The Role of Private Regulation in Creating, Interpreting and Enforcing Labour Law.

W.A. Zondag and H.H. Voogsgeerd

Labour law is an early example of a field of law in which non-state actors participate intensively in its creation, interpretation and enforcement. Ever since Teubners' concept of 'reflexive law' (Teubner, 1983) it has become mainstream to involve other actors in government-activity, because it is presumed that these actors are better able to regulate themselves or their members for the sake of effectivity of the policy in general. Sometimes, governments use minimum rules within which these actors have to operate.
One of the oldest examples of 'reflexive law' is the collective labour agreement. Also here, governments are involved with the work of non-state actors such as trade unions and employers' organizations. On the one hand the state ought to respect the fundamental right on freedom of association and collective bargaining. It should be a state-free zone according to the fundamental ILO conventions. On the other hand the state ought to facilitate a machinery in order to stimulate the process of collective bargaining. Especially in the decision to impose this collective agreement on a complete sector of the economy: to make it generally binding, the minister of Social Affairs and Employment has a responsibility.
In this contribution we will analyze the interaction between the legislator (the minister) and the social partners in the creation, the interpretation and the enforcement of labour law. The focus will be on the Netherlands and on Dutch law with a brief excursion into the EU-level negotiations between management and labour. After an introduction into the concepts of reflexive law we will give an overview of the interaction in the Netherlands between management and labour on the one hand and the legislator on the other hand. A continuum of forms from pure soft-law to private regulation in the area of Dutch labour law will be given. The most important part of our contribution is a limited number of case studies: private regulation by collective agreement replacing legislation; private regulation by collective agreement complementing (minimum)-legislation; private contract (ondernemingsovereenkomst) interpreting legislation; enforcement of private regulation by collective agreement by a foundation. In what way does the interaction between private regulation and public regulation evolve?

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*Department of Company and Labour Law, University of Groningen.

Labour law in continental European systems is often characterized by the involvement of 'private' parties, a good example of so-called reflexive law. In the Netherlands a lot of experience has been gathered in the cooperation between the legislator and the collective partners: representative trade unions and employers' organizations. The famous 'polder'model has got interest from over all the world. From time to time, however, this cooperation is not that positive. In case the legislator is not amused with the result of the negotiations between the social partners it still issues legislation against the wish of the partners. There is clearly, a threat of hierarchy: the actual negotiations concerning the pensionable age is an example of this.

How has this involvement of the social partners evolved in the Netherlands the last 10 to 12 years? Is the involvement only there in the earlier inventory stages of the policy cycle, when a broad social basis is sought in order to introduce a new kind of policy? Or is the involvement also there in the implementation and enforcement stages? Is the government from time to time taking back the initiative? We studied several case studies in order to answer these questions?

The first example is about a pure case of self-regulation. The 'Sollicitatiecode' is a document developed by the Dutch Association of Personnel Management and Organisation Development (Nederlandse Vereniging voor Personeelsmanagement & Organisatieontwikkeling). It gives norms organisations and companies may comply with during the application stage and is meant to combat forms of discrimination. Although the document is self-regulatory, an applicant can notify the Commission on Equal Treatment in case a company has acted against the norms of the code. Moreover, it has become a generally accepted unwritten rule that companies and organisations should abide by the code. It is also an example of reflexive law in that companies and organisations have some freedom to adapt the norms to their own individual situation.

The second case concerns the Dutch law on the adaptation of working time/the duration of work (Wet Aanpassing Arbeidsduur, Waa). In article 2, paragraph 11, the legislator gives the power to deviate from the legal rules by collective agreement, or, subsidiary, by written agreement between the employer and the works council or a personnel representation ('ondernemingsovereenkomt'). This power is, however, only given in the situation of an increase in the duration of work. It is a clear example of protective labour law on the one hand (e.g. to protect the 'weak' party, the individual worker, against a decrease in the duration of work) and flexibility. Deviation by collective agreement is also called 3/4 coercive law (dwingend recht) and deviation by 'ondernemingsovereenkomst' is called 2/3 or 5/8 coercive law. These notions are accepted now in the Netherlands and it is an example in which Dutch labour law is unique. Other concrete examples of 2/3 or 5/8 coercive law are to be found in the Dutch law on working time (Arbeidstijdenwet) and the Dutch law on Labour and Care (Wet Arbeid en Zorg).

A third case concerns the topic of implementation. The Netherlands has longtime been the champion of manpower agencies. The enlargement of the EU in 2004 with ten new member-states has also implied a rise in so-called malafide manpower agencies. In 2005 the social partners and the ABU, the umbrella organisation of manpower agencies, established the SNCU, a Foundation to Enforce the collective agreement of manpower agencies' sector (Stichting Naleving CAO Uitzendkrachten). This 'collective labour agreement police' or 'cao police' as it is called in everyday language can issue sanctions from 5000 to 100.000 Euro, even with retroactive force. The focus of the 'police' is on the payment of social security contributions, holiday pay and payment of overtime or irregular time by the employees who work for the manpower agency. The 'cao police' is already quite effective. After a visit of the SNCU to the (mala fide) agencies, many of them ended up in a state of insolvency or decided to stop their activities. The work of the SNCU clearly complements the work of the Labour Inspectorate. In the annual report of the Dutch Labour Inspectorate for 2010 the Inspectorate admits that only 15% of the imposed fines has been collected in fact. Cooperation between the Inspectorate and the 'cao police' can therefore bring more enforcement in the area of malafide manpower agencies. The government can further facilitate this process by introducing a duty to register for manpower agencies, as is actually considered. So even in the area of implementation and enforcement the sector can organise itself and complement government activities. The legislator may facilitate this situation by introducing procedural legal rules.

It is submitted that reflexive law in the area of labour law in the forms studied above, is an essential element of Dutch labour law. Not only in the first stages of the policy cycle, but also in the field of implementation and enforcement the role of the sector itself is indispensable. State legislation and norms to be developed by the sector itself should go hand in hand and strengthen and complement each other.