

# Stories and Ideals

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## 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.<sup>1</sup> 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.

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<sup>1</sup> '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.<sup>2</sup> 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.'<sup>3</sup> The problem is that strictly legally speaking this makes no sense because the Rule of Law only holds for the state and its institutions.<sup>4</sup> 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*.

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<sup>2</sup> 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.

<sup>3</sup> Ph. Selznick, *Law, Society and Industrial Justice*, New York, Russell Sage Foundation, 1969, p. 259.

<sup>4</sup> This is an important statement that I will elaborate on below.

