Application of labour and employment law beyond the contract of employment

Mark FREEDLAND*

Abstract: The personal scope of employment law is the subject of much ongoing debate. Arguing that an exclusively contractual analysis of this domain is unsatisfactory, the author constructs a European-based empirical typology distinguishing the personal work relations of "standard employees", public officials, "liberal professions", individual entrepreneurial workers, marginal workers, and labour market entrants. These categories and their inter-relationships are then analysed dynamically in terms of "personal work nexuses"—a concept encompassing complex legal ramifications beyond the contractual framework. The conclusions highlight the value of this analytical approach to recent efforts by the ILO and the European Commission to "modernize" labour law.

It is a very great privilege to be allowed to contribute to the first issue of the *International Labour Review* in its re-launched form. In this article I am seeking to elaborate and build upon a set of ideas which I put forward in my article, "From the contract of employment to the personal work nexus";¹ and I am also seeking views upon and further insights into the lines of development of those ideas which I am pursuing. So I begin by recapitulating briefly upon the themes of that article, and I then indicate the directions in which I am now

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¹ Mark Freedland: "From the contract of employment to the personal work nexus", in *Industrial Law Journal*, Vol. 35 (2006), No. 1, pp. 1–29. This work will hereinafter be referred to simply as "my 2006 article".

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seeking to take those themes. The present article seeks to make a small contribution to the very important and interesting debate about “the personal scope of labour law” or “the application ratione personae of employment laws”. However, the contribution to that discussion will be a rather indirect or tangential one; that is because my purpose is not so much to present prescriptive arguments about those issues of the personal scope of labour or employment law, but rather to develop an analytical framework for the understanding of individual work or employment relations, and especially the contractual aspect of those relations, on a European comparative basis. Much the greater part of this article will be devoted to that analysis; a concluding section will consider its relevance to international evolutions of the debate about the personal scope of labour law in the policy-making of the ILO and of the European Union (EU).

In my 2006 article I presented two sets of arguments, or developed two themes, which I suggested might help to strengthen that analytical framework. The first theme concerned the family of personal work contracts; the argument was that it is useful to envisage a domain or broad category of personal work relations, and to analyse the work contracts within that domain not so much as centred upon the contract of employment, but rather as a family of contracts, within which the contract of employment was probably numerically much the most frequently occurring, but nevertheless not necessarily the supremely dominant paradigm which we have tended to treat it as being.

It should, however, be stressed that the category of personal work contracts, albeit significantly larger than that of the contract of employment, is nevertheless still confined to contracts wholly or primarily for performance by the worker personally, that is to say by himself or herself. As such these contracts are contra-distinguished from commercial contracts for services which are not necessarily or even primarily for performance by the worker personally.

The second theme concerned the personal work nexus; the argument here was that, even when elaborated into the form of the “family” of personal work contracts, an exclusively contractual analysis of this domain was likely to prove unsatisfactory, and that the contractual analysis needed to be supplemented by a recognition both that personal work relations might on occasion not take a contractual form, and that even where, more typically, a personal work relationship or arrangement is centred upon a personal work contract, it might nevertheless have complex legal ramifications which were not contained within that contractual framework – the notion of the “personal work nexus” was invoked to characterize the looser framework which would be necessary to encompass those broader ramifications. The two arguments combine together to give rise to a notion of an expanded subject-matter or domain of employment law, including but also going beyond the sphere of the contract of employment, consisting of a group or family of personal work nexuses which are of different types, and vary in the degree to which they are purely contractual in character.

Although this set of arguments and this theoretical construction of the domain of personal work nexuses have continued to seem to me to be potentially
useful ones, I have come to feel that they need a more practical or empirical and contextual development than I was able to accord them in my 2006 article. That is the shortcoming which the present article seeks to begin to remedy. The endeavour is to do so in a way which will be conducive to a European comparative analysis of personal work contracts (PWCs) and personal work nexuses (PWNs). The method of proceeding with this development consists of several steps, the first of which centres on the identification of a socio-economic notion of personal work relations (PWRs) and of the enumeration of a number of leading types of personal work relations. The second step is an analysis of the personal work nexuses which are respectively associated with those leading types of personal work relations. The third step is an attempt to establish a diagram or map of those types of personal work nexuses showing how they relate to each other; and I offer a suggestion as to how the legal binary analysis of personal work relations into the two categories of employment and self-employment fits on to that map. Finally I engage in a consideration of how these reflections relate to current debates about the scope of employment law and also about European contract law.

Some leading types of personal work relations

The crucial first step of my present argument therefore consists in establishing a practical or empirical typology of personal work relations as a basis for a European comparative analysis of the treatment of those relations in different employment law systems. This, it must be admitted from the outset, is a decidedly hazardous undertaking for several reasons. The notion of a practical or empirical typology – as opposed to a legal taxonomy – of personal work relations is essentially a socio-economic one; so an employment lawyer proposing such a typology is operating outside his or her own immediate expertise, and is encroaching upon that of labour economists or sociologists. This would not be too grave a matter in itself, for these areas of expertise overlap with that of the employment lawyer, and legal ordering is important among the factors which inform and shape the practical or empirical typology of personal work relations. A greater problem is that an employment lawyer when suggesting such a typology, rather than straying too far from his or her own legal discipline, will not stray far enough – that is to say, will remain entrapped within the legal frame of reference, and will propose a typology which simply reflects the legal categories from which the very aim of the exercise is to break free.

To propose a typology which had that character, and to purport to use it as a basis of evaluation and criticism of the corresponding legal categories would run the risk of engaging in autopoiesis or self-referential argument. That, I dare to suggest, is what employment lawyers very often do when seeking to sustain and to apply the binary division of personal work relations and of personal work contracts into those of “employment” on the one hand and “self-employment” on the other hand, since that binary division is one largely invented and imposed by legal systems of labour market administration. But I am highly aware of the
danger of falling into more complex and apparently sophisticated forms of the very same analytical error.

There is yet a further and even more dangerous set of rocks upon which this analytical enterprise might all too easily founder; its aim is to establish a non-system-specific basis for European comparative reflection, yet it would be all too easy for me to propose a typology which is reflexive of the practice of the British labour market rather than of European labour markets in general. It would require a much deeper immersion in comparative labour market sociology than I have achieved, in order to be confident of avoiding that trap, so I do not imagine that I will have done so. For all these reasons, the ensuing catalogue of leading types of personal work relations is a preliminary one, entirely subject to revision which it is intended will follow from the discussion which I hope this article may provoke.

Very conscious, therefore, of all these hazards, I suggest that it may be useful to identify the following six leading types of personal work relations, the ordering of which will be explained later in this paper:

1. "standard employee" work relations;
2. the personal work relations of "public officials";
3. the personal work relations of those engaged in "liberal professions";
4. the personal work relations of individual entrepreneurial workers, such as "freelance workers" and "consultants";
5. the personal work relations of marginal workers such as "casual", "temporary", "part-time" workers and "volunteers"; and
6. the personal work relations of labour market entrants, such as "trainees" or "apprentices".

One or two points of detail may usefully be made about this scheme. It is not intended to be a comprehensive typology covering all possible personal work relations. The categories are not only therefore incomplete but also not mutually exclusive, so that they are overlapping and intersecting ones; this is a point to which we revert later. I have enclosed terminologies in quotation marks where I believe that they emerge from, or at least are identifiable within, a reasonably pan-European discourse of practical or empirical personal work relations which is authentically distinguishable from the legal analysis of those personal work relations, though necessarily inter-connected with that legal analysis for the reasons which I have previously given. I think this is true even of the "standard employee" type, though I acknowledge that this category is the one which is most open to the suspicion of being simply a back-formation or reflection of a legal typology.

Rather differently, the notion of "individual entrepreneurial workers" which I have invoked as category (4) is one which I have invented in order to group together a number of existing practical or empirical types such as "freelancers" and "consultants". This represents a deliberate resisting of the temptation to use the terminologies of "the self-employed" or "independent con-
tractors” to identify this category, because they are so obviously reflections of legal categories; but I am conscious that my argument becomes difficult here. Equally open to debate is my invoking of the notion of “marginal personal work relations” in order to assemble, in category (5), a number of practical typologies; here the difficulty is not so much that it steers either towards or away from a legal category, as that it alludes to a very imprecise socio-economic characterization.

There are, on the other hand, other genuinely practical or empirical typologies which could be invoked, but which I believe to be cross-cutting ones rather than additional ones; the most important of those are “agency workers” (meaning workers employed through employment agencies) and “contract workers” (meaning workers employed on a “contracted-out” basis through sub-contractors); personal work relations of these kinds are to be found to a greater or lesser extent within categories (3) to (6) of the system outlined above; we revert to this issue later in this article. It is hoped by means of these various caveats and explanations to have established a sufficiently robust typology of personal work relations to act as the foundation of the legal superstructure of “personal work nexuses” which the succeeding sections of this article seek to build up.

Personal work nexuses in the different practical types of work relations

In this stage of my argument, I consider the legal nature of personal work relations in each of the practical or empirical categories which were identified in the previous section. Since one of the starting points for the whole of my argument in this article is that the legal construction of personal work relations can usefully be envisaged as a set or a variety of different kinds of personal work nexus, this stage of the argument therefore involves considering what kinds of personal work nexus are associated with each of our practical or empirical categories when those categories are passed through the filter of legal construction. By way of reminder, I point out that this analysis is posed against a generally accepted legal construction of the world of personal work relations which imposes on it a binary division into the two contrasting types of “employees” and “independent contractors”, or, more specifically, into the two contractual categories of “contracts of employment (or of service)” and “contracts for services”.

In order to apply my personal work nexus analysis to my six practical or empirical types of personal work relations, one or two further definitions or refinements are needed. Firstly, we should, as a matter of legal analysis, draw certain distinctions between different types of personal work nexus. Personal work nexuses may differ from each other in more than one dimension. They may differ in the extent to which they are contractual in character; they may be wholly contractual (PWN/C), wholly non-contractual (PWN/NC), or partly contractual and partly non-contractual (PWN/PC). They may also differ as to how many sides or links they have; they may be bilateral (PWN/B), or multilateral
(PWN/M). Again, this analysis is posed as a challenge to a generally accepted much simpler paradigm for the legal construction of personal work relations in which those relations are viewed as universally or nearly universally having the legal character of bilateral contracts (i.e. being PWN/C/Bs).

One further element of definition is then needed in order to explain the relationship between that simpler accepted paradigm (in which personal work relations are almost systemically reduced to PWN/C/Bs) and the more complex or multifarious analysis which I am proposing. As I have indicated, in the simpler more generally accepted analysis, the bilateral contracts, in terms of which personal work relations are legally construed, are subjected to a binary division into contracts of employment with employees and contracts for services with independent contractors. In that system of construction, enormous analytical effort is concentrated on drawing a bright line between those two types (an illusory quest in my view); but the outer perimeters of the whole double category of contracts are left relatively undefined. In particular, little care or energy is devoted to distinguishing between those contracts for services which fall within the domain of personal work relations, and those which are outside that domain but are within the whole large domain of services contracts in general.

That turns out to be a serious issue when, as happens more and more frequently in current European practice, the scope of employment legislation is extended beyond that of employees with contracts of employment to include other workers, who therefore, according to this binary system, are normally regarded as working under contracts for services – criteria are needed to delimit this expanded sphere of employment law from that of commercial contract law in general, but those criteria tend to be lacking. In the system of analysis which I am trying to construct, much importance is attached to the articulation of those criteria; they are crucially needed to define the personal character of the personal work contract and, for that matter, the personal work nexus, the latter being a more expansive concept, but one which is nevertheless limited to work relations which are focused upon the doing of work or provision of services primarily by an individual operating as such rather than by a multi-personal organization. In short, the system of analysis based on the concepts of the personal work nexus and the personal work contract requires a distinction between the personal contract for services (in the above sense) (PCfS) and the contrasting non-personal contract for services (NPCfS).

Armed with these distinctions, we can usefully analyse the legal construction of personal work relations within the practical or empirical categories identified above. We will attempt to do this both statically and dynamically; that is to say, we will consider both the predominant current analysis of personal work nexuses within each of our six categories, and also the dynamics whereby personal work nexuses tend to transmute within and between our six categories. At this point, however, it needs to be borne in mind that the practical or empirical categories and the legal categories do not evolve totally independently of each other – changes in the legal character or construction of personal work nexuses are generally linked to changes in the character and
functioning of the practical or empirical categories of personal work relations, though there are significant phenomena of mis-matching between practical work relations and their legal construction. So the dynamics which we shall seek to identify, although primarily describing legal evolutions, secondarily refer also to associated socio-economic or empirical ones.

“Standard employee” work relations

Thus we begin with category (1), i.e. “standard employee” personal work relations. The legal construction of these work relations is, of course, overwhelmingly strongly oriented towards the contract of employment – though I argued in my 2006 article that this bilateral contractual construction of “standard employee” relations often belies a more complex reality which ought to be reflected in the recognition of an only partly contractual personal work nexus in which the worker is accepted as having legally significant though non-contractual vertical, horizontal or diagonal links with other workers and managers within or connected to the employing enterprise. For example, the employing enterprise and other workers or managers might be delictually liable for harassment of the worker in question, or for a prohibited form of discrimination against that worker. But that is a prescriptive or normative argument on my part; the reality of legal construction of “standard employee” personal work relations is one of imperviousness against such elaborations, I believe, in most if not all European employment law systems.

There is at the same time a practical dynamic according to which some “standard employee” personal work relations evolve either towards individual entrepreneurial work relations, or towards casual temporary and part-time work relations. For example, this can happen where the remuneration of the worker is more strongly related to performance or output than it previously was, or in that the employment security of the worker is reduced, thus transferring more risk of downturn in demand to the worker than was previously placed upon him or her. However, it should be noted that such changes, fundamental though they may be from a socio-economic perspective, often do not displace or even disturb the legal construction of the personal work relations in question; much of that dynamic of entrepreneurialization or “precarization” of “standard employee” personal work relations can be absorbed within the “soft texture” of the contract of employment. However, the parties to “standard employee” personal work relations may be under strong incentives created by fiscal and regulatory regimes – to reconstitute those relations in the practical form of individual entrepreneurial work relations or casual work relations, and more particularly in the legal form of the personal contract for services.

The personal work relations of public officials

The inclusion of this type of personal work relations in our system of categories dramatically illustrates the diversity of legal constructions of personal work
relations in general, and the unsatisfactoriness of envisaging those relations as falling into a simple binary division between contracts of employment and personal contracts for services. Although the particular personal work relations of public officials or functionaries in substance usually resemble versions of “standard employee” work relations in which the worker benefits from strong protection of security of employment and income, the legal construction of those relations is usually radically different from that of standard employee relations, being in terms of a public law status which would in many systems not be regarded as a contractual one, because the view is taken that the public official should be “above the fray” of contractual work relations.

European legal and administrative systems diverge considerably as to how widely they accord the status of public official or public functionary. There is quite a widespread practical dynamic towards the approximation of these work relations to those of standard employee relations, indeed towards versions of standard employee relations which transfer some degree of economic risks to the worker; but European state legal systems diverge considerably in the extent to which they have inbuilt resistances to those changes. The employment law system of the United Kingdom has been very open to this kind of adaptation, while many other European systems erect much higher barriers around the separate public-law status of public officials.

Personal work relations in liberal professions

The logic of the binary legal conception of personal work relations would suggest that these particular work relations would fall squarely within the category of personal contracts for services – indeed, that they would represent the very archetype of this legal category, since professions have historically been described as “liberal” precisely because those engaged in them are seen as operating on an autonomous basis rather than as subordinate “servants”. However, the legal construction of these personal work relations is in reality much less straightforward. There is considerable divergence between European systems as to the regulatory regimes which have been devised for the practice of various different liberal professions – law, medicine, architecture and accountancy for example – but one can generalize by saying that those practicing these professions often do so within highly complex personal work nexuses involving, as legal actors in various ways, public authorities or publicly accountable professional bodies, and, in another sense, professional colleagues who work together in various forms of partnership or collegiality.

The dynamics of movement from those kinds of personal work nexuses are also very complex and interesting. Historically, those dynamics have often tended to be towards a greater involvement of the State – especially in the work of lawyers and doctors – so that those engaged in these professions came more to resemble public officials or functionaries. However, a more recent and quite pervasive dynamic has seemed to be towards a further “liberalization” or even “privatization” of these professional roles, identifying these work rela-
tions as being more squarely within the domain of private law. One might expect that this would involve a clearer characterization of these work relations as those of personal contracts for services. The reality is a more complex one, in which the relations of professional partnership or collegiality of individual practitioners tend to be transformed into professional enterprises often resembling commercial enterprises. This is comparable with a dynamic situation which exists within the sphere of individual entrepreneurial work relations, to which we now turn our attention.

**Individual entrepreneurial work relations**

A picture is emerging in which none of the types of personal work relations which we have identified is as simple or as stable, either in its practical existence or in its legal construction, as one might have imagined. This fourth typological category, that of individual entrepreneurial work relations, is no less deceptive in that sense. Although the terminology is admittedly one which I have coined, it seems to identify a well-established form of personal work relations – those of the autonomous individual or personal provider of services – with a clearly corresponding legal construction – that of the personal contract for services. These personal work relations, those of the self-employed or independent contractor, seem to occupy a well-defined space in the labour market, historically reserved for the commercial and artisanal counterparts of the liberal professional.

That is a deceptive simplicity, because contemporary European labour markets and the regulatory regimes in which they operate, although they seem on the face of it to encourage and favour this type of personal work relations, also impose powerful dynamics of movement away from these relations and transform their practical mechanics and legal construction. There are in a sense pressures in several directions away from this type of personal work relations and away from their stereotypical legal form of the personal contract for services. In labour markets and regulatory regimes which exact organizational competence and competitiveness, it is hard for an individual to sustain an entrepreneurial role as a sole operator. He or she may be impelled by those forces towards the greater security of "standard employee" work relations, or forced to settle for casual or temporary work relations. At the level of legal construction, the worker may be under pressure to move from work relations characterized by personal contracts for services to those represented by the contract of employment.

There is also another dynamic in a very different direction, indeed an almost diametrically opposed one. If the less successful individual entrepreneurial worker is driven by the adversities of sole operation towards fully dependent or semi-dependent employment relations, the more successful one seems to come under an equally strong set of pressures to extend and elaborate the organizational structure of his or her personal work relations. A number of observers have usefully identified this phenomenon in terms of the evolution of "networked" employment arrangements involving "networks" or teams of workers,
and in my 2006 article, I remarked upon this as providing a good example of the evolution of complex personal work nexuses. However, I am now of the view that very often, the evolution of individual entrepreneurial work relations is not so much towards the elaboration of networks of workers but rather towards the transformation of the sole operator into a multi-personal small-scale enterprise.

This might occur, for example, where an individual entrepreneurial worker in, let us say, the plumbing trade (whether or not Polish!), takes on assistants and begins to function as a very small-scale employer. The institutional forms for this kind of functioning as a very small enterprise vary considerably between European countries; but I think they would have this in common, that the work relations of the individual entrepreneur with the purchasers or users of his or her services cease to be personal work relations. In legal terms, such relations move from the primary form of personal contracts for services to the primary form of non-personal contracts for services, i.e. ordinary commercial or business contracts; and the work relations therefore fall outside even the enlarged domain of employment law which I have identified for the purposes of my arguments in this article and the earlier article upon which it builds.

The personal work relations of marginal workers

This discussion has to begin with a reiteration of the rather impressionistic character of this typological category, and in particular of its overlap with, and indeed its lack of precision in relation to, the categories of “standard employee” work relations and individual entrepreneurial work relations. This category consists in effect of personal work relations which are marginal to “standard employee” work relations, not so much because of any preference on the part of the workers in question for autonomous and entrepreneurial forms of working, but rather because those workers do not have favourable access to the “standard employee” sector of the labour market. The dynamics of the evolution of these work relations and of their legal forms are therefore in fact rather different from those which were identified for “standard employee” work relations or for individual entrepreneurial work relations; but, as in the latter case, these dynamics tend in two very different or opposing directions.

One such dynamic is towards the classification and treatment of marginal work relations more and more like “standard employee” work relations. The legal systems of different European countries vary as to their adaptability in this respect; some are more disposed than others to treat marginal work relations as falling within the legal category which they apply to “standard employee” work relations – typically that of the contract of employment; but there seems to be a common trend among those systems either to construct marginal work relations in that way or to devise legal conceptions of similarity with “standard employee” work relations, which can be deployed in order to impose regimes similar to those applicable to “standard employee” work rela-
tions, whether in terms of employment law or in terms of taxation and social security provision.

There is, however, a contrary dynamic, which has perhaps not been identified as clearly as it deserves to be in view of its very real practical and legal significance. This is a dynamic whereby the various practical and legal actors involved in the conduct or regulation of marginal personal work relations contrive to deepen the separation between marginal work relations and "standard employee" work relations, in other words increasing the social, economic and/or legal marginalization of those in this sector of the labour market. One significant manifestation of this marginalization may consist in increasingly structuring such work relations in the form of temporary agency employment or labour subcontracting, especially if the protective apparatus of employment law and social security is weakened by the interposition of employment agencies or labour subcontractors.

There is a further very important point about the way in which this dynamic away from "standard employee" work relations may operate; it is one which has major implications for the legal construction of the personal work nexus in marginal work relations. As I have previously implied, the further marginalization of such work relations away from "standard employee" work relations does not typically project them towards individual entrepreneurial work relations. Instead, it projects them towards the "informal" or "grey" sectors of the labour economy in which work relations are characterized not by the positive autonomy of the workers but rather by the absence of legal regulation and protection. In terms of the legal construction of those work relations, this may amount to a tendency away from contracts of employment, but not towards personal contracts for services in the way that the binary legal conception of personal work relations might suggest. Instead, the tendency is towards legally indeterminate or legally defective kinds of personal work nexus which fall below the horizons of contractually-based employment law systems.

The personal work relations of labour market entrants

The personal work relations of labour market entrants, such as trainees or apprentices, are especially interesting for the purpose of this analysis because of the intervention into them of the active labour market policies and public employment services of various European states. In practical terms they display some of the characteristics of "standard employee" work relations – representing forms of those relations in which these workers are both strongly integrated into the employing enterprise and subordinated to it – but they also present some of the aspects of marginal work relations, especially as expectations of subsequent employment security following successful completion of training or apprenticeship are reduced by post-Fordist patterns of work organization. State intervention tends to consist in supporting and facilitating the creation and maintenance of these types of work relations as a way of combating unemployment, especially
among young entrants to the labour market. In practice, such interventions often result in the formation of multilateral personal work relations in which the State is an active participant via public employment services.

The legal construction of these personal work relations has generally taken the form of special variants upon the contract of employment; in some employment law systems – for example, the French one – there is a tendency to identify these as new contractual forms such as the contrat d’insertion or the contrat de professionnalisation. These represent complex forms of personal work nexus in which public authorities may be formally recognized as legal actors. The dynamics of these personal work relations are also especially interesting; there is a tendency for them to undergo a degradation, from “standard employee” work relations enhanced by elements of vocational training, into marginal or casual work relations. Such transitions are sometimes acutely controversial, because of suspicions that governments may be introducing them in order to effect a more generalized downgrading of “standard employee” work relations to marginal or casual work relations. That was the essential explanation for the recent controversy in France about the proposed introduction of the contrat première embauche – here, the debate about a particular species of personal work contract or nexus reached the level of a national political crisis.

Re-mapping personal work relations and the personal work nexus

The foregoing analysis is perhaps best understood as a map of the domain of personal work relations and of the different kinds of personal work nexus which may exist within that domain. An attempt at drawing that map is made in figure 1. It depicts the different types of personal work relations identified and discussed above. It also seeks to show the dynamics of movement between and from those different types of work relations as described in the previous section. Finally, it illustrates the zones of application of the classical types of personal work nexus which are constructed by employment law systems as the legal expression of those relations, namely those of the contract of employment and the (personal) contract for services.

While helping to give a graphic reality to the domain of personal work relations which I have sought to identify, the diagram also conveys the sense of the variety of types of personal work nexus which may arise within that domain and it shows how the different types overlap and connect with each other. Although the map shows how all the other types of personal work relation and of personal work nexus interconnect with “standard employee” work relations and with the contract of employment, it also seeks to demonstrate that those other types should not be regarded as a mere periphery to that particular work relation and work nexus, still less a uniform periphery entirely occupied by individual entrepreneurial work relations and the personal contract for services. In order to heighten the emphasis upon this crucial point, the diagram depicts the respective spheres of the contract of employment and of the per-
sonal contract for services, showing that they do not between them occupy the whole domain of personal work relations, and that the interface between them is a complex but limited one.

The diagram is also intended to give further illustration and support to the arguments which I have presented by showing the dynamics of movement between the different types of work relation and work nexus. This depiction challenges an accepted or traditional conception by showing how the dynamics of movement do not consist simply of centrifugal movements away from – or centri-petal movements towards – “standard employee” work relations, nor for that matter simply of two-way movement between the legal forms of the contract of employment and the personal contract for services. The movements are shown instead to be complex inter-sectoral ones, sometimes indeed extending beyond the domain of personal work relations into the sphere of commercial or non-personal business relations in which the prevalent legal form is the non-personal services contract, or moving out to the zone where marginal work relations shade off into the relations of the informal economy.
Conclusion – A contribution to several discussions?

I conclude by noting briefly the several discussions to which I believe or hope that the arguments in this article might contribute. First, there is of course the discussion about the personal scope of labour law and of particular items or aspects of employment legislation. The starting point of this article was indeed to seek to elaborate on that discussion, enriching it rather than obfuscating it, I hope. But before concluding with and on that topic, I point to towards two rather different evolving discussions in which I think these arguments might possibly figure, one of them within the wider province of employment law, the other outside it.

The discussion which lies within the wider province of employment law, or perhaps one should say within the realm of social law, is one which seeks to look at labour or employment law very broadly in terms of labour market regulation, that is to say at the functioning of labour or employment law as one of the means by which states or legal systems can shape and direct the ways in which their labour markets operate. One very important aspect of that discussion consists in bringing labour law into a discourse in which it is connected up with social security law, with human rights law, and also with the law and practice of employment policy, that is to say normative activity designed to maximize levels of employment, and the “employability” of actual and potential members of the workforce. In one of its most ambitious or provocative forms, as famously developed in the so-called “Supiot Report”\(^2\) this discussion is deliberately and consciously extended beyond the traditional sphere of labour or employment law, even beyond the wider domain of personal work relations which I have envisaged in this article, to embrace a consideration of the rights and expectations of those engaged in any aspect of work in society, including for instance domestic work in one’s own household. That particular line of discussion, for all its undoubted importance, is apt to seem a rather abstract and speculative one. I hope that further analysis of personal work relations and the personal work nexus of the kind in which I have engaged in this article might in some way help to connect that discussion more fully with the practicalities of personal work relations and their legal regulation.

Next, I venture a word about a very different kind of discussion which, so far from ambitiously expanding the frontiers of labour or employment law, offers to curtail them. This is the current discussion directed towards the formulation or advancement of European Contract Law, that is to say the articulation of general principles of contract law on the European plane or on a Europe-wide basis. That is therefore or in fact a discussion about the general-

ization across Europe of some of the major aspects of private and commercial law. An important part of this discussion concerns a large sub-set of contracts which are gathered together under the heading of "services contracts" – this refers essentially to contracts which are concerned with the provision of services, primarily on a commercial basis. Yet, it seems to me that such discussions might, almost unintentionally, extend from their primary territory – that which has figured in this article as the zone of "non-personal contracts for services" – into the sphere of "personal contracts for services". While not in any way wishing to present any recalcitrant obstruction to that extension of the discussion of European contract law, I should like to draw attention to the risk that independent entrepreneurial work relations might thus be drawn away from the sphere of employment law. I hope that this article may have provided a slight counter-check to that particular evolution.

However, as indicated earlier, I propose finally to conclude this article by reverting to what I see as the mainstream of the current discussion of the personal scope of labour or employment law, and by suggesting the ways in which the arguments developed above might contribute to that discussion. I seek to do that by commenting briefly on two major recent developments which, in their rather different ways, indicate the most highly trodden paths of evolution of the personal scope discussion, namely, the ILO's Employment Relationship Recommendation, 2006 (No. 198) and the European Commission's Green Paper on Modernising labour law to meet the challenges of the 21st century, also of 2006. My suggestion is that both of the policy instruments tend towards the creation of rather complex and experimental regulatory frameworks for the determination of the personal scope of employment laws, and that the analysis of the family of personal work contracts and nexuses which has been attempted in this article may assist in the further articulation and in the operation of those regulatory frameworks.

At the beginning of this article, I disclaimed any intention to present a particular set of prescriptive solutions to the set of problems which are widely perceived to beset the topic of the personal scope of employment laws. The framers both of ILO Recommendation No. 198 and of the Green Paper seem for their own reasons to have been equally keen to avoid any simple set of blunt prescriptions. Of course, these two policy instruments cannot be compared and contrasted on completely equal terms, because while the former is an enactment, albeit a recommendatory rather than a mandatory one, the latter represents no more than a set of tentative policy proposals or policy questions. Moreover, these two policy instruments were framed from the perspectives of two policy agendas which are not identical. Nevertheless, they have it common that, for their respective reasons, they both institute a process of articulation of solutions

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3 COM (2006) 708 final, Brussels, 22 November 2006. [Editor's note: A separate analytical review of the contents of this Green Paper is provided in the "Notes, documents and communications" section of this issue of the International Labour Review.]
to problems about the personal scope of employment laws, rather than themselves carrying out that articulation. I now proceed to consider slightly more fully the reasons for which and the ways in which they do this.

Recommendation No. 198 was the product of a quite long-standing concern on the part of those in the Labour Standards Department of the ILO that the maintenance of legislative labour standards at national level was often subject to erosion by the development or increased deployment of personal work arrangements or relationships accepted as falling outside the concepts and definitions of the personal scope of worker-protective employment laws. Over a number of years, it proved difficult to formulate a normative basis upon which to address this concern, but it was eventually agreed to do so particularly by reference to the notions of "disguised" and "ambiguous" employment relationships, i.e. employment relationships which were treated as falling outside the scope of employment laws either because they were successfully disguised as relations other than those of employment, or because they were ambiguous as to whether they were employment relations or not, and were given the benefit of that doubt by being treated as not being employment relations. The normative task of correcting these distortions or failures in the application of worker-protective employment legislation could, in this formulation, be regarded as a kind of quest for a particular species of legal certainty with regard to the personal scope of employment laws.

It might be imagined that such a quest for legal certainty would be pursued by the laying down of clear definitional and mandatory norms concerning the personal scope of employment law. Instead, however, Recommendation No. 198 takes a gentler processual approach; it begins by exhorting member States, in its paragraph 1, to "formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship". The remainder of the Recommendation is essentially devoted to suggesting what that review process should consist of and include, and how the existence of an employment relationship should be determined within each member State. Paragraph 11(b), for example, recommends that member States should "consider the possibility of … providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present".

All that said, it should not be thought that the processual and "soft law" character of this measure bespeaks a weakness of motivation on the part of the ILO. Instead, I suggest that the proponents of this measure took the view that this was the furthest point to which they could hope to advance in the face of no small degree of policy disagreement at supra-national level and considerable conceptual diversity or at least lack of conceptual reconciliation as between member States in the ways that they approach the formulation of the personal scope of employment laws. Given the constraints imposed by that conceptual and practical context, Recommendation No. 198 represented a significant normative achievement.
Although one might venture the opinion that the aspirations of the proponents of the European Commission's Green Paper are somewhat similar to those which underlie Recommendation No. 198, the policy orientation of that consultative document is subtly different. If the framers of the ILO Recommendation had a vision of modernizing labour law by reinforcing it, those who devised the Green Paper, being openly in the business of "modernising labour law", saw themselves as doing so by realigning it. This realignment is constructed around the notion of "flexicurity", which represents the aim of reconciling the traditional worker-protective elements of labour law - comprehended with the idea of "security" - with another set of objectives - gathered under the banner of "flexibility" - which have to do with maximizing the efficiency and job-creating capacity of the labour market by enhancing the adaptability and hence the employability of the actual and potential members of the labour force.

The Green Paper thus comes from a policy agenda which is somewhat different from that underlying Recommendation No. 198. However, from those somewhat different starting points the two policy instruments converge in at least two significant respects. Firstly, the Green Paper is no less preoccupied than the ILO Recommendation with re-consideration of the personal scope of employment laws, albeit for a rather different purpose. In the case of the Green Paper, the re-drawing of the lines of application of employment laws to existing and novel forms of employment relationships and contracts is seen as a key method for overcoming inefficient labour market segmentation and "enabling 'insiders' as well as 'outsiders' to make successful transitions between different employment situations while also assisting businesses to respond more flexibly to the demands of an innovation-driven economy and to changes in the competitive landscape brought about by restructuring" (pp. 3-4). Secondly, in much the same way as in the case of Recommendation No. 198, the execution of this design is envisaged as an ongoing process of regulatory evolution, rather than as culminating in a one-off legislative enactment.

It is upon this note that I return to the subject-matter of the previous sections of this article, and suggest that it might be relevant to the ongoing normative processes or discussions which have thus been opened up by ILO Recommendation No. 198 and the European Commission's Green Paper. It seems to me that both of the processes of normative development, which are in different senses initiated by each of these two policy instruments, require searching analysis of the practical and legal forms of personal work arrangement which are currently evolving outside the once "standard" employment relationship and beyond the contract of employment. Such analysis appears to be fully necessary to the "modernization" of labour law, whether such modernization is conceived of as maintaining the legislative protection of workers in a changing practical and legal environment, or regarded as the realignment of labour law towards an equilibrium of "flexicurity".

The purpose of this article has been to suggest one path which that process of analysis might follow. When I advance that suggestion, and lay claim to its possible utility, in the pages of the International Labour Review, it is important
to acknowledge the limitations of the Eurocentric study from which it is derived. However, one might hope that, even within a set of models of practical and legal construction of personal work contracts and nexuses which is confined to Europe, there is sufficient factual and conceptual diversity to provide starting points for a more generally and genuinely international debate on this pivotal and topical set of issues for current labour law.