

SAFEGUARDING PUBLIC INTERESTS: A LEGAL PERSPECTIVE

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1 Introduction

1.1 The legal character of safeguarding instruments

Public interests can be safeguarded in many ways using different instruments. This chapter limits itself to the *legal* instruments for safeguarding these interests. The question addressed is: what instruments can be derived from law for safeguarding public interests and how are these instruments applied to safeguard public interests in social security?

This question needs to be clarified with respect to two elements, which also explains the position of this chapter between the other chapters in this volume. First and foremost, with respect to the meaning of the term *law*. In the earlier chapter, written by Gijsbert Vonk, law is used as a *source* on the basis of which public interests can be defined. Law is thus a collection of condensed norms and principles, behind which higher values shelter.¹ The analysis of these values and principles leads to a definition of the public interests in social security, which, from a legal point of view, should always be protected. With respect to social security protection, inclusion, reliability, solidarity and equal dispensation of non-discrimination from a legal perspective are defined as material public interests, alongside the preconditional public interests of the rule of law and good governance. In this chapter law has another meaning: law is not a *source* of public interests, but an *instrument* with which these interests can be protected. A positive law perspective befits this instrument-based approach to the law. After all, the law is a policy instrument alongside other instruments.²

This leads to the second definition, the boundary between *legal* instruments and other instruments with which public interests can be safeguarded. The feature that distinguishes legal instruments from other instruments is the shift of rights and obligations caused by the legal instrument. These legal consequences can be realised and enforced by the courts. Other, non-legal instruments do not have this legal consequence. This chapter examines the instruments that do have a legal consequence. In practice this means, for instance, that contracts do count as legal instruments, but covenants do not. After all, a contract involves reciprocal rights and obligations that can also be enforced by law. In contrast to this a covenant is much more of a gentlemen's agreement with no legal shift of rights and obligations taking place.³

1 See: Chapter 4 in this book.

2 Fenger & Klok 2008, p. 224-225.

3 Pröpper & Herweijer 2004. For examples of covenants see: Algemene Rekenkamer, *Convenanten uitgaansgeweld*, 's Gravenhage: Sdu Uitgevers 2004.

1.2 Approach

The operation of non-legal instruments is the subject of other chapters. This chapter restricts itself to the instruments that have legal consequences. The objective of this chapter is to characterize legal safeguarding instruments and examine how these instruments are deployed in safeguarding the public interests in the specific policy field of social security. To this end paragraph 2 starts with a general description of the form and varieties of the legal safeguarding instruments. The question of how these legal instruments are given substance in the specific legal field of social security is then addressed. This is of particular interest because in this legal field public and private responsibilities merge. This mixed responsibility also has consequences for the type of instrument deployed by the state to safeguard social security: from provider to regulator to facilitator. Paragraph 3 examines these three roles and takes a closer look at the legal instruments in the policy field of social security. Paragraph 4 concludes with a brief elucidation of the significance of legal instruments in the safeguarding of public interests in social security.

2 Law as a safeguarding instrument

2.1 Identifying legal instruments

This description of the legal instruments attempts on the one hand to bring to the fore the national context, while on the other hand endeavouring to describe the variety of instruments insofar as this is possible. Both ambitions must be accounted for.

The legal safeguarding mechanism in a national context

The function of the law as an instrument for safeguarding public interests is largely dependent on the national legal system. In a system based on common law the emphasis is on case law rather than on legislation, whereas in the continental systems based on the *rechtsstaat*,⁴ law-making is pre-eminently the task of the legislator. The consequence of this is that in continental systems we can expect to find the safeguarding of public interests embedded in legislation, whereas in common law systems we can expect to find the safeguarding of the public interest lying with the judiciary, where principles play a greater role.

This difference, however, is not as great as it first appears. After all, when the state takes control and uses the law as an instrument, the result can always be traced back, either directly or indirectly to legislation.⁵ General rights are created or general obligations imposed by legislation and legislation lays down how these rights and obligations can be realised, who is charged with realising the authority of the state and who is empowered to perform the legal acts under public law to make such rights and obligations concrete. And finally, the law forms a regulatory framework within which the independent judiciary can judge these acts.

Legislation has this function in all legal systems. It does not make so much difference whether the system is based on the principle of the *rechtsstaat* of the continental systems, as in Ger-

4 The literal translation would be 'rule of law'. But as there are more than one meanings of the 'rule of law' I prefer to use the term *Rechtsstaat*, with all its elements.

5 According to Verdeyen 2009, p. 25.

many and France, or whether it is based on common law, as in the United Kingdom.⁶ The specific field of social security in particular is dominated by this instrumental legislation, making the nature of the legal system of less importance.

This chapter describes the legal safeguarding instruments without reference to the national legal context. The consequence of this is that full justice cannot be done to the peculiarities of national legal systems. The chapter suffices with a rough explanation of the instruments. Examples from a number of legal systems are used to make the abstraction more concrete. These examples are, however, chosen at random.

Three types of legal instruments

The second ambition is to provide a *full* description of the range of legal instruments. This is, however, an impossible ambition insofar as the collection of legal instruments knows almost no limits. Despite this, in an effort to leave nothing out the legal instruments are categorised into a more abstract group or type. The first type is the legislative power. The distribution of legislative power between different legislators and the mutual relationship between these legislators falls under this type.

In many cases the safeguarding of public interests leads to the creation of administrative competence under public law, empowering an administrative agency or public bodies to perform legal acts. The authorisation of public bodies and the degree in which the courts can regulate this authority forms the second type of legal instruments.

In addition safeguarding can also take place through intervening in the existing private relationships. The legislator can redistribute responsibility or create procedural safeguards. The third group of legal instruments relates to intervention in relationships under private law.

2.2 Legislating powers

Allocation of legislating power in a legal system

Legislation is based on a legislating power. In many systems the adoption of general binding rules can be traced back to the constitution. In non-constitutional states, such as the United Kingdom, this power can be traced back to the principle of the sovereignty of parliament: all legislating power is based in parliament.⁷

In almost all legal systems a number of entities can be distinguished that are each individually authorised to legislate. The legislating power is related to a territorially or functionally defined jurisdiction. Where the legislating power is divided, the mutual relationship between these legislating powers is significant. Hereby a dichotomy can be made between on the one hand federal and on the other hand decentralised relationships. In a federal relationship the different legislating entities are on an equal footing, whereas in a decentralised relationship a hierarchy can be distinguished between an ‘upper’ legislative level and a ‘lower’ legislative level.⁸ This hierarchy implies that the legislation of the upper level can restrict the legislation

6 For France see: Auby & Cluzel-Métayer 2007, p. 77. For Germany: Schröder 2007, p. 120. For the United Kingdom: Partington 2004, p. 142 e.v.

7 Partington 2004, p. 31, Heringa & Kiiver 2007, p. 21.

8 Heringa & Kiiver 2007, p. 29 e.v. Examples of a federal relationship: United States, Switzerland, Germany, Belgium. With respect to some aspects the Kingdom of the Netherlands is also a federation, namely in the relationship to the components of the Kingdom. This does not detract from the fact that the Netherlands is usually considered to be a decentralised state, as is the United Kingdom and France.

of the lower level. However this does not detract from the fact that the decentralised legislative levels have free regulatory powers within the hierarchical framework.

Decentralisation can be distinguished from deconcentration. The common feature is the hierarchy within which decentralised or deconcentrated agencies exercise their legislating powers. The difference, however, is that a deconcentrated agency does not exercise its powers independently but is subject to the supervision of the higher legislative level. Deconcentrated agencies only have a legislating power insofar as this results from higher legislation, whereas decentralised entities have a legislating power insofar as this is not restricted by higher legislation.⁹

The European and international legal order

Apart from the allocation of legislating powers within a state, general binding rules can also be derived from international and European law. European law forms an independent, autonomous legal order, from which citizens and member states can derive rights and obligations.¹⁰ These rights and obligations can be enforced through the national institutions: after all, European law is ultimately implemented or effected by the national administration and national courts.

In addition to the European legal order there is an international legal order that lays down preconditions that must be complied with by national systems.¹¹ The exact meaning of these legal norms under international law and whether or not a citizen can invoke a provision from international law depends on the national legal system. In some systems these norms only become binding once they have been transposed into national legislation.¹² In other systems the binding effect depends on the substance of the provision. Thus in the Netherlands norms contained in international conventions become binding after they have been announced and insofar as the substance of them is generally binding.¹³

Safeguarding public interests through the allocation of legislating power

The decision as to which forum is competent to legislate is important for a number of public interests. In the first place the legislating level has consequences for the *legitimacy* of the rules. Legitimacy is considered to be part of good governance.¹⁴ Legislation is adopted in a legislative procedure. This procedure provides for endorsement by those whom the decision addresses. For instance because legislation is adopted by parliament or another body representing the people, or because the legislation is made the subject of a referendum. Moreover, the legislative procedure is public and accessible, allowing room for consultation and recommendations before legislation is adopted.¹⁵ Both are mechanisms aimed at increasing (democratic) legitimacy.

9 Burkens 2006, p. 284.

10 European Court of Justice Case 26/62 Van Gend & Loos (1963) ECR I and Case 6/64 Costa v. ENEL (1964) ECR 585.

11 See Vonk 1999 for the significance of international law for national social security law.

12 This, for example, is the case in Great Britain.

13 Art. 93 of the Dutch Constitution.

14 See chapter by Vonk, which defines this interest. The connection between 'good governance' and legitimacy is explained in literature on 'good governance'. See for example: Van Montfort 2004.

15 Perhaps the best example is the Administrative Procedure Act in the United States, in which the procedure to be followed to lay down binding rules is fully regulated and provides various opportunities for consultation.

This safeguard applies to a lesser extent to binding rules arising from the European legal order. After all, here democratic legitimation only occurs indirectly, through the democratic legitimation of the national governments that adopt the legislation in the European Council and through democratic legitimacy through the European Parliament that legitimates the institution charged with drafting the legislative proposals (the Commission). The European legislation does illustrate a second public interest that is safeguarded by the choice of legislative level: by placing legislative power at a higher level, *inequalities* can be reduced. Indeed one characteristic of legislation is that it addresses a general group of citizens. The fewer jurisdictions there are, or the fewer exhaustive rules are laid down within a hierarchy at a higher level, the fewer differences there will be between the different jurisdictions.

Division of competency between the public authorities and the judiciary

Legislation has to be implemented. In many cases the implementing of legislation depends on concrete legal acts performed by a public body appointed by law. For example, the law empowers the body to grant permits, to enforce prohibitions or to pay benefits. The other side to this allocation of competency is the legal supervision by an independent judiciary. The independent judiciary has the task of settling disputes related to the implementation of legislation. In other words: legislating results in a division of competency between the public bodies on the one hand and the judiciary on the other hand.

Discretionary powers for the public authorities

The judicial regulation is limited in line with the extent in which the legislator allows the public bodies discretion. Allowing the public bodies discretion is sometimes the result of a well-considered decision, when the legislator grants the public authorities freedom with respect to the policy it adopts when deciding whether a subsidy or permit shall be granted.¹⁶ Discretionary administrative powers facilitate tailor-made solutions that would be impossible if general rules have to be applied.

Alongside this well-considered discretionary power aimed at facilitating tailor-made solutions, discretionary power can also be created unintentionally. For example because it proves to be impossible to encompass the complex reality in general rules. The legislator then uses vague terms that require further interpretation.

Regardless of the origin of discretionary power, in first instance it is the public body that will have to make a decision. The public body is the first to interpret and apply the vague term. Only when a dispute arises does the court, in second instance, pronounce judgement regarding the administrative decision.

Judicial review

The question that arises with respect to judicial review is how far can the courts impose their opinion on that of the administrative agency. Or: where does the discretion of the public body end and judicial review start? In German law the beginnings of an answer to this question can be found in § 20 Grundgesetz:

‘Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden.’

¹⁶ Compare de pouvoir discretionnaire in French law (Auby & Cluzel-Métayer 2007, p. 77) and the doctrines with respect to Ermessen and the unbestimmte Rechtsbegriffe in German law (Schröder 2007, p. 130).

The use of administrative power by the administrative agency is thus defined by acts (*Gesetzsmäßigkeit*) and law. In first instance the court investigates whether the administrative agency has violated a written legal rule and in second instance the court answers the question of whether another, unwritten, rule has been violated. It is with respect to this latter question that the court usually applies a little more restraint.

This distinction between written and unwritten law (legal principles) can be seen in all legal systems. For example in English law this test is laid down in *Associated Provincial Picture Houses v. Wednesbury Corporation*, where the court tested the exercise of a discretion against the requirement that this should be ‘reasonable’¹⁷:

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

In the United States the Supreme Court defined a similar test in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 in 1984. In the Netherlands the same test is included in the case *Doetinchemse woonruimtevoorzorging* (HR 25 februari 1949, ABKlassiek 2003, 8).

Although the judicial review in the legal systems is comparable, there are differences in emphasis. In continental systems, such as Germany and France, much weight is attached to the *legality principle*. As a result of this the statutory boundaries create very narrow frameworks for review: if the public body acted without an authority provided by the legislator, this in itself can be sufficient grounds for nullifying the legal act.¹⁸ In the United Kingdom, where less weight is attached to the legality principle, the public body is competent *unless* it can be derived from the legislation that this is not the intention. Thus even if the public body did act without legislative authority, this does not necessarily have to mean that this is contrary to the legislation. The judiciary reviews *ultra vires* and addresses the question of whether the public body acted in the spirit of the legislator.¹⁹

17 *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223.

18 This is primarily the case if the act of the agency is qualified as negative state conduct, which restricts the citizen in his freedom or rights.

19 Principally in British law: *Anisminic v. Foreign Compensation Board* [1969] 2 WLR 163.

Additional norm setting by the public authorities

Administrative powers are generally limited to the individualising of the law: the public authorities can perform *concrete* legal acts. In addition the public body also frequently has regulatory powers, with which it is able to lay down further rules. These regulatory powers allow part of the legislating authority to be shifted to the public body.

The choices made by the public bodies in adopting these rules are left to the discretion of the public bodies themselves. In other words the discretionary power is very wide-ranging, which forces the court to apply more restraint. As a result of this the statutory setting of norms with respect to administrative legislation focuses primarily on the procedure according to which these rules are created. Contrary to the usual legislative process, access and direct or indirect influence over the way in which administrative legislation is created is not automatic. The consequence of this is that the legislation that sets the norms for administrative acts often contains procedural norms relating to the way in which norms are developed. The American Administrative Procedure Act is an example of this: this act sets norms relating to the way in which administrative agencies make use of their regulatory powers. German law also provides a number of formal requirements with regard to administrative regulation. What is interesting in both examples is that violations of these standards can lead to nullification of the rules by the court.²⁰

In addition to the external binding rules adopted by the public authorities, rules can also be created that merely have internal effect. It is when the public authorities have been granted a discretionary freedom that we can expect to see additional norms being set within the administrative agencies. In the bureaucratic practice of the administrative agency these rules are unavoidable.²¹ Thus we see *Verwaltungsvorschriften* (German law), *beleidsregels* (Dutch law), *directives* (French law) or guidelines (American law).²² An exceptional subvariant of these non-binding rules concerns rules created between two administrative agencies, whereby one administrative agency has to render an account to the other. These rules do have a binding effect to some extent because failure to comply with these rules can result in a correction by the higher administrative agency. These are the '*omzendbrieven*' (Belgian Law) or circulars.²³

Self regulation

Another form of regulation is the (imposed) self regulation by the norm addressees themselves. Self regulation often takes place within the framework of a power to be exercised under public law. Thus complying with the norms created by self regulation becomes a condition for exercising a power under public law. There are various examples of self regulation. The decision of whether or not to grant an environmental permit, for example, is based on the 'best available techniques'. The drafting of these requirements is realised in consultation with the industrial sectors to be regulated.²⁴ The best available techniques ultimately form the basis of the permit rules, so that there is, within specific margins, evidence of self regulation with consequences under public law.

20 Schröder 2007, p. 112-113.

21 Davis 1980; Perrow 1986; Hood et al 1999.

22 Schröder 2007, p. 113-114; Auby & Cluzel-Métayer 2007, p. 78; Harter 2007, p. 370.

23 Leus 1992; Lust 2007, p. 23.

24 See art. 17 lid 2 IPPC-regulation (2008/1/EG).

Another example concerns norm setting with regard to the acts of medical professionals. In the Netherlands the practicing of a medical profession depends on registration in a medical register. Registration in the register for a medical specialism depends on compliance with the requirements formulated by the professional group representing that medical specialism.²⁵ Professional legal groups, such as lawyers and civil-law notaries also have a high degree of self regulation.²⁶

In all these examples there is self regulation within a social group, for example an association of professionals or an industrial sector, within which norms are formulated. Failure to comply with these requirements has consequences under public law, ranging from withdrawal or refusal of a permit, to disciplinary jurisdiction and the striking of a name from an official register.

Safeguarding public interests through administrative powers

The legal instruments relevant to the granting of administrative powers can vary according to different aspects. Here we see a development from a traditional unilateral ‘command-and-control’ legal relationship, in which the administrative agency can impose one-sided obligations on the citizen, to a more modern horizontal legal relationship, in which the norm addressee is given space to create its own standards.

In literature this horizontal legal relationship is referred to as ‘new governance’.²⁷ In new governance we see a shift in the public interests to be safeguarded. After all, the assumption is that the more closely the norm addressee is involved in the setting of the norms, the more likely he is to support these norms. Legitimacy, effectiveness and efficiency are thus important public interests on which new governance is founded.²⁸

Yet in essence ‘new governance’ is little more than a friendlier version of the traditional ‘command-and-control’ legal relationship. In both cases there is an administration in the background that is ready to intervene if the citizen does not act in line with the public interest as this is perceived by the administration. Ultimately it does not make much difference whether the public body grants a permit applying its own rules, or strikes a name from the register because the professional did not comply with the norms of his ‘peer group’.

Furthermore, one can also expect the administrative agency in a one-sided legal relationship to take account of the norm addressees’ individual circumstances, thus, practically speaking, to adjust application of its administrative power to these circumstances.²⁹ Especially if the legislator has given the administrative agency the discretionary power to do so. When such tailoring is made impossible because of internal rules that do not allow cases to be assessed on an individual basis, it is an illusion to expect that the rules that are the result of self-regulation will make allowances for the individual circumstances involved in the case.³⁰ To summarise:

25 See the Dutch Individual Healthcare Professions Act.

26 For more on self regulation of the medical and legal professionals see: Zeegers & Bröring 2008.

27 Solomon 2008, p. 822.

28 Hoekema et al 1998, p. 327.

29 Nicolai 1990, p. 54 e.v.

30 Tollenaar 2008, p. 244-245.

the tension between rules aimed at creating uniformity on the one hand and individualising tailoring on the other hand depend on the characteristics of the legal relationship. ‘Command-and-control’ or ‘new governance’ makes little difference at this stage.

2.4 Private law as a safeguarding instrument

The development towards ‘new governance’ does reveal a changed vision of governance, in which instruments under *public law* are replaced by mechanisms under *private law*. The government uses instruments that not (only) result in a legal relationship between the citizen and the administration, but (also) in new relationships between citizens. Public interests are safeguarded by reallocating liabilities under private law, or by formulating procedural requirements to which actions undertaken under private law must comply. These are legal instruments, because these instruments are ultimately bound to *legal* consequences. The re-allocation of liability makes it possible, for example, to recover damage from another party and, if a procedural requirement has been violated, a request may be submitted for the legal act under private law to be nullified.

Liability as a governance instrument

Civil relationships are entered into between two equal parties, both with a will of their own and the freedom to make a choice. It is this principle that distinguishes legal relationships under private law from legal relationships under public law, whereby, per definition, the two parties are unequal. However, the assumed equality between the parties in the private construction is uncertain because of social status and the inequality of knowledge. For example the manufacturer of a product knows more about that product than the consumer. The consumer is not able to make a well-reasoned choice and thus runs the risk that the product purchased will not fulfil his expectations.

In this example the inequality between the parties is balanced by the law by making the manufacturer liable for the product. Similar liabilities can be found in every legal system.³¹ The purpose of these liabilities is to protect the weaker party against the stronger party. Whether this is about the protection of the consumer from the manufacturer, the weaker road user from motorised traffic or the employee from the employer: in all cases private law gives the weaker party the opportunity to hold the stronger party liable in the event of damage.

This reallocation is based on the assumption that the liable party will make more effort to prevent damage occurring. Manufacturers will invest more in the quality of their products and information about these products for the consumer, drivers of motorised vehicles will drive more carefully, financial providers will inform their customers better about possible risks and the employer will improve working conditions to prevent illness or invalidity occurring.

Institutional safeguards

The legislator can also compensate social inequality by formulating procedural requirements for specific legal acts. Procedural requirements are often institutional safeguards: the legislator makes the establishment of a supervisory committee or works council obligatory. Failure to consult the works council, or non-acceptance by the supervisory committee or the meeting

³¹ With regard to product liability this arises from the European Directive on Product Liability (85/374/EEC).

of shareholders, for instance with respect to investment decisions, opens the way for the legal act to be nullified by the court.³²

The legislator also creates institutional safeguards to safeguard public interests in other sectors. Educational committees, in which students participate, supervise the quality of the teaching and have to be consulted with respect to decisions to make changes to the education.³³ Care providers have to set up clients' participation council, which promote the common interests of customers and advise the care provider of these.³⁴ In all these cases the legislator has created a procedural safeguard with the objective of removing inequalities.

Safeguarding public interests by private law

The legal instruments examined in this paragraph focus on strengthening the legal position of a weaker party. The public interest served by this compensation is the removal of inequality. At the same time these instruments make private parties primarily responsible: the weaker party must realise its rights itself. This definition sometimes has a normative justification: the state must leave space for the private sphere. However, there is more often a more practical or economic justification: intervention by the state in the form of general rules or in the form of providing facilities, leads to market failure and affects welfare.³⁵

However, the use of this type of instruments is accompanied by a great danger. After all it is dependent on the question of whether the citizen really wants and is able to make use of his powers. Indeed, practice has taught us that there is a great difference between *having* a right and *realising* a right.³⁶ This leads to a new type of state intervention, whereby supplementary instruments under public law are deployed. For example the legislator appoints a supervisor to supervise. In the Netherlands for example the Consumer Authority supervises the way in which companies treat consumers.³⁷ This authority can impose penalties if, for example, the company violates rules regarding consumer information. These facilities under public law exist alongside the possibility for the aggrieved consumer to hold a company liable under private law.

3 Legal safeguarding instruments in social security

The objective of this chapter is to examine the working of the legal safeguarding instruments in the field of social security. This policy field is distinguished by a mixed public and private responsibility. This also has consequences for the type of legal instruments that can be found

32 A fairly recent example of the meaning of this type of obligations: Brussels Court of Appeal, 12 December 2008, 2008/KR/350, on the decision of the board of Fortis in October 2008 regarding the sale of this company.

33 See art. 9.18 of the Dutch Higher Education and Research Act.

34 Care providers are charged with the provision of care within the meaning of the Dutch Act on Exceptional Medical Expenses and the Dutch Health Care Act (see: art. 1 Dutch Act on Clients' Right to Participation) the obligation to establish these committees is laid down in article 2 of this act.

35 See this argumentation: Chapter 2 by Nentjes & Woerdman.

36 Galanter 1994.

37 More countries have a comparable institution. In the United Kingdom the Office for Fair Trading has a similar task.

in the regulation of social security. The following description of these instruments is based on the study and analysis of the social security systems in a number of countries.³⁸

3.1 Legislating powers in social security

Social security is primarily a matter for national law and is centrally organised in every legal system. This does not only apply to unitary states, such as the Netherlands, where one would expect legislating power to be centralised. In federal states too, such as Belgium and Germany, the fixing of the subsistence minimum, the formulating of award criteria and the method of funding is a federal matter.³⁹ Within this framework the *gemeenschappen* or the *Länder* have the power to decide how these rights will be effected and to confer supplementary or additional rights.⁴⁰

The central bias of social security legislation that is to be found in every legal system is nuanced in two ways. In the first place there is the European and international legal order which creates norms. In the second place the setting of norms in legislation is bounded by the social security existing in the private sector.⁴¹ The boundary between public and private in social security is unpredictable and can relate to both the (private) organisational forms for administering (public) social security and to the responsibility for substantive claims.

The European and international legal order

European intervention in national social security relates first of all to the coordination of social security between member states. European social security particularly comes into play when an employee and his family migrate between member states. The coordination of national social security in such cases is regulated in Regulation 2004/883.⁴² However, the obligation to coordinate also results in a substantive claim in article 4 Regulation 2004/883: those persons falling within the scope of the provisions of the regulation have, in principle, the same rights and obligations pursuant to the legislation of each member state as the nationals of that member state. In other words: it is not permitted to make a distinction between nationalities in a national social security system.⁴³

Alongside this direct intervention in social security, the European legal system also creates norms that affect national social security systems in a more indirect manner. On the one hand this intervention is connected to the combating of discrimination relating to labour and profession.⁴⁴ On the other hand indirect intervention takes place as a side-effect of the European harmonisation of national labour law, as the result of the harmonisation of the national

38 The social security systems in Belgium, Germany, the United Kingdom and the Netherlands have been chosen. This choice is based on the one hand on the relative simplicity of the sources to be studied and on the other hand on the expectation that the systems in these countries demonstrate sufficient variation.

39 For Belgium see art. 5, § 1, II, 2 sub a of the Exceptional Act (Bijzondere wet) of 8 August 1980 reforming the institutions and for Germany: § 74, Abs 7 and 12 Grundgesetz.

40 For Belgium see: art. 5, § 1, II, 2 sub b of the Exceptional Act (Bijzondere wet) of 8 August 1980 reforming the institutions and for Germany: § 15 Sozialgesetzbuch VII. See further: Vansteenkiste 1995, p. 115.

41 McKay & Rowlingson 1999, p. 3.

42 With regard to the predecessor see (Regulation 1408/71): Penning 2001, p. 6.

43 The discrimination prohibition is another material rule in European law that affects the national social security systems, see: Vonk 1999, p. 12 e.v.

44 Codified in Directive 2000/78/EC. With regard to the consequences thereof in the form of the Mangold case see (HvJEG 22 November 2005, case C-144/04, Jur. 2005, p. I-9981): Jans 2006, p. 115-129.

economies.⁴⁵ The harmonisation of labour law automatically leads to questions regarding the formulation of a minimum level of protection for all workers at European level.⁴⁶

Apart from the European legal order, more indirect international norms are laid down with respect to social security through international conventions, including the ILO conventions.⁴⁷ These conventions restrict the legislator, for instance with respect to the level of protection provided.⁴⁸ In this way the conventions are able to influence the legal safeguarding instruments. Such influence is indirect because the courts cannot always test cases directly against these conventions. However, the norms do dominate the political debate and can act as guidelines when interpreting legal concepts.

Private social security

With regard to social security in particular, the legislating power is bounded by the private sector. Where work related risks are concerned, responsibility lies with (representatives of) the employers and employees.⁴⁹ Within the labour relationship agreements are made relating to social risks associated, for example, with employment, invalidity and pensions. These risks can be covered by taking out private insurance, which may be arranged at corporate level or at sector level.⁵⁰ Public social security is also limited in other areas of social security, including national assistance. National assistance is a subsidiary facility, which only makes an appearance if all other facilities fail.

The boundary with private social security is in the first place formed by *private organisational forms* charged with providing social security. For example German law has the *Prinzip der Selbstverwaltung*:⁵¹ citizens must in principle be able to solve, arrange and manage their own problems.⁵² As far as social security is concerned this leads to the explicit observance of a self-regulatory power for *Selbstverwaltungs* agencies within the framework of the *Sozialgesetzbuch* under public law. These *Selbstverwaltungs* agencies may have legal personality under public law and have powers under public law, but they are compiled by the citizens involved, in other words the employees and employers and the rules allow them some room for supplementary norm setting under public law.⁵³

Similar organisational forms can also be found in other legal systems. In Belgium, payment institutions, health funds and social insurance funds for self-employed persons are charged with the administration of certain social security provisions. These agencies also have characteristics of private law, but derive their powers directly or indirectly from the law; they

45 See the green book 'De modernisering van het arbeidsrecht met het oog op de uitdagingen van de 21ste eeuw', European Commission, 22 November 2006.

46 This consequence of harmonisation of labour law is being critically followed by the member states and occasionally explicitly rejected. See the Joint opinion of the German social insurance umbrella organizations, 30 March 2007, p. 3 and the response of the Dutch government: Kamerstukken II, 30893, nr 4, p. 13.

47 More specifically ILO Convention 121 containing the general standards.

48 Pennings 2006, p. 112.

49 In the (distant) past the capacity of society to self-regulate was also an important reason not to intervene in societal arrangements through legislation as far as this concerned the security of subsistence. With regard to the charity and the meaning thereof for the safeguarding of public interests: Plantinga & Tollenaar 2007.

50 Verdeyen 2009, p. 59.

51 Becker 2003, p. 226.

52 Maurer 2009, p. 570.

53 Becker 2003, p. 226, see further § 44 SGB IV.

require recognition as social security institutions and are thus subject to supervision based on the legislation.⁵⁴ In the Dutch social security system private organisational forms play a specific role in pension accrual. The administration of the pension funds can be outsourced to private parties. This private arrangement occurs within a public framework and under the supervision of government institutions, such as the Central Bank of the Netherlands. The insurance of health costs is another example of a private arrangement within a public framework: it is mandatory for citizens to take out insurance to cover health costs, but they are free to decide which health cost insurer they want to conclude this insurance with. The coverage is subsequently also regulated by law.

By imposing requirements with regard to the organisational form or by subjecting the organisations to supervision, the state makes room for the social security provisions created in the private sector. The social security legislator may withdraw at times, but new legal arrangements then come into play under which the state is the regulator and although it may not formulate material rights, it does create procedural safeguards, or it is the facilitator in which case it (also) applies other, financial, instruments.⁵⁵

3.2 The division of power between the public authorities and the judiciary

The division of power between the public authorities and the judiciary has special features in the field of social security. In the first place, the legislator occasionally explicitly refrains from granting discretion and opts for a penetrating judicial review – even though, with a view to subsidiarity and tailoring, one might assume that statutory discretion would be granted to the public bodies. In the second place, discretion is virtually unavoidable when the public body exercises its administrative powers on the basis of facts that can only be established by an expert. This applies, for example, when an assessment involves a medical claim.

Tailoring and administrative discretion

In § 8 the German Bundessozialhilfegesetz contains the explicit obligation with regard to the ‘Form und Maß der Sozialhilfe ... nach pflichtmäßigem Ermessen zu entscheiden’. National assistance in particular requires tailoring and therefore the public body must consider the interests. For this reason the legislator often grants the public body a discretionary power.

There are, however, risks accompanying discretion. Discretionary powers are a ‘two-edged sword for benefit recipients’: on the one hand wide-ranging discretionary powers facilitate tailoring, on the other hand inconsistencies and arbitrariness lie in wait.⁵⁶ During the reform of the ‘income support’ in the nineteen eighties in the United Kingdom the scales tipped in favour of codified rights for citizens and less room for discretion for the administration.⁵⁷ A similar tendency can be observed in Germany and the Netherlands.⁵⁸

The result is: less room for the administration, and more room for the judicial review. Discretion can then only be used by the public authorities for the calculation of the financial resour-

54 Verdeyen 2009, p. 49.

55 According to Klosse & Vonk 2000, p. 191 and Plagemann 2003, p. 438-439.

56 McKay & Rowlingson 1999, p. 134.

57 Wikeley & Ogun 2002, p. 275.

58 For Germany see: Schellhorn & Schellhorn 2002, p. 97-98. For the Netherlands: CRvB 8 November 2005, USZ 2006, 13.

ces of the citizen, or in finding a solution to the question of whether the exceptional costs can be met from the resources and the assistance provided.⁵⁹

Establishing facts when assessing a claim: the definition of medical concepts

In other areas of social security the public body does have room for discretion. This is the case for instance with respect to the question of whether or not an individual is incapable of work. Determining the incapacity for work requires a medical assessment by a doctor. Sometimes the question of whether the employee is ill depends on the report submitted by a doctor appointed by the administrative agency (for example in the United Kingdom).⁶⁰ In other case (for example in Germany) the employee himself can submit a doctor's declaration attesting to the fact that the employee is incapable of work.

Setting the norms with respect to the facts that can lead to the conclusion that an employee is incapable of work, is in every case exceedingly difficult. In the United Kingdom the doctors' reports are regulated in regulations, which, however, tend to focus on setting norms with regard to the method of assessment and do not provide qualification with regard to established facts.⁶¹ In Germany the definition of *arbeitsunfähigkeit* is left to the guidelines that are formulated by the profession itself.⁶² This is comparable to Dutch law, whereby appointed protocols set the norms for the company doctors' reporting.⁶³

The role of the experts' reports also has consequences for the judicial review. The court shall after all be inclined to remain silent in the face of facts that are established by a (medical) expert. This is unavoidable because the court itself lacks the medical knowledge to impose its opinion on the medical opinion of a doctor. The result of this is that the court seeks procedural leverage points, which reveal something about the quality of the opinion. Relevant facts here include who has carried out the medical examination (is this doctor sufficiently qualified?) and the method by which the examination was carried out (were the relevant protocols applied?). With regard to substance the medical examination can only be invalidated if another expert's report is produced to contradict it.⁶⁴

Where the latter is concerned, the United Kingdom offers an interesting in-between variant, whereby in the phase preceding the safeguarding of the legal rights disputes are heard by an external Tribunal. This Tribunal consists of three independent members, possibly including a medical professional. This Tribunal can impose its ruling in the place of the administrative agency's decision (in this case: the Department for Work and Pensions' Benefits).⁶⁵ In this way more room is created for a penetrating assessment of the medical facts during the legal proceedings.

59 For Germany: Schellhorn & Schellhorn 2002, p. 98 and for the Netherlands: art. 35 lid 1 Work and Social Assistance Act.

60 Wikeley & Ogus 2002, p. 530 e.v.

61 See: Borghouts-Van de Pas & Pennings 2008, p. 42.

62 These guidelines are based on § 92 SGB V.

63 See Regulation of protocols for insurance physicians with regard to incapacity for work acts.

64 De Graaf, Schuurmans & Tollenaar 2007, p. 3-15.

65 The protection provided by the Tribunal bears some similarities to the objection stage in Dutch law, whereby a medical insurance expert re-examines the facts established in the primary phase.

3.3 Private law as a safeguarding instrument in social security

Public safeguards in private disputes

Insofar as it relates to the work related risks, social security is unavoidably bound to labour law. The legislator sometimes makes explicit use of the existence of a private legal relationship to safeguard public interests. The bestowing of liability in the event of illness or invalidity on the part of the employees on the employer is an example of this. This liability is given substance by the obligation laid down by law to continue to pay wages if the employee is unable to perform his or her work as a result of illness. In the United Kingdom this obligation arises from the obligation for the employer to pay a Statutory Sick Pay (SSP) to the employee who is ill for longer than four days. The SSP consists of a fixed sum per week and is paid for a maximum period of 28 weeks. In this way the employer himself experiences the disadvantages of his employee being absent due to illness.⁶⁶ In the German system there is an obligation to continue to pay wages (Entgeltfortzahlung), albeit that this is limited to six weeks and many companies can re-insure themselves against this risk under public law.⁶⁷ In the Netherlands the employer bears the risk of his employee falling ill and in the event of his employee falling ill the employer must continue to pay wages equivalent to at least 70% of the wage for a period of two years.⁶⁸

The definition of this liability under private law expresses the fact that the relationship between employer and employee extends beyond the performance of work in return for the agreed wage.⁶⁹ Furthermore, it is assumed that the employer shall avoid the situation in which his employee calls in sick by, for example, investing in good employment conditions. On the other hand it is assumed that the employee shall call in sick less often given that he or she is not supported by an anonymous government agency but by a visible opposite party, namely the employee's employer.⁷⁰

A consequence of this re-definition of the liability is that simple disputes will arise regarding the question of whether or not the employee is indeed ill. This is primarily a matter for private law: the employee calls in sick and is required to submit some sort of proof in order to realise his or her right to continued wage payment. The employer can invalidate this proof. In every legal system in which the legislator includes the risk related to illness in the labour relationship, arrangements are made under public law to settle this type of disputes. In the German system the employer can report to the benefits agency, which must then investigate whether the absence due to illness is justified.⁷¹ In the Netherlands this type of disputes leads to actions to recover back wages, during which the employee is required to request a second opinion from the public body's doctor.⁷² These examples illustrate that although the legislator may opt to use liability under private law as an instrument to safeguard public interests, ar-

66 Wikeley & Ogun 2002, p. 530 e.v.

67 Based on § 617 BGB and the Entgeltfortzahlungsgesetz. See also: Hoogendijk 1998, p. 226 e.v.

68 Based on art. 7:629 Civil Code.

69 Schmitt 2007.

70 Fluit 2001.

71 On grounds of § 275 SGB V the medical service of the Krankenkas must start an investigation in the case of 'begründeten Zweifeln an der Arbeitsunfähigkeit, insbesondere auf Verlangen des Arbeitgebers'.

72 The employee submitting a wage claim must also submit an expert's opinion on grounds of art. 7:658b of the civil Code.

rangements under public law are necessary to balance the undesirable effects of the private power game.

Public safeguards in private institutions

The legislator also uses private institutions to safeguard the public interest in social security. The empowerment of the employee, benefit recipient or client forms an argument for ordering the establishment of works councils or clients' participation councils. Examples of this type of institutional safeguards can be found in every legal system. In Germany there is the *Betriebsrat* on grounds of the *Betriebsverfassungsgesetz*, in the United Kingdom the Works Council on grounds of the Information and Consultation of Employees Regulations 2004 and in the Netherlands the *ondernemingsraad* on grounds of the Works Councils Act. The function and authority of these councils varies from country to country. In many cases these councils are able to influence the way in which social policy is given substance within the company through the right to consultation and recommendations. For example, with respect to the way in which the employer gives substance to preventive measures with regard to absence due to illness.

Other examples of institutional safeguards are the clients' participation councils, established by agencies under public law charged with the provision of social security. In the Netherlands persons entitled to national assistance, an unemployment benefit or an invalidity benefit are able to exert influence through so called *cliëntenraden* set up by the administrative institutions.⁷³

Finally, complaint procedures also represent an institutional safeguard. In particular when services are provided by public institutions, the law often arranges for a complaint procedure. In the Netherlands this procedure is laid down in the Dutch General Administrative Law Act. In the United Kingdom these procedures are regulated by the public authorities charged with the administration of the different facilities. This applies for example to the Jobcentre, which exercises the most authority.⁷⁴ The most important characteristic of a complaint is that it seldom results directly in legal consequences. A grounded complaint does not lead directly to the invalidation of a legal act, or to the creation of a new legal right. On the other hand, complaint procedures are pre-eminently suited to protect a public interest as 'good governance': after all in the ideal situation the quality of the service provision is thereby enhanced.

4 How do the legal instruments work?

The above reflections on how legal instruments work in general and in social security in particular bring us to three conclusions. In the first place, the legal instruments offer a number of choices between what at first sight are contradictory public interests. For example, at the level of the legislative authority, a uniform and equal social security system is an argument to for granting legislating power at a high legislative level. Legitimacy, effectiveness and tailoring are, however, reasons for granting regulatory powers at a level closer to the norm addressee.

⁷³ See art. 7 Work and Income (implementation structure) Act and art. 47 Work and Social Assistance Act.

⁷⁴ See <www.jobcentreplus.gov.uk>.

With regard to the substance of the legislation we are faced with similar dilemmas. The legislator can choose between open norms, which make more tailoring and effective decision-making possible or closed norms, whereby equality and legal certainty are safeguarded. The degree of penetration of the judicial review is also dependent on this choice. The more discretion the legislator leaves to the administration to seek tailor-made solutions or to qualify facts, the less the courts are able to judge the substance of the administration's opinion.

These tensions are also revealed in the use of instruments under private law. On the one hand, these steer by creating incentives and thus contribute to an awareness of responsibility and an efficient distribution of social security. On the other hand, it is exactly this type of incentives that can lead to external effects, which make new interventions necessary. The employer who is liable for the illness of his employee can, for example, rather than investing in better employment conditions decide to take this risk more into account when selecting, with the result that some groups, especially elderly people and handicapped persons, fall overboard. The legislator will have to act to reduce these threats of inequality.

The second conclusion relates to the range of legal instruments. Legal instruments have particular consequences for *individual* legal relationships, which can only be realised at that individual level. Ultimately the employee or benefit recipient has to enforce his or her rights. The law is tailored to this individual administration of justice and provides, with its extensive procedural rules and principles, for legal actions whereby this right can be acquired. The law cannot claim that it is able to safeguard public interests at a more general level.⁷⁵ If the employee or the benefit recipient refrains, for whatever reason, from enforcing his or her right, the public interest in respect of which the right is granted will never be realised. For this reason alone, non-legal instruments are indispensable.

This latter observation brings us to the third conclusion: in an extended system of privatisation it is unavoidable that new instruments under public law will turn up to compensate the economically and socially weaker party. The working of private instruments depends on an equal playing field. If parties are unequal there is reason for the state to intervene with supplementary instruments. Supervisors and institutional safeguards are the result. The privatisation of social security, whereby increasingly more private instruments are more frequently chosen as a means of providing social security, thus does not result in less state intervention, but to state intervention of a different sort. This is exactly what the regulatory welfare state is all about.

⁷⁵ Leaving aside the systems with a Constitutional Court, where the Court can interfere on a more abstract level. Nevertheless: even these courts are limited to the legal arguments and will have to respect the political decision-making.

REFERENCES

- Auby, Jean-Bernard & Lucie Cluzel-Métayer (2007), 'Administrative law in France', in: René J.G.H. Seerden, *Administrative Law of the European Union, its Member States and the United States*, Antwerpen: Intersentia 2007.
- Becker, Ulrich (2003), 'Organisation und Selbstverwaltung der Sozialversicherung', in: Bernd von Maydell, Franz Ruland (ed.), *Sozialrechtshandbuch*, Baden-Baden: Nomos 2003, p. 225-247.
- Borghouts-van de Pas, I.W.C.M. & F.J.L. Pennings (2008), *Arbeidsparticipatie van jonggehandicapten Een onderzoek naar Europese systemen en praktijken*, Tilburg: OSA 2008.
- Burkens, M.C. et al (2006), *Beginselen van de democratische rechtsstaat*, Alphen aan den Rijn: Kluwer 2006.
- Davis, K.C. (1980), *Discretionary justice: a preliminary inquiry*, Westport, CT: Greenwood Press 1980.
- Fenger, H.J.M. & P-J. Klok (2008), 'Beleidsinstrumenten', in: A. Hoogerwerf & M. Herweijer (red.), *Overheidsbeleid*, Alphen aan den Rijn: Kluwer 2008, p. 223-241.
- Fluit, P.S. (2001), *Verzekeringen van solidariteit* (diss. Amsterdam UvA), Deventer: Kluwer 2001.
- Galanter, M. (1994), 'Why the haves come out ahead', in: R. Cotterell (ed.), *Law and Society*, Aldershot: Dartmouth 1994, p. 165-230.
- De Graaf, K.J., Y.E. Schuurmans & A. Tollenaar (2007), 'Een nieuw denkmodel voor de feitenvaststelling in beroep?', *JB Plus* 2007 (2), p. 3-15.
- Van de Gronden, J. (2007), 'Deel III: Bestaat er een coherente visie op de verhouding tussen diensten van algemeen economisch belang, de Dienstenrichtlijn en andere communautaire regelingen?', *SEW* 2007 (10), p. 399-421.
- Halbach, G. et al (1998), *Übersicht über das Arbeitsrecht*, Berlin: BMA 1998.
- Harter, Philip (2007), 'Administrative law in the United States', in: René J.G.H. Seerden, *Administrative Law of the European Union, its Member States and the United States*, Antwerpen: Intersentia 2007, p. 351-397.
- Hartlief, T. (1996), 'De zwakke verkeersdeelnemer', *Tijdschrift voor Privaatrecht* 1996, p. 1271-1341.
- Heringa, A.W. & Ph. Kiiver (2007), *Constitutions compared*, Antwerpen: Intersentia 2007.
- Hoekema, A.J. et al. (1998), *Integraal bestuur: de behoorlijkheid, effectiviteit en legitimiteit van onderhandelend bestuur*, Amsterdam: AUP 1998.
- Hood, C. et al (1999), *Regulation inside government: waste-watchers, quality police, and sleaze-busters*, Oxford: Oxford University Press 1999.
- Hoogendijk, B. (1998), *Loondoorbetalingsverplichting gedurende het eerste ziektejaar* (diss Rotterdam), Deventer: Gouda Quint 1998.
- Jans, J.H. (2006), 'De doorwerking in de nationale rechtsorde van het verbod van leeftijdsdiscriminatie als algemeen beginsel van gemeenschapsrecht', in: M. Herweijer, G.J. Vonk & W.A. Zondag, *Sociale zekerheid voor het oog van de meester (Noordam-bundel)*, Deventer: Kluwer 2006, p. 115-129.
- McKay, Stephen & Karen Rowlingson (1999), *Social Security in Britain*, London: MacMillan Press 1999.
- Leus, K. (1992), *Pseudo-wetgeving*, Antwerpen ; Apeldoorn: Maklu 1992.
- Klosse, S. & G.J. Vonk (2000), 'De betekenis van het recht voor de toekomst van de sociale zekerheid', in: S. Klosse (red.), *Sociale zekerheid: een ander gezichtspunt*, Brugge: die Keure 2000, p. 189-239.
- Lust, Sabien (2007), 'Administrative law in Belgium', in: René J.G.H. Seerden, *Administrative Law of the European Union, its Member States and the United States*, Antwerpen: Intersentia 2007, p. 5-60.

- Maurer, H. (2009), *Allgemeines Verwaltungsrecht*, München: Beck 2009.
- Van Montfort, C.J. (2004), *Ruimte voor goed bestuur. Tussen prestatie, proces en principe*, Den Haag: WRR 2004.
- Nicolaï, P. (1990), *Beginselen van behoorlijk bestuur*, Deventer: Kluwer 1990.
- Partington, Martin (2004), *Introduction to the English legal system*, Oxford: OUP 2004.
- Pennings, Frans (2001), *Introduction to European Social Security Law*, 3rd edition, The Hague: Kluwer 2001.
- Perrow, Ch. (1986), *Complex organizations: a critical essay*, New York, N.Y.: Random House 1986.
- Plagemann, Hermann (2003), 'Ersatzpflichtiger Dritter', in: Bernd von Maydell, Franz Ruland (ed.), *Sozialrechtshandbuch*, Baden-Baden: Nomos 2003, p. 437-466.
- Plantinga, M. & A. Tollenaar (2007), *Public Governance in the Dutch Welfare State: The Consequences of Privatisation for Securing Public Interests in the History of the Dutch Welfare State*, paper ECPR 2007, <<http://ssrn.com/abstract=1103468>>.
- Pröpper, I.M.A.M. & M. Herweijer (2004), *Effecten van plannen en convenanten*, Deventer: Kluwer 1992. Zie voor voorbeelden van convenanten: Algemene Rekenkamer, *Convenanten uitgaansgeweld*, 's Gravenhage: Sdu Uitgevers 2004.
- Schellhorn, W. & H. Schellhorn (2002), *Kommentar zum Bundessozialhilfegesetz*, Kriftel: Luchterhand 2002.
- Schmitt, J. (2007), *Entgeltfortzahlung und Aufwendungsausgleichgesetz*, München: C.H. Beck 2007.
- Schröder, Meinhard (2007), 'Administrative law in Germany', in: René J.G.H. Seerden, *Administrative Law of the European Union, its Member States and the United States*, Antwerpen: Intersentia 2007.
- Sluijs, J.J.M. (2004), *Gereguleerde marktwerking van socialezekerheidsbelangen*, Deventer: Kluwer 2004.
- Solomon, Jason M. (2008), 'Law and governance in the 21st Century Regulatory State', *Texas Law Review*, 2008 (68), p. 819-856.
- Tollenaar, A. (2008), *Gemeentelijk beleid en beleidsregels*, Den Haag: BJu 2008.
- Vansteenkiste, Steven (1995), *Sociale zekerheid, federalisme en de Europese Gemeenschap*, Leuven: Acco 1995.
- Verdeyen, V. (2009), *Overheidssturing en socialezekerheidsinstellingen: mogelijkheden en instrumenten* (diss. Leuven), Leuven 2009.
- Vonk, G.J. (1999), *Overijverige rechter of tekortschietende wetgever? De rol van rechter en wetgever bij het proces van doorwerking van internationale normen in het socialezekerheidsrecht* (oratie VU Amsterdam), Deventer: Kluwer 1999.
- Wikeley, N.J. & A.I. Ogus (2002), *The law of Social Security*, London: Butterworths 2002.
- Zeegers, N.E.H.M. & H.E. Bröring (2008), *Professions under pressure. Lawyers and doctors between profit and public interests*, Den Haag: Boom juridische uitgevers 2008.