Stories and Ideals

Caroline RAAT

1. Introduction

In the Netherlands, there have always been many private organisations with public functions, like public housing, education, welfare, health care, and so on, and their number is still growing. From a legal point of view, these organisations are considered private and are therefore governed by private law. If we look at them through sociological or ethical eyes, what we see is a locus of power. And power can be used and abused. Thus, the fact that they have power urges these organisations to act properly toward their clients, even though positive law sets no such rules.

In Western law, the doctrine of the *Rechtsstaat* has been developed to limit the abuse of state power. But there are more situations of power where abuse may occur. In this chapter, I will argue that the *Rechtsstaat* is an ideal, something worthwhile achieving. The *Rechtsstaat* in this respect is not so much a set of positivised rules; it is based on human values and inner commitment.[1] One of the advantages of such an ideal-based conception is that it can also be used in situations of private power.

An example of private power can be found in private social housing foundations, which allocate most of the houses in the Netherlands. By means of empirical research I tried to get an idea of the institutional setting of such organisations and whether the *Rechtsstaat* as an ideal is of any use in these organisations. I used a method called storytelling, which will be dealt with in this chapter. Stories can be used to reveal attitudes and thoughts that are normally left unspoken. They are a good way to trace down the ideals in an organisational culture. The 'Story of the Decent Vagabond' may illustrate this.

---

[1] 'Ideals are values that are implicit or latent in the law, or the public and moral culture of a society or group that usually cannot be fully realized, and that partly transcend contingent historical formulations and implementations in terms of rules and principles'; W. van der Burg, 'The Importance of Ideals', *The Journal of Value Inquiry* 31 (1997), 23-37, p. 25.

At the end of this chapter, I will make the same point in a more general way: we can speak of *rechtsstaatliche* ideals in organisations, but I will also show that there is the risk of particularism when dealing with clients in hard cases. I believe there are solutions for dealing with this risk. Unlike most jurists, I will not focus on legislation, adjudication, or self-regulation, but I will use insights from organisational ethics and the social sciences to point to the motivational aspect of the *Rechtsstaat*.

2. How the Law Limits Power

2.1 The Rule of Law and the Rechtsstaat*: Answers to Power*

In this contribution, I will use the word *Rechtsstaat* mainly for the reason that my research was done in the Netherlands.[2] Important work in the field of expanding the doctrine to private spheres was done by Philip Selznick in 1969, in his book *Law, Society, and Industrial Justice*. His sociological approach to institutions and the law made him argue that private organisations too should be subjected to the Rule of Law. 'Clearly [a "law of governance"] should apply wherever the social function of governing is performed, wherever some men rule and others are ruled.'[3] The problem is that strictly legally speaking this makes no sense because the Rule of Law only holds for the state and its institutions.[4] In my opinion, the *Rechtsstaat* should be regarded not only as a legal but also as a social, historical, *and* ethical concept. The main reason why the doctrine of the *Rechtsstaat* was created was the wish that those in power would no longer act toward the objects of this power in an arbitrary manner. The clearest way to follow the route from this wish to *Rechtsstaatlichkeit* as an ideal is to divide this route into four steps:

Step one: The organisation is in a position of power.

Step two: The client is an individual with inseparable rights.

Step three: The organisation bears responsibility for this individual.

Step four: The organisation can and should commit itself to the ideal of the *Rechtsstaat*.

---

[2] There is also a more fundamental reason to do this. Many jurists treat the German terms *Rechtsstaat* and *Rechtsstaatlichkeit* and the English term Rule of Law as synonyms because they refer to the same phenomenon, but there are essential differences that made me choose the German concepts. I will mention only one aspect: the Rule of Law seems to have a stronger connotation with positive law than the *Rechtsstaat* does.

[3] Ph. Selznick, *Law, Society and Industrial Justice*, New York, Russell Sage Foundation, 1969, p. 259.

[4] This is an important statement that I will elaborate on below.

Considering all four steps together, we may conclude that what we are actually dealing with is a morality of organisational power. The more power an organisation has over its clients, the more urgent the need for such a morality becomes. The social housing foundations I will discuss below have, indeed, specific features that make control of their exercise of power necessary:

1. It concerns the relation between an organisation and an individual.
2. The organisation has a (semi-)monopoly position, which means that there is no alternative organisation for the client to turn to.
3. The organisation supplies a product or service that constitutes a basic need for the client, such as the right to health, housing, or education.
4. There is no mutual dependency and, therefore, no equality of position.

The special features of the organisation, its product, and its clients are largely the same for many commercial enterprises. Many business ethics theorists these days believe that privately owned companies have social responsibilities.[5] These social responsibilities are even more important for private organisations that have public tasks. Though the Constitution and administrative laws do not apply directly to them, the power of this type of organisations over their clients is enormous. An orientation toward *rechtsstaatliche* ideals can be a way to develop the organisational morality that is required for such a powerful organisation. In the next section, I will try to explain that the legal way people usually look at law and the *Rechtsstaat* is a limited one. In contrast, I would like to suggest that the *Rechtsstaat* can also be seen as an ideal, with a much broader impact than positive law.

2.2 A Static-Institutional Approach

Lawyers are taught to think in a positivist way about law, not only in their education but also in their day-to-day practice. Law is generally seen as a body of rules that is outside the persons or organisation(s) it applies to. In legal writings, aspects of law, like coercion and controllability, are emphasised. In Dutch handbooks on constitutional and administrative law, the *Rechtsstaat* is 'positivised': The Netherlands *has* a Constitution, etc., therefore, the Netherlands *is* a *Rechtsstaat*.[6] Oosting calls this traditional view on the *Rechtsstaat static institutional*.[7] By this

---

[5] See the writings on business ethics, e.g. W.M. Hoffman and R.E. Frederick, *Business Ethics: Readings and Cases in Corporate Morality*, New York, McGraw-Hill, 1995.

[6] E.g. W.J. Witteveen, *De geordende wereld van het recht*, Amsterdam, Amsterdam University Press, 1996.

[7] E.g. M. Oosting, 'De last van het recht: Recht als opdracht en als obstakel', in J.W.M. Engels *et al.* (eds.), *De rechtsstaat herdacht*, Zwolle, W.E.J. Tjeenk Willink,

he refers to a traditional lawyer's view on the law and the state. He sees a great risk in this view: if an organisation and its employees only regard the *Rechtsstaat* as something externally imposed on them, they may develop a legalistic manner of rule-following. Webb describes legalism as 'an ethical attitude which encourages individuals to treat moral conduct as rule-following and to use rules manipulatively through forms of creative compliance'.[8] This means that the rule is followed only because it is a rule without taking notice of its content and moral background. Abuse of power easily occurs here.

2.3 A Dynamic-Cultural Approach

During the past few centuries, jurists and political philosophers have been working on this concept, not simply as a set of rules that is part of positive law, but as a historical and socially developed concept, based on this very urge to demand responsibility from those who are in power. This makes the *Rechtsstaat* an ideal: something worthwhile achieving. Organisations can and should bind themselves to this ideal, not so much in a legal way, but in a moral way.[9]

For the state and public organisations, the doctrine of the *Rechtsstaat* has been 'positivised' in externally imposed legal rules. For private agencies, the same doctrine has not, or only in part, been codified. This does not mean that the doctrine has no appeal to private organisations. Speaking of the *Rechtsstaat* as an ideal, something worthwhile achieving, every powerful organisation should feel bound to the rules of the *Rechtsstaat*. This is also the case for private powerful organisations, even though legally speaking these rules do not apply to them. Ideally, such an organisation has an internal commitment to abide by these rules, so to speak, because of the moral character of the organisation. If this is the case, it has internalised the norms of the *Rechtsstaat*. This has an enormous advantage: the organisation will act according to the rules even if there is no threat of external sanctioning,[10] just because it *wants* to act according to the rules. Where there are no rules or when rules are

1989, pp. 171-183, p. 172 (my translation). Oosting has been the Dutch National Ombudsman for many years, which means that he monitored the *behavior* of the administration towards its clients.

8 Julian Webb, 'Ethics for Lawyers or Ethics for Citizens? New Directions for Legal Education', *Journal of Law and Society* 25 (1998) 1, 134-150, p. 137.

9 Both *Rechtsstaatlichkeit* and responsibility can be regarded as organisational virtues, a concept that I will not deal with in this article, but that will be a central issue in my doctoral thesis.

10 Because there is no legal procedure open or because it is known from experience that the client will not use it (because it lacks bureaucratic competence).

unclear, the principles of the *Rechtsstaat* will lead to a better decision. Oosting calls this the dynamic-cultural approach of the *Rechtsstaat*.[11] By this he means that law is more than the law in the books; the moral and sociological background of the law is also taken into account by those who are in power.

A central concept in this dynamic-cultural approach is responsibility.[12] According to Witteveen, power and responsibility are 'mirror images: if you look for the former you will also see the latter. Whoever looks power in the face, demands responsibility.'[13] But is not this the main problem? Those who have no power are not in a position to demand anything.

On the other hand, the urge of responsible execution of power is clear. Most people seem to favour responsible action, but what does this mean in concrete cases? In the day-to-day functioning of organisations, this question is not all that easy to answer. The proof of this can be seen every day: How often do we not talk about organisations acting 'wrongly'? I think that an important contribution can be made by regarding the *Rechtsstaat* as a concept with a broad meaning.

2.4 The Ideal of the **Rechtsstaat**

So far I have explained the difference between two ways of looking at the law and the ideal of the *Rechtsstaat*. I will proceed by explaining what this *Rechtsstaat* means in a more detailed sense. I will confine myself to two major features: governance by rules and principles, and responsiveness.[14] The first one is a more classic way to describe the *Rechtsstaat*, the latter is an addition made by Nonet and Selznick to

11 E.g. Oosting, 'De last van het recht', p. 172.

12 M.A.P. Bovens, 'De veelvormigheid van verantwoordelijkheid', in M.A.P. Bovens, C.J.M. Schuyt and W.J. Witteveen (eds.), *Verantwoordelijkheid: Retoriek en realiteit, Verantwoording in publiek recht, politiek en maatschappij*, Zwolle, W.E.J. Tjeenk Willink, 1989, pp. 17-41, p. 30.

13 W.J. Witteveen, 'Retorische constructie', in M.A.P. Bovens, C.J.M. Schuyt and W.J. Witteveen (eds.), *Verantwoordelijkheid: Retoriek en realiteit, Verantwoording in publiek recht, politiek en maatschappij*, Zwolle, W.E.J. Tjeenk Willink, 1989, pp. 81-99, p. 83 (my translation).

14 The concept of *responsive law* was developed by Philippe Nonet and Philip Selznick; see Ph. Nonet, and Ph. Selznick, *Law and Society in Transition: Toward Responsive Law*, New York, Harper & Row, 1978. It means that '[a] responsive institution maintains its integrity while acknowledging the legitimacy of an appropriate range of claims and interests'; Ph. Selznick, *The Moral Commonwealth, Social Theory and the Promise of Community*, Berkeley, Cal., University of California Press, 1992, p. 463.