Fatsoenlijke flexibiliteit : de invloed van ILO-conventie 181 en de regelgeving omtrent uitzendarbeid

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Decent flexibility

Through the years, labour flexibility has demanded increasingly more attention. An area of tension is apparent between employers aiming for more flexibility and employees desiring decent treatment. Temporary agency work is one of the forms of flexibility that raised questions at the level of the International Labour Organization (ILO) quite early on.

The development of social law with respect to temporary agency work has a rich history that is closely linked with the history of *private labour intermediation*. As early as in 1919, ILO Recommendation no. 1 advocated abolishment of commercial employment agencies. In the 1920 Maritime Labour Convention it was established that ILO member states were to do everything they could 'to abolish the practice of finding employment for seamen as a commercial enterprise for pecuniary gain as soon as possible'. In 1933, Convention 34 on fee-charging employment agencies was drawn up, stipulating that private labour intermediation with a view to profit should be abolished and that private not-for-profit labour intermediation should be curbed considerably.

This convention was shelved, having achieved only six ratifications, which resulted in a revision in the form of Convention 96 (1949), containing two variants: one assuming in principle the abolition of private labour intermediation in a time frame to be determined later (Part II), and one assuming regulation of the profit-seeking employment agencies, conditional to supervision, licensing and prescribed fee structure (Part III).

It took a few decades for the subject of private employment agencies to reappear on the ILO agenda. In 1994, a general discussion of the subject took place following a study by Sergio Ricca. He denounced the monopolist perspective in thinking about labour intermediation, listing no fewer than fifteen forms of intermediary services existing at the time. Apart from fee-charging employment agencies he named (non-exhaustively):

> …overseas employment agencies, agencies for the recruitment and placement of foreigners, private employment agencies (TWAS), contract labour agencies, staff leasing agencies, executive search agencies, outplacement agencies, job search consultants, personnel management consultants, training and placement institutes, job shops or cooperatives, employment advertising agencies, computerised job database agencies, career management agencies, employment enterprises or intermediary associations.

A total ban would be pointless, according to Ricca. Therefore, he advised a revision of Convention 96, which was entered on the agenda for the 1997 ILC, when Convention 181 and Recommendation 188 were adopted.

Crucial in this revision is that the definition was no longer limited to private labour intermediation, but now included the triangular relationship that may arise if the intermediary is also acting as a formal employer. The convention pays attention to:

- licensing, certification and scope (art. 3)
- definition (art. 1)
- protection of agency workers (art. 4, 11, 12)
- data protection (art. 6)
- no fee to worker (art. 7)
- fundamental rights at work (art. 4, 9, 11, 12)
- non-discrimination (art. 5)
- migrant workers (art. 8)
- complaints (art. 10)
- public/private cooperation (art. 13)

By now, 32 countries have ratified the convention, which exceeds the average of 28 ratifications for technical conventions. Of all the conventions adopted since 1990, it features among the three most ratified ones. According to a 2010 poll by the ILO, 38 further countries appeared to be interested in ratification, and since then 5 member states have indeed done so.

In 2009, the ILO organised a workshop, at which it was stated with respect to Convention 181:

> The Convention can be an engine for job creation, structural growth, improved efficiency of labour markets, better matching of supply and demand for workers, higher labour participation rates and increased diversity. It also sets a clear framework for regulating, licensing and self-regulation, thereby encouraging reliability; ensuring effective protection of workers against unfair practices, for example as regards pay, contract conditions, safety and health, by unscrupulous providers or user enterprises of temporary agency workers; discouraging human trafficking; and promoting cooperation between public and private employment services.

Convention 181 was adopted with an overwhelming majority of 347 votes in favour, 5 votes against and 30 abstentions. It was a positive ending to a discussion that all but encompassed the twentieth century. However, this is only one side of the truth. Another side remains, which is defined by continuous discussions about phenomena such as *contract labour, precarious work* and *Non-Standard Forms of Employment (NSFE)*.

In 1997, the ILC agenda also featured the subject of contract labour, because it had become muddled. Contract labour gave rise to insufficient social security of the workers concerned.

Labour only contracting was distinguished from job contracting. With the former, a commissioning client put out work to a contractor in a three-party relationship and supervised the activities. With the latter, work was put out to a contractor in a two- or three-party relationship where the contractor supervised the job himself.

Temporary agency work and labour only contracting can be regarded as overlapping notions. The fact that Convention 181 had been adopted in view of these types of intermediary services brought about that particularly employers constantly advocated an exceptional position for them.

Confusion of ideas, lack of participation by governments and mutual irritation between the parties concerned brought the ILO discussion about contract labour to a complete standstill. In the end, it was agreed to shift the focus to the employment relationship, which gave rise to the adoption of Recommendation 198 in 2006, which employers did not support. In spite of doubts about the legal necessity, the recommendation included the provision that 'this Recommendation does not revise the Private Employment Agencies Recommendation 1997 (no. 188), nor can it revise the Private Employment Agencies Convention 1997 (no. 181)'.

Following on contract labour, the notion of precarious work has likewise contributed to the entanglement of temporary agency work. The American Kalleberg defines precarious work as 'employment that is uncertain, unpredictable, and risky from the point of view of the worker'. Vosko distinguishes a one-dimensional from a multi-dimensional approach to the notion. The one-dimensional approach looks at the degree of job insecurity. The multi-dimensional approach – the dominant theory – involves more characteristics. For instance, Rodgers distinguishes:

- a short time horizon, limited duration or a high risk of termination;
- little or no control over working conditions, the work process and the wages;
- little or no labour protection;
- low income – on or near the poverty line.

These scientists would class temporary agency work with precarious work as well, certainly from the one-dimensional approach. However, some differentiation appears to be in order. One study shows that temporary agency work does not rank among the worst forms of precariousness. Seasonal labour, teleworking, casual work, zero hour contracts, false self-employment and informal work do considerably worse. Also, according to the same study temporary agency work scores nearly as high as steady full-time employment. Moreover, an OECD study makes clear that more certainty in terms of job security and employment protection does not automatically make

people feel more secure. The OECD states that unemployment benefits are appreciated more than employment protection.

According to trade unions, however, 'permanent direct employment is on the way out'. They see 'social regression rather than progress, and the less progress we see, the more agency work we find'.

The issue has a wider scope; more is at stake than just temporary agency work. Convention 181 should be examined for meaning, range, impact and implementation. In a 2011 Global Dialogue Forum, social partners became split between two extreme positions. The following bottlenecks with regards to temporary agency work emerged:

- employment is insecure;
- there is disparity in wages;
- the collective bargaining relationship of the trade union movement is weakened;
- there are insufficient limitations.

As the OECD study shows, it is no so much the employment protection that offers guarantees, as the social safety net.

Equal pay for equal work pivots around the question, which the comparable employee is: another temporary worker with that same agency doing the same work, or a comparable employee of the commissioning client.

The practice in various countries also shows that the trade union movement has actually managed to obtain a strong negotiating position where temporary agency work is concerned. Furthermore, in various countries specific legislation is in place regarding the use of temporary agency work.

At the ILO, a continuous discussion is taking place via the subject of Non-Standard Forms of Employment (NSFE). That discussion largely signals the same pressure points as those sketched above in relation to precarious work, even though they are not limited to temporary agency work, but relate to all forms of non-standard work.

In the course of the past years, Convention 181 has been 'joined' by other forms and implementations of international social law. This has resulted in policy competition, which begs the question whether Convention 181 is still relevant and whether it is still an adequate instrument for the international legislation of temporary agency work. This question has been considered from the angle of recent international developments in social law as well as from a Dutch context. These developments in social law relate to *decent work*, *human rights*, *global social dialogue: IFAs* and *Europe*.

Opposite the notion of precarious work, we can put the notion of *decent work*. Whereas the former notion indicates the weakening of the working population, the latter has by now become a catchall term to indicate the pursuit of improving the position of the working population. The term came into existence at the ILO in the

slipstream of the Declaration on Fundamental Principles and Right at Work, which focussed attention on freedom of association and the right to collective bargaining, the elimination of forced or compulsory labour, the abolishment of child labour and the principle of non-discrimination as basic principles for a globalisation that was also socially equitable. Priority was given to the associated Conventions 29 and 105 (forced labour), 100 and 111 (discrimination), 138 and 182 (child labour), as well as 87 and 98 (freedom of association and collective bargaining).

Alongside, the so-called Decent Work Agenda came into being. Its primary goal was formulated as follows: '… to promote opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity'.

As the objectives of the agenda, the ILO formulated:

- to promote and realise standards, and fundamental principles and rights at work (fundamental principles);
- to create greater opportunities for women and men to secure decent employment (employment);
- to enhance the coverage and effectiveness of social protection for all (social protection);
- to strengthen tripartism and social dialogue (social dialogue).

How must temporary agency work under Convention 181 be interpreted in relation to these objectives, and more generally: is temporary agency work decent? The Director-General of the ILO stated among other things that 'employment services have a great deal to offer in overcoming labour market inequality'.

There is doubt as to whether temporary work agencies create employment, however promoting employment does also benefit from a solid convergence process, in which temporary work agencies can likewise play a significant role. In his 'Report of the Employment Taskforce' dated 2003 Wim Kok phrased it as follows:

> Temporary agency work can be an effective stepping stone for new entrants into the labour market and hence *contribute to increased job creation*, for example by facilitating recruitment instead of overtime. Acting as human capital managers – rather than mere manpower suppliers – these agencies can also play a role of new intermediaries in the recruitment and management of both qualified and unqualified staff, offering employers an attractive alternative to traditional recruitment channels.

Thus, Kok's Taskforce makes an explicit statement about the positive role temporary work agencies can play in increasing job opportunities: while they may not actually create new jobs, at least they are increasing employment.

Many countries have specific legislation in place with regard to social protection. The OECD observes that in many countries the regulation of temporary agency work extends further than that of fixed-term contracts.

Through Convention 181 the fundamental rights with respect to freedom of association and collective bargaining, child labour, forced labour and non-discrimination have been guaranteed. In the temporary employment sector, social dialogue is taking place on various levels; on a cross-sectorial level, on a sectorial level, on temporary agency level and on a commissioning client level. The manner is heavily dependent on the (temporary) labour relations that have evolved in practice. If we test temporary agency work against the Decent Work Agenda objectives, we can conclude that, under Convention 181, temporary agency work contributes considerable to the realisation of these objectives

If we then test temporary agency work against the decent work indicators adopted by the ILO it turns out to tally with these indicators completely. The only exception is the termination of employment indicator. However, it would be taking things too far to label temporary agency work as indecent solely because this indicator is lacking. This applies all the more now that the Termination of Employment Convention (no. 158) and the corresponding Recommendation (no. 166), which on certain conditions create room for temporary jobs and thus for temporary agency work, are controversial as they allegedly lag behind the topicality and dynamism of the labour market. It is said that 'full employment and open labour markets are more important for perceived employment security than strict project dismissal regulations'.

Also, the main challenge with decent work is the informal economy, where ultimately the largest decent work deficit exists. It is striking, then, that the more strictly temporary agency work is regulated, the larger the informal economy is.

Temporary agency work amply complies with the Decent Work Agenda and the decent work indicators and can contribute to the transition from informal to formal, more decent work. It is also an important instrument in fighting human trafficking.

The big question has always been how the business sector had to address the *human rights*. The human rights have a rich history of declarations and regulations that were to protect people from an all-powerful sovereign. In his 1941 oration in the United States Congress, president Roosevelt spoke of the fundamental freedoms (freedom of speech and expression, freedom of every person to worship God in his own way, freedom from want and freedom from fear). Later that year, Roosevelt and Churchill launched the Atlantic Charter, in which they stated that 'all the men in all the lands may live out their lives in freedom from fear and want'. This charter was succeeded by the Declaration of the United Nations in 1942 and by the Charter of the United Nations in 1945.

In 1946, a committee was appointed to work on an international Bill of Rights that partly took shape in the 1948 Universal Declaration of Human Rights (UDHR). This declaration was further developed in other treaties, of which the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESR) are best known.

There are various regional equivalents of these human rights declarations, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

As mentioned above, the big question was how the business sector was to deal with these covenants and conventions. In 2004, the Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights triggered widespread resistance. A special representative was to solve the issue. To that end, Harvard professor John Ruggie was appointed, who in 2008 proposed the Ruggie Framework. This framework rested on three principles, viz. the state duty to protect against human rights abuses by third parties, including business (state-duty to protect); the corporate responsibility to respect human rights (corporate responsibility to respect); and greater access by victims to effective remedy, both judicial and non-judicial (more effective access to remedies).

Ruggie developed his framework into 31 guiding principles that were published in 2011. As from 2011, these guiding principles were incorporated into the OECD guidelines. They refer to the internationally recognised human rights that have been included in the International Bill of Rights, consisting of the Universal Declaration of Human Rights and the main instruments codifying the declaration: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as the fundamental rights principles that are part of the 1998 Declaration for Fundamental Principles and Rights at Work of the International Labour Organization (ILO).

The multinationals in the temporary employment sector, Adecco, Manpower and Randstad, all endorse the Ruggie Framework, and in their annual reports they account for progress. Particularly, the awareness of the ethical principles is high on the agenda.

Attention for the human rights issue also ensues from the need that businesses have to aim for CSR (Corporate Social Responsibility), which forms part of the principles of corporate governance.

There is a difference between 'hard' and 'soft' law, where 'hard' denotes legal obligations and 'soft' represents weak or non-existent obligations. This relates to frameworks that are usually referred to as soft law. They transcend the law, but they are definitely not permissive and may also refer to hard law regulations and be tantamount to that.

How must Convention 181 be appreciated in the light of this 'human rightification' of labour relations?

When comparing the regulations, one might conclude that Convention 181 encompasses the many human and labour rights that can also be found in the declarations of human rights. However, in these declarations, the rights have a wider scope. The corresponding international normative frameworks (the ILO -Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises) relate to soft law, but in practice may frequently prove 'hard'.

However, a ratified convention such as Convention 181 will carry more obligations with respect to temporary agency work. This certainly applies to stipulations that are specific, for instance with regard to regulating the status of the temporary work agency and the no fee to worker principle.

If more and more respect is demanded for human rights instruments, what is the importance of Convention 181? The answer to this question is that Convention 181 is more specific in nature, that ratification entails obligations while regarding fundamental labour rights, and thus it has value over and above human rights. Although there is an overlap, the various regulations that point in different directions may also enhance each other.

Thus, from the perspective of 'human rightification', Convention 181 is valuable and its substance is adequate.

Labour law varies widely by source (the constitution, law in the formal sense, collective agreements, international law and case law) and by nature, in the sense that it may have a public or a private basis. Historically, labour law has a public nature, but through the years the private component has become stronger and stronger.

Van der Heijden has a preference for giving private law a larger role in the world of work. In relation to this, the ILO speaks of social dialogue, which 'describes the involvement of workers, employers and governments in decision-making and workplace issues'.

Relatively new is the *Global Social Dialogue*, in which the international unions engage in a dialogue with multinationals and enter into so-called *IFAs* (International Framework Agreements). By now, GUFs (Global Union Federations) have concluded 115 IFAs. IndustriALL is forerunner in this respect (43), closely followed by UNI (38). IVF, BWI, PSI and IFJ have 7, 22, 3 and 2 respectively.

The IFAs focus mainly on anchoring the ILO core-conventions regarding freedom of association and collective bargaining, non-discrimination, forced labour and child labour. Also, attention is paid to protection of workers and the so-called supply chain, in which the IFA regulations are extended to the suppliers and subcontractors.

Usually, IFAs are soft law regulations, although the terminology often uses the term 'agreement' and thus suggests otherwise.

There is also an IFA for temporary work agencies, which UNI and the corporate members of CIETT, including Adecco, Kelly Services, Manpower Group and Randstad, have endorsed. It takes the shape of a Memorandum of Understanding, in which the parties acknowledge that Convention 181 and Recommendation 188 provide a regulatory framework for temporary agency work. Furthermore, they acknowledge the core-conventions guaranteeing decent temporary agency work, while they indicate that temporary agency work contributes to improving the functioning of labour markets, fulfils specific needs for both companies and workers and aims at complementing other forms of employment.

Apart from referring to Convention 181 and Recommendation 188 the IFAs also prescribe fair treatment of temporary agency workers with respect to their basic working and employment conditions, based on non-discrimination (for instance, equitable, objective and transparent principles for the calculation of agency workers' wages and benefits, considering national legislation and practices).

Moreover, they prohibit replacement of striking workers by temporary agency workers without prejudice to national legislation or practices.

The Memorandum is criticised as it has been concluded with only one GUF. There is a preference for a more broadly based approach. Also worth mentioning is the Charter on Temporary Work that the Volkswagen Group entered into with IndustriALL. Under the Charter, both parties agree on a reasonable use of temporary work or temporary agency work and implementing the equal pay principle in the framework of a phased plan; 5% temporary employment is considered to be reasonable. Equal pay for equal work must be effective after 9 months. And in principle, the temporary (agency) worker is entitled to be considered for permanent employment after 18 months.

The commissioning client takes the lead in the agreements, and the question arises how to deal with the bargaining rights of temporary workers' employers who also have reached agreements with unions.

The IFA can be added to the toolbox for managing international relations. The IFA for temporary agencies promotes Convention 181, but can hardly take its place. It can, however play a role in the flanks with respect to dealing with pressure points with temporary agency work, such as job insecurity, unequal pay, weak union position and excessive use of temporary agency work.

Through supply chain regulations, attention can be paid to fair wages and other labour and employment conditions. Labour market regulations can prioritise permanent employment and promote a responsible appraisal when deciding on the use of temporary agency work.

Attention must be paid to the equally justified interests of temporary workers' employers. Room for consultation between all parties involved in temporary agency work and scope for further synchronisation must likewise be guaranteed.

The European Union has had a vast influence on social legislation regarding temporary agency work in Europe. As a result of increasing attention for the Union's social dimension, temporary agency work also came up as an object of law. This was first the case when the question arose whether temporary workers could also appeal to the exception to the regulation that the social security law of the 'employing country' applies. In 1970, the Court of Justice answered this question affirmatively and thus effectively acknowledged temporary employment services as well as their characteristic tripartite relations.

Another major breakthrough in European law occurred in the Höfner-Marcotron (1990) and Job Centre (1996) cases. The judgments in those cases referred to the monopoly position of public job intermediation that already existed in various EU member states. The Court decided this was incompatible with competition law. The judgments resulted in a process of de-monopolisation in all countries concerned, which cleared the way for temporary employment services.

As early as in 1982, a draft directive with regard to temporary agency work was established. While ostensibly tackling distorting competition, oblique attempts were made to restrict temporary agency work. Also, efforts were made to improve the health and safety conditions of temporary (agency) workers. While those efforts were successful, any attempt to restrict temporary agency work came to nothing.

Temporary agency work also came up in relation to the development of and discussions about the Services Directive. Since temporary agency work had hardly been regulated on a European level by then, it must certainly be excluded from the Services Directive. This was actually the case in the later development of the Services Directive, which had been adjusted from a social point of view and was considerably toned down.

The discussion surrounding the Services Directive had highlighted temporary agency work, and the Maastricht Protocol provided scope to think about a social temporary agency dialogue. This dialogue actually took place, but prior to this, the Posted Workers Directive was effected, which regulated cross-border work, including temporary agency work, in more detail. According to this directive, the member states were to ensure that a series of core labour and employment conditions would be guaranteed in relation to cross-border work.

The practical implementation of the directive left much to be desired, and jurisdiction proved disadvantageous for employees on several occasions. For the Euro-

pean judge, the freedoms of the internal market outweighed the social aspects. This resulted in the implementation of the Enforcement Directive, which had to restore order. Nevertheless, the issue has still not been resolved.

By now, seven member states (the Netherlands, France, Germany, Sweden, Belgium, Luxemburg and Austria) are advocating equal pay for equal work in the same workplace. However, nine other member states (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia) consider this to be harmful to the common market. So far, the Commission has adopted the approach of the former seven countries and has put forward a proposal to that end.

Ultimately, a social temporary agency dialogue was to solve the issue of general regulation of temporary agency work. ETUC was clearly in favour. UNICE, however, was wavering, but was won round under pressure from CIETT. Unfortunately, this dialogue, to which nine months had been allotted in 2001, failed to bring results. The lack of timely consensus on the principle of equal pay caused the failure. Finally, ETUC pulled the plug on further consultations. A last-minute concession on the part of the employers to accept the user pay reference exclusively for temporary agency workers was of no avail.

Subsequently, it was the Commission's turn and it put forward a proposal in 2002. The articles 4 and 5 of this proposal can be considered pivotal.

Article 4 stated that the member states were to review periodically – and at least once every five years – any restrictions and prohibitions on temporary work and verify whether they are still justified. If this is not the case, they must be discontinued.

Article 5 imposes an equally favourable treatment as the one given to a comparable worker in the user enterprise, in terms of basic working and employment conditions, including seniority in the job, unless the difference in treatment is justified by objective reasons. Exemptions were allowed for:

- temporary workers with permanent contracts, if they continue to be paid in the time between postings ('German exemption');
- collective agreements as long as an adequate level of protection is provided for temporary workers ('Swedish exemption');
- during the first six weeks.

The proposal raised many objections and was shelved until a breakthrough was achieved through a deal made in the United Kingdom between employers and employees regarding a twelve-week 'period of grace' before user pay would be obligatory. This agreement gave the Commission the opportunity to put forward a new proposal.

Subsequently, the social temporary agency parties declared that the equal treatment principle had to apply with regard to basic working and employment conditions. Any restrictions for the proper functioning of temporary work agencies had

to be identified and abolished, while abuse had to be countered. In the case of permanent contracts, exemptions are allowed if continued pay between postings has been agreed upon. Exemption by collective agreements is also allowed, as well as by a qualifying period, as has been agreed upon in the United Kingdom.

The Commission put forward its new proposal largely to that extent.

Through so-called employment guidelines, the Commission has also made an effort to get the concept of 'flexicurity' accepted. In this context, four elements of policy are at play, viz.:

- flexible and reliable contractual arrangements;
- comprehensive lifelong learning (CLL);
- effective labour market policies (ELMP);
- modern social security systems.

In their social dialogue for the temporary work sector, the social temporary work agency partners have set out to give the concept of flexicurity substance as well as shape.

The EU likewise has regulations in place respecting all the areas that Convention 181 addresses. Some are less far-reaching, for instance the status determinations in relation to licensing and certification requirements, some reaching further, for instance in relation to wages and the core labour and employment conditions in the Posted Workers Directive. The EU lays down rules for 28 subjects about, or relating to temporary agency work to a greater or lesser degree, whereas ILO Convention 181 regulates 22. This ILO convention regulates matters less comprehensively, but as a result has more focus. In that sense it is sufficient for the EU, albeit as a minimum regime.

As an agreement, Convention 181 provides focus and guarantees for an adequate protection for temporary agency workers as well as for a satisfactory functioning of temporary work agencies. Ratification entails various obligations for member states, including those with regard to fundamental labour rights. While the EU Charter of Fundamental Rights is in place, it is dependent on existing EU law, a condition that does not apply upon ratification of Convention 181.

EU law has its contradictions and interpretation issues as well, for instance with regard to the Posted Workers Directive. Moreover, the ILO convention offers more guarantees as to continuity, since countries can only withdraw once in a decade. This also guarantees protection against banning temporary employment services, even though specific prohibitions may exist.

All in all, Convention 181 can provide EU member states with focus, clarity and guarantees for respecting fundamental labour rights and continuity of temporary employment services.

Labour intermediation in the Netherlands was originally in the hands of private parties. During the First World War, it came under public control.

The 1930 Placement Act (*Arbeidsbemiddelingswet*) laid down in legislation what had already developed in practice. Both private and public intermediation of labour was available. The private, profit-seeking intermediation was subject to licences, which were due to be discontinued, in accordance with the ideas accepted at the ILO at the time.

Apart from labour intermediation, the 1960s labour market became acquainted with the notion of manpower provision, which includes both temporary agency work and hiring-out of workers.

The issue of the illegal labour subcontractors, who perpetrated a fraudulent form of hiring-out of workers, required public action, and mainly to that end the Manpower Provision Act (*Wet op het ter beschikking stellen van arbeidskrachten*) came into force, aiming to protect the interests of good relations in the labour market and to promote that the workers concerned could play a full part in society.

The act remained a dead letter until riots took place in the Nieuwe Waterweg canal area, and the authorities took action on the strength of the act by introducing a licensing system. The following years are characterised by a difficult relationship between the authorities and the temporary agency. This only changed when the first Lubbers Cabinet took office, which in its policy statement pleaded for a more generous policy with regard to temporary agency work.

In 1990, manpower provision was regulated in the Public Employment Act (*Arbeidsvoorzieningswet*), which also regulated the tripartisation of labour market policy. This tripartisation was cancelled in 1996, and the question arose how manpower provision was to be regulated from then on. Among others, the Social Economic Council (SER) was asked for advice. Employees wanted a licence, a ban on obstructions and a pay equivalence rule. Employers were in favour of abolishing the licence requirement and of regulating the scab ban.

In 1994, minister Melkert (Social Affairs and Labour) introduced his flexibility and security memorandum, which included his policy intentions with regard to temporary agency work. He wanted to abolish the licensing requirement, but did aim for legislation of the pay equivalence rule, the scab ban and the ban on obstructions. Moreover, he set out to improve the legal position of temporary agency workers.

The memorandum was put to the Labour Foundation (star), which submitted a largely unanimous advice. It suggested that the agency work relationship would henceforth be designated as an employment contract, albeit one with a special character due to the possibility of an agency proviso enabling the commissioning client to terminate the agreement.upon completion of the work.

Besides, the advice created the opportunity to enter into three fixed-term employment contracts in a three-year period. Exemptions had been collectively agreed on. Also, the Foundation advised to establish a special redundancy guideline for the benefit of the temporary agency sector. Furthermore, the advice included a pay equivalence rule and scab ban. The ban on obstructions was not included in the advice.

Meanwhile, temporary agency employers ABU and NBBU on the one side and FNV, CNV, Unie BLHP and LBV on the other agreed to make considerable changes to the agency work relationship. A special regime of 'the longer the posting, the more rights' was developed in a phase structure. In the first two phases the temporary work agreement ended legally at the end of the hiring period; the third phase was characterised by a limited number of fixed-term contracts (eight) that could be effected in a two-year period. The fourth phase involved contracts for an indefinite term.

Apart from agreeing on this 'growth contract', arrangements were made with respect to pensions and education.

The Flex and Security Memorandum, the temporary agency covenant and the STAR agreement formed the basis of the new flex legislation that was developed in the Dutch Civil Code and in the 1998 Worker Allocation by Intermediaries Act (*Wet allocatie arbeidskrachten door intermediairs*).

In the summer of 1999, both Chambers of Dutch Parliament tacitly ratified Convention 181, after hearing the Council of State.

Following the turn of the century concerns arose about increasing fraudulence in relation to temporary agency work. Once again, the authorities wanted to revive a licensing system, but this met with resistance on the part of the temporary agency sector, supported by politicians. By endorsing the Bruls motion, members of Dutch Parliament showed a preference for a system of self-regulation with periodical audits and a certification system. To that end, the Labour Standards Register (SNA) was founded.

By the end of 2015, over 4000 certified private employment agencies had registered with the SNA. Apart from that, there is a 'periphery' of about 8000 temporary agencies. On the other hand, more than 3000 businesses have disappeared from the field since 2007, illustrating the highly dynamic character of the sector.

The implementation of a registration requirement at the Chamber of Commerce for intermediaries providing manpower likewise contributed to a comprehensive approach. This enactment was included in the Netherlands Worker Allocation by Intermediaries Act as art. 7a. Simultaneous with this requirement, the Temporary Agency Work Directive was implemented.

Following a development that could be characterised as positive, there is by now a more critical attitude towards temporary agency work and towards flexible labour in general. This is marked by the Security for Flexibility Bill (*Wetsvoorstel zekerheid voor flexibiliteit*), which wants to restrict flexible labour in general. The bill was initiated by the opposition of the day, but because of the 'colour adjustment' that arose from the Second Rutte Cabinet, these ideas ended up on the government table, and even in a social partnership agreement that was concluded in the spring of 2013.

Important showpieces that resulted from this agreement were the Work and Security Act (*Wet werk en zekerheid*) and the Act on Combating Sham Arrangements (*Wet aanpak schijnconstructies*). The rules for temporary agency work remained mostly unchanged with respect to the permitted periods. Temporary agency work with agency clause continued to be allowed for a period of 78 weeks, to be followed by a maximum of 6 contracts (formerly 8 contracts were allowed) in a 4-yearperiod. All that had already been included in the collective labour agreement for ABU. However, the collective labour agreement for NBBU had to be readjusted by reducing its maximum temporary employment period from 104 to 78 weeks.

The Act on Combating Sham Arrangements ensures that the employee who does not receive the wages he is owed can make every consecutive link in the chain of principals, service providers and (sub)contractors responsible for paying his wages.

The social partnership agreement also included arrangements to improve the structuring of tripartite relations. An approach to payroll services and a further analysis of these relations were necessary to promote sustainable relations with a perspective that provides for the justified needs and interests of employees and employers alike. The Labour Foundation was to advise on this, but so far has not managed to do so.

In 2013, minister Asscher (Social Affairs and Labour) brought self-regulation up for discussion and the question 'licence or certificate?' was back on the political agenda. In close consultation with all parties concerned, a package of 28 measures was agreed on that was to result in improving the system. By the end of 2015, these activities were almost completed. The minister looked satisfied for the time being and gave the system the benefit of the doubt. Regretfully, the specialists at FNV and CNV have terminated their collaboration to the quality mark by the certification system. In their opinion, the product development of the temporary agency sector is moving in an undesirable direction. They are unwilling to support specific new forms, such as contracting and intermediation for the self-employed.

By now, the minister has also put forward a proposal for the implementation of the Enforcement Directive, while integrating the Terms of Employment (Cross-Border Work) Act (*Wet arbeidsvoorwaarden grensoverschrijdende arbeid*). Also, the

minister wants to pursue payroll services as a result of the Hamer motion asking him to do so. The minister appears to disregard the motion for now.

Through the years, temporary agency work has been accompanied with various other types of flexible labour.

As Ricca stated as early as 1994, it is a dynamic segment. Over the past years (2003–2015) flexible labour has grown considerably (+62%) and the number of permanent positions has decreased equally substantially (–11%). In that period, the share of self-employed persons increased by 61%.

Temporary agency work has not kept pace with the growth of flexible labour. The share of on-call/substitute workers and self-employed persons grew considerably faster.

The Netherlands easily meets the standards of Convention 181. Thus, labour only contracting is dealt with. What has not been regulated is two- as well as three-partite job contracting. Both internationally and in the Netherlands there is a loophole in relation to job contracting that calls for action. In doing so, the OECD Guidelines can be elaborated on.

All in all, ILO Convention 181 is worthy of further promotion as a means to advance decent flexibility and to fight informal labour and human trafficking.