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 Rechtstaat 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 Rechtstaat is an ideal, something worthwhile achieving. The Rechtstaat in this respect is not so much a set of positivised rules; it is based on human values and inner commitment. 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 Rechtstaat 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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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 Breg, ‘The Importance of Ideals’, The Journal of Value Inquiry 21 (1987), 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.\(^4\) 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.’\(^5\) The problem is that strictly legally speaking this makes no sense because the Rule of Law only holds for the state and its institutions.\(^6\) 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.


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. 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 rechtstaatliche 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. Oosting calls this traditional view on the Rechtsstaat *static institutional*. By this

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

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’. 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.

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, just because it wants to act according to the rules. Where there are no rules or when rules are

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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.\textsuperscript{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.\textsuperscript{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.'\textsuperscript{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.\textsuperscript{14} The first one is a more classic way to describe the Rechtsstaat, the latter is an addition made by Nonet and Selznick to

\textsuperscript{11} Eg. Oosting, 'De last van het recht', p. 172.
emphasise that law has to be open to the needs of society. Both function as counterweights in a balance. Only if an organisation has both features can we speak of full Rechtsstaatlichkeit in this organisation. This concerns the difference discussed above: it will not do for an organisation to display rule-following behaviour only; it also needs a sense of justice and a sense of who its client is. Responsiveness can be defined as having an open mind to the needs of the client. This open mind may prevent the organisation from legalistic ways of applying the law, so that the client has a bigger chance of getting what he is entitled to. In fact, responsiveness is meant to compensate for too much bureaucratic rule-following.

In addition to the previous section, where the Rechtsstaat was introduced as an ideal, it may be enlightening to look again at why this doctrine was developed in the first place. One of the features that the Rechtsstaat and the Rule of Law have in common is that both have been developed to prevent arbitrariness, because this was and still is experienced as a flagrant violation of most people’s sense of right and wrong. It is important to find out why this is so: and this leads us to the question about the values behind the Rechtsstaat. There is no consensus about these values. Most authors come up with notions like: autonomy, freedom, security, equality, human dignity, the value of the individual, and so on. In this chapter, I choose to use human dignity,\(^{15}\) because it is the broadest notion that includes the most important of the others that have been suggested: freedom, equality, and justice.

Each of these three values is connected with elements of the Rechtsstaat. Freedom has a negative and a positive meaning, as equality has a formal and a material side. Negative freedom means that every person has the right to be protected from arbitrary intervention by the state.\(^{16}\) This is protected by legality, the principles of due administration (both addressing obligations to the state and its institutions) and by the individual’s constitutional rights, such as the freedom of religion. This type of freedom refers to formal equality: before the law, people are equal, regardless of their personal differences. The state and its institutions of justice must give both parties in a legal procedure equal tools in order to eliminate inequality of power. The image of Justitia with her blindfold is typical for this way of thinking. Positive freedom is closely connected

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\(^{15}\) This does not mean that authors agree on what human dignity means or implies. Bobbio, for instance, regards these values as the moral essence of the Rule of Law: (procedural) equality, individual autonomy, and security. R. Cotterrell, ‘The Rule of Law in Transition: Revisiting Franz Neumann’s Sociology of Legality’, *Social & Legal Studies* 5 (1996) 4, 451-470, p. 459.

with material equality: the institutions of justice must not be blind to the
total inequalities that exist in reality. The idea of equality of arms
developed in the nineteenth-century liberal state might not be enough to
truly eliminate inequality, both in legal procedures and in the design of
society. Positive freedom is necessary to fully achieve negative freedom.
Social constitutional or human rights try to guarantee at least a minimum
standard of welfare, health, housing, etc. But these rights do more than
that; they are not only a means to achieve positive freedom, they also
represent an end in themselves. By introducing social rights and material
equality, we enter the domain of justice. Justice, used here as a material
notion, means more than freedom and equality. It means that the state
fully acknowledges the intrinsic dignity of every individual human being
as a value that must be achieved and protected.

3. Empirical Research of Ideals

In the previous section, I introduced the Rechtsstaat as a moral no-
tion. If we want to find out whether this notion is of any use in reality,
we need a sociological framework. The concept of internal morality can
be a starting point for such a framework, as it refers to the central norm-
ativaive idea of the Rechtsstaat and connects this to law and public
administration in such a way that it can be studied empirically. This
concept means, according to Selznick, that organisations can get a
characteristic that is not based on external enforcement, but on self-
limitation. He calls this morality, which can easily be recognised as
rechtstaatliche, 'corporate responsibility', a notion often mentioned in
business ethics.

For institutions, as for persons, self-regulation does not mean freedom to do
as one pleases. Rather it implies the exercise of options that will... enhance
its integrity... The great task of institutional design is to build moral com-
petence into the structure of the enterprise. This is the key to corporate res-
ponsibility - private as well as public.... [A] responsible enterprise, like a
responsible person, must have an inner commitment to moral restraint and
aspiration.  

Selznick writes about the development of organisations in terms of
institutionalisation and culture. Internally, as the organisation takes on a
distinctive identity the source of integration shifts from goals to values,
from specific objectives to ways of thinking and deciding. In short: a

17 Ibid., p. 131.
18 This concept was developed by Lon Fuller in The Morality of Law (rev., ed., New
Haven, Conn., Yale University Press, 1959).
corporate culture is created." Organisational culture in this sense can be used as an equivalent for the internal morality of an organisation.

3.1 Organisational Culture and Attitudes

Organisational culture has to do with the living norms and values of an organisation. It is strongly connected with opinions and mentalities that are characteristic for the organisation. "Culture is the basic assumptions and beliefs shared by members of the organisation that operate unconsciously and that defines in a basic, taken for granted fashion an organisation's view of itself and its environment." Values are the core of organisational culture. These values play a vital role in the way people in the organisation treat each other, and, more importantly, their clients. Values, when used in this sociological sense, are not intrinsically good or bad. If we want to connect the concept with ideals that are intrinsically good, we have to add positive terms to our definition, referring to responsibility or "Rechtssstaatlichkeit." A "rechtssstaatliche" organisational culture will be defined as: a set of opinions of an organisation that is based on and expresses the values the "Rechtssstaat" is meant to protect. This set is also determinative for the way the organisation acts.

What culture is for organisations, is attitude for individuals. This phenomenon can be defined as follows: "An attitude is a rather stable mental position held toward some idea, or object, or person. ... Every attitude is a combination of beliefs, feelings, and evaluations, and some predisposition to act accordingly." Just as culture does for (parts of) an organisation, attitude not only refers to opinions, but also to action. Just like culture, attitudes can be good or bad. A "rechtssstaatliche" attitude can be described as a set of opinions of a person that is based on and expresses the values the "Rechtssstaat" is meant to protect. This set is also determinative for the way the person acts.

Culture and attitude do not refer to the same actor, one refers to an organisation or a group, the other to a single person. This does not mean that there is no relation between the two concepts. A major aspect of this relation is socialisation: the process by which an organisation transmits its culture, instilling in new members the values and norms of the organisation, transforming an outsider into an insider. If this process

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20 Ibid., p. 237. He calls the development of organisations from goal-driven to value-driven (thick) institutionalisation.
succeeds, we can see ‘deep commitment’ to the organisation and its goals by its members: the norms have been internalised. This deep commitment is often referred to as loyalty.\(^{24}\) The link that exists between organisational culture on the one hand and attitude of employees on the other may be called the institutional setting.

If we describe the same phenomena in ethical terms rather than in sociological ones, we can use the term virtues. I regard organisational virtue as the positive ethical equivalent of the sociological concept of organisational culture. Personal virtues find their equivalent in the social-psychological concept of attitudes. Both are important if we want to find out what the ideals of a specific organisation are. The culture of an organisation cannot exist without the moral contribution of its members, and the attitude of the members is influenced by the culture of the organisation. An institutional setting can be called virtuous when it meets the ideal of the Rechtsstaat.

3.2 Stories: A Key to Ideals

One of the most complicated things to study in practice is organisational culture and attitudes, precisely because the members of the organisation hardly ever write them down. Everyone who works in an organisation can tell you that culture is there and that it is very important. Though this culture is often felt in an unreflected or even half-conscious way, it still influences the way employees think and act, sometimes even more than overt rules do. Studies of this phenomenon have in common that they try to find out what a culture is in an indirect way, precisely because it is not directly visible. If you ask an employee what the local culture is, he will often only be able to describe it in very general terms. How it affects his own functioning is a different matter. This was not different in my empirical study. In order to find a way to get to this unreflected and more detailed level, I used a technique called narrative analysis, which is also referred to as storytelling.\(^{25}\)

The basic thought behind the method of storytelling is that stories told in organisations can teach us a lot about the organisation’s charac-

\(^{24}\) Loyalty, however, is a problematic concept with not only a positive, but also a very negative meaning. In my doctoral thesis, I will argue that loyalty to the organisation or to its management is not always good, and that therefore a shift should take place to loyalty to values, such as the values of the Rechtsstaat.

\(^{25}\) I prefer the word ‘storytelling’ because it indicates what it is. Apart from that the word ‘analysis’ holds a claim of objectivity and exactness that storytelling does not. See also S. Maynard Moody, and M. Masheo, ‘Morality over Legality: Invoking Norms from the Front-Lines of Government’, paper presented at the annual meeting of the Law and Society Association, Chicago, May 1999.
ter, its members, what they stand for, and what moral norms and values exist. I use the so-called naturalistic variant, which is a pragmatic, empirical method. The main focus in this variant is on the moral dimension of a practice: values play a central role when it comes to how people experience reality. Stories are reflections of this experienced reality. Storytelling is valuable, not because it gives us an idea about the objective reality, but about the experiences of people and the values involved. Stories are symbolic representations of human action in practical, concrete situations. There they function as an explanation, as a justification, and as a guideline for future action.

Stories do not say so much about objective reality or events, but about meaning and experience. A story is interesting because it says something about the storyteller. Stories can help reveal the norms and values that this person has. When we want to study the ideals of an organisation, storytelling is a good method to make ideals explicit that usually remain implicit in the practice. Stories can show us that they play a role in daily functioning. Ideals can be seen as those goals an organisation or a person regards as worthwhile achieving, such as the ideal of the Rechtsstaat. Also, stories can show us how different values, or how values and rules, can be intrinsically conflicting. The ideal situation can function as a critical counterpoint in these cases. Stories often deal with events that show us how ideals and reality can conflict, or how the storyteller can be in conflict with the rest of the world.

27 The word ‘practice’ was introduced into recent debate by Macintyre. For an elaborate description of the various ways it is used, see B.Z. Tamir-Ayal, Realistic Socio-Legal Theory, Pragmatism and a Social Theory of Law, Oxford: Clarendon Press, 1997, pp. 168-172. I use it here in the way Wegenaar does. He says that a practice is concrete, situated in an institutional setting, intrinsically conflicting, action oriented, and morally loaded.
30 Ibid., p. 10.
31 In this case, the ‘ideal situation’ is a situation where the organisation has Rechtsstaatlichkeit as a virtue. This ideal situation functions as a kind of ideal type, as it was developed by Weber. This means that we can describe a phenomenon in abstracto by certain features and see to what extent a concrete example of this phenomenon meets the description.
32 Kohler Riessman, Narrative Analysis, p. 5.
3.3 How to Analyse a Story

There are different ways in which to use stories and to analyse them. Here I will confine myself to a brief description of how I analyse the content of a story. The first way to grasp how people actually tell stories and how they insert their own views of reality into a story is *backward mapping*. By starting at the end, the orientation to the situation and the characters will give a completely different view of a story. Reading from end to beginning, all sorts of useless details and descriptions of characters have to lead to a certain conclusion. This is because the storyteller has a stake in his own version of reality, in order to justify his own behaviour and the fact that he wants to tell you the story at all. One could say that *backward mapping* reveals the ideal in a strong manner: it forces itself upon you. A second way to show that a storyteller gives you his version of a story, which is not necessarily the only one, is *alternative reading*. A storyteller wants to take you with him in his convictions, experiences, his sympathies, and so on, by presenting events and characters in a certain way. He wants to make you think that the conclusion, the way the story ends, is inevitable and right.

4. Ideals in Action

4.1 Background of the Story

In this section, I will give an example of a story told to me during an interview. The story is illustrative in many ways, not only because it shows how a conflict of values occurs in practice, but also because it represents many other aspects regarding my research. It tells us something about ideals in reality, about the public-private dichotomy, about the value of pluralism versus the value of the *Rechtsstaat*, about the question whether a private housing foundation is part of the private domain or not, about power and responsibility, and so on. Before telling the story I will briefly introduce the backgrounds of the organisation and the storyteller.

The story takes place in the WSE, a private social housing foundation in E., a middle-sized town. In every Dutch town and city, there are some such foundations, and they usually have a long history. Since the 1980s, the subsidies have stopped and the housing foundations had to become financially independent. They can be financially independent by developing commercial activities, such as selling houses. On the other

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32 *Ibid.*, p. 20. She calls these justifying clauses "the soul of the narrative".
33 Wageman, *Beleid als fictie*, p. 16.
hand, they are legally still obliged to house ‘those who are not able to find housing on the free market’.25

The foundation concerned is a large one. It is, like most of them, very modern. The allocation of houses (for which in this town the local government issued rules) is completely computerised. This means that the influence of the employees on allocation is minimised. Here, the chance of arbitrariness is very small. However, there are other tasks that are still ‘risky’, because the influence of the employees is big. One of these tasks is assigning so-called priority. This means that the client gets preferential treatment for social (divorce, etc.), financial, or medical reasons. Though there are rules, of course, and though an independent committee takes the final decision, the employees make a first selection. They do this by calculating the chance that the client will eventually be assigned this priority. The employee concerned said during the interview that she regards “compassion” both as her own ideal in work and as the most important value of the organisation. Her colleagues also value this highly, so it can be regarded as part of the organisational culture. For the employee, it means she has to empathise with the clients’ situation and, if necessary, to put the rules aside to help them.

4.2 The Decent Vagabond

This man, who worked in E., came to the office. He had been divorced six months and since then he had stayed in someone else’s house. At some point, this other person had said: ‘You will have to leave my house within two months, otherwise I’ll kick you out.’ Then the man tried to get other accommodation; I believe it was a shed or an attic room in a farmer’s house somewhere. When he wanted to move in, the farmer told him: ‘I’m sorry, but I’ve changed my mind about the whole thing’, and then the man literally was on the street. He would sleep on a bench in the local park, and every time I saw him he looked worse and worse. Officially, he could not get priority because he was not registered as a resident of E. However, he could get a house, because he works in this town. At that time I was working on several furnished apartments with his employer. So I called the employer and asked whether this man couldn’t get one of those apartments. After all, the man was his employee. But the employer said he had other plans with the apartments. Of course, I was a bit angry and wanted to give up but then — here I am with my compassion again — of course I’m not sensitive to everything people tell me. But I think it is unacceptable that someone who has a regular income in 1999 should live in the street. Of course you can say: ‘Why don’t you go to the Salvation Army’, or something, but I don’t think that is appropriate in a case like this. Then I talked to my colleagues about

25 This is a rough translation of an Article of the Dutch Housing Act.
this case and asked them: ‘Isn’t there something we can do for this poor man?’ Then we looked again and we found a house that was right for him. It didn’t look all that smart, so we had to repair some things. You can’t believe how happy the man was. Well, of course you can say: rules are rules, but if someone has to sleep in the street without the possibility of having a shower or changing his clothes... I think this was the right decision.

The argument that a person should not sleep in the street can be regarded as an appeal to human dignity, a motive directly related to the Rechtsstaat. The storyteller makes this appeal in a particularistic way: in her opinion someone with a ‘regular income’, someone she can identify with and whom she regards as a decent person, should not live in the street these days. This is her motive for action. We should note here that she goes much further in her efforts to help the man than normally is to be expected. After all, if she were to help everyone who appeals to her in this way, she would not be able to help many clients because it would take too much time. Besides, the man did not live in E. and had, according to the rules, no right to preferential treatment.

**Backward mapping**

The end of the story is that, thanks to the special efforts of the employee, the man gets a house. Not only the fact that he gets a house needs to be justified, but also the special efforts. The first is done by making clear it is not the man’s ‘own fault’ that he lives in the street: he is the victim of a chain of unhappy events. He has a job, an average income, and does not belong to the category of people that should live in the street or should go the Salvation Army. In this case, humanity is a higher good than legal rules. This is the ideal that guides the employee’s action.

**Alternative reading**

We may retell the story in the following way: There was a man who worked in E. He had been divorced and was obviously stupid enough not to make the right arrangements before leaving his wife. First, the friend he stayed with got tired of him, and then the farmer he was going to rent a room from clearly changed his mind about the whole thing. The result of all this was that he had no accommodation. As the weeks passed, he looked dirtier and dirtier. Officially, he had no right to get priority status. Then I thought to myself: Yeah, of course, you have to be

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human in this business, but I'm not sensitive to everything people tell me. If you have a regular income in 1999, it must be your own fault if you live in the street. And, of course, the Salvation Army is not willing to help him because they are there to help genuinely poor people. Well, I'm not going to do anything extra for this guy and I'm certainly not going to break the rules. He will have to wait his turn like everyone else. After all, he has no right to priority status. And why should someone with a regular income have more rights than someone who has no income? Well, of course you may say that compassion should go before anything else but if you sleep in the street because of your own negligence, then I think it's okay to simply apply the rules.

4.3 Conclusions on the WSE

The story told above can be said to reflect the organisational culture and the attitudes of the employees quite well. What I have learned from the interviews is that there is a risk of what I call particularism. By this I mean that the employee's own opinion of people, what they do, and how they live their lives, plays a role in decisions where there is discretion, like the decision to grant someone priority status. More concretely, people who are polite, who are sympathetic, and easy to empathise with seem to have a greater chance of getting what they are entitled to, or even to what they are not entitled to, than people who are not. If it is in any way 'your own fault' to be in a difficult situation, the employees are less willing to help you out. People who are different, for instance from other cultures or from other social backgrounds, are not always understood as easily as 'own' people. There also seems to be a rule that you 'have to do your best' to get a house before asking for priority. All these informal norms are not laid down in the official rules, and can largely be regarded as being opposed to these rules. There seems to be a guiding value behind these informal rules that is in accordance with the norms and values in society at large.\footnote{Of course, this short story is merely one example of this organisational culture but it is consistent with my other findings of the interviews. In my doctoral thesis, I will give a detailed description and analysis of these interviews.}

Generally, we can say that the legal, bureaucratic rules that apply to the WSE are followed, partly because of the computer system\footnote{Lipsky, Street-Level Bureaucracy, p. 169.} and partly because of the fact that generally the rationale behind these rules (a fair distribution of houses) is well understood. The following of rules, one major aspect of the Rechtsstaat, is met here, and so is responsi-
siveness. The story shows that the WSE is responsive, but in a limited way. The limitation originates from the fact that it is particularistic responsiveness. This is due to the private, and even semi-commercial identity of the organisation that makes the employees think it is justified to distinguish between people, though according to the Rechtsstaat idea people should be treated equally.

5. General Conclusions on the Ideal of the Rechtsstaat

5.1 Generalising the Empirical Material

Rechtsstaatlichkeit can be seen as an ideal for organisations. This means that it is not, or not only important what external, legal rules apply to the organisation, but that it is the internalised norm that really matters. This internalised norm is based on the main thought behind the Rechtsstaat which is that the arbitrary use of power as regards the organisation's clients is not right. Instead, the organisation should develop a sense of responsibility. In sociological terms, we can say that the organisation should have a responsible institutional setting. This means it must have a rechtstaatliche organisational culture and that the employees should have a responsible attitude. In my research on the WSE, I found a certain internal morality that to some extent agrees with that of the Rechtsstaat. Customer-friendliness is one of the key words it uses to emphasise that the client is highly valued. The employees are generally responsible people, motivated to do their job as well as they can. They have a sense of justice, which makes them make the right decisions in most of the cases. In hard cases, particularism plays an important role. I believe that in this respect the WSE is not much different from other private housing foundations or from public administration bodies.

Thus, a more or less rechtstaatliche institutional setting may be found in private organisations. This may be called remarkable, regarding the fact that, traditionally, the Rechtsstaat only applies to public organisations. Many things may be deduced from this statement. For instance, understanding that the conditions under which an organisational culture will be more or less rechtstaatlich, may shed light on the issue whether the privatisation of public tasks is wise. If we privatisate, we abolish the other (legal) safeguard of the Rechtsstaat, the control by constitutional and administrative positive law. We could say that even though this setting may exist, it would not be wise to privatisate all sorts of public tasks because, legally speaking, they do not have to act accord-

49 A similar conclusion was drawn by Philip Selznick in his empirical work.
ing to the rules of the _Rechtsstaat_, such as the Constitution and administrative law.

Another conclusion may be that legal scholars, legislators, and policy-makers should not only look to positive law for understanding how certain organisations function, but should also take the sociological aspects into account. One step further, we may say that maybe the organisational culture and the attitude of its employees are of greater importance if we want their clients to get what they are entitled to than when the formal rules are applied to them, and that, therefore, a private organisation may sometimes be even more _rechtsstaatlich_ than a public one. These conclusions are spectacular, but still quite speculative as well. What I would like to focus on here is an often-underestimated connection between law, ethics, and social science.

### 5.2 The Motivational Aspect of the Rechtsstaat

As mentioned above, all employees interviewed emphasised their own motivation. This was the contact with the clients, the variety of people, and the willingness to help people. This motivation does not automatically lead to the ‘right’ outcome. My question is: How ‘bad’ is this? The traditional jurist would answer that it is bad, and that we should make more rules to diminish discretion in order to prevent the arbitrary use of power by employees of administrative organisations. In his frame of thinking he may be right. After all, every ‘wrong’ outcome violates someone’s dignity, something the _Rechtsstaat_ wants to prevent.\(^4\) However, instead of only focusing on what goes wrong, we might also look at all the good things that happen in this type of organisations, because we can learn a lot if we want to prevent wrong outcomes. And is the motivation to do the right thing not an important key to that? I believe this motivation shows that there is such a thing as a responsible attitude among street-level employees, something that is not very surprising. The fact that some things go wrong only points out that there may be and should be ways to let this attitude grow. We may wonder whether the traditional legal solution is the only option at hand and whether an opposite solution might bring us closer to the _ideal_ of the _Rechtsstaat_.

At the beginning of this chapter, I briefly pointed out that following rules simply because they are rules may lead to legalism. This implies that making more rules may have the effect that the employees will regard the rules only as impeding limitations to their freedom and not as

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\(^4\) In the case of housing agencies: someone entitled to a house does not get this house, which will largely affect his life and well-being.
good guidelines for action. One reason for this is that they might feel distrusted, which is, of course, not very good for motivation. In order to enhance motivation, making people feel trusted and valued for their skills is a better solution. Making more laws is not the way to do this. What then do we need? There is a great variety of ways to improve organisational culture and attitudes. Some of them are based on ethical works on institutional citizenship, loyalty, whistle-blowing, integrity education, and ethical auditing. Others come from legal writings that base their ideas on sociological insights, and deal with self-regulation and internal democracy, and symbolic legislation. Still others are based on literature about organisations, such as a plea for organisational change and persuasive communication.

6. Conclusions

This chapter discussed the question: How do we deal with the power that organisations have over individuals? Starting with the traditional legal way of solving this problem by making legislation, I took a step further by looking at the ethical and sociological issues that underlie this problem. These made me develop my thesis that Rechtsstaatlichkeit is an ideal that should exist in every powerful organisation. Also, through empirical research I have shown that something like a responsible institutional setting may exist in the type of organisations I am concerned with here, private social housing foundations. An important feature of this setting may be that street-level bureaucrats have a strong motivation to help people, something that may enhance rechtsstaatliche behaviour.

It seems that it is not far from this step to the next step, the insight that motivation is, so far, underestimated aspect of the Rechtsstaat. My idea is that if we really want this important doctrine to progress, we must also think about power and responsibility, about what law is and what it has to do with ethics and sociology. If we really want to limit the arbitrary use of power more and more, arguing for organisational change may be more fruitful than writing about new legislation. Of course, there will always be a discrepancy between ideal and real life. This does not mean that it is not and remains not important to strive for this ideal.

42 In this chapter, I can only prelude on my own suggestions for improvement. Value-driven leadership and openness are the main issues I focus on. C. Raat, 'Macht en rechtstaat: Verantwoordelijkheid als organisatielievend in de praktijk', in R.J.M. Juurissen and A.W. Musschenga (eds.), Integriteit in bedrijf, organisatie en openbaar bestuur, Assen, Van Gorcum, 2002, pp. 100-122, esp. pp. 113-120.
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The Importance of Ideals

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