartism  
Department

# **Defining and Regulating Work Relations for the Future of Work**

Nicola Countouris (University College London)

International Labour Office  
Geneva

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## Foreword

The employment relationship lies at the intersection of the economic organization and the legal regulation of work. Its central feature is hierarchical organization: the employer has power to direct employees in their work; to control their work by monitoring their performance; and to discipline them for poor performance. All legal systems regulate this subordinate employment relationship through the contract of employment. From a systemic perspective, the contract of employment, however defined, is the key regulatory device for allocating rights and obligations between an employee and an employer: it is the worker with a contract of employment who has access to benefits and rights established by public law. These workers can in turn agree with their employer on working conditions above minimum legal requirements.

However, the contract of employment is increasingly challenged in its ability to fulfil this critical regulatory goal in the labour market. First, workers are increasingly engaged in non-standard employment, including temporary employment; temporary agency work and other work involving multiple parties; ambiguous employment relationships; and part-time employment. These arrangements can provide businesses and workers with important flexibility. But they are often associated with significant decent-work gaps such as lower earnings, reduced social security coverage and diminished working conditions.

Secondly, not all work for pay or profit happens in an employment relationship. Some workers are self-employed, and their working conditions are largely – but not exclusively – regulated by civil contracts with those to whom they supply their labour. Some workers may be neither employees nor self-employed, such as unpaid trainees, interns or volunteers. Often, it is hard to identify whether a worker is in an employment relationship at all. Thirdly, many workers are deprived of the benefits of an employment relationship because their work is informal. They may work in the informal economy, or their employment in the formal economy may be undeclared, or under-declared. For decades, countries have been tackling both forms of informality. But progress has been slow, and the standard form of employment in many developing countries remains an elusive goal.

This paper addresses the important question of legal rules for an evolving and encompassing employment relationship. It was initially commissioned as a research paper input for the ILO's Global Commission on the Future of Work, and is a welcome contribution to the GOVERNANCE Working Paper series. The author, Nicola Countouris, is a professor of labour law and European law at the University College London. He is a co-ordinator and founding member of UCL's Labour Rights Institute, and a member of the Executive Committee of the Institute of Employment Rights. Professor Countouris has published extensively on the changing nature of the employment relationship, and its legal regulation through the contract of employment.

His paper provides a rich contribution to this important debate. It challenges our thinking about how to ensure that workers can enjoy security and protection regardless of their employment classification. We hope you enjoy it.

Colin Fenwick  
Head, Labour Law and Reform Unit  
Governance and Tripartism Department,  
International Labour Office, Geneva



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## Abstract

In some jurisdictions the legal institution known as the contract of subordinate employment still performs many of the worker protective functions that it was originally designed to pursue. However, in recent years, policy, economic and technological changes, and conscious attempts to circumvent the employment relationship, have reduced the efficacy of employment protection legislation. This paper advocates for a *progressive* transition to a new and broader conceptualization of the employment relationship that could be used to shape the personal scope of application of labour legislation in the 21st century, namely the concept of “Universal Work Relation”. A “Universal Work Relation” framework would embrace those traditionally captured and covered by the contract of subordinate employment, but would also cover other, perhaps less visibly subordinate, continuous or formalized personal work relations that are currently excluded from the scope of labour law. The “Universal Work Relation” proposal developed in this paper dovetails with the overall regulatory and policy framework promoted by the ILO, in particular as exemplified by Recommendation R-198, and seeks to solidify the ILO’s original commitment “to ensure a just share of the fruits of progress to all”, as envisaged by the ILO Declaration of Philadelphia 1944. This proposal builds upon the protections and gains achieved through existing employment protection legislation achieved under the subordinate contract of employment model and expands it to provide these protections to a broader range of workers.

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## 1. Introduction: **Regulating for the future of work and the legacies of the past**

*‘La crisi consiste appunto nel fatto che il vecchio muore e il nuovo non può nascere: in questo interregno si verificano i fenomeni morbosi piú svariati’<sup>1</sup>*

Our human condition is such that activity is a fundamental feature of our existence. We are all active in different ways, and for a variety of reasons, but, whether to satisfy “the vital necessities produced and fed into the life process” (Arendt, 1998, p. 7) or to satisfy other perhaps less material but no less fundamental needs of our collective and individual human existence, our lives are invariably shaped by our activities. But while activity may be fundamental to our human condition, it does not necessarily follow that all activities are valued, let alone treated, in the same way by human societies or by the laws set up to regulate them. Work, employment, education, training, affection, care, leisure, exercise, rest – there are “many different kinds of activity that actually make up a ‘thriving’ human life” (Nussbaum and Sen, 1993, p. 7). But for a variety of reasons, our societies have always drawn normatively laden, if often artificial, distinctions and categorizations between them.

One such distinction, as identified primarily by feminist legal and political scholarship, is between activities amounting to “production associated with the world of paid work, and the role of men, and social production assumed to be women’s role” (Stewart, 2012, p. 11) and typically falling outside the realm of paid work, or even outside the realm of work broadly understood (Antonopoulos, 2009; Benería, 1999; ILO, 2018). Nussbaum (2017) notes that “much of the work women do around the world is unpaid care and domestic labour” typically excluded from the concept of “work”, and sometimes even classified as “leisure activity” (p. vii). “Nevertheless, society could not survive for more than a few days any disruption of the domestic work that secures everyday life” (Supiot, 2001, p. 53). According to the UK statistical authorities, “figures for 2014 show that total unpaid work had a value of £1.01tn, equivalent to approximately 56% of the country’s GDP” (ONS, 2018), while according to the UN the “total value of unpaid care and domestic work is estimated to be between 10 and 39 per cent of GDP, and can surpass that of manufacturing, commerce, transportation and other key sectors” (UN, 2017).

Another fundamental conceptual divide between those human activities generally accepted as falling within the domain of “paid work” is the distinction between subordinate employment and independent or autonomous self-employment. For a number of legal systems, this distinction, and the emergence of the contract of employment as the central “institution of the labour market” (Veneziani, 2009, Ch. 4), is inextricably tied to the joint and in many cases mutually reinforcing effects of the processes of vertically integrated industrial production (Collins, 1990; Stone, 2004), the establishment and functioning of the welfare state (Deakin, 1998) and the social and political changes (Garofalo, 1999; Dukes, 2014) that affected much of Western Europe, and the Western world in general, in the 20th century (Deakin, 2006).

The scope of application of labour law in the 20th century was fundamentally shaped by these two binary divides. With some minor exceptions, labour law was tasked with

<sup>1</sup> “The crisis consists precisely in the fact that the old is dying and the new cannot be born: in this interregnum a great variety of morbid phenomena appear” (Gramsci, 1975, quad 3, p. 311).



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regulating the world of “paid employment” (to the exclusion of other activities perceived as non-work-related) and more precisely and narrowly, those work-related activities fitting the archetypally subordinate, continuous and bilateral “standard employment relationship” performed under a contract of employment (to the exclusion of other work relationships and activities performed under other types of contracts). There are of course clear and cogent, if highly contextual, reasons as to why 20th-century labour law became, in many ways, the law of the contract of employment, and some of them will be elaborated upon in the next section of this paper. But section 3 will go on to identify a number of key structural fallacies in this understanding of labour law, partly in an attempt to explain the current challenges, both in respect of the policy goals and a number of clearly identifiable structural failures affecting the contract of subordinate employment model.

Having identified these fallacies, and their regulatory implications, the paper will query the extent to which it is reasonable to expect the contract of employment to continue to act as the “cornerstone of labour law” in the 21st century. Section 4 will explore, sometimes in a critical vein, three key regulatory options that have emerged as possible alternatives for addressing the challenges in respect of the subordinate contract of employment: i) expanding and strengthening its conceptual boundaries; ii) identifying and regulating an intermediate category of workers, sitting between the classic binary divide of subordinate employment and independent self-employment; and iii) retargeting labour rights beyond the contract of employment, with a particular emphasis on the regulation of personal work relations. Section 5 offers a fresh perspective on the question of the future regulation of work, by reference to the idea of the “Universal Work Relation”, a new macro-category of “personal work relations” (Freedland and Kountouris, 2011, p. 443) embracing a wide range of forms of work and work-related activities, and premised on the idea of the universal application of fundamental labour standards (including of course international labour standards) and on a fairer mutualization of the social risks attending the performance of work so as to disperse them away from workers and share them more equitably between employers and the State, as well as consumers and society at large.

Ultimately, this paper argues that while in some jurisdictions the legal institution known as the contract of subordinate employment still manages to perform some of the worker protective functions that it was originally designed to pursue, in recent years its efficacy has been challenged by a series of policy, economic and technological changes and by the increasingly systematic and conscious attempts to circumvent its legal construction and definitional structures in order to facilitate the avoidance of employment protection legislation. Therefore, the paper advocates for a *progressive* transition to a new and broader organizing concept that could, and arguably should, be used to shape the personal scope of application of labour legislation in the 21st century, namely the concept of “Universal Work Relation”. This is a new “umbrella category” embracing a wider range of employment and work relations including those traditionally captured and covered by the contract of subordinate employment, but also covering other, perhaps less visibly subordinate, continuous or formalized personal work relations that are currently excluded from the scope of labour law.

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## 2. The rise of the subordinate contract of employment model

The process through which the contract of employment became what Otto Kahn-Freund famously defined as “the cornerstone of the edifice of labour law” (Kahn-Freund, 1954, p. 45) is possibly one of the most thoroughly explored academic research questions (Hepple, 1986; Supiot, 1994; Deakin and Wilkinson, 2005; Vettori, 2016; Deakin, 2006). At risk of failing to do justice to such a rich and vast literature on the topic, it is arguably possible to identify three key developments in the rise of the contract of employment as “the fundamental legal institution of Labour Law” (Wedderburn, 1967, p. 1).

Firstly, the rise of the contract of employment is inextricably linked to the emergence of what is often termed the standard employment relationship. In most legal systems, the contract of employment was developed (by labour law but also through the support of other areas of law, including social security and tax law, cf. Deakin and Wilkinson, 2005) as the legal institution devoted to capturing a particular social phenomenon that policy-makers at some point in history saw as worthy of specific, and special, legal recognition and protection, namely “subordinate employment”. Subordinate employment was dressed in the legal exoskeleton that is the contract of employment in a way that, for a considerable part of the 20th century, was a clearly mutually reinforcing dynamic. Subordinate employment became *the* social phenomenon captured by the legal institution of the contract of employment, and the legal institution of the contract of employment further reinforced the role of subordinate employment as the main social phenomenon and the very paradigm for labour law regulation. The central paradigm of work captured by this mutually reinforcing dynamic was that of remunerated work provided under the control – preferably the direct control – of the enterprise, integrated within it, and provided on a continuous basis, which – once embedded in a web of statutory and collectively agreed rules – shifted the risk of losses from the individual worker and onto the capitalist enterprise. Crucially, dismissal, redundancy and social security laws were also tasked with apportioning some of those risks to the State and society at large.

Secondly, in most legal systems, “subordinate employment” was perfectly understood as being but one form of work, albeit for a relatively long period of time an increasingly prevalent and socially relevant one. Traditionally it was juxtaposed to, and contrasted with, autonomous work that most legal systems also understood as amounting to work but consciously expunged from the bulk of the protective coverage of employment legislation. That work was understood as being broader than subordinate employment is evident from a number of sources (Lyon-Caen, 1990). Take Article 35 of the Italian Constitution of 1948, expressly providing that “*La Repubblica tutela il lavoro in tutte le sue forme e applicazioni*”, but with the Italian civil code and labour law statutes essentially protecting subordinate employment alone (Garofalo, 2008). It is not just self-employed workers who suffered the exclusionary effects of the binary divide, but also workers in training arrangements (Owens and Stewart, 2016), workers offering their services through intermediaries (Vosko, 2001) or employed through informal, temporary and casual arrangements (Leighton, 1986; Hepple and Napier, 1978; Sylos Labini, 1964; Kahn-Freund, 1967). No less importantly, as noted by Fudge and Owens (2006), this “model of employment ... was premised upon a gendered division of labour in which men had the primary responsibility for paid employment and women were primarily concerned with unpaid care work” (p. 4). As noted by Deakin, there is now a general acceptance of the fact that “the contract of employment is an ‘artificial’ model imposed on a more complex ‘reality’ of labour relations” (Deakin, 2006, p. 104).

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Thirdly, while the contract of employment was essentially a European legal institution, it quickly spread beyond European confines, seemingly becoming a global legal institution. As evidenced by the work of Hay and Craven (2004), the phenomenon of exporting rules regulating work from Europe to other parts of the world in many ways predates the development of the contract of employment. In the 19th and 20th centuries in particular, “the idea took root that ... emancipation by way of contract was universal in scope, and would one day extend to all nations still in their infancy” (Supiot, 2000a, p. 326). This factor largely contributed to the spread of contract models for the regulation of work, such as the contract of service, and eventually facilitated the spread of the contract of employment model beyond Western Europe (Kollonay Lehocky, 2006). So, for instance, in “South Africa, as in most other Southern Africa countries, the employment relationship ... sources in the common law distinction between contracts of employment (service) and contracts for services (independent contractor) [were] inherited from South Africa’s Roman-Dutch law (common law) orientation” (Benjamin, 2011, p. 102), although the “unification of the contract of employment [...] clearly took much longer [with] the South African policy of racial segregation during most of the twentieth century” being “certainly the most obvious reason” (le Roux, 2010, p. 148). Scholars have noted that “the path taken in the evolution of labour law in India in the post-1945 period basically followed the pattern established earlier in the restrictive policies of the colonial government” (Mitchell, Mahy and Gahan, 2014, p. 420), and unsurprisingly the notion of “employment” underpinning the “workmen” definition of the Industrial Disputes Act 1947 has been understood by the Indian Supreme Court as involving “three ingredients: (1) employer (2) employee and (3) the contract of employment” (*Chintaman Rao & Another vs The State Of Madhya Pradesh* 1958 AIR 388). Even in Latin America, and in spite of a much different and earlier trajectory in the decolonization process, “*el punto de partida de la regulación laboral [...], fueron las normas civiles sobre el arrendamiento de servicios [...] recogidas en códigos civiles, en su mayoría inspirados en el muy liberal Código de Napoleón*” (Bronstein, 1998, II.a), eventually facilitating the spread and emergence of the contract of employment.

This is not to suggest that, across different regions or countries of the world, the concept of the contract of employment has been shaped as a single monolith by its “legal origins” (Deakin, Lele and Siems, 2007; Countouris, 2011) alone. Nor is it to say that, once enshrined as the central legal institution in labour law statutes across most of the world, it succeeded in attracting comparably large swathes of workers under the protective umbrella of employment protection legislation. On the contrary, careful comparative analysis reminds us that, for instance, many of the important political processes that shaped the 20th century, such as the disparate timing and legacy of colonial rule (Hay and Craven, 2004) and decolonization, the Cold War with its crude partitioning of the world between “market” and “planned” economies (Kovács, Lyutov and Mitrus, 2015; Cooney, Biddulph and Zhu, 2013), and regional factors such as institutionalized racial segregation and apartheid rule (le Roux, 2010), all meant that the “contract of employment” unitary model ended up covering or excluding substantially different groups of workers. (Sankaran (2012) notes that “[t]he formal sector employs a little over 10 per cent of workers in India” (p. 30). But having noted these important, even fundamental, quantitative and qualitative caveats, it is still arguable that throughout the 20th century the subordinate “contract of employment” did emerge as a formidable and in many ways global labour market institution. What Villasimil Prieto wrote to describe the evolutionary trajectory of the employment relationship in Latin American countries holds true in a number of other global latitudes: from a legal evolutionary

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perspective “*la historia de la relación de trabajo fue, en rigor, la de la subordinación*” (Villasimil Prieto, 2016, p. 227; Villasimil Prieto, 2015).

The emergence of this relatively unitary, binary and ubiquitous – if ultimately artificial – subordinate contract of employment model was simultaneously entrenched but also nurtured by the rapid institutionalization of the labour market in the second half of the 20th century. Taken on its own, the contract of employment might not have been the success story it became, as its contractual structures, while offering a veneer of formal equality between very unequal parties, ultimately operate as a vehicle for the legitimate exercise of the managerial prerogative on a subordinate individual. But, as put by Fudge (2017), “contractualization, which facilitated labour’s commodification, was followed by trade union and state regulation” and “the standard employment relationship was both embedded in, and the outcome of, an institutional ensemble that was fashioned out of the post-war capital–labour compromise in industrialized democracies” (p. 376). As elegantly put by Supiot, the idea of approaching “the employment relationship as the insertion of a status in a contract has permitted the expansion of labour’s empire in the abstract, favouring the unification of the salaried worker status, and the progressive disappearance of distinctions premised on the actual object of the performance of work” (Supiot, 2002, pp. 33–34, my translation). So what Freedland defined as “the false unity” of the contract of employment and the “false duality” between an employment contract and “other work contracts” (Freedland, 2003, pp. 17–18) while no doubt being “good legislative policy” for much of the 20th century, may well have been ultimately “imposed or maintained by legislation” (ibid. p. 22; for a modern and original articulation of good policy goals attached to the notion of subordinate or dependent work see Davidov, 2016, Ch. 3). And when the policy goals pursued by legislation changed, the whole edifice began to crumble.

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### 3. The erosion of the subordinate contract of employment

In 1998, writing about one of the arguably most institutionalized and regulated labour law systems in the Western world, the French system, Antoine Lyon-Caen wrote:

*Quoiqu'on dise, il n'y a jamais eu de modèle juridique unique. Mais la diversité ne recevait pas d'encouragements public et elle rencontrait des bornes, notamment dans celles que les juges puisaient dans des règles générales. La nouveauté provient ainsi de la promotion de la diversité.* (Lyon-Caen, 1988, p. 541)

In a similar vein, Adams and Deakin (2014) have identified the proliferation of non-standard and precarious forms of work as being “due in part to institutional rigidities, associated with the [standard employment relationship]” and to “conscious policy choices that have privileged casualization, wage suppression, and the fiscalization of employment over the promotion of stable work and a living wage” (p. 780).

In terms of shifting policy priorities, it is fairly accepted that starting from the 1970s and more markedly, the 1980s, policy-makers at a domestic and international level started prioritizing new policy goals such as growth, job creation, competitiveness and flexibility that were seemingly predicated on fundamental changes in the industrial and economic structures of capitalist societies. This is a familiar part of the parabola of the subordinate contract of employment and of the standard employment relationship (for some of the earlier works see Pedrazzoli, 1989; Rogers and Rogers, 1989). In the first instance it was the parable of the “vertical disintegration” of the firm (Collins, 1990), of “Toyotism” (Womack, Jones and Roos, 1990), of the core and peripheral workforces (Pollert, 1988), of the demand for “flexible” and “atypical” forms of work such as part-time, temporary and agency work (ILO, 2016a) spreading across labour markets in the West (Blanpain, Yamakawa and Araki, 2000; Hepple and Veneziani, 2009) and since the 1990s, in the East (Frankowski and Stephan, 1995) and – to some extent and with some important qualifications (Cooney et al., 2002; Berg, 2001) – in East Asia (Lee, 2002) and the global South (Novick, Lengyel and Sarabia, 2009; Pochmann, 2009; Vega Ruíz, 2005; Teklè, 2010; Roychowdhury, 2018). In more recent decades it also became the parable of globalization (Blanpain, 2008), of “flexicurity” (Cazes and Nesporova, 2007; Sciarra, 2007), the “insider-outsider” (OECD, 1994) (false) dichotomy (clearly deconstructed by De Stefano, 2014), of fiscalization (Adams and Deakin, 2014), of “austerity” (Hastings and Heyes, 2016; Countouris and Freedland, 2013) and the “global economic crisis” (Kuttner, 2013), all demanding further deregulatory sacrifices on their respective altars. It moved on to the contemporary debates on the “gig economy”, “platform-work” and “crowdwork” (De Stefano, 2016; Prassl, 2018; Hatzopoulos, 2018), each adding their own verse to the litany of deregulatory policy demands (Harris and Krueger, 2015; Taylor, 2017) and new pressures piling up on the foundations of labour law, including on a contract of employment increasingly incapable of accommodating within its structures the growing number of non-standard forms of work mushrooming in the labour market. Stone and Arthurs (2013) warn us that “it is unlikely that these trends can be reversed any time soon or that we can reinstate the standard employment contract and the worker-friendly regulatory regimes that were built upon it” (p. 5).

While there is little doubt that conscious policy choices have greatly contributed to the fragmentation of the employment relationship, especially in the global North, it should not be assumed that this process has developed synchronically across the globe, or in the absence of countervailing movements. For many Latin American countries, for instance, the turn of

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the century has coincided with a period of policy trends specifically aiming at the reduction of informality in labour market arrangements (ILO, 2015a; Gomez Ramírez, 2016), including through highly successful labour and social security law measures that have strengthened the regulation of the employment relationship (Costanzi, Barbosa and da Silva Bichara, 2013; Berg, 2011). The work by Cooney et al. (2002) warns us that in some East Asian labour law systems the impact of regulation and deregulation has also been uneven. In fact, in some jurisdictions reforms have been recently undertaken with the explicit objective of further institutionalizing and formalizing employment relations. China is a particularly pertinent example of a system implementing reforms seeking to underpin the standard employment relationship with a more robust regulatory framework, for instance through measures such as the 2007 Labour Contract Law. While studies continue to test the actual quantitative impact of this reform on informal and casual employment – with some authors seeing the impact as positive (Cheng, Smyth and Guo, 2013; Freeman and Li, 2013), others as modest (Chen and Xu, 2017) or even negative (Liang, Appleton and Song, 2016) – it is clear that the overall aim of these reforms has been “to encourage the use of permanent labour contracts and improve the quality of non-standard jobs” (ILO, 2016a, p. 67), and “stabilizing work relations through the mandating of formal labour contracts” (Cooney, Biddulph and Zhu, 2013, p. 90). However, even in China, as noted by Cooney (2017), the narrow definition of the concept of “labour contract” has resulted in the exclusion from labour law protections of substantial numbers of working people, including some that are genuinely involved in other types of “employment contracts” or relationships.

So while Stone and Arthurs’ negative outlook on the prospects of redeveloping new, worker-friendly, regulatory regimes may well be justified on the basis of long-term trends in North America and Western Europe, other parts of the globe have had more or less significant, if at times reversible (Ministero Publico do Trabalho, 2017), experimentations with alternative and more worker-protective policy frameworks.

But admittedly, the challenges facing the subordinate contract of employment model are not only a question of policy. They also concern internal contractual structures that in more than one way have struggled to adapt to the emergence of both old and new forms of non-standard work. The word “rigidity” is often invoked in connection with various claims of inadequacy addressed to the contract of employment, the standard employment relationship, and even to labour law at large, and therefore requires some clarification. In some quarters, the expression is used to suggest, in essence, that “rigidities” in labour laws, governing in particular the formation and termination of standard contracts of employment, act as a disincentive to either engage workers on permanent contracts or to engage workers at all (OECD, 1994). As such, these rigidities are seen as contributing to a growth of non-standard forms of employment (Ahsan and Pagés, 2007) or to a growth of unemployment levels (Franks, 1994), and are typically relied upon to justify calls for the deregulation and flexibilization of labour law systems (World Bank, 2007). In reality, within this – highly contested (Deakin, Malmberg and Sarkar, 2014; Landau, Mahy and Mitchell, 2015) – discourse, the word rigidity is a misnomer. What its proponents really contest is the level of protection offered to workers and the fact that these protections are typically not derogable by the parties, and by the employer in particular.

In the present paper, the term “rigidity” is deployed in a diametrically different way. What is suggested here is that, by and large, the defining structural elements of the contract of employment have been shaped by doctrinal work, by statute, and by jurisprudential analysis in ways that have had a set of exclusionary consequences on a growing number of workers

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whose working patterns and arrangements do not fall within the strict confines of the standard employment relationship that, ostensibly, the contract of employment was designed to capture and institutionalize. These “rigidities” have emerged at various levels, but the most glaring ones are arguably attributable to the central function that the concepts of *subordination*, *continuity* and *bilaterality* play in the legal construction of the contract of employment.

### 3.1 Subordination

Subordination, broadly understood as a manifestation of the power of control and direction over a worker, is at the same time an essential characteristic and an indicator or test for the existence of a contract of employment (Waas and Heerma van Voss, 2017; Countouris, 2007). “In the last few decades, however, significant organizational changes have occurred and business practices arisen [...] reducing the grip of legal tests based on strict hierarchical control” (ILO, 2016a, p. 11). While in some systems, jurisprudential and doctrinal developments have made allowances for slightly broader understandings of the concept (Supiot, 2000; Ghera, 2006; Countouris, 2007; Fudge, Tucker and Vosko, 2002), and while in some jurisdictions intermediate “quasi-subordinate” categories of workers have accrued some – though not all - labour rights (Davidov, Freedland and Kountouris, 2015), it is clear that subordination retains a central normative role in the qualification of a work relationship, a role that defies both the emergence of new forms of (often technological) control and discipline over a seemingly independent workforce (De Stefano, 2017) and the fact that it has traditionally excluded large groups of workers in both the formal and informal economy (Sankaran, 2007) who predominantly or exclusively earn their living through the provision of personal work or labour (Freedland and Kountouris, 2011), whether under the strict control of an employer or otherwise.

Far from being a helpful device for the allocation of labour rights, subordination has become in many ways a double jeopardy for workers. Strip the contract of employment of its external worker protective layers provided by statute, collective bargaining and worker protective jurisprudence, and all that is left is a vehicle for the subjugation rather than the emancipation of workers and society. The paradox is that if workers try to escape this growing subjugation that comes with subordination, and unilaterally try to improve their terms and conditions of employment through genuine individual bargaining, then the contract of employment internal structures collapse. The reason is intrinsically linked to the subordination dimension of the contract of employment: if pay, hours, shifts or performance are not exclusively set (often unilaterally) by the employer, but rather by the worker and are thus for the employer to agree, then an inference – and a very strong one at times – will be made that the employee is actually an autonomous worker, an independent contractor, providing services to a client or customer, setting her own professional fee and organizing her own work around her needs and preferences.

### 3.2 Continuity

Similarly, those aspects of the contract of employment that sought to capture the “continuous performance” dimension of the standard employment relationship have also emerged as a formidable internal rigidity, with considerable exclusionary effects. These effects manifest themselves in various manners in different legal systems, usually as requirements for regular

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or durable employment on which specific “qualifying periods” for accessing particular labour rights hinge, which typically result in excluding short and “casual” fixed-term contracts from important protections (ILO, 2016a, p. 256). But, perhaps more worryingly, continuity can also operate as one of the criteria for distinguishing employment from self-employment, in a way that can wholly disenfranchise workers, and female workers in particular (Fredman and Fudge, 2016), on short or intermittent contracts (Davies, 2007) from the entire panoply of employment protection legislation, on the grounds that their work arrangements do not suggest the presence of any future obligation between the parties. This issue has emerged most vividly in the context of so called “zero hour” and other “on-call” contracts’ (ILO, 2016a, pp. 22–30, 83–86) and raises very complex regulatory challenges for labour law systems essentially premised on the binary divide. If the lack of “continuity” does not fatally affect the classification of a work relationship as essentially amounting to self-employment, then various remedial measures – from “day one” rights to “minimum guaranteed hours”, to the payment of minimum “indemnities” (ILO 2016a, pp. 258–261) – can and have been adopted to render less precarious the working lives of these casual workers. But when, in a given legal system, the absence of continuity results in a work relation being classified (or misclassified, for that matter) as one of autonomous or semi-autonomous employment, then the consequences for the worker are far more radical, and legal systems premised on the idea of labour rights mainly or exclusively applying to employees working under a contract of subordinate employment inevitably fall short of the challenge.

### 3.3 Bilaterality

A third structural rigidity of the contract of employment is deeply associated with the understanding of the standard employment relationship as essentially bilateral, and more precisely as arising “between *one* worker and *one* employer” (ILO, 2016a, p. 11, emphasis added). Clearly, in a number of jurisdictions, this bilateral understanding has generated important challenges for the regulation of temporary agency work relations, though it is fair to say that some systems have been more successful than others in addressing some of them. But, strictly understood and applied, bilaterality has also exacerbated other prescriptive and exclusionary facets of the contract of employment “exoskeleton”. For instance, it has exacerbated the already strict and often formalistic requirements of personality in the provision of work that can be easily defeated by even the loosest of substitution clauses (*IWGB v Deliveroo*, 2016). Even the most sophisticated judicial interpreter can struggle to distinguish a genuine substitution clause from a right to swap shifts, or even a requirement, explicit or implied, to actually find a substitute to mitigate the effects of an unforeseen impediment and absence from the workplace (*Pimlico Plumbers v Smith* [2018]). Bilaterality can also degrade into an “exclusivity” requirement, perhaps suggesting that a worker offering her labour to multiple parties, under an complex or unclear set of contractual arrangements, ought to be presumptively classified as a self-employed person offering services to multiple “clients and customers” (*Stringfellows v Quashie* [2012]), given her ability to spread more broadly the risk of loss inherent in her “business”. A paradoxical situation, considering that many employees working under standard contracts of employment can often work for more than one employer, and may well have to do so to make ends meet if they are hired through low-paid or part-time contracts. Narrow views of bilaterality are also associated with what Prassl (2015) defines as “the unitary concept of the employer” (p. 16), a notion that permeates most labour law systems (Corazza and Razzolini, 2015), and that can often result in placing into a legal limbo swathes of workers employed



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through subcontracting chains, outsourced service companies, franchising arrangements (Koukiadaki and Katsaroumpas, 2017) and other complex private equity businesses arrangements (Prassl, 2015, p. 54). In most of these cases, workers will struggle to identify “the party responsible for their rights” (ILO, 2016a, p. 275), that is, if their resulting employment status grants them any rights in the first place.

It is probably all too easy, through a careful use of sources and intricate legal arguments, to reach the ungracious view that the contract of employment has lost all relevance and is now a relic of the past. It would not be just ungracious, it would also be inaccurate. The contract of employment model has displayed considerable resilience in the face of adverse policy environments, structural technological changes and constantly emerging human resource management practices (Countouris, 2007; Davidov, 2016). But it is also clear that its practical relevance as the principal vehicle for the allocation of labour rights is relatively limited for substantial groups of workers in both economically advanced and developing countries (though clearly more so in the latter) and has a disparate exclusionary impact on women, the young, and migrant workers in particular (ILO, 2016a). Its internal structural rigidities, as discussed above, have provided the perfect blueprint for “armies of lawyers” (*Autoclenz v Belcher & Ors* [2011] UKSC 41, para. 25) (and increasingly armies of software and algorithm developers) to shape some forms of work in ways that would not fit its particular contractual exoskeleton, and would thus fall outside the scope of labour law.

The artificiality of the entire exercise is best grasped by the fact that different types of contractual exoskeletons can often host factually identical work relationships. For instance, it is increasingly accepted that, sometimes in the same workplace, you can have an employee cleaner, or a self-employed cleaner, or just a cleaner working for cash through a variety of informal arrangements that are not contractually relevant. In the same British school, one can find employee teachers and self-employed teachers working side by side year after year. We have employee orchestra players and self-employed orchestra players. Very soon we could have self-employed waiters working alongside employee waiters, their customers and clients being the various diners placing orders, paying, and rating them via apps, while expecting the same service they have been traditionally accustomed to. As put by Supiot (2000b) nearly two decades ago, the earlier distinction between salaried and independent employment, “*a laissé la place, au sein de chaque profession, à la coexistence du salariat et de l’indépendance*” (p. 132). There is now a growing awareness that “work understood to be indefinite employment in a subordinate employment relationship, while still the most common form of salaried employment in developed countries, has nonetheless lost ground over the past few decades, in both developed and developing countries” (ILO, 2017, p. 32). An emerging consensus that reform, whether incremental or more radical in character, is necessary is progressively shaping up.

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## **4. Reforms: Reaffirming the contract of employment model, identifying new intermediate categories, and retargeting labour law**

Before exploring and evaluating some of the main reform options that in different ways seek to address at least some of the regulatory challenges described in the previous sections of this paper, it is important to acknowledge that inaction, or even more action aimed at further deinstitutionalizing the exchanges between capital and labour in market economies, remain among the options on the table. Capitalism may well have reached a dystopian stage in its centuries-old evolutionary trajectory, where public intervention in the regulation of markets in general, and of labour markets in particular, is no longer a priority in terms of its sustainability and functioning, and where private regulation, or the simple power of “dominium”, may well be destined to play an even greater role in shaping our working lives, and our lives more generally (Supiot, 2012).

So, in a sense, it is possible to argue that if reform is to be pursued, it ought to take as its starting point the view that public intervention in the regulation of market economies is both necessary in terms of their functioning and desirable in terms of the more equitable distributive and societal outcomes it can generate (Deakin, 2011; Deakin, 2016). This approach arguably sits at the core of the ILO’s Future of Work agenda (ILO, 2015b), and remains the main driver behind its debates on the future of the employment relationship: reforms must tackle the “regulatory challenges in providing adequate protection to workers in evolving employment relationships” (ILO, 2016b, p. 1).

With this important caveat in mind, this section of the paper introduces three main reform approaches that have emerged in recent years as the most conceptually coherent sets of ideas aimed at providing increased protection for the growing numbers of workers currently falling outside labour law’s safety nets.

### **4.1 Reaffirming the contract of employment model**

The first approach essentially consists of reforms and proposals aimed at strengthening the centrality of the subordinate or dependent contract of employment model. This approach is variably referred to by academic authors as “stretching the notion of employee” (Countouris, 2007, p. 58), or expanding the notion of subordination, sometimes by reference to a broad notion of dependency (Davidov, 2016,). It can often entail recommendations aimed at strengthening the conceptual frontiers between standard employment and self-employment by reference to long lists of indicators (*ibid.* pp. 128–133), or seeking to police that frontier more effectively by means of clearer “sham contract” tests and rebuttable presumptions of status, general or specific (ILO and ELLN, 2003). Much about this approach is commendable, not least the fact that it includes a range of practical measures that have been or are being already implemented in a number of legal systems, precisely with the view of retaining the relevance of the contract of employment against a background of relentless political, social, economic and technological changes. By reinforcing the norm it can also assist with those policies seeking to approximate, on an equal treatment basis, the rights of some non-standard workers to those enjoyed by typical employees, as has done in the past, for instance, for part-time, fixed-term and temporary agency workers (Kountouris, 2016).

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There are however three underlying weaknesses with this first approach. Firstly it rests on the assumption that the standard employment relationship will retain at least a factual dominant relevance in the years to come, and therefore that it is both practicable and desirable to invest resources to ensure that the law of the contract of employment continues to provide a good legal fit for this broadly stable phenomenon, and perhaps contribute to stabilizing it. As noted in the previous sections of this paper, this is a big assumption. The second weakness applies to particular versions of this approach that, for the sake of strengthening the unitary model of a new “single contract of employment” (for a review of the debate, cf. Casale and Perulli, 2014), may be willing to make important concessions in terms of the level of protection workers would be entitled to, especially in terms of job security. While it is unclear whether this genre of proposals would attain any of the unification objectives it purports to achieve, it is all too obvious that if it did so it would “significantly lower the protection of standard workers as they will not be protected against unfair dismissal before the expiry of a probation/qualifying period much longer than in the past” (De Stefano, 2014, p. 279). Many would argue that it is important that reforms aimed at rescuing the standard employment relationship from its current process of decay do not end up throwing out the “labour law baby” along with the dirty bathwater elements arising from a narrow understanding of the subordinate contract of employment model. Third, the idea of reinforcing and underpinning the “norm” arguably ignores the all too obvious fact that, at the best of times, the contract of employment and the standard employment relationship “norm” have had some serious exclusionary effects on large groups of working people, and “fails to acknowledge that many of these other people are women, migrants, and those living in Southern countries where self-employment and reproductive work are central” (Albin, 2017, p. 17). So, even in its best case scenario, it still ends up delivering sub-optimal results.

#### 4.2. Identifying new intermediate categories

The second approach is possibly less incremental and more radical in character, and effectively suggests the identification of a new third form of employment relationship sitting between employment and self-employment and thus broadly located within the conceptual space currently occupied by “quasi-subordination” or “quasi-dependence”, tasked with absorbing vast numbers of non-standard forms of work, both old and new. There is nothing particularly new about this idea. Dependent contractors, para-subordinate contract workers, *collaborazioni coordinate e continuative*, “limb-b workers”, *arbeitnehmerähnliche Personen*, *trabajadores autónomos económicamente dependientes* (Perulli, 2003; Eurofound, 2017; Davidov, 2014; Fudge, 2010), have been recognized, with varying degree of protections (Fudge, 2010), by a number of jurisdictions around the world, in some cases since the 1960s and 1970s. These have also failed to address the underlying problems arising from the changing nature of the employment relationship. In fact they may have exacerbated them, and this, I believe, for three main reasons.

Firstly, in some systems they have facilitated the ability of employers to structure their work needs and arrangements through contractual forms that departed from the employee/contract of employment classification. It is easier to persuade a court that a worker is not an employee with a contract of employment, but rather (and legitimately) a quasi-subordinate worker, than to argue that she or he is self-employed. *Quasi-subordinate/dependent* worker contracts retain, in all systems, an important set of contractual characteristics borrowed from the contract of employment model. So disguising employment relations as “quasi-subordinate”

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ones is typically easier than trying to fit them into a “bogus self-employment contract”. In most systems para-subordination simply offers a new, easier opportunity for misclassifying employees, without paying any significant worker protective dividends.

Secondly, in most systems they have led to a further fragmentation of the labour law, social security and fiscal regulatory bases, exacerbating the problem of “fiscalisation” (Adams and Deakin, 2014). This is doubly challenging because we now have labour systems where workers need to classify themselves as “quasi-subordinates” in order to benefit from the tax advantages that are typically offered to the self-employed and make ends meet. It has also ingrained a dependence of these workers not just on their employer/client, but on a particular tax (and welfare) dimension that only adds to the challenges faced by the standard employment relationship. We now have important groups of quasi-subordinate workers who, while aspiring to more robust labour law protections, would naturally resist being reclassified as employees if that meant losing the tax benefits that are essential to their usually modest livelihoods (IWGB, 2017).

Thirdly, there is now a serious risk that labour law (or important areas of labour law) could be asked to refocus itself around these intermediate contractual forms. Harris and Krueger’s work in 2015 arguably anticipated this prospect, especially when advocating their “independent worker” category as ideally suited to structure the work relations of “temporary staffing agency employees, ... members who secure jobs through union hiring halls, outside sales employees, and (perhaps) direct sales employees occupy the points of triangles with other economic actors” (Harris and Krueger, 2015, p. 22; see also Taylor, 2017), all workers who in most systems are or ought to be classified as standard employees enjoying the full spectrum of individual and collective labour rights (Cherry and Aloisi, 2018).

#### **4.3. Retargeting labour rights beyond the contract of employment: Regulating personal work**

The third approach includes a range of different reform suggestions that can be varyingly described as advocating an extension of labour rights beyond the subordinate contract of employment and, to the extent that the latter operates as the exoskeleton of the standard employment relationship, beyond the standard employment relationship itself. Of all three approaches this is admittedly the one where less actual experimentation has taken place, with academic authors, and also increasingly some trade unions, taking the lead in developing reform ideas and sometimes even reform proposals to expand the coverage of labour rights “*au-delà de l’emploi*” (Supiot, 1999). Within this broad reform approach two main strands can be identified. One strand advocates the extension of all or most labour rights beyond the contract of employment and to other “work” or “personal work” relations (Freedland and Kountouris, 2011; CGIL, 2016; Ewing, Hendy and Jones, 2016; Dockès, 2017). The other believes that only some labour rights, such as anti-discrimination or health and safety rights, can or should be applied beyond the confines of the employee concept, and crucially that core labour protections such as the protection against unjustified dismissal ought to remain limited to subordinate employees (Davidov, 2016).

Typically, this approach attracts three sets of critiques. Firstly, there are concerns that expanding the scope of labour rights beyond the contract of employment may actually contribute to further destabilizing the standard employment relationship, whose lack of

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viability is all but proven. Secondly, these proposals, especially those advocating a broad extension of most labour rights, are met with the concern that an overly broad extension of their scope of application could result in a rapid deterioration of the present standards. Can we really ask a customer or client of a plumber, window cleaner or greengrocer to guarantee these “professionals” holiday pay or unfair dismissal rights? the argument goes. Thirdly, there are concerns that guaranteeing some labour rights to independent contractors, including fundamental rights such as the right to bargain collectively, may unduly interfere with some fundamental laws of the market, including laws that seek to promote free competition and prevent the formation of cartels or abusive dominant positions (Case C-413/13, *FNV Kunsten Informatie en Media*).

With these criticisms in mind, the following section of this paper goes on to develop a set of proposals, broadly located in this third genre of reform approaches, that might contribute to an extension of employment protections beyond the contract of employment, and address some of the regulatory failures identified in the previous sections of this paper without incurring any of the pitfalls described in the previous paragraph.

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## 5. Regulating for universal work relations

The set of proposals briefly illustrated in this section is currently being developed by the present author and a number of other academic authors (Ewing, Hendy and Jones, 2018; Countouris and De Stefano, 2019) on the basis of two key prior publications. The first is the 2011 monograph *The legal construction of personal work relations*, co-authored with Professor Mark Freedland (Freedland and Kountouris, 2011; see also Freedland, 2003; Freedland, 2007). The second is the 2016 publication *A manifesto for labour law: Towards a comprehensive revision of workers' rights* produced by a number of UK-based academics for the London-based think tank Institute of Employment Rights and edited by Keith Ewing, John Hendy and Carolyn Jones.

This set of proposals takes as its starting point the analysis developed in sections 2 and 3 of the present paper, and in particular the view that much of what is wrong with the (in many ways) unsatisfactory and inadequate coverage of labour law can be attributed to a series of complex processes leading to the de-institutionalization and weakening of the standard employment relationship, as well as the internal failures in the structure of the contract of employment model. As discussed in section 3, this model is too narrowly focused on subordinate employment, too tied to the idea of continuous performance, and fatally affected by a narrow understanding of bilaterality. An alternative approach is necessary, and one that is premised on the idea of universality, both in the sense of the personal scope of application of labour law and in the sense of the substance of the rights and protections it ought to guarantee.

### 5.1. Workers, employing entities and presumptions of work

A first step in these proposals is to suggest a new framing concept for the application of labour rights that would cover a broader range of personal work relations, including of course those currently covered by a contract of employment, while excluding only genuine own-account businesses. Such a framing concept could be formulated along the idea that labour rights ought to apply to every “worker”, understood as an “individual who (a) seeks to be engaged by another to provide labour; (b) is engaged by another to provide labour; or (c) where the employment has ceased is engaged by another to provide labour, and is not genuinely operating a business on her or his own account” (Workers (Definition and Rights) Bill 2017–19).

This concept of worker would entail that all those providing their labour to another party would be put in a position to enjoy the rights and protections contained in employment statutes (and for that matter most rights contained in the International Labour Code) regardless of the way their contracts or work relations define them. So, it goes without saying, this concept would naturally cover those workers offering their labour through a standard contract of subordinate employment. But crucially, the absence of a “control” or “subordination” requirement means that the new status would also include those who are currently classified as self-employed people who provide their services as part of a profession or business undertaking carried on by someone else, and who would thus benefit from employment protection laws. It would also cover other workers currently classified or misclassified as self-employed on the basis of a variety of contracts for services or personal self-employed relations, so long as they are not genuinely operating a business undertaking on their own account. By excluding from the scope of labour law these genuine business and

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commercial activities, this definition of worker ensures that employment protection legislation does not interfere with civil and commercial relationships, and could be rendered compatible with the functioning of competition and anti-trust law (Schiek and Gideon, 2018).

The new definition would also be broader than the current notion of contract of employment in that it would not require the existence of mutual obligations of a contractual character, and would thus cover various informal work relations that do not meet strict contractual requirements, so long as a legal obligation or duty to provide personal work, including one that is unpaid or voluntarily undertaken (Supiot, 2001), can be ascertained from the reality of the situation. The definition would exclude those operating a genuine business and providing services to a plurality of clients or customers by means of substantial tangible or intangible assets. If the assets are not substantial but marginal, or if they are ancillary to what is essentially a provision of personal work or services for an employer, then the person would be deemed to be a worker. A fortiori, the new definition would exclude those in business on their own account who employ other workers for the purpose of their business undertaking, though of course the staff they employ would be covered. In that sense the definition acknowledges that, in 21st-century capitalist societies, the way in which factors of production interact and combine to generate value (Eckbia and Nardi, 2017) is sometimes less clear-cut than in the past (Freedland and Kountouris, 2017). But such a broader definition would also make sure that adequate labour protections are offered to “those who ‘labour to live’ [because] it remains the case that ‘capital hires labour’ (Putterman, 1984) rather than the reverse” (Deakin, 2016, p. 10).

For this definition to accomplish its protective goals, at least two further elements would need to be present. Firstly, it would require the adoption of an equally broad concept of employing entity. A broad formulation of the “employer” concept can be found in s.43K(1)(a) of the UK Employment Rights Act of 1996, essentially positing that where a worker’s terms of employment are “in practice substantially determined ... by the person for whom he works or worked, by the third person or by both of them” then the worker may be considered as employed by whichever of the two entities played a greater role in setting those terms, and potentially by *both* of them if both have “substantially determined” the terms of engagement and employment (*Day v Health Education England and Ors* [2017] EWCA Civ 329). This definition of employer is thus not an exclusive definition in any sense, and can in effect result in a “joint employer” status arising in respect of multiple employing entities. A similar understanding of the employing entity would arguably assist with a range of personal work situations where various limbs of the employer prerogative are dispersed across a number of nodes and actors, as often happens in both the new and the old economy.

Secondly, a rebuttable presumption of worker status should apply so that all those providing their labour to others would be presumed to fall within the scope of labour law, unless the end user or the service provider can demonstrate that they are performing a genuine entrepreneurial activity (i.e. a rebuttable presumption). When it is possible on a reasonable construction of the relationship for a tribunal or court to characterize the person as a worker, then it should be understood that the employer will not be able to rebut the presumption. This will require the addition of specific provisions dictating that where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the status of worker, it shall be presumed that the individual qualifies as such unless the other party to the arrangement establishes that the *only* possible construction of the engagement is that the individual was not providing labour as a worker.

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## 5.2. The role of international labour standards

These proposals very much dovetail with the overall regulatory and policy framework promoted by the ILO. One of the ILO's core objectives has always been "to ensure a just share of the fruits of progress to all" (ILO, 1944), and the broad personal scope of application of international labour standards has played a crucial role in pursuing this wide redistributive goal promoted by the organization. "*It is untrue that ILO standards are only for those in the formal economy where there is a clear employer–employee relationship.* Most ILO standards refer to 'workers' rather than the narrower legal category of 'employees'" (ILO, 2002, p. 45). So the broad definition of "worker" advocated in these pages would be of considerable assistance to those policy initiatives that seek to encourage the transition from the informal to the formal economy, as it would, for instance, necessarily include "employees holding informal jobs in or for formal enterprises" and "workers in unrecognized or unregulated employment relationships", and a variety of other work relationships covered by the Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), that may not meet the strict contractual and formal requirements of subordination, continuity and bilaterality expected for a formal contract of subordinate employment to arise.

It should be noted that some of the most fundamental ILO instruments are already expressly understood as covering workers that, in some national jurisdictions, are classified as self-employed. For instance, in construing the scope of application of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the ILO Committee on Freedom of Association has long established that "[t]he criterion for determining the persons covered by that right... is not based on the existence of an employment relationship, which is often non-existent, for example, in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize" (ILO, 2001). More recently the Committee requested the Government of the Republic of Korea to take the necessary measures to "ensure that 'self-employed' workers, such as heavy goods vehicle drivers, fully enjoy freedom of association rights, in particular the right to join the organizations of their own choosing" (ILO, 2012b), and it is accepted that several other ILO instruments, both "fundamental" (ILO, 2012a) and not (ILO, 1970), are equally bestowed with very broad personal scopes of application, applying well beyond subordinate contracts of employment.

Perhaps most importantly, the ILO's own Employment Relationship Recommendation, 2006 (No. 198), is premised on the recognition that "situations exist where contractual arrangements can have the effect of depriving workers of the protection they are due" and that "protection should be accessible to all" (Preamble), "notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties" (Paragraph 9). Unsurprisingly, it offers the conceptual building blocks for moulding labour rights onto a broad notion of work that includes both traditional, and narrower, forms of employment "carried out according to the instructions and under the control of another party", but also broader or looser conceptions of work that are "carried out personally by the worker" (Paragraph 13). In doing so, the Recommendation relies on a series of indicators that ought to be read and understood on the basis of the protective purposes of the instrument, and should therefore be seen as directory, not mandatory, and inclusive, not exclusive. The only limit imposed by the Recommendation is that "national policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships", which certainly suggests that self-



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employed individuals operating a genuine and sufficiently capitalized business undertaking on their own account, perhaps by employing others, should be left outside the scope of employment protection legislation. The Recommendation also asks national definitions to ensure that standards are “applicable to all forms of contractual arrangements, including those involving multiple parties” (Paragraph 4(c)), and encourages the adoption of “a legal presumption that an employment relationship exists where one or more relevant indicators is present” (Paragraph 11(b)).

The ILO Commission on the Future of Work is contemplating the prospect that “a comprehensive policy response will be needed to ensure the promotion of decent work and equality treatment for all workers” (ILO, 2017 p. 35). Should the ILO be mandated to develop such a response, it is almost inescapable that such a process should begin internally and incrementally, by surveying and reviewing the personal scope of application of its own standards. A second step could see the production of a general survey on the personal scope of application of ILO Conventions and Recommendations as applied and implemented by ILO constituents. And this could be followed by the adoption of a horizontal instrument on the scope of application of ILO Conventions and Recommendations, perhaps in the form of a Recommendation for the ILO at large to interpret and apply its own instruments broadly, beyond the scope of formal salaried employment, subject only to specific instruments expressly requiring a narrower scope. The Recommendation should be inspired by the principles of universalism and coherence, and apply not only to the Organization’s supervisory bodies but also to the constituents of the ILO and to the Office. Its personal scope should be shaped by reference to a broad definition of “worker” covering all those “engaged by another to provide labour”, regardless of the contractual form or other arrangement under which labour is provided, thus excluding only genuine self-employed persons who genuinely manage a business on their own account, as opposed to those who mainly “labour to live”.

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## 6. Conclusions

Writing in 2006 about the state of health of the contract of employment model, Davidov caustically used the well-known quotation from Mark Twain in the title of his article: “The reports of my death are greatly exaggerated” (Davidov, 2006). He was, and in many ways is, right. The contract of employment continues to act as the gateway for the application of a great number of labour rights for a great number of workers. But as recently noted by the ILO, “work understood to be indefinite employment in a subordinate employment relationship, while still the most common form of salaried employment in developed countries, has nonetheless lost ground over the past few decades, in both developed and developing countries” (ILO, 2017, p. 32). So this paper argues that the state of health of the contract of subordinate employment is hardly something to aspire to, and that this once fundamental legal institution may well be going through the twilight stage of its existence: still too strong to die, but also too weak to thrive and perform its original purposes and functions. We are witnessing an interregnum fraught with difficulties. It is hardly the pedestal on which the future of work or the future of labour law should be built. This paper proposed and elaborated on a broader concept of personal work relation and suggests that it could be used to replace the functions once performed, in a fairly adequate if always incomplete way, by the contract of employment and guaranteeing universal labour rights to an increasingly complex universe of personal work relations. In doing so, this new, broad, and relational concept could go as far as rescuing the standard employment relationship from its current process of decay and would do so without compromising the integrity and level of protection offered by employment protection legislation. It would get rid of the dirty bathwater elements arising from a narrow understanding of the subordinate contract of employment model, but without throwing out the “labour law baby” in the process.

It should also be acknowledged, by way of conclusion, that the proposals elaborated in this paper would not be able to achieve their full desired effects if they were exclusively tied to labour law reform. Further regulatory interventions may well be necessary to pursue a fairer mutualization of the social risks attending the performance of work, so as to disperse them away from workers and share them more equitably between employers and the State, as well as consumers and society at large (Freedland and Kountouris, 2011). In particular, the pursuit of the policy goals underpinning the regulation and protection of the “universal work relation” would require, or at least greatly benefit from, three broader sets of interventions. Firstly, they would be greatly assisted by targeted interventions in the area of social security law aimed at bestowing non-contributory and redistributive entitlements to larger groups of active persons, including in the form of a guaranteed basic income (Atkinson, 2015; Standing, 2017; Behrendt and Anh Nguyen, 2017; De Stefano, 2018), especially where – in spite of the reliance on a broader definition of “employing entity” – the law fails to identify a party responsible for the payment of wages (so long as other personal nexuses point to the performance of work) (Fredman and Fudge, 2013), and increasingly for those who produce value through activities that are not (yet) recognized as work in the automated digital economy (Ekbia and Nardi, 2017). Secondly, they would necessitate a more far-reaching role for sectoral collective bargaining in shaping specific protections underpinned by fundamental statutory rights, including in terms of enhanced job security. Finally, they would entail, but could also lead to, significant transformations in the way capital and labour interact with each other, with workers also organizing for the purposes of sharing costs and ultimately capital through a variety of arrangements, including cooperative and corporate ones, so as to be able to offer their services to a variety of clients and customers while

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enjoying the rights and benefits that typically accrue to employees in a traditional business structure.

It may be questioned whether it is both realistic and desirable to associate the future of labour law with reforms that span well beyond the traditional remit of the discipline. In reality however, labour law has always interfaced with, and occasionally relied upon, other areas of regulation in market economies, and in this sense the proposals and ideas developed in this paper simply suggest a new, if slightly broader and deeper, institutionalization trajectory for personal work relations in 21st-century capitalist societies.

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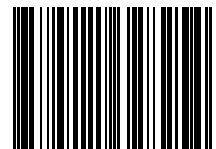
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**International Labour Office (ILO)**  
**GOVERNANCE**  
Route des Morillons 4  
CH -1211 Geneva 22  
Switzerland

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