

**Hard Law/ Soft Law Hybrids as a Conceptual and
Policy Framework:
A look at the regulation of temp agency work in highly
regulated countries**

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1. INTRODUCTION

In recent years there has been growing interest among labour and social law scholars regarding the development of soft-law alternatives to traditional modes of regulation. The soft law concept intertwines with the discourse of 'governance' that seeks to expand the notion of regulation beyond the traditional 'command and control' regulation by the state. Increasing reference to soft law carries with it a price of indistinctness, as soft law seems to have become hard law's Other. That is— 'soft law' encapsulates everything that deviates from the traditional method of regulation. Moreover, the emphasis on soft law as a new solution to the current challenges to the regulatory state conceals the fact that soft-law measures have been used in the past as well, particularly in the sphere of labour regulation.

The purpose of this paper is therefore twofold. First, we would like to present a conceptual distinction between some of the many meanings of soft law and its different objectives, as well as the growingly familiar recognition that between soft law and hard law there is a vector of continuums on which many hybrids are located. New governance often draws on an integration of soft- and hard-law measures. Second, we would like to observe in greater detail an example of a hybrid governance method. To that end, we seek to compare two hybrid systems that were developed in the Netherlands and Israel with regard to the regulation of temporary work agencies (hereon: TWAs).

We claim that it is particularly difficult to regulate TWAs, as an example of an institution that promotes numerical flexibility, using the traditional hard-law method. Therefore, the integration of soft-law measures can aid in the governance of the temp work sector. Yet, this is where the manifold objectives of soft law, as well as its institutional forms, explain why the integration of soft-law measures is a controversial process: it seeks to reconcile the diverse, sometimes conflicting, objectives of the parties involved. Some suggest that such unification of objectives is indicative of soft law's institutional success in forging a win-win situation where political positions and economic interests are polarized. Others would claim that the hybrid form of governance preserves the conflicting interests and usually functions as a method of

denying labour's rights. Possibly both views have merit, and the introduction of soft-law measures – as such – is neither a vice nor a virtue, but an expansion of the institutional repertoire that provides a new strategic sphere. That is, a sphere of interaction among the participating agents, in which they strategically seek to advance their interests. The importance of the hybrid form lies in its ability to increase the number of participants in regulation, and in allowing deliberative methods that are not based solely on lobbying of the legislature and litigation in courts. However, these are process-based changes that do not guarantee a more just solution, but neither do they necessarily lead to the derogation of rights and responsibilities.

The remainder of this paper is structured as follows: Part I presents the problem of regulating (or governing) the temp work sector. In Part II we identify the multiple meanings and objectives of soft law, and point at the development of hybrid forms that draw on traditional hard law and the various alternatives clustered under soft law. This survey frames the description of the two regulatory governance systems that were developed in the Netherlands and in Israel, which will be presented in Chapter 4. In Chapter 5, which concludes, we offer a comparison of the two regulatory schemes, and draw on the comparison to illustrate the strategic field that has been developed in both countries in the move to the new governance systems.

2. THE PROBLEMATICS OF THE TEMP WORK SECTOR

The current orthodoxy of management is the need for flexibility.¹ This, however, is a rather broad claim, as few would argue that rigidity is a virtue. The need for flexibility in organizations is obvious, but flexibility can be achieved by different means: wage flexibility, functional flexibility, time flexibility (all three making it easy to change the terms of employment for the existing workforce), and numerical flexibility

¹ Guy Standing (1999), *GLOBAL LABOUR FLEXIBILITY: SEEKING DISTRIBUTIVE JUSTICE*. New York: St. Martin's Press; Ton Wilthagen, Frank H. Tros and Harm Van Lieshout (2003), *Towards 'Flexicurity'? Balancing Flexibility and Security in EU Member States*; European Expert Group on Flexicurity (2007), *FLEXICURITY PATHWAYS TURNING HURDLES INTO STEPPING STONES*.
(file:///private/tmp/1357/C/Users/admin/AppData/Local/Microsoft/Windows/Temporary%20Internet%20Files/Low/Content.IE5/FLB5ICTI/flexi_pathways_en%5B1%5D.pdf)

(which makes it easy to change the size of the workforce itself). There is a trade-off among the various types of flexibility.² The less numerical flexibility there is, the more an employer must develop one or more of the alternative types of flexibility. It may require, for example, a high level of functional flexibility, and therefore a high level of on-the-job training, which may in turn require raising the wages in exchange for the workers' investment in developing firm-specific human capital. By contrast, a high level of numerical flexibility may require maintaining a small 'core' workforce, and employing the rest of the workers on a temporary and per-project basis.

Employing workers through temp work agencies is one method of introducing numerical flexibility.³ It is therefore functionally equivalent, at least in part, to other methods of achieving numerical flexibility – such as designating workers as individual contractors, hiring temporary workers 'directly', using subcontractors, outsourcings, seasonal work, training contracts, and the like. What distinguishes hiring through temp agencies from other methods is that this system creates a triangular employment relationship (unlike the hiring of independent contractors), in which the temp agency provides nothing but labour power (unlike subcontracting) and remains constantly involved (unlike employment mediators). In temporary agency work the temp worker is employed by the temporary work agency and, by means of a commercial contract, is hired out to perform work assignments at user-firms; hence temp work is governed by both labour and commercial law.

The question of regulating temp work agencies is prevalent throughout the developed economies. It is an industry with a socially sensitive "product", which has developed in an often attentive and salient institutional environment.⁴

² Irini Voudiris (2007), *The Co-Evolution of Functional and Numerical Flexibility: Do Technology and Networking Matter?* NEW TECHNOLOGY, WORK AND EMPLOYMENT, 22, 3, 224-245.

³ Ton Wilthagen, Mijke H. Houwerzijl, Hester Houwing, and Martijn van Velzen (2006), *Flexicurity in the Dutch Temporary Work Sector: A Positive Sum Game?* in WINNERS AND LOSERS OF FLEXICURITY, Brussels: ETUI.

⁴ Bas A. S. Koene (2006), *Situated Human Agency: Institutional Entrepreneurship and Institutional Change*. JOURNAL OF ORGANISATIONAL CHANGE MANAGEMENT, 19, 3, 365-382.

Moreover, TWAs form a relatively new 'industry', which is continuously developing in a highly institutionalized labour market context. The possibilities for commercial labour market mediation developed in a context where the open-ended employment relationship was considered normal and desirable, whereupon both employment standards and social security were organized on the assumption of permanent employment relationships. Consequently it is not surprising that the debate on regulating TWAs was, and sometimes remains, rather passionate. The regulation of TWAs, more than any other form of numerical flexibility, has attracted considerable political attention. For example, in the Netherlands for a long time the temp sector was considered a threat to the traditional form of employment relationship. The process of according legitimacy and acceptance to the industry has taken over four decades. In other countries, Israel included, the controversy over TWAs has persisted for the most part since the early 1990s, with the growing reliance on numerical flexibility.

Crudely described, one side of the political debate holds that TWAs are like any other employer, and there is therefore no need for *particular* forms of regulation. This argument is most commonly made by the TWAs themselves, but also from time to time by the end-users (public and private alike), their associations, and also by the state (particularly by neoliberal and rightwing parties). These claims appear at the state level, but also in supranational forums, such as the ILO and the EU.⁵

When the argumentation that underlines these claims is looked at, there seem to be three major justifications involved. The familiar efficiency claim holds that markets work best when they are not regulated, that is – when they are left alone. TWAs in particular are a form of market response to overcome labour market rigidities, and therefore should not be regulated. Moreover, increased pressure caused by globalization and the need to accommodate a more diverse workforce make regulation intrinsically inefficient. The complementary argument in favour of deregulation is based on the moral claim that freedom of contract, recognition of employers' property rights and the freedom of occupation should exempt TWAs

⁵ Green paper on labour law 'Modernising labour law to meet the challenges of the 21st century, 2006; European Expert Group on Flexicurity, 2007; European Foundation' Varieties of flexicurity: reflections on key elements of flexibility and security' (2007). Dublin: European Foundation for the Improvement of Living and Working Conditions.

from regulation, in particular from *sui generis* rules that distinguish TWAs from other employers. Furthermore, regulating TWAs may undermine the right of access to employment of underprivileged groups in the workforce. Together, the moral and efficiency claims constitute the traditional neoliberal argument against regulation. These two claims are of a first order. Yet even if some believe that efficiency and human rights do not provide the necessary justification for non-intervention, there is also a second-order claim. This is the regulatory claim, which asserts that regulation, even if justified, simply doesn't work. It is costly to monitor and enforce. Moreover, it creates perverse incentives and encourages the development of strategies that demonstrate technical compliance ('shadow administration', manipulative accounting techniques and the like): Consequently, the costs of enforcement are prohibitive, and outweigh its benefits.

On the other hand, there are several counterarguments that favour unique forms of regulation, although they do not all necessarily lead to the same regulatory prescription.⁶ First, there is a general argument against neoliberal orthodoxy, according to which the new global order, the rise of new technology and demographic changes (growing entry into the labour market, migration) have admittedly destabilized the traditional form of labour market regulation. At the same time, however, these processes do not imply that there is no need for regulation. Rather, the need is for re-regulation.⁷

⁶ Roger Blanpain – Bulletin of Comp. Labour Law ;Brian Langille & Guy Davidov (eds) (2006), THE BOUNDARIES AND FRONTIERS OF LABOUR LAW. Oxford: Hart publisher; Kathy Stone (2004), FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE. New York: Cambridge University Press; Leah Vosko (2000), TEMPORARY WORK: THE GENDERED RISE OF A PRECARIOUS EMPLOYMENT RELATIONSHIP. Toronto: University of Toronto Press.

⁷ Guenther Schmid a.o. (2004) *Jobs, Jobs, Jobs. Creating More Employment in Europe*, REPORT OF THE EMPLOYMENT TASK FORCE, chaired by W. Kok, Luxembourg: Office for Official Publications of the European Communities; Kathy Stone (2004), FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE. New York: Cambridge University Press; Alain Supiot (2002) *Vers un Ordre Social International? Observations Liminaires sur les "Nouvelles Régulations" du Travail, de l'Emploi et de la Protection Sociale* in P. Auer et C. Daniel (éd.) L'AVENIR DU TRAVAIL DE L'EMPLOI ET DE LA PROTECTION SOCIALE ORGANISATION. INTERNATIONALE DU TRAVAIL, 131-156; Mark Freedland, and Paul L. Davies (2007), TOWARDS A FLEXIBLE LABOUR MARKET – LABOUR LEGISLATION AND REGULATION SINCE THE 1990s. Oxford: University Press.

Beyond the general argument, there are arguments that also undermine the simple efficiency and moral claims, particularly when addressing the problems created by the thriving TWA industry. On the efficiency front, it has been highlighted that TWAs do not have any capital assets, and in fact profit from renting out human capital. In case of liquidation the workers have no security. There will always be a certain number of TWAs that make a profit from informal labour market activities and abuse the weak labour market position that temp workers are in, given their low socioeconomic status, lack of market opportunities, or status as migrants. On the moral front, it has long been, and for some still is, difficult to normatively accept agency work as a proper business product. Temp work is considered an opportunistic and essentially undesirable type of employment relationship.⁸ These companies make a profit solely from renting out other people's labour power, sometimes without adding any value. Admittedly, the practices of TWAs are not monolithic. An important distinction that has been made in both the Netherlands and Israel, as well as in other countries, points to the difference between 'authentic temping' – in which there are ongoing training and placement costs – and 'fictitious temping' in which the temp agency doesn't invest anything.⁹

The problem of slack enforcement is one that advocates of regulation are well aware of. However, the claim has been made that this does not imply the solution of deregulation, unless alternative paths for observing labour standards are suggested. The solution of deregulation is exceptionally fragile when multiple employers are involved, because the legal distribution of responsibility is often vague. Moreover, in many countries, Israel and the Netherlands included, a relatively high incidence of fraud and illegal activities has been tied to the sector.¹⁰

⁸ Bas A. S. Koene (2006), *Situated Human Agency: Institutional Entrepreneurship and Institutional Change*. JOURNAL OF ORGANISATIONAL CHANGE MANAGEMENT, 19, 3, 365-382.

⁹ In Israel see, for example Ruth Ben –Israel (2004), *Employment of Workers by Manpower Agencies: Protection of Worker Rights in Case of Insolvency of the Actual Employer*, HAPRAKLIT, 47, 9; Hugo de Bondt & Douwe Grijpstra (2008) NIEUWE GRENZEN, OUDE PRAKTIJKEN: ONDERZOEK NAAR MALAFIDE BEMIDDELAARS OP DE ARBEIDSMARKT. Leiden: Research voor Beleid.

¹⁰ In Israel see [XXGuy?](#); In the Netherlands see Hugo de Bondt & Douwe Grijpstra (2008) NIEUWE GRENZEN, OUDEPRAKTIJKEN: ONDERZOEK NAAR MALAFIDE BEMIDDELAARS OP DE ARBEIDSMARKT. Leiden: Research voor Beleid.

This may be explained by the relative ease with which TWAs can be established, and the temptation to use them as a means of sidestepping regulation (including tax and social security obligations). If TWAs remain outside the regulated domain, the disparity between the regulated and deregulated sectors creates an incentive for employers to use temp agencies, especially for all the wrong reasons (avoidance of regulation, rather than to meet the authentic needs for numerical flexibility).

For those who are persuaded by the arguments against regulation, it is rather easy to prescribe the deregulatory solution. Advocacy of deregulation has also been accompanied by attempts to mainstream the industry. For example, industry associations are working to establish legitimacy to counteract the bad moral image of TWAs and trying to assume a socially responsible position, professionalizing the relationship with the temp employees and establishing relationships with the public employment services.¹¹

However, for those who reject the moral and efficiency claims at the basis of the neoliberal suggestion to deregulate, the industry's attempts at putting a moral gloss on the practice of temping is not enough. Yet finding a regulatory alternative is a difficult problem. Generally speaking, deregulation is an easy and attractive approach – 'simple rules (of contract and property) for a complex world'.¹² That is – a wholesale process of deregulation is much easier to conceptualize than a process of re-regulation in which new configurations of labour market institutions must be devised.

There are several reasons for the difficulty associated with the regulation of TWAs. First and foremost, there are the problems pertaining to the value-laden assessment of the legitimate field of employment accorded to TWAs. Should temp

¹¹ James Arrowsmith (2006) *Temporary Agency Work in an Enlarged European Union*. Carried out for the European Foundation for the Improvement of Living and Working Conditions in Europe, along with European sectoral social dialogue partners: UNI-Europa and Eurociett. Dublin: European Foundation for the Improvement of Living and Working Conditions.

¹² Richard A. Epstein (1995), *SIMPLE RULES FOR A COMPLEX WORLD*. Harvard: Harvard University Press.

agencies be engaged only in providing temporary work, or can an employment relationship be maintained on an ongoing basis through an intermediary? If the employment contract were one and the same under both arrangements, then perhaps the question would be moot. Yet a second set of problems seems to emerge uniquely from the triangular nature of the relationship. The separation between the place of work and the contractual employer (the temp agency) makes it difficult to administer conventional forms of regulation in areas such as health and safety, dismissals, collective labour relations and employment reintegration.¹³ Attempts to sort out the responsibility of the employer-user and the temp agency usually lead to a complex body of law in which the division of responsibility is fragmented and contextual.¹⁴

A third, and strongly related, group of problems concerns enforcement. Workers employed through TWAs tend to belong predominantly to the weaker segments of the workforce.¹⁵ Not only does the enforcement of rights rest on a rather weak foundation, but the triangular relationship raises further hurdles that make litigation and public enforcement more difficult to advance.

To the extent that TWAs are relatively easy to identify, and registration requirements may solve some of the problems, *sui generis* arrangements that are limited to TWAs pose further difficulties. If one form of numerical flexibility is heavily regulated, employers-users and even the temp agencies can identify ways to sidestep the regulation. For example, in order to avoid stiff regulatory requirements workers can be removed from a temp agency to a service contractor.¹⁶ While the differences between the two forms are seemingly easy to define, they become vague when the service contractor provides a service that is based predominantly on hours of work (cleaning, security, and the like).¹⁷ Thus, for those in favour of some regulation,

¹³ James Arrowsmith (2006), *Temporary Agency Work in an Enlarged European Union*. Carried out for the European Foundation for the Improvement of Living and Working Conditions in Europe, along with European sectoral social dialogue partners : UNI-Europa and Eurociett. Dublin: European Foundation for the Improvement of Living and Working Conditions.

¹⁴ In Israel, see: XXGuy?

¹⁵ In Israel, see: Ruth Ben-Israel (2004) *Employment of Workers by Manpower Agencies: Protection of Worker Rights in Case of Insolvency of the Actual Employer*, HAPRAKLIT, 47, 9.

¹⁶ This was a dominant track that was taken by the Israeli public sector since 2000.

¹⁷ In Israel – see XXGuy?

TWAs have the advantage of being 'regulable' (that is – there is a technical way to regulate them), unlike other forms of numerical flexibility that are difficult to define and regulate in a similar fashion. This also ties in strongly with the first problem identified. There is a deeply grounded disagreement on what it is that we are trying to achieve by regulation. Is regulation intended to prohibit numerical flexibility, or the abuse of rights in a triangular relationship? Or is it meant to advance a general principle of 'equal pay for equal work'? What are the values that distinguish bona fide from mala fide temp agencies?

This is the fundamental regulatory dilemma. On the one hand there is the high-regulation track: the more accurate the regulation is in terms of trying to identify good and bad forms of temping, and the more forms it seeks to capture, the more complex the regulation is likely to become, and the more difficult to comply with it. Consequently, enforcement costs grow, workers are unable to understand their rights, and employers are likely to be quick in exploiting loopholes, alternatives and other forms of employment that sidestep the ever-growing, complex body of law. On the other hand there is the low-regulation alternative: simple regulation draws general (one size fits all) principles, which are easier to implement, comply with, and enforce, but may not be sufficiently accurate to deal with the complex reality (one size fits nobody). Either the deregulation track may be taken in which the law gives up on identifying good and bad forms of temping, leaving everything to market forces, or all forms of numerical flexibility may be assumed to be bad and hence sweepingly prohibited.

In striking a balance between the low-regulation (no regulation or strictly prohibitive regulation) and high-regulation alternatives, there are several noteworthy considerations. There are problems of variations across sectors and workplaces. Regulation must address many situations that arise because temp agencies are enmeshed within diverse industries and workplaces. Furthermore, it is difficult to achieve a political compromise, given the numerous agents and groups involved and the conflicting interests that each has with regard to temping. Given the heterogeneous nature of temp work agencies, the same institution is used and perceived differently by the different agents. The interests of the large temp agencies

may be geared towards raising standards, partially as a way to crowd out smaller competitors. On the labour side, there are different interests among the 'insiders' and 'outsiders' (insiders are afraid that raising the costs of temp workers may lead to growing pressure to reduce or freeze the insiders' rights).¹⁸ Consequently, on both the technical side of 'how to regulate' and the political side of 'how to advance regulatory solutions', it is easy to arrive at a regulatory impasse.

3. MAPPING THE TERRAINS – MOVING FROM THE HARD-LAW OPTION TO SOFT-LAW FORMS AND HYBRIDS

A regulatory impasse can take one of two forms. First, where TWAs have been strongly regulated in the past, an impasse preserves the regulatory status quo. This outcome has two potential drawbacks. First, it may lead to excessive limitation of flexible work measures. To some, no limitation can be excessive, and any such is a virtue. However, when over-regulation is preserved then employers tend to avoid it by bootstrapping alternative means of temping workers and promoting numerical flexibility, most of which are more difficult to regulate than TWAs. A strongly related problem is that excessive regulation may lead to under-enforcement. The second form of impasse occurs when there is no regulation to begin with, in which case employers and temp agencies maintain their unlimited prerogative to use temp workers 'at will'. A regulatory impasse therefore is usually not conducive to anyone who endorses some form of regulation, supervision, monitoring or setting of standards.

As long as the questions that remain on the traditional regulatory docket are “who is the employer?” or “how long can an employee be hired through a temp agency?” – there is only a limited set of responses, in which case a political impasse might easily materialize. However, as described in the previous Part, the problems posed

¹⁸ Guy Mundlak (2007). *The Right to Work - The Value of Work* in: Daphne Barak-Erez and Aeyal M. Gross (eds) *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE*. Oxford and Portland: Hart Publishing Ltd.

by the hiring of workers through TWAs require a much more complex regulatory regime than merely determining a time-based standard. This is where the emerging forms of soft law may be of help.

Soft law has become a term that designates many different phenomena and seeks to promote different objectives.¹⁹ For some, it describes the post-union alternative or even a method of avoiding unionization and labour standards. For others, it signifies the possibility of promoting employment standards where traditional forms of regulation are no longer effective. Some view it as a means of circumventing labour market regulation. Others consider it part of the new governance that seeks to redress the intrinsic limitations of traditional regulation. The many references to soft law seem to be emanating not only from competing ideological strands, but from very different types of institutions as well. The potential strength, as well as weakness, of the new interest in soft law is that it brings together policymakers and scholars who might otherwise have remained apart. This may either be a sign that soft law is an empty vessel, or confirm it as a new focal point that blurs irrational rivalries.

i. Defining soft law

Soft law has become the Other of hard-law measures. Some have defined soft law as “a matter of look and feel on the basis of closeness to the prototype”.²⁰ In a slightly more detailed effort to explain the terrains of soft law, Abbott and Snidal use hard law to refer to “...legally binding obligations that are precise and that delegate authority for interpreting and implementing the law,” whereas soft law “begins once legal arrangements are weakened along one or more of the dimensions.”²¹ Trubek et al. draw on this distinction and claim that soft law provisions “lack features such as *obligation, uniformity, justiciability and sanctions...*” (italics added).²²

¹⁹ Orly Lobel (2004). *The Renew Deal: The Fall of Regulation and the Rise of Governance*, CONTEMPORARY LEGAL THOUGHT, San Diego legal studies paper no7-27.

²⁰ Frans Pennings (2006). BETWEEN SOFT AND HARD LAW: THE IMPACT OF INTERNATIONAL SOCIAL SECURITY STANDARDS ON NATIONAL LAW. The Hague: Kluwer Law international.

²¹ K. Abbott and D Snidal. “Hard and Soft Law in International Governance” (2000) 3 International Organization 54: 421-422.

²² David M. Trubek, Patrick Cottrell & Mark Nance (2005), “Soft Law,” “Hard Law,” and European

This view defines a binary model of hard/soft law.²³ The various dimensions of soft law suggest that while one soft norm may lack sanctions, another brand of soft norms may impose sanctions for non-compliance yet leave broad leeway that minimizes situations of non-compliance to begin with. A third soft norm may be enforceable and defined, but be written by non-state agents and frequently change according to dynamic market conditions.

Soft-law measures are therefore not uniform, and should be viewed as a vector of several continuums. For our purpose we will elaborate on three: the absence of sanctions, the authors of the norm, and the flexibility of the norm. We would like to demonstrate that even in regard to each and every continuum by itself, the concept of soft law does not emerge as one pole of a dichotomous model with the

'traditional', allegedly hard law.

ii. Absence of sanctions

In the literature that studies soft-law modes of governance, the feature most commonly attributed to soft-law measures is that they are not enforceable in courts.²⁴ However, the assumption that hard law is always accompanied by sanctions and soft law lacks any sanction is overstated.

Integration: Toward a Theory of Hybridity, Jean Monnet Working Paper 02/05, 6-7.

²³ Shelton (2003) criticizes the law/non-law binary distinction to which we will refer later in the article. Also see Dinah Shelton (2003). *Introduction: Law, Non-Law and the Problem of "Soft Law"* in D. Shelton (ed) *COMMITMENT AND COMPLIANCE: THE ROLE OF THE NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEMS*, Oxford: Oxford University Press.

²⁴ Francis Snyder (1993) *Soft Law and Institutional Practice in the European Community* in S. Martin (ed) *THE CONSTRUCTION OF EUROPE – ESSAYS IN HONOUR OF EMILE NOEL*, Deventer: Kluwer Academic Publishers; Jerzy Sztucki (1990) *Reflections on International 'Soft Law'* in Lars Ramberg, Ove Bring & Saaid Mahmoudi (eds) *FESTSKRIFT TILL LARS HJERNER*, Stockholm: Norstedts; Adrienne Héritier (2001) *New Modes of Governance in Europe – Policy making without Legislating?* in Adrienne Héritier (ed) *COMMON GOODS: REINVENTING EUROPEAN AND INTERNATIONAL GOVERNANCE*, Lanham, MD: Rowman & Littlefield; Dinah Shelton (ed) *COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEMS*, Oxford: Oxford University Press; Frans Pennings (2006). *BETWEEN SOFT AND HARD LAW: THE IMPACT OF INTERNATIONAL SOCIAL SECURITY STANDARDS ON NATIONAL LAW*. The Hague: Kluwer Law international.

There are hard-law regulatory measures that are not enforced by the public authorities as a matter of police priorities. Lack of enforcement may be a sign of hard law becoming "softer". Slack enforcement is particularly a problem in the context of labour law.²⁵ However, enforcement of labour standards takes place in two spheres: public enforcement – for example, by public inspectors – and private enforcement by means of private litigation in courts. Under-enforcement may be the result of public officials' disregard of their duty, an interest in avoiding enforcement (when there is no political consensus on the norm), or due to budgetary constraints. These reasons are not easily separable. Private enforcement is contingent on the ability of individual employees to bring their case to court. Low-waged workers, or workers at the periphery of the labour market, often find that the enforcement of their rights carries a high price tag. The legal process is often not conducive to claims by employees, who may easily lose their jobs if they pursue justice. Moreover, the fact that individual employees are required to contest employers who are often repeat players, or in a preferential position to utilize the legal process to their advantage, suggests that the legal process remains intrinsically biased.

On the other side of the continuum, there is an assumption that soft-law measures carry no sanctions. They present a norm that is intended to guide the practice of employers, workers, associations and the state, but compliance with the norm is based on extralegal measures – such as stock prices, shaming techniques, shared beliefs of fairness, economic incentives for cooperation, and the like. Some familiar examples of soft-law measures conform to the assumption that no legal sanctions are available in situations of non-compliance: for example, the growing use of corporate codes of conduct, which are based on voluntary measures of compliance, from which a company can opt out at will without any legal sanction.²⁶

At the same time, some soft-law measures are not entirely divorced from legal

²⁵ Guy Davidov (2010), *The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions*, INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS, 26,61-82.

²⁶ Tineke Lambooy (2010) CORPORATE SOCIAL RESPONSIBILITY. LEGAL AND SEMI-LEGAL FRAMEWORKS SUPPORTING CSR. Deventer: Kluwer.

sanctions. When collective bargaining and other types of bargaining 'in the shadow of the law' are considered to belong to the domain of soft law, then a breach of the agreement is enforceable by private means, like any other breach of contract. The use of private enforcement measures in the familiar domain of contract and collective agreements also indicates future paths that are being considered in regard to the more innovative and modern forms of soft law. For example, there may be situations in which an employer signed into a code of conduct, and marketed its corporate responsibility, but did not live up to its promise. In such a case, the employer may be sued for breach of promise or even fraud.²⁷ These options are currently also being considered in regard to international collective agreements that are deemed to be based solely on voluntary compliance. Despite the premise of voluntarism, trade unions and NGOs are looking for ways to 'harden' the norms of these agreements and bring them to court.²⁸

Consequently, it is difficult to draw on the most common characteristic of soft law

– the absence of sanctions – as the sole criterion in distinguishing hard from soft forms of law. Nevertheless, this characteristic is useful for pooling together regulatory instruments that at first sight have little in common. At the descriptive level, the continuum of sanctions should be split into *de jure* and *de facto* absence of sanctions. At the normative level, the continuum should be used to assess when legal sanctions should be viewed more favourably as compared to extralegal sanctions.

iii. Multiple agents who take part in authoring the law

While the absence of a legal sanction may be the most prominent feature cited in the attempts to characterize soft law, it is often coupled with others. Commonly there is an emphasis in the literature on the authors of the norm. The state (the legislature, executive, or the courts) rarely produces norms that are not matched with a sanction. There are few exceptions to the rule, such as state norms that are

²⁷ Kristen Bell DeTienne & Lee W. Lewis (2005) *The Pragmatic and Ethical Barriers to Corporate Social Responsibility Disclosure: The Nike Case*, JOURNAL OF BUSINESS ETHICS, 60, 4, 359 – 376.

²⁸ Tineke Lambooy (2010) CORPORATE SOCIAL RESPONSIBILITY. LEGAL AND SEMI-LEGAL FRAMEWORKS SUPPORTING CSR. Deventer: Kluwer.

deliberately non-justifiable (for example – social rights in some countries), or state norms that are not enforced for policy reasons (*desuetudo*) or due to lack of resources.²⁹ Yet, soft law also refers to measures that delegate the power of the state to non-state agents to devise their own norms (self-regulation). This is, in a sense, a way of semi-privatizing the state's monopolist power in imposing regulation on private activity. Delegation can take the form of allowing private agents and agents in civil society to write their own norms, which will later be enforced. It might also give them the power to self-enforce and apply their own sanctions. The state can review these forms of self-regulation, or remove itself from this type of self-regulation altogether.³⁰

In this second continuum, the distinctions point to the difficulty of neatly separating the hard and soft forms of law. For instance, some forms of public deliberation between semi-private agents and associations in civil society are drawn upon in the making of 'regular' hard law. "Reg-neg" measures and methods to incorporate the public into lawmaking are used even when the output is hard law.³¹

In these situations the state seeks the participation of many groups in the process. Another example is when hard law refers to extralegal documents, such as official standards or collective agreements, and leans on these extra-state norms.³² The use of extension orders and derogation clauses in labour law demonstrates such effects, but they can also be observed in the areas of commerce and consumer protection.³³

As long as the state agency makes the final decision, then the effects of such processes on the classification of hard and soft law are marginal. However, at other times a state may extend more power to civil society, or agree to enter arbitration on public matters, thus exposing itself to the power of others. Extension orders,

²⁹ Mahav Khosla (2010), *Making Social Rights Conditional: Lessons from India*. *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW*, 8, 4, 739-765.

On the forms of self-regulation in the shadow of the state's power, see: Darren Sinclair (1997), *Self-regulation versus Command and Control? Beyond False Dichotomies*. *LAW & POLICY*, 19, 4, 529-559.

³¹ Reg-neg **XX Guy?**

³² Standards **XX Guy?**

³³ Extension orders and derogation clauses **XX Guy?**

commonly used in both Israel and the Netherlands, are dependent on the collective agreements that are being extended, just as are technical standards in the areas of health and safety (which are sometimes linked to private standards). The degree of control maintained by the state is therefore a sliding factor on the continuum of authorship.

Soft-law norms, in the sense of norms that are authored by agents other than the state, are also not entirely removed from the state's monopolist power. Collective agreements are easily enforceable in most jurisdictions by means of private enforcement measures, according to procedures that are determined by the state. Community standards (such as various living wage arrangements) are set with the involvement of municipal authorities, which also have the power to withhold contracts and tenders from contractors unless the standards are complied with.³⁴

Local standards are also bounded by state-imposed minima. Such standards are also susceptible to judicial review under administrative law.

Moreover, the state is sometimes involved in determining the parties allowed to take part in the process of authoring norms. The state may require local parties to negotiate standards, while at other times it may deny certain parties the right to participate. For example, when the state provides incentives for parties with *conflicting* interests to negotiate their own norms (by means of hard law), this is viewed as a way of inducing consensus-driven solutions. By contrast, under antitrust regulation (again, a form of hard law), the state does not allow parties with *shared* interests to establish their own solutions to market problems, fearing the formation of a cartel. The difference between the two forms is not easy to decipher. If the state is agnostic to the establishment of industrial codes in which no trade unions, NGOs or other forms of workers' representation are involved, it allows a *de facto* method of regulation that leans towards a cartel. If it requires that codes be negotiated by institutionalizing deliberations between conflicting interest groups, it is then implicated in the ordering of power among the negotiating agents. In both situations,

³⁴ Katherine Stone & Scott Cummings (2011), *Labor Activism in Local Politics: from CBA's to CBA's*. in G. Davidov & B. Langille THE IDEA OF LABOUR LAW, Oxford: Oxford University Press.

the distinction between hard and soft law remains unclear.

At the descriptive level, the second continuum makes it possible to distinguish between various forms of self-regulation on the basis of the state's involvement, its use of power, and the determination of the parties allowed to take part in the process of authoring the legal norm. At the normative level, the second continuum addresses the question regarding who is/are the more suitable agent/s for authoring the norm. If a soft-law solution is proposed, the assumption is that the state is not necessarily the most desirable agent for authoring regulatory norms. For example, the soft-law alternative is particularly important when participation is a value in itself. Participation is a method of fostering civic virtue, it makes possible a learning process, and it can aid individuals and groups to redefine their interests (rather than assume their interests are exogenous and predetermined) and encompass broad policy issues (e.g., employment policy).³⁵ Generally speaking, more extensive attempts at bringing together agents with diverse interests can be correlated with positive objectives. A reluctance to involve diverse interests, as for example in the case of corporate codes that are drafted and enforced in-house, renders them more vulnerable to critique.³⁶

There is interplay between the first and second continuums. When the state remains an enforcing agent, the delegation of authoring norms to subsidiaries has a different significance, as compared to situations in which delegation also includes the power of enforcement. However, there should be a distinction between the question of which sanctions are more effective and the question of who is the more suitable agent to prescribe the norm.

iv. Flexible and rigid norms

Although the two continuums of sanctions and authorship dominate the academic

³⁵ Michael C Dorf & Charles F Sabel (1998), *A Constitution of Democratic Experimentalism*, CORNELL LAW FACULTY PUBLICATIONS, paper 120.

³⁶ Lit that distinguishes between codes on the basis of how many parties are involved in the writing of codes

literature, and are also more useful for the comparison of the Israeli and Dutch models, there are others. Particularly important in the present context is the substantive (rather than procedural) nature of hard and soft law. It is generally assumed that hard law is more rigid and uniform, while soft-law norms can be more flexible and accommodate the adaptation of general rules to particular circumstances.

The choice of soft law or hard law, or between rules and open standards, is strongly related to the procedural differences. Broad discretion and open-ended standards reduce the power of sanctions. As long as discretion is structured by general rules of administrative law (e.g., due process) or contract law (e.g., good faith), they are closer to the hard-law end of the spectrum. At other times, norms may draw on prevailing community standards, on solutions that are devised by those who are affected by the standards, on flexible solutions that tailor solutions to individual needs, and the like.³⁷ Under these circumstances, the softer nature of the law becomes evident.

Each of the three continuums suggests that institutional choices can be aligned on a continuum, rather than classified in binary fashion as “hard” or “soft”. Configurations of hard and soft law create hybrids that are rarely entirely soft (non-binding, wholly outside the state, and wholly subjective) or entirely hard (binding, authored by the state, and universal or objective). Rather, we should seek to see how the hard and the soft are integrated, and who determined the objectives and institutional design of the hybrid.

³⁷ Craft and commercial codes see Lisa Bernstein (2001), *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms and Institutions*. MICHIGAN LAW REVIEW, 99, 7, 1724-1790.

4. HYBRID GOVERNANCE FORMS FOR REGULATING TWAS IN THE NETHERLANDS AND ISRAEL

i. Why compare the Netherlands and Israel?

The many meanings of soft law suggest that it can be a highly favoured option for regulation, yet at the time also a precarious means of avoiding regulation altogether. The recognition that soft law and hard law are not two dichotomous options, but rather a vector of various hard-soft options, and that hard and soft law forms can be utilized together (hybrids) – requires a detailed institutional analysis of new governance methods. To facilitate such a comparison, we have chosen two means of regulating agency work – the regulation of the business (primarily by means of licensing and monitoring procedures in public and company law) and the regulation of employment contracts and assignments (primarily by labour law) – using an example of the former in the Netherlands and of the latter in Israel. Prior to the presentation of the two models and their comparison, it is important to explain the rationale for the Israeli-Dutch comparison.

Both Israel and the Netherlands are relatively small state economies, which face the problem of regulating within the state domain yet remaining competitive.³⁸ The Dutch economy is more open, particularly because of its membership in the European Union. The Israeli economy used to be relatively closed but has opened up to a significant degree over the last two decades, being both an exporter of industrial goods to other countries and an 'importer' of foreign industrial goods (particularly in the new economy) and of migrant workers.³⁹

Both countries are densely regulated and also share a tradition of centralized bargaining, which has significantly shaped, in rather similar ways, their social and

³⁸ Peter J. Katzenstein (1984), *CORPORATISM AND CHANGE: AUSTRIA, SWITZERLAND, AND THE POLITICS OF INDUSTRY*. ITHACA, UNITED STATES: CORNELL UNIVERSITY PRESS; Peter Auer (2000), *EMPLOYMENT REVIVAL IN EUROPE. LABOUR MARKET SUCCESS IN AUSTRIA, DENMARK, IRELAND AND THE NETHERLANDS*. Geneva: International Labour Organization.

³⁹ Provide indicators of openness – foreign investment, exports **XX Guy?**

economic approach to TWAs.⁴⁰ In both countries there was a fear that TWAs would undermine centralized wage-setting institutions. At the same time, however, unions did *not* take an outright stance against temp agencies. Moreover, centralized bargaining has played an important role in regulating the temp agency sector.

Despite the strong tradition of centralized bargaining, which falls under the rubric of 'centrally managed economies', both countries have also experienced a growing pressure to adopt a neoliberal market ideology and institutions.⁴¹ These similar pressures stem from different reasons and have not disrupted the traditional systems to the same extent. The Netherlands is strongly concerned with migration, both from within the expanding European Union and from outside it. In Israel, changes have been driven by the more drastic effects of globalization on the power of the regulatory state, coupled with the political shift from the Labour Party to the centre-rightwing parties and the rapid decline of the corporatist bargaining regime. These differences explain why the process has been more drastic in Israel than in the Netherlands. At the same time, the neoliberal tendency is also structured by similar pressures in both countries – changing demographics, changes in the composition of industry and services, problems of chronic unemployment, and the need to adapt labour market regulation so as to remove rigidities that were legislated, or bargained, in the past, without removing the security net for workers and the unemployed still provided by the prevailing model of the welfare state.

A final point of similarity, which is of particular importance, is that in both countries temp agencies play an important role in the labour market. While 'atypical' employment contracts prevail now in all developed economies, the patterns of atypical contracts are not universal. In some countries temp workers are hired directly; in others part-time contracts are a more common method of introducing numerical flexibility. In the Netherlands and Israel, hiring through temp agencies has become one of the more dominant methods of achieving numerical flexibility. In the Netherlands the data indicate that approximately 2-3 percent of the workforce is

⁴⁰ Jelle Visser & Anton Hemerijck (1997), *A DUTCH MIRACLE. JOB GROWTH, WELFARE REFORM AND CORPORATISM IN THE NETHERLANDS*. Amsterdam: Amsterdam University Press; Guy Mundlak (2007), *The Right to Work: Linking Human Rights and Employment Policy*. INTERNATIONAL LABOUR REVIEW, 146, 3-4, 189-215.

⁴¹ Peter A. Hall, David Soskice (2001). *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE*. Oxford: Oxford University Press.

employed through temp agencies at any given point in time. The data in Israel indicate a high level of fluctuation. Until 1996, less than one percent of the workforce was employed through temp agencies; the numbers then peaked in around 2000 at the level of approximately five percent, and have since gradually declined. For reasons that will be elaborated in the following section, the share of workers hired through TWAs in the public sector has declined to almost zero percent. For comparable EU countries, see Table 1.

Table 1 Agency Work Statistics 2009

| Country | Number of TWA companies 2009 | Number of Agency Workers (FTE) 2009 | Agency workers as % of total | Turnover (million Euro) (source CIETT 2010) |
|----------------|------------------------------|-------------------------------------|------------------------------|---|
| Israel (2002) | 280 | 83.000 | 4.3 | |
| The UK | 3.640 | 212651 | 2.5 | 7.700 |
| Germany | 11.500 | 1.068.197 | 3.6 | 36.000 |
| Czech Republic | 9.078 | 625000 | 1.6 | 8.000 |
| Poland | 215 | 3 | 0.7 | --- |
| France | 1086 | 7 | 0.3 | --- |
| Denmark | 1.200 | 447.348 | 0.7 | 19.000 |
| Hungary | 1.347 | 21.227 | 0.6 | 760 |
| Austria | 667 | 22.153 | 0,6 | --- |
| Sweden | 1.200 | 57.230 | 1.4 | --- |
| Ireland | 500 | 46.000 | 1.0 | 1.200 |
| Slovakia | n.a. | n.a. | n.a. | 1.300 |
| Norway | 465 | 14.492 | 0.6 | 31 |
| Finland | 700 | 20.186 | 0.8 | 654 |
| Spain | n.a. | 20.000 | 0.8 | 650 |
| Portugal | 1.700* | 141.064* | n.a. | 2.520 |
| Bulgaria | 427* | | n.a. | 800 |
| Romania | n.a. | 5 | n.a. | --- |
| Belgium | 194 | 22.153 | 0.2 | --- |
| Italy | 1234 | 71.759 | 1.7 | 3.383 |
| Slovenia | 2900 | 162.000 | 0.7 | 4.000 |
| Luxembourg | 140 | 2 | 0.3 | --- |
| Greece | na | 1 | n.a. | --- |
| | 16 | 5 | 0.1 | --- |

Source: CIETT 2011 The agency Work Industry around the World. Brussels: CIETT

* Figures for 2007

** Figures agency work statistics CIETT 2005

Data for Israel Ministry of Labour (Nadiv 2003).

In the context of the overall changes and challenges faced by the system for labour market regulation in both countries, the relatively high share of workers employed through TWAs has led to political controversy in both countries. While other forms of numerical flexibility are more dominant, the high visibility of TWAs has placed them at the centre of the public and political debates, which only makes finding an agreed-upon regulatory solution more difficult. In both countries there is much at stake for industry, trade unions and the various branches of government. These pressures have also paved the way for regulatory innovations of the 'governance' type, drawing upon hybrids of hard and soft law. We will briefly describe the developments in each country, and subsequently compare the two models.

ii. Israel⁴²

While the first temp agency entered the country in the 1970s, the number of agencies grew only in the late 1980s, a rise associated with the decline of the corporatist pact that prevailed in Israel for several decades. It is important to note that the emergence of the temp sector was induced in part by the trade unions themselves. Despite the low share of workers employed by temp agencies at the time, it was assumed that the legislature would try to curb the sector's growth and impose more duties on employers who receive the workers from the agencies (the 'end-users'). In an effort to forestall such legislation, the temp agencies started to negotiate collective agreements with the trade unions. The companies hoped that such agreements would mainstream temp working and legitimize them, and consequently render legislation on hiring through temp agencies unnecessary.

Despite the attempt to mainstream the agencies, in 1996 the professional cadre in the Ministry of Labour succeeded in preparing a law on the employment of workers through TWAs and getting the legislature's approval. The 1996 law sidestepped many of the thorny questions that were already on the table, most notably who the employer is in triangular employment relations. Regarding workers' rights, the new law launched for the first time a hybrid that was based on a derogation clause in the

⁴² For a more detailed overview of the regulatory changes, see Guy Mundlak (2007), *The Right to Work: Linking Human Rights and Employment Policy*. INTERNATIONAL LABOUR REVIEW, 146, 3-4, 189-215.

law itself. The law stated that all workers employed through a temp agency will be entitled, after three years of employment in the same workplace, to the same terms as the collective agreements that apply to the 'regular' employees, except for protection against dismissal (the 'three-year rule'). This rather slim guarantee was intended to prevent long-term employment through temp agencies. As such, it is an example of a simple hard-law provision, albeit one geared to the interests of employers and temp agencies. It accommodated a rather long definition of 'temp work' (three years) and provided no protection from unfair dismissal. Yet an additional clause held that the former provision can be derogated by a collective agreement signed by a trade union with the temp agency. If such an agreement exists it overrides the law and applies to the worker from the first day of employment, and the three-year rule no longer applies. The derogation clause is a form of soft-law provision because it transfers the power to govern the employment relationship to the agents of collective bargaining, sidestepping the state as the common regulatory agency.

The purpose of the derogation clause was to encourage the use of collective agreements as the primary source of regulation, relying on the traditional form of self-governance that was more common in Israel in the past. Its outcomes, however, were rather harsh to the temp workers themselves. Within four years, the share of workers employed through temp agencies rose from one percent of the workforce to approximately five percent. Moreover, the more significant rise occurred in long-term 'temp workers' (i.e., those who are employed like 'regular' workers, for an indefinite period of time, conducting routine tasks in the workplace, but without the benefits of direct employment). The reasons for this rise are rooted in the industrial system, and it would require much detail regarding the political process to explicate them.⁴³ In a nutshell, the derogation clause encouraged the signing of sweetheart deals between competing trade unions and temp agencies, with the encouragement of end-users, particularly of the largest end-user – the state itself. Consequently, the possibility of self-regulation by the industry and the trade unions became a card for legitimizing the worst practices of employment through temp agencies, rendering the state-authored regulation redundant.

⁴³ The details are described in Mundlak 2007, *ibid.*

Given the unexpected outcomes of the 1996 legislation, the law was amended in 2000. Under the new law, two hard provisions were introduced. The first held that after nine months of employment in the same workplace, the temp worker becomes the employee of the employer-user (the 'nine-month rule'). The contestation of the hard rule by employers, most notably by the state, led to the introduction of a series of temporary orders that withheld the application of the nine-month rule, which only came into effect in 2008. This is a good demonstration of impasse in the sphere of hard law. The second hard norm held that the temp worker is entitled to equal rights to those of 'internal' workers from the first day of employment (the 'equal rights provision'). This was intended to correct the biased 'three-year rule' in the original law. To overcome the political impasse, a new derogation clause was introduced, according to which the equal-rights rule can be derogated. However, unlike under the previous derogation clause, this can only be done by a sector-wide collective agreement extended by the Ministry of Labour to all the temp agencies and their workers. The intention was to maintain the assumed advantage of self-regulation by the industry, while at the same time preventing the race to the bottom that took place when competing unions proposed sweetheart agreements to employers. In plain terms, the purpose of the new derogation rule was to undo the equal rights provision before it went into effect. Thus, the equal rights provision was merely a penalty default rule intended to encourage the industry to reach a workable and relatively fair collective agreement. It was not really intended to extend equal rights to temp workers.

The outcomes of the 2000 reform are difficult to assess. For reasons of inter-union rivalry, it took four years until a collective agreement was signed. Meanwhile the equal rights provision came into effect, but its success in guaranteeing equal rights to temp workers was very partial, to say the least. This demonstrated the limits of hard regulation in complex employment relationships, particularly as there was no political consensus whatsoever on the merits of the equal rights provision. The rule was sidestepped by means of simple avoidance, whereby it was assumed that public enforcement and private litigation would not succeed in targeting the avoiders. In other instances, equality was achieved by matching temp workers with the lowest-

waged 'regular workers', assuming that questions regarding the actual meaning of 'equal pay for equal work' would be extremely difficult to judge and monitor. The absence of public enforcement and private litigation on these questions reaffirmed the avoidance techniques. This process aptly demonstrates the doubtfulness of the assumption that hard norms are characterized by hard enforcement processes. The norms were *de jure* hard, but *de facto* soft. Similarly, the broad leeway for interpreting the meaning of equality demonstrates that the allegedly hard norm was diluted by its relatively soft substance.

When the expected collective agreement was eventually signed, it was intended to undo the effects of the equal rights provision, even though the latter was not in fact implemented. The new collective agreement was signed, for the first time in Israel, by two rival trade unions, by two rival employers associations in the temp agency sector, and with the support of the Federation of Employers Associations (representing the interest of the end-users). The collective agreement applied only to the private sector and was extended by the Ministry of Labour to the entire temp work sector in the private sector (hence leaving the equality rule intact in the public sector). The agreement prescribed the rights of temp workers, guaranteeing them a level of rights slightly above the statutory minimum and providing a level of wages that is industry-sensitive. It also granted for the first time a guarantee of pension. While the terms of the pension are less benevolent than those assigned to regular workers, the guarantee is still better than the absence of pensions for workers in the private sector who are not covered by a collective agreement at all.⁴⁴ In this case, self regulation provided a more nuanced compromise, which could not have been achieved in the political sphere and drafted as a 'hard' regulation.

After a lengthy political stalemate, the nine-month rule came into effect in 2008. Since 2000, various laws also sorted out the rights and responsibilities of the temp agency and end-users in particular contexts (such as minimum wage, sexual harassment,

⁴⁴ Only in 2008 a mandatory collective agreement with an extension order guaranteed pension to all employees in Israel, although the mandatory pension is slimmer than that which is guaranteed for temp agency workers in the collective agreement.

equal opportunity, and occupational health and safety).⁴⁵ Moreover, the Labour Court's decisions in various cases strongly affected the division of responsibilities in triangular employment relationships. For example, the court held that before the temp work legislation is assumed to be applicable, it is necessary to determine whether the triangular relationship is authentic or fictitious. In the latter situations, the court assigned wholesale direct responsibility to the end-users.

Moreover, human rights organizations and cause lawyers have tried to use the elaborate jurisprudence to navigate between the self-imposed standards in the collective agreement and the hard statutory norms.⁴⁶ Thus, the complex body of soft and hard norms has increased the strategic leeway of old and new agents who contest each other in the process of governing the labour market.

To summarize, the 2000 soft-law provision included a derogation clause in statute that imposed a penalty default rule, encouraging self-regulation, which was achieved by means of a social pact formally packaged in a collective agreement that was extended by an executive order. The outcomes are difficult to judge, as the cup may be looked upon as either half-full or half-empty. The rights of temp workers have been improved somewhat, and the agreement has discouraged some of the more cost-cutting temp agencies which fitted under the definition of mala fide companies. At the same time, however, self-regulation has continued to legitimize the unequal rights of temp workers compared to workers who are employed directly, and it has not prevented the long-term employment of temp workers. This legitimacy is most evident in the private sector, where the collective agreement derogated from the equality clause. The hard norms that continued to govern the public sector, particularly after the nine-month rule came into effect, gradually shrunk the use of temp workers through agencies. However, this outcome is not clearly any better than that of the private sector, as numerical flexibility was simply shifted to the non-regulated options, such as subcontracting and the direct employment of temp workers. As numerical flexibility shifted to alternative forms of temping, hard- and soft-law hybrids slowly started to emerge, predominantly in the cleaning and security

⁴⁵ Give examples of legislation **XX Guy?**

⁴⁶ Mundlak 2010 **XX Guy?**

sectors. These include government supervision of tender offers for service contractors, a legal (hard) requirement for prior registration of service contractors, case-law on the division of responsibility between the end-user and the service contractor, as well as attempts at soft self-regulation such as a code of practice in the cleaning sector and a renewed branch-level collective agreement in the security sector. Despite the evolving use of hard-soft hybrids in application to service contractors, there is still an enormous gap between the heavily hard-soft regulatory environment of TWAs and that which is applied to service contractors.

iii. The Netherlands

In regulatory terms, the Netherlands was the first EU country to recognise TWAs. The first TWAs started operating already in the 1940s, but it was only much later, after a period of economic growth in the 1960s, that they came to play a prominent role in the Dutch labour market. Due to the stringent Dutch dismissal law that developed after World War II, employers searched for a way to avoid the regular employment contract. This explains the relatively early growth of the Dutch temp sector as compared to other EU countries. Temp work was, and still remains, an effective alternative for an employer wishing to circumvent dismissal law obligations. It was the proliferation of illegal labour brokers in the 1960s that encouraged the government to introduce hard law to regulate the industry, by means of a licensing system that was established in the Act on the Provision of Temporary Labour in 1965.⁴⁷ At the time, the TWA sector criticized the strict licensing conditions that were introduced, arguing that the sector was not just a poor arrangement for workers, but in fact also offered them positive elements like additional income and independence.⁴⁸ The continued growth of TWAs in later years was attended by collective labour agreements. Consequently, the Dutch regulatory model which took shape over the years was based on a detailed and specific regulation in statutory law combined with collective agreements concerning the employment contract with the agency.

⁴⁷ Els Sol (2001) *Targeting on Transitions: Employment Services in the Netherlands*, *COMPARATIVE LABOUR LAW & POLICY JOURNAL*, 23, 1, 81-129; Theo Dunnewijk (2001), *Temporary Agency Work in the Netherlands: Emergence and Perspective*, CBP Report 2001/1, The Hague.

⁴⁸ Willem Albeda, Henk J. van de Braak & Gerard M. J. Veldkamp (1972), *UITZENDARBEID: ONTWIKKELING EN VERWIKKELING*, Rotterdam: Universitaire Pers.

To this model a major regulatory innovation was introduced in the Flexibility and Security Act in 1999 [hereon: the F&S Act], following an agreement between the social partners in the national bipartite consultation body for industrial relations, called STAR (*Stichting van de Arbeid*). The legal position of temporary employees, according to the F&S Act, derives from a standard labour contract between them and the TWA, providing job security that increases with the time spent at the agency. The Act also introduced participation rights for TWA workers in the user enterprise. The innovation in regulatory terms was a hybrid form, with hard law (the F&S Act) and soft law (collective agreements) closely interwoven. This is best demonstrated by the interaction between the statute and the derogation of terms in collective agreements pertaining to the duration of temporary work.⁴⁹ Under the F&S Act, the relationship between the temporary employee and the temporary employment agency is explicitly anchored in civil labour law as a normal employment relationship. This means that all civil labour law regulations apply to the temporary employment relationship, with one exception: the law contains a special provision, according to which there is no protection from dismissal in the first 26 weeks of a temporary employment relationship.⁵⁰ The law allows for collective agreements to derogate from this provision, for instance, to lengthen the 26-week period. Indeed, the largest national collective agreement for temporary employment agencies (ABU-CAO; the collective labour agreement concluded by the Dutch federation of temporary work agencies, *de Algemene Bond Uitzendondernemingen* (hereon: ABU)) extended this period to 78 weeks. After 26 weeks, on the other hand, this collective labour agreement entitles temporary employees to training and awards them the right to enter into a pension scheme. The current flexicurity debate in the EU on labour law builds on the Dutch F&S Act and the policy constructs

⁴⁹ The Dutch Civil Code permits social partners to deviate from coercive law by collective agreements, also to the detriment of employees. It concerns the so called 'three-quarter coercive' stipulations. The number of this type of provisions is limited by law. The introduction of the 'Flexibility and Security Act' in 1999 has led to an extension of the number of this type of stipulation: G.J.J Heerma van Vos 'Driekwart dwingend recht', in: R. Duk, *CAO-recht in beweging*, Den Haag: SDU, 2005, p.121-133.

⁵⁰ This must, however, be explicitly agreed on. See *Algemene Bond van Uitzendondernemingen* (ABU-CAO), Section 7:691 of the Dutch Civil Code (1999). The 26-week period does not include intervals. In the case of continuous employment, this involves a period of half a year. If there are many intervals between periods of work, however, it can take much longer to meet the 26-week criterion (24 months). On the other hand, each week in which at least one hour is worked counts as a week in which work was performed.

associated with it.⁵¹

As for the other key issues of regulation, namely the licensing and monitoring requirements of TWAs, the Dutch introduced another regulatory innovation combining hard and soft law. This process started in 1998, when in a major turn towards deregulation the Dutch abolished the licensing system, because the TWA sector was considered to be sufficiently mature to ensure normal business practices. The Labour Market Intermediaries Act (WAADI), which came into force on 1 July 1998, abolished the licensing system as well as a number of restrictions relating to placement, maximum duration, worker redeployment, and the ability of TWAs to obstruct employees from entering into direct employment contracts with user firms and others. Other rules remained, such as a prohibition on posting employees in user firms in which there was a strike; the financial warranty scheme also was retained (dual responsibility of user firms and TWAs for the payment of social premiums and taxes), as was the requirement for equal wages for TWA workers. According to the explanatory memorandum, fighting the TWA sector's fraudulent practices in the area of taxes and premiums still remained a major policy goal. However, licensing was regarded as an improper way to attain this goal, as it could be achieved by other means. Nevertheless, the government left open the possibility of reinstating the licensing system.⁵²

Very soon, however, unexpected developments urgently demanded that new steps be taken, or, rather, a return to the old system. The recent enlargement of the EU, with Polish, Romanian and Bulgarian workers entering the market, dramatically changed the temp sector's playing field in the Netherlands, with more and more mala fide intermediaries employing an increasing number of undocumented migrant workers, making enormous profits, and escaping public control. Undocumented workers were badly paid and worked under poor conditions. On the other hand,

⁵¹ Green paper on labour law 'Modernising labour law to meet the challenges of the 21st century, 2006; European Expert Group on Flexicurity (2007), Flexicurity Pathways. Turning Hurdles into Stepping Stones. Brussels; European Foundation (2007), VARIETIES OF FLEXICURITY: REFLECTIONS ON KEY ELEMENTS OF FLEXIBILITY AND SECURITY, Dublin: European Foundation.

⁵² Explanatory memorandum Waadi Act, *Kamerstukken II* 1996-97, 25264, nr 3 p.8.

agencies which abided by the rules suffered from unfair competition.

Among the fraudulent practices identified were such that concern the reporting of work time, including hours of work that were not accounted for by the TWA's administration, the manipulation of working hours under different names, and the avoidance of time measurement by holding workers to be self-employed. Similar practices included the registration of workers as home-workers, in regard to whom the law does not impose similar tax and compensation requirements. TWAs were also found to abuse migrant workers' lack of familiarity with Dutch law, for example by requiring workers to remit income tax refunds to the agency.⁵³

As a result, the recently deregulated regime for temp agencies came under pressure to be regulated once again. Agencies competed one with another with their daggers drawn, highlighting the need to take corrective measures. The role of TWAs in supplying illegal, often immigrant labour led to calls for tighter enforcement mechanisms and for reinstating the licensing system. Although the government proposed to reintroduce a licensing scheme on such grounds, this proposal was rejected by the Lower House in May 2005, following objections from employers. Because the proposed system was considered too bureaucratic and ineffective, the possibility of introducing soft-law measures was raised, first by employer associations and trade unions and later in Parliament. Subsequently a new hybrid was introduced, combining generic (not TWA-specific) state fraud-enforcement instruments and self-regulation in the form of norms drafted by the sector itself, with the support of the government. Among the other measures introduced by the government in 2005 were the use of administrative fines in case of employment of undocumented employees and more intensive cooperation between the Labour Inspectorate and Foreigners Police.

The development of norms of self-regulation in the sector resulted from the political deadlock in the debate over TWAs. One Parliament member even explicitly proposed

⁵³ M. Zuidam & D. Grijpstra (voornamen?) (2004), OVER DE GRENS. EEN ONDERZOEK NAAR DE ILLEGALE ACTIVITEITEN. Eindrapport. Leiden: Research voor Beleid.

a motion to promote self-regulation by the temp sector.⁵⁴

Eventually, in 2007 a new type of instrument came into force, called the NEN norm 4400-1. The goal of the norm is to sift the wheat from the chaff and give hallmark certified companies an advantage in receiving assignments from user firms. Instead of the traditional 'naming and shaming' of 'bad' companies, the new instrument was geared at the 'naming and praising' of 'good' companies. The system is based on a self-governed mechanism of certification, which is operated by the industry itself. Originally the temp sector wanted government to conduct the certification process, but the Minister of Labour refused on the grounds that enforcement should be conducted by the private parties themselves. That is, the arrangement is binding on those companies that join the certification process, but companies are free to join it or not, and thus self-enforcement applies on a voluntary basis. Taking such measures is seen as being in the interest of the bona fide service providers. By the end of April 2010, 2,290 temp agencies already had themselves hallmarked.⁵⁵

The NEN norm developed by the Dutch national standardization institute (hereon: NEN Institute) contains (among other things) provisions on the identification of the temp agency workers by the agency; the payment of wage and turnover taxes; the payment of minimal wages and holiday allowances; the avoidance of employment of undocumented workers; subcontracting; and agency administration. The *Stichting Normering Arbeid* (Foundation for Labour Standards, hereon: SNA) is responsible for the registration of certified TWAs and provides for inspections twice a year (by independent auditors).

In a letter to the Lower House of Parliament, the government announced that it would evaluate the NEN norm and the certification system at the beginning of 2008.⁵⁶ If fraudulent practices and mala fide TWAs had not drastically changed by

⁵⁴ *Kamerstukken II* 2004-05, 17050, nr. 287. Later the MP, Mr Bruls became the chair of Stichting Normering Arbeid. See also 'Zelfregulering via één onafhankelijk keurmerk', *Uitzendwerk* 2006, nr.4.

⁵⁵ Information from the Foundation SNA, www.sna.nl

⁵⁶ Letter by the under Minister Van Hoof regarding licensing the TWA sector of 5 November 2004. AAM/BR/04/65581.

that time, the government threatened to reintroduce the licensing system and/or the requirement to provide financial warranties. The evaluation in 2008 led to the proposal of a new set of measures, most of them originally proposed by the ABU. These new measures passed the House of Lords in January 2010 and most of them have come into force. Although the NEN norm was still new and difficult to assess, it was given the benefit of the doubt and it has been decided to continue along the path of self-regulation. For reasons of cost-cutting (on the part of the government, as the sector currently bears the costs for the NEN norm as well as the costs of inspection), efficiency, and the lack of a workable enforcement policy, the reintroduction of a licensing regime was not considered to be a viable route.⁵⁷

The new set of measures builds on the measures previously introduced, encouraging the sector's private initiative by introducing a form of "recipients' liability" (*inlenersaansprakelijkheid*) with respect to the payment of the legal minimum wage and the legal minimum holiday allowance. Under a new section in the Dutch Civil Code, the temp agency and the user firm are jointly liable with regard to these statutory rights, although the joint liability is not extended to the contractual wages, whether or not based on a collective labour agreement. Moreover, user-firms that do business with a certified and registered temp agency are exempted from the recipients' liability. This exemption is a novelty in the development of Dutch law.⁵⁸ The SNA certificate, however, does not protect the user-firm regarding unpaid (wage and turnover) taxes and insurance premiums to the Dutch Tax Authorities. In the past a user-firm could not be held liable for unpaid taxes and insurance premiums when doing business with a licensed temp agency. When the licensing system was abolished, a "recipients' liability" was created, pursuant to which a user-firm could indeed be held liable for unpaid taxes and social premiums.⁵⁹ Apparently,

⁵⁷ For info on NEN norm see

<http://www.normeringarbeid.nl/Applications/getObject.asp?FromDB=1&Obj=1002066.pdf>

⁵⁸ *Kamerstukken II* 2008-09, 31822, nr. 3, p. 3 and section 7:692 of the Dutch Civil Code.

⁵⁹ See section 34 Collection of State Taxes Act 1990 (*Invorderingswet* 1990). In this respect, it is relevant to note the possibility of opening a G-account. A G-account is a blocked bank account that serves to make payments, solely and exclusively, to the Dutch Tax Authorities. The purpose a G account is to avoid a situation in which the formal employer (the temp agency) evades the payment of payroll taxes. The user-firm pays for the services of the temp worker, except for the expected due amount for taxes and social insurance premiums. This amount is put into a G-account and can only be used to pay those taxes and premiums. The user-firm may thus be confident that the taxes and social insurance premiums will be paid. It will no longer be held liable for the amount paid into the G-account if the temp agency has failed to make the required payments. In the framework of the new set of measures, as of early 2010, it is no

extending the exemption from the recipients' liability to taxes was a bridge too far for the Dutch government.⁶⁰ It follows from the legislative history that a comprehensive approach to mala fide temp work agencies demands the assignment of a separate responsibility for user-firms, even in the case of dealing with a certified TWA. To summarize, the new arrangement distinguishes between two types of user liability: the first applies to minimum wage and holiday premiums, where an exception has been created for user-firms which do business with a certified and registered temp agency, and a second type of user liability for unpaid (wage and turnover) taxes and insurances premiums, which applies to all user-firms, regardless of the TWA they do business with.

One of the new measures that was discussed and will be introduced in 2012 is the imposition of a legal requirement for all temp agencies to be registered in the trade register (even if a foreign temp agency does not have its corporate domicile in the Netherlands). If they do not, they get fined. The fine for the first time is 12.000 euro per employee, the second time 24.000 euros and 36.000 euros in third offense. SNA will be informed of registrations of temp agencies in the trade register in order to approach them and persuade them to get certified.⁶¹

What makes the Dutch case unique is the combination of a general anti-fraud law with the more encompassing, partially self-regulated method of ensuring compliance with employment standards, as well as the complementary setting of standards by collective agreements and extension orders (i.e., some of the Dutch collective agreements require cooperation with a certified temp agency). No other country has such a mix of public and private regulation in the TWA sector, with strong horizontal elements and a voluntarily imposed role for the market actors. No longer does the government impose rules on the private actors in a hierarchical relationship, but meets with them instead on the basis of consultation, exchange of expertise and persuasion.

longer possible for non-certified temp agencies to open a G-account with the Dutch Tax Authorities, Kamerstukken II 2008-09, 31833, nr. 6, p. 7-8.

⁶⁰ See also: Zwemmer, J.P.H. 'Inleners van gecertificeerde uitzendbureaus dienen te worden gevrijwaard van ketenaansprakelijkheid', NJB 2010, 648.

⁶¹ *Kamerstukken II 2008-09, 31833, nr. 6, p. 2*

It is interesting to note that the legislature has indicated that the arrangement of the NEN norm cannot provide a full guarantee against fraud and illegal work.⁶² The private parties involved in developing the norm came to the same conclusion. In 2006 an *ex ante* evaluation held that although the system is not watertight, the norm is generally seen by all actors involved as an improvement on the former system.⁶³

Those who promoted the initiative claimed that it would accommodate a more transparent division between the bona fide and mala fide companies. However, public authorities that are involved, such as the Labour Inspectorate and the Taxes Inspectorate, warn that the norm does not guarantee that the certified companies will actually follow the rules. They are afraid that TWAs will start developing a 'shadow administration' – one to demonstrate compliance, another for documenting their practice in fact.⁶⁴ At this time, while the adequacy of the new NEN norm is still a matter of controversy, it is also interesting to note the role of the biggest Dutch trade union (**FNV Bondgenoten**), which accepted the invitation of the employers association to join the certification program, even though employees are not directly involved in the norm. The union explained that its consent was intended to limit the damage to the sector and its employees. According to a spokeswoman of the FNV (Federation of Trade Unions), some of the members did so '*contra coeur*', being aware that the Achilles heel of the new certification program is the lack of enforcement capacity.

⁶² Algemene Bond Uitzendondernemingen (ABU), Bouwend Nederland, Centrale Organisatie Vleessector (COV), Crop Registeraccountants, FNV Bondgenoten, Land- en Tuinbouw Organisatie Nederland (LTO), Nederlandse Bond van Bemiddelings en Uitzendondernemingen (NBBU), Stichting Financiële Toetsing (SFT), Stichting Flexkeur, Stichting Kwaliteit van de Arbeid (SKA), Stichting VRO, Vereniging Internationale Arbeidsbemiddeling (VIA), Vereniging Registratie Ondernemingen (VRO).

⁶³ Jaco J. van Velden, Coen Zoon & Peter Donker Heel (2006), ZELFREGULERING TER BESTRIJDING VAN FRAUDE EN ILLEGALITEIT IN DE UITZENDBRANCHE. Ex ante evaluatie van de ontwerpnorm Nen 4400-1. Rotterdam: Ecorys.

⁶⁴ Ibidem.

5. COMPARISON OF THE HYBRID FORMS OF GOVERNANCE

The Dutch and Israeli examples present two hybrid forms of governance that integrate hard and soft forms of law. In both cases the hybrid came about as a result of a political impasse that stalled the negotiation of a stable 'hard' regulatory provision. In both, the soft law is closely interrelated with hard-law regulation and did not evolve spontaneously outside the legal regime. However, the two governance forms also differ in the balance between the hard and soft law, as well as in the choice of soft-law method.

The Israeli model leans more strongly towards the hard-law end of the continuum, and its 'softer' component devolves from the state's delegation of power to the social partners to self-regulate the industry, without binding them by the statutory provision. However, whichever norm the social partners adopt is itself enforceable, and is therefore at the harder end of the enforceability continuum. This brings non-state agents into the regulatory process, albeit only those who comply with the power accorded by the state to the most representative trade unions and employers associations. Finally, the system of derogation allows for flexible adaptation of the substantive norm itself to the needs of the sector, and accommodates distinct arrangements for the public and private sectors, while also excluding certain occupations from both the hard and soft components of the system.

The preliminary hybrid devised by the Dutch system resembled the Israeli arrangement. However, the addition of the Dutch NEN norm provides a distinct form of soft law, in the sense that it is not obligatory for temp agencies to be certified, although legal sanctions will be applied to those agencies that choose not to be certified. The system is based on positive sanctions that are administered through a system of accreditation. It can also be considered a form of soft law in the sense that it is the product of self-regulation by the industry. Moreover, the agents are

not assigned power by the state in the sense of exclusive representation rights.⁶⁵ However, agencies that do not seek certification are in the domain of hard law. Finally, the NEN norm does not allow for flexible amendment of the substantive norm itself, although it is assumed that self-generated norms will be easier to amend, over time, than legislation. Table 2 compares the two models, whereby □ S designates proximity to the softer end of the legal continuum, □ H to the harder end.

Table 2

| HL/SL continuum | NL | IL |
|--|-----|-----|
| HL is enforceable/ SL is not | □ S | □ H |
| HL is authored by the state/ SL is authored by means of self | □ S | □ S |
| HL is rigid/ SL is flexible | □ H | □ S |

These differences highlight the way in which the move towards a hard- and soft- law hybrid served to overcome a political impasse, and can aid in identifying the objectives of each model. On the basis of the preceding discussion of the hard-soft law vector, we suggest there are eight objectives in terms of which the Israeli and Dutch models can be compared.

Legitimacy

The Dutch model adopted the NEN norm to achieve a higher level of legitimacy for a sector with admittedly a recurring problem of fraud and illegal behaviour. The NEN norm was a way of signalling that temp agencies are interested in preventing such practices and want to ‘keep the sector clean’. The introduction of the “recipients’ liability” and the exemption mechanism can be seen as a supportive gesture by the authorities, albeit elicited by the sector.

The Israeli model also sought legitimacy, as clearly demonstrated by the

⁶⁵ The Dutch system generally does not recognize exclusive representation rights, even in the traditional context of collective bargaining.

attempts to 'mainstream' TWAs. The use of collective agreements was intended at first to thwart legislation. Once legislation was passed despite the attempts to prevent it, an ongoing dialogue between the legislature and the social partners emerged. As long as collective bargaining remained uncoordinated, however, legitimacy could not be achieved. It was only when a higher level of control was reached, by imposing the requirement for a sector-wide collective agreement and a state-wide extension order, that the detrimental effects of soft law were somewhat contained. The hybrid, which took the form of shared responsibility for governance between the social partners and the state, therefore moved along the continuum towards more leverage for the state.

Transparency

The NEN norm produced a document that pulled together norms which had appeared in separate laws and agreements in the past. Given the complexity of regulating triangular employment relationships, the codification of all norms in one document makes them more transparent and more readily accessible to temp agency workers. Therefore, it is paradoxical that the arrangement concerning the "recipient's liability" (an incentive to make the NEN norm more efficient) renders the regulation of the triangular employment regulation less transparent to temp agency workers, as it makes the user-firm dependent on certain circumstances and to a certain extent liable for the temp workers' unpaid wages. [Eva ik weet niet meer waar deze zin vandaan komt, wat mij betreft kan hij er uit. Wat wordt hier bedoeld?]

The sector-wide collective agreement in Israel had a similar effect. While the basic rule stated that temp workers deserve equal rights, it did not specify how the equality measure was to be implemented. It also did not resolve the disparity in working conditions, which is not helpful to a worker trying to find out who she is equal to, or which rights are accorded to the worker with whom she is 'matched'. Having a single collective agreement that uniformly prescribes the rights of temp workers makes the norms, as in the Dutch model, more transparent and accessible to workers. At the same time, there is a trade-off between the flexibility of prescribing

norms only to the private sector and the exclusion of some temp workers from the collective agreement. Understanding the hybrid mix of rules in law, adjudication and collective agreements has become an arduous task, which many employees cannot easily follow.

Enforcement

It is usually assumed that soft-law measures are without legal sanctions, but those who favour the soft-law alternative argue that in comparison to innately under-enforced hard law, they may actually lead to better compliance. This was the basic premise of the support for the Dutch NEN norm. The efficacy of the certification mechanism is currently unclear and its success (unlike that of hard-law measures) depends on the cooperation of all parties involved in the sector. It may be noted meanwhile that the mechanism is extensively interwoven with hard-law measures, such as the linking of accreditation with differentiated enforcement (*i.e.*, more enforcement measures against companies that are not certificated) and, most notably, the applicability of the "recipients' liability" and exemption from it. The latter (among other things) was introduced as an incentive to user-firms who require the certificate. However, given that this is a soft norm in itself and there is no sanction for non-compliance, not all employers insist on the certificate.

The situation in Israel is somewhat different because legal sanctions are available, and therefore the law did not undermine the possibility of filing a legal claim. On most issues, workers have available only the method of private enforcement (litigation) and not public enforcement (labour inspectors who are only entrusted with assessing compliance with statutory minima). It was assumed that the adoption of state-wide collective bargaining would make the filing of legal claims easier, in part because of trade union involvement. While this may be true in theory, the alleged advantage has remained latent due to several factors: namely, the attenuated power of the trade unions, coupled with their interest in satisfying employers (particularly during the years 1996-2000), and the nature of sector-wide collective agreements, which are removed from the day-to-day practice of implementation and monitoring

compliance.⁶⁶

Raising awareness and creating a path-dependent solution

The Dutch model seeks to raise awareness of the abuse of temp workers' rights. The certification program is aimed first and foremost at the employers-users who contract with the temp agencies, but it is also meant to raise the general public's awareness. Even if at present the system's impact is relatively weak, it may be anticipated that the somewhat seamless integration into hard legislation (such as the measures relating to the "recipients' liability") and the growing use of the certification program will induce a change over time.

In Israel, the delegation of the norm-making to the social partners did little in terms of raising awareness, and may even have had the opposite effect. Removing the making of norms from the statutory docket to the more difficult-to-grasp sphere of collective agreements was not conducive towards raising awareness. To the extent that the problem of workers in TWAs and other forms of numerical flexibility is constantly under scrutiny, this is more due to the proactive approach of NGOs, and to a lesser extent reported court cases, than to the agreements between the social partners and/or the other state branches.

Sidestepping workers' rights

Given that the Dutch certification program is parallel to the hard-norm regulatory system and does not replace it, the problem of undermining workers' rights is less acute. However the major trade union (FNV) sees the lack of enforcement of

'chain-responsibility' for social premiums and taxes between prime contractor and subcontractors as a major threat. There is a further concern that the NEN norm may prevent further regulatory attempts of the hard type that can increase the protection of temp workers, especially foreign workers.

⁶⁶ Mundlak 2010 *XX Guy?*

The Israeli model formally undermines temp workers' right of equality. However, this formal statement does not capture the fragility of the equality norm itself. As noted above, full equality was never really the intention, and the equality rule was used as a penalty default rule to induce cooperation. Where no derogation arrangement existed (the 'nine-month rule') the implementation of the law was stalled for a considerable length of time. It is unclear whether the equality rule would have suffered a similar fate if no collective agreement had been signed. The collective agreement was also applied only to the private sector, where many temp workers' right to equality would have matched them with 'regular' workers who no longer have a collective agreement. It was not applied to the public sector where most workers do have a collective agreement, which makes the promise of equality somewhat more appealing. As noted earlier, the question of gains and losses is contingent on the benchmark chosen – a hard-to-enforce promise to match the rights of temp workers with those of typically employed workers, some of whom have few rights to begin with, or a more practical list of clear rights, which are sometimes less than those of typically employed workers. Finally, the question of protecting workers rights is a difficult one because, while the current arrangement may seem to compromise on workers' rights, the outcome of the law has been to reduce the share of temp workers and increase the share of workers employed through service contractors (who are not designated as TWAs). The more significant the protection (public sector), the more intensive is the move from employment through temp agencies to subcontracting arrangements.

Inducing cooperation

The Israeli example aptly demonstrates how hard law was used to induce cooperation among rival trade unions and employers associations (where rivalries also existed between competing agents within both the labour camp and the employers' camp). By using a penalty default rule in hard law, and allowing the agents to circumvent the hard norm by devising their own softened form of law, the hard-soft law hybrid changed the payoffs for cooperation among the agents. The development of the hybrid was therefore indispensable to forging cooperation that

could not have been attained at the political level.

In the Dutch example, the employers seem mainly to have taken the initiative, in an attempt to prevent the reintroduction of the old, state-managed regulatory model. The cooperation of the trade unions is still in its infancy, and the trade unions themselves have admitted to viewing it as a form of damage-control, rather than a parity-based scheme.

Delegating power

A major difference between the Dutch and Israeli models is the scope of delegation. The Dutch model delegated, first and foremost, the role of enforcement to the system of self-regulation. The substantive rules remained in the hands of the state. However, it is important to emphasize the role of collective agreements and extension orders in the Netherlands. The state was never the sole agent responsible for the setting of standards, and in the tradition of the Dutch Polder model, many of the substantive norms are established by agreement. One of the reasons for abolishing the licensing system was the government's desire to step out of the private domain. But the prevention of fraud is, in essence, a task for government. Indeed the NEN norm is a form of delegation, whereby the sector has taken the initiative to fill a gap left by the government *and* to bear the costs. However, by offering a discussion forum Parliament did lend support to the NEN norm, and by introducing the "recipients' liability" it meant to give the NEN another boost.

The Israeli model delegated the role of authoring the substantive norms to the social partners, but left the role of enforcement, for the most part, in the hands of the state. While the social partners are free to establish parallel enforcement mechanisms, they haven't done so and do not seem to be advancing such solutions at present.

Adapting strict rules to a complex labour market

Clearly, the Israeli model serves the purpose of making the substantive norm more flexible. The flexibility is twofold. First, norms that are grounded in collective agreements are generally easier to adapt to changing labour market circumstances than statutes. Second, collective agreements and other means of self-regulation are more easily adapted to differences between sectors, employers, and forms of employment through temp agencies. The fact that after a long process of negotiation the collective agreement was extended only to the private sector is an apt example of such differentiation. At the same time, the fact that the collective agreement from 2004 has not been amended since also indicates that the partners

are hesitant to enter into an ongoing process of adaptation and are keeping the 2004 bargain intact.

The Dutch model, with its emphasis on enforcement, does not allow adaptation. However, flexibility and adaptation exist in the prior process of establishing norms, which is also based on collective labour agreements (CAO) and extension orders (AVV). Although the NEN norm can be unilaterally amended by the Dutch National Standardization Institute that is responsible for it, we do not believe that any such thing would be attempted.

6. CONCLUDING REMARKS

Hybrid forms of governance are closely related to powerful political lobbies by representative organisations. In both the Israeli and Dutch cases the latter have been the driving force behind the new forms of governance. Hybrid forms of governance combining soft and hard law fulfil multiple objectives and can succeed in rejuvenating labour law in its task. In times when a political impasse threatens to make labour law stagnant, impractical, and unsuited to different types of regulatory challenges, the fusion of hard and soft forms of law can provide a compromise on which conflicting interests concur. Both the Dutch and Israeli cases demonstrate how the new hybrids succeeded in resolving such political controversies.

Yet the optimistic view of hard and soft law hybrids does not refute the competing perspective, according to which the soft-law forms do not resolve the underlying political controversy, but merely conceal it. For example, the former spokeswoman of the European Trade Union Confederation (ETUC), Catalene Passchier, has repeatedly argued in favour of revamping the traditional licensing system, stating that the ILO-Convention 181 (which was adopted by the ILO conference in 1997 by an overwhelming majority and with the support of all the 'old' EU member states) has to be taken into account. The convention explicitly allows and encourages licensing and supervision systems, which would allow member states to protect their labour markets and promote good quality temp agency work'.⁶⁷

The performance of the two systems in light of the various objectives discussed in the paper indicates that there is probably some merit to both views. On the assumption that the development of labour market institutions is path-dependent, the effects of the two models will be clarified over time. The Dutch model is more advanced than the Israeli, because the latter suffices with strengthening the seams between statutes and collective bargaining, a matter the Dutch model has already internalized and built upon in its current development of the certification.. The NEN norm relies upon and has been motivated by previous rounds of regulation. One notable consequence of the Israeli model was a significant reduction in the use of TWAs, particularly in the public sector where the equality principle was not derogated. As a result, the regulatory challenge merely shifted from TWAs to subcontracting to service contractors. The process of establishing the hard-soft hybrid during the years 1996-2008 is now being repeated in the context of subcontractors, and is still in its infancy. The Dutch model, then, situated the partners in a state of constant bargaining and innovation with regard to TWAs, whereas the Israeli model succeeded in advancing a resolution of the debate on TWAs at the price of relocating the debate elsewhere.

⁶⁷ European Parliament Committee on the internal market and consumer protection. Hearing on proposed Directive on Services in the Internal Market 11-11-2004. Contribution on behalf of the European Trade Union Confederation (ETUC) by Catalene Passchier, confederal secretary.

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