IDEALS IN LAW

INTRODUCTION: TAKING IDEALS SERIOUSLY

'Ideals in law' may seem a strange subject to some readers. Law is basically a system of rules, perhaps a system of rules and principles, but why should we regard ideals as important elements in law? Perhaps 'ideals and law' could have been an acceptable subject heading, because law is often an instrument in the service of political ideals, and our legal systems are influenced by ideals such as those of democracy, the rule of law and human rights. But is it really necessary to address ideals as a separate category in law?

Indeed, this is a serious question. Various authors, especially those working in legal practice, argue that ideals are irrelevant to law. Nevertheless, there are also a number of authors, from philosophically diverse backgrounds, who argue that we do need to study ideals in the context of law. Basically, they have given three different reasons. (Van der Burg & Taekema 2004)

Firstly, that in order to understand, to interpret and to work within a legal system, from the internal point of view, we must take account of the role of ideals in law. Secondly, that in order to understand the concept of law or the phenomenon of law, both from the internal and the external point of view, we must understand how ideals play a role in law. Thirdly, that in order to understand certain specific phenomena, ranging from legal development to legal pluralism and legal ethics, we have to address ideals in our analysis. Each of these reasons may be purely descriptive, a version of the idea that including ideals improves our understanding of law, but they may also be more normative, varying on the idea that attention to ideals helps to improve law, e.g., by guiding legal development.

These reasons are all controversial. For example, many positivists deny that we must pay attention to ideals to understand the concept of law. Moreover, many authors who believe that ideals are important in law have widely varying conceptions of why that is true. This variation has partly to do with conceptual issues. What are ideals precisely? In what respects do they differ from values or principles? What does it mean to say that they are part of law? Are they eternal, like Plato's ideas, or can ideals grow and wither away? The answer to each of these questions partly determines the answer to the question what roles ideal play.

We have thus identified two central questions that will be discussed in the next sections:

1. How should ideals be understood? Are they immanent or transcendent, eternal or changing, part of the law or external to law?
2. For what purposes, if any, do we have to pay attention to ideals in law?

THE CONCEPT OF IDEALS

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In definitions of ideals, recurring common elements are their unrealizable character, their being vague or abstract, and, partly as a consequence of the previous features, their being open to varying interpretations and difficult to formulate precisely. Ideals present a desirable state of affairs that seems good in a way our world is not, and thus ideals serve as guides for improving social reality. Ideals are generally seen as an important source of motivation for action of individuals or groups, without, however, themselves specifying the precise steps to be taken for their realization.

Different conceptions of ideals can be classified as belonging to either of two traditions (Taekema 2004). The first, with a Platonic inspiration, sees ideals as transcendent: ideals do not belong to reality but are abstract entities, ideas such as the true, the beautiful and the good. Seeing ideals as transcending reality means that certain features of ideals become central: ideals are abstract, perfect, they escape complete formulation and they are inherently unrealizable. The most influential strand in this tradition is Kantianism, which regards ideals as necessary mental constructs. The second tradition, with an Aristotelian inspiration, sees ideals as immanent: ideals are latent in natural and social reality, are present in a rudimentary form in practices. Seeing ideals as immanent entails that they are in principle realizable, although there may be practical obstacles to achieving realization, and that ideals may remain implicit in a practice. An influential strand in this tradition, apart from (neo-)Aristotelianism, is pragmatism. Whereas the transcendent concept primarily regards ideals as abstract ideas, the immanent concept regards ideals as aspects of concrete natural and social phenomena.

A separate issue is whether ideals should be seen as eternal or not. The natural law tradition advances the view that ideals are eternal and unchangeable, and that this is precisely the reason why ideals should be reflected in law. Many modern views of ideals see them as developing along with the social and cultural environment and only provisionally valid in any given context. Moderate, sociologically oriented, views such as pragmatism see ideals as directions for solving problems in the practices of law. The more extreme modern views see ideals as mere subjective preferences, which often leads to a combination with a form of legal positivism stating that such subjective ideals have no place in law.

IDEALS, VALUES, PRINCIPLES AND RULES

Opponents of the idea that ideals are a necessary category in law often argue that ideals are insufficiently distinct from either values or principles to warrant separate attention. That the legal system consists not only of precise, digitally applicable, rules, but also of vaguer principles, is widely accepted in legal theory. However, principles and rules are both norms and are prescriptive in nature. Values and ideals have a different character: they indicate what is good or desirable, but do not in themselves prescribe what to do in order to bring the good about. If one accepts Alexy's description of principles as having a mixed character, in part prescriptive, or deontological, and in part value-oriented, or axiological, values or ideals can be seen as providing the purely axiological side parallel to the purely deontological position of rules. Although values or ideals are then a necessary category, it does not settle the question whether they are part of law, or remain outside of it. This depends on one's concept of law. If such a concept defines law as purely a system of norms, the value dimension will remain outside. However, if law is defined as an enterprise or practice that is governed not only by norms but also by aspirational moral standards, values or ideals become an integral part of law. A clear example is Lon Fuller's theory.

A further question is whether the category of ideals is distinct from that of values. First, ideals can be seen as a subcategory of values if one endorses a broad concept of values as including all notions of the good or the desirable; within such a category of values, ideals are distinguished by their unrealizable character as those values that can never be realized. Second, a more specific theory of values can be endorsed that sees values as never completely realized themselves; in such a conception of values, the distinction between ideals and values fades. In legal theory, the second conceptualization of values and ideals is more common, which is in part attributable to the function of values and ideals in law. The distinction between values and ideals does not matter in theories (such as those of Fuller, Selznick and Radbruch) that see law as governed by demanding standards, which law can only strive for, but never reach.

THE IMPORTANCE OF IDEALS

UNDERSTANDING AND INTERPRETING THE LAW

Law can be seen as an interpretative practice. Lawyers and ordinary people try to make sense of the law by interpreting it, sometimes by trying to construct it as a largely coherent body of norms, sometimes by constructing it as a largely incoherent amalgam of historically grown norms. In both cases, in such an interpretative practice we have to go beyond the rules to the principles and ideals underlying them. We cannot understand a modern legal system without paying attention to largely shared ideals such as the rule of law, due process, and human rights, and to more controversial ideals such as the capitalist free market and industrial democracy. Surely, these ideals are not the whole story, but they are at least part of the story that has to be told if we want to understand our legal systems.

This is not only true of the legal system as a whole, but also for specific parts of the law. If we want to solve hard cases, we need to go beyond the body of rules, as Ronald Dworkin has forcefully argued, and take into account the underlying principles. In his later work, e.g., *Law's Empire*, Dworkin goes beyond the level of principles and focuses also on the central virtues, values or ideals that characterize law. Only by looking at the hard case in light of these underlying ideals can we make sense of it and find in their surplus of meaning a possible way to a solution. Only in light of ideals of due process and protection of citizens may a balanced and creative solution be found by a judge or a legislator when confronted with the issue which measures against terrorism should be allowed.

THE CONCEPT OF LAW

How to define law is a famously controversial issue. According to authors as diverse as the neo-Kantian philosopher Gustav Radbruch and the pragmatist sociologist Philip Selznick, law is essentially characterized by an orientation to ideals. If we do not take this into account, we simply cannot understand the point of law. We cannot understand it as participants, but we cannot understand it either as external observers. The practices of law only get their meaning to us if we acknowledge that law is oriented towards the master ideal of legality (Selznick) or the *Rechtsidee* (Radbruch).

Many authors who are critical of such essentialism, nevertheless hold that paying attention to ideal elements is necessary to understand the concept of law. Lon L. Fuller regards law as an enterprise, characterized by both a morality of duty and a morality of aspiration. The morality of aspiration, which is an integral part of the internal morality of law, is an ideal element in law without which the enterprise of law can only function sub-optimally (cf. Winston 1986).

In our view, the orientation towards ideals is an important part of law without which any understanding of law is impoverished. The orientation towards legal ideals of justice and legality can, moreover, explain the relative autonomy of law. The orientation to distinctly legal ideals explains its autonomy, the orientation to broader ideals explains its openness to morality and politics. If one takes this view, the debate between natural law and legal positivism gets a new perspective, because a middle position becomes possible. Neither the identification of law with eternal moral values, as defended by natural law, nor the complete irrelevance of values for the concept of law, as argued by positivists, seems plausible if we acknowledge that law is characterized by an orientation towards both legal and broader ideals (Taekema 2003).

THE DYNAMICS OF LAW

In studying ideals, we need a sociological eye for variation. In some fields or issues, their role is marginal and may be ignored, in others their role is crucial. One of the phenomena that can only be understood well if we take ideals seriously, is that of legal development. The openness of ideals, their surplus of meaning, makes them a resource for new interpretations. They can always be interpreted anew. Thus they can be a source for new doctrines, new rules and creative solutions for new problems such as those arising because of biotechnology or information technology. The fact that many ideals are not strictly legal, but also shared as moral and political ideals in society, makes them a bridge to societal changes. If our morality changes, e.g., with regard to sexual mores, new legal interpretations of our ideals of privacy and equality may incorporate those societal changes in the law.

A good example of this is the dynamic interpretation of the European Convention on Human Rights, in a process of progressive clarification and implementation. Both the rights and the exception clauses of the Convention refer to ideals of human rights and democracy, which are open to continuous reinterpretation in the light of changing circumstances and changing ideas. This has made it possible for the Court to modernize its case law, by keeping track of developments in the member states. Other areas where the role of ideals can be detected in legal development, are those of environmental law and health law.

This orientation towards ideals need not always be beneficial. It is only so, if the openness is retained and the risks of one-dimensional interpretation and ideological ossification can be avoided. Radbruch warns that law is governed by a number of potentially conflicting ideals and that too much emphasis on only one of them may lead to disastrous results. Nonet and Selznick warn for the regression in their strongly aspirational stage of responsive law. Trying to make law respond to social needs may lead to a neglect of procedural safeguards, making law a tool for the politically powerful.

PLURALISM AND DEBATE

Ideals can explain the existing pluralism of law in two ways; because ideals may give rise to a plurality of interpretations and because a plurality of ideals may exist. Their surplus of meaning makes ideals open to different and even conflicting interpretations. The fact that they are not completely realizable leaves an even greater variation in different and sometimes conflicting ways to interpret and to realize the same ideal. Many other legal disagreements are connected to different ideals. For example, in the debate on head scarves in schools, some arguments emphasize the ideal of freedom of religion, others the ideal of equality between the sexes.

This plurality of (legitimate interpretations of) ideals also plays a role in debate and controversy. The idea of legitimate plurality, in the interpretation of the law, is essential to our legal institutions: they channel this plurality, but also need this plurality in order to function adequately. Without accepting the plurality of opinions there can be no democracy, but also no due process in courts. The openness of ideals for reinterpretations always offers a resource to challenge settled doctrine, and thus to critically rethink this doctrine.

PROFESSIONAL ETHICS

A third issue to which ideals are central is professional ethics. Many authors have argued that good professionals are characterized by a commitment to both professional ideals (or virtues) and more general ideals. This ideal-orientation is connected with the need for professional autonomy and integrity - the autonomy enables professionals to do whatever is necessary in highly variable contexts, in light of their professional ideals. Many professional codes acknowledge this partly aspirational character of professions by explicitly including

aspirational norms that are open for a plurality of interpretations. In the literature on the legal professions, however, complaints may be found that the profession of lawyers has lost its ideal-oriented character. This loss of ideal-orientation is then regarded as a sign of decay, resulting in dysfunctionality. (Kronman 1993)

The acknowledgement of this ideal-oriented character of professions is not only important if one wants to understand professions, but also if one wants them to function better. Control of professions with the help of the market may reinforce an instrumentalist attitude among professionals, thus eroding their professional sense of integrity. Trying to regulate professions with the help of strict rules and protocols may have a similar effect. Only a careful analysis of how the ideal-oriented character of professions may be influenced by market forces and legal interventions, may prevent such effects.

RELATED ENTRIES

VALUES IN LAW
RADBRUCH
DWORKIN
FULLER
PRINCIPLES AND RULES
NATURAL LAW
POSITIVE LAW AND NATURAL LAW
LEGAL ETHICS

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Authors: Sanne Taekema and Wibren van der Burg