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Sanne Taekema

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THE CONCEPT OF IDEALS IN LEGAL THEORY

by

SANNE TAEKEMA

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Managing Editors

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I dedicate this book to Jean-Pierre Simons, with love.

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CHAPTER 1

IDEALS IN LEGAL THEORY: AN INTRODUCTION

1. COMMON SENSE UNDERSTANDINGS

In the nineteen-thirties there were two Dutch neighbours, Van Stolk and Van der Goes, who were involved in a dispute over a footpath. Relations deteriorated so much that Van Stolk decided to place a hideous construction, a wooden pole decorated with old cloth, on his land to spoil the view of Van der Goes. Van der Goes went to court. After the judicial decision that placement of the construction was illegal, Van Stolk decided to make the construction into a water tower, first without even bothering to connect it to water, but later making it into a workable tower. Again Van der Goes went to court, claiming that this constituted an abuse of ownership rights. Dutch law contains the rule that the use of a right, which is legitimate in the abstract, can be illegitimate in specific circumstances in relation to another person. Now that the construction had the appearance of a working tower, the Dutch Supreme Court had to decide what criteria had to be fulfilled to constitute an abuse of rights. Simply harming the interests of another is not enough, according to the Court; the owner must have the sole purpose of harming someone and must have no reasonable interest in the exercise of his right. Given the context and history of this case, these criteria were fulfilled in the case of the water tower: building a tower simply to spite one's neighbour constituted an abuse of ownership rights.¹

This Supreme Court decision tells us much about the scope and nature of the right to private property. The right to property creates a sphere of freedom of movement and decision, in which a person can make his own autonomous choices. This freedom is not unlimited, but every limitation needs to be well-argued. As the Dutch jurist Paul Scholten said in his comment on this case: "Ownership is not a power given for a specific purpose, but the recognition of

¹ There are two Supreme Court decisions in this case, HR 13-3-1936, NJ 1936, 415, and HR 2-4-1937, NJ 1937, 639; the first annotated by Paul Scholten.

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a freedom not to be defined.”²

Why, you may ask, this excursion into the law of property in a work which, according to its title, is devoted to ideals in legal theory? Because the personal freedom of which property is a guarantee can be understood as a legally recognized ideal. Ideals are not directly obvious aspects of the law, but this book is motivated by the idea that ideals are nevertheless important and irreducible features of legal systems. How we should conceive of ideals exactly and what place they have in law is the leading question of this book.

‘Justice is blind’. A recurrent image of law in art is the figure of Justice: the figure of the blindfolded lady with scales and a sword. This figure represents an ideal: the perfect administration of justice. Blindfolded — without prejudice; carrying scales — in complete fairness; and carrying a sword — backed by power to enforce the decision. The three features of the image of justice all suggest omnipotence. The blindfold makes it seem as if a judge can close her eyes to shut out any preconceived judgments about the people involved in a case and decide it only on its merits. The scales suggest the competence to weigh arguments minutely. Once a decision is reached, the sword guarantees that it will also be effective.

The figure of Justice reflects some of the common sense understandings about the ideals of law. Less obviously, so does the case of the water tower. Justice represents unattainable characteristics of a perfect judge: an ideal appears, first, to imply perfection, and, second, to imply unrealizability. At the same time, ideals have appeal. Ask someone to give an example of an ideal and often he or she will come up with a political slogan: ‘Liberté, Egalité, Fraternité’ or ‘Peace and Love’. These were the banners for political or social upheaval; they moved people to political action. The ideal in its perfection brings out flaws in the current situation and gives a direction for improvement. It is, however, so lofty that we can never quite reach it.

In the case of the water tower, the ideal of freedom only appears after a detour through a range of rights, relations, and responsibilities. The focus is on the limitations of the right to property, but when the question is put how far these limitations extend, we are suddenly confronted with the freedom of the owner as the core value to be protected. The perception of the ideal is different here, and so is the relationship between law and the ideal. Here we trace the meaning of freedom negatively, by examining its limitations. It is clear from the start that an owner’s freedom cannot be exercised to the full. That would be the ideal of freedom, which in reality is constrained by other people and

² In Dutch: “Eigendom is niet een met een bepaald doel gegeven bevoegdheid, maar een erkenning van een niet te omschrijven vrijheid” (noot NJ 1936, 415).

other values. Here we see more clearly than in the case of justice that the realization of an ideal is hindered by all kinds of constraints and obstacles. There is another difference between the two examples. The figure of Justice is in a sense the impersonation of the aspirations of all legal agents; she is the guiding light for the whole of law. In the case of the water tower, however, the ideal of freedom remains in the background until we come to a difficult legal question. Personal freedom informs our understanding of the case, but it appears in a specific legal form here — as property rights. We might say that freedom is an ideal which law is designed to protect. It is a reason to have all kinds of legal rules, but it does not seem to be an integral part of our understanding of law in the way that justice is.

The two examples raise questions about the role and character of ideals in law: Is there a difference between an ideal like justice and an ideal like freedom with regard to the connection to law? Are these different kinds of ideals? The case of the water tower also draws attention to the limitations to which an ideal is subject and the connections the ideal has to different elements of the legal system. How should we conceive of limitations and conflicts? Are these caused by the relation to rules or principles, by factual circumstances, or maybe by other ideals? What to think of the relations of ideals and rules, of ideals and facts?

These are the kinds of questions that I aim to answer in this book. I will try to unravel the concept of ideals, and provide a sensible interpretation of the different features of ideals that came up in the two examples. Before I start the investigation, however, I want to bring some order to the questions that guide it, and reveal some of the theoretical background to these questions.

My main aim is to arrive at a defensible concept of ideals, which can be used in a theory of law. This makes it necessary to pursue two main sets of questions, the first set regarding the concept of ideals as such, the second set regarding the role of ideals in a theory of law. These will be guiding questions throughout the book, but a first impression of the issues concerned can be given here. An inquiry into the concept of ideals raises philosophical questions about the nature of ideals and their place in our world. In philosophy, ideals are traditionally connected with notions of the good or notions of value. When considering the nature of ideals the relation between ideals and values needs to be examined as well. Any interesting view on the nature of ideals presents ideals in a certain context and, most importantly, advances a view about ideals and reality. Thus, the first set of questions are questions about the nature of ideals and their relation to reality; this is the subject of the next section (1.2).

The second issue then is how to use such a concept of ideals in a theory of

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law. Again, we can distinguish between ideals as such and the place of ideals, now in the realm of law. In connection to theories of law, the question is whether ideals are to be seen as a general category or whether there is a specific category of legal ideals. If there are specific legal ideals, I also want to know what role these have to play in comparison to other ideals. The question of legal ideals as a category is further introduced in section 1.3. The second aspect of the place of ideals in legal theory is how the concept of ideals is connected to other aspects of the domain of law. More specifically, what interests me is how the concept of ideals is related to other concepts that are central to theories of law: rules and principles. To this issue I turn in section 1.4. Finally, section 1.5 gives an overview of the other chapters in this book.

2. IDEALS AND VALUES

The first set of questions concerns the nature of ideals in general. What type of entity are we thinking about? The first indication can be drawn from the observation that ideals function as guides for improvement. The unspoken premise here is that ideals are worth aspiring to, that they are something valuable. Of many things we are inclined to say both that they are an ideal and that they are a value. Both justice and freedom can be regarded as an ideal or as a value. So can world peace, love, solidarity, equality. Is there a difference between the ideal of justice and the value of justice?

Thus, the first question regarding the general nature of ideals is whether a meaningful distinction can be made between ideals and values. And if such a distinction can be made, what does the difference between ideal and value consist in? In order to get a first impression of the kinds of questions arising, it is helpful to look into the background of the two concepts.

As a philosophical term, ideal has a longer history than value. The adjective 'ideal' is derived from the Greek 'idea', which was already used in a philosophical sense in ancient Greece, most famously by Socrates and Plato. From this use as an adjective accompanying the Platonic idea, the substantive 'ideal' was first used in the eighteenth century.³ The term 'value' arose in the context of the economy, at first simply meaning: the worth of a thing.⁴ Only recently, near the end of the nineteenth century, did it acquire a broader,

³ It was used primarily in aesthetics and ethics, see the entry "Ideal" in the Dictionary of the History of Ideas (Wiener 1973, 549-552).

⁴ See the entry "Value and Valuation" in *The Encyclopedia of Philosophy* (Edwards 1967, 229-232).

philosophical meaning. It has become the generally used term both to refer to the positive qualities of an object or state of affairs — speaking of something ‘having value’; and to refer to people’s basic commitments — speaking of something ‘being a value’.

Since the concept of value has been introduced, it has become the subject of vigorous debate and it has given rise to a wealth of theories about the nature of values. The problems that form the subject of value theory are equally relevant in the context of a study of ideals: they concern the relation of ideal to reality, knowledge of ideals, the possibility of truth and criticism. Therefore I will give a sketch of the main topics related to the nature of values and give a brief typology of value theories.

In any inquiry into the nature of values, there are three theoretical components which are sometimes hard to disentangle, but can be distinguished. These are ontology, genealogy⁵ and epistemology; i.e. an account of what values are, an account of their origin, and an account of our knowledge of them. On these issues a number of ‘-isms’ have been developed: cognitivism and non-cognitivism, realism and anti-realism, naturalism, subjectivism, etc.⁶ Most often, the focus is on a combination of ontological and epistemological questions: do values really exist and how do we know them?

The central question of value ontology is whether values exist mind-independently in the extra-human world (Bransen & Slors 1996, 1). Value realism answers this question positively, anti-realism answers it negatively. In value epistemology opinion is divided over the question whether value judgments can be true or false, that is, whether we can have knowledge of values. Cognitivism asserts that value judgments are truth claims, while non-cognitivism denies this.

Cognitivism and non-cognitivism are broad categories: each comprises a number of theories respectively asserting and denying that values are subject to judgments of truth and falsity. Two important varieties of cognitivism are rationalism and moral realism.⁷ The first theory claims that value judgments

⁵ I will not pay separate attention to the way values come into being; the issue is touched upon in passing throughout this book. For extensive treatment of the issue, see *Die Entstehung der Werte* (Joas 1997).

⁶ These are different positions in meta-ethics, that is, theories about the status of moral judgments and moral values. For the time being, I will simply treat value as equivalent to moral value; the issue of different kinds of value, more specifically legal and moral value, will be treated in the next section.

⁷ My account of the varieties of cognitivism and non-cognitivism is based on Arrington’s book on moral epistemology (1989). References can be found there. Well-known proponents (continued...)

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are true by virtue of their relation to a self-evident first principle. Justification is a process of rational deduction from that principle. Moral realism claims that value judgments are true by virtue of their correct appreciation of the moral quality of a situation. Emotivism and prescriptivism are influential non-cognitivist theories.⁸ Emotivism claims that value judgments are expressions of feelings of approval or disapproval, while prescriptivism claims that value judgments are commendations for the choice of objects and actions. In both cases, value judgments are not assertions that something *is* in fact good or bad; they express a person's feeling or attitude towards it.

The connection between epistemology and ontology is found in the reasons why value judgments are or are not capable of being truth claims. Epistemological realism makes truth or falsity dependent upon the existence of a value in the extra-human world. It is backed by a realist theory of the ontological status of values. Value judgments can be true or false because values exist: they are correct or incorrect appreciations of those values. Other cognitivist theories, however, are supported by an anti-realist ontology. Rationalism does not claim mind-independent existence of values. Truth of a value judgment depends on a self-evident value, but that value only needs to be self-evident for human beings — there is no need to claim independent existence. Non-cognitivist theories are very clearly anti-realist: they make value judgments directly dependent on human, mind-dependent, feelings or attitudes. Thus, we see that the two pairs of opposed positions do not correspond: there is a large field of cognitivist anti-realism, in which we can locate theories such as rationalism.

The distinction between realism and anti-realism has the advantage of clarity, but it leaves open a number of questions, particularly regarding anti-realism. What positive theories are connected to the idea that values do not exist mind-independently in the extra-human world? Pondering this question leads to a host of other concepts which determine the shape of these theories. Two pairs of such concepts are especially relevant to my project: objective and subjective, absolute and relative. All of these figure in discussions on the ontological status of values, but not always with a clearly delineated meaning.⁹

⁷(...continued)

of rationalism are Alan Gewirth and Bernard Gert; John McDowell and Mark Platts are leading moral realists.

⁸ Emotivism was advocated by Ayer and Stevenson (see Stevenson 1963). Prescriptivism was developed by R. M. Hare (1952).

⁹ Of course, and this makes it more complicated, they are not restricted to the question of ontology: they have epistemological relevance as well. Often, ontological and
(continued...)

The issue of value objectivity and subjectivity is the most slippery. The claim that values are objective has been described as the ontological claim that values are “part of the fabric of the world” (Mackie 1977, 15). This can be interpreted as ontological realism, as saying that values are part of the fabric of the extra-human world, a position which one could also call objectivism.¹⁰ Often, however, it is the more modest claim that values have a specific, verifiable, basis in social reality. This means that values can be objective, but still mind-dependent and part of the human world. Of subjectivity, we can give a similar account: strict subjectivism is the doctrine that values are no more than an individual’s mental states.¹¹ Again, there is the more modest idea of subjectivity that values always need to be recognized by a subject to exist. Once the restricted versions are rejected, objectivity and subjectivity become combinable features. We can then say that values have objective and subjective components. It then remains to specify to what extent values are objective or subjective. I will reserve the terms objectivism (or ontological realism) and subjectivism for the strict views on value objectivity and subjectivity. There is, however, also an intermediate position in describing the ontological status of values: the idea that values are intersubjective. Values are then seen as the shared standards of a human group, which means they are not dependent on an individual’s affirmation but neither do they need to have a basis in reality.¹² We can draw a parallel with the existence of a legal rule, which is not part of the non-human world either, but part of the shared norms of a group. Exactly in what sense a rule or value can be said to exist when it is intersubjective is a difficult question because of the ambiguity of the idea that it is shared. The claim that values are intersubjective needs to be backed

⁹(...continued)

epistemological arguments for a position are mixed together. For example, relativism is usually a denial of the epistemological claim that cross-cultural assessment of beliefs about values is possible, backed by the ontological claim that values are never more than the intersubjective standards of a particular group.

¹⁰ Objectivism is the term used by Mackie. I think the term ontological realism is clearer because it refers directly to the reality of which objective values are supposed to be part. See Bransen & Slors (1996) for a discussion of ontological realism.

¹¹ A good example of subjectivism is the theory of Gauthier, who claims that values are an individual’s considered preferences (1986, 49).

¹² An intersubjective view on values is part of Rawlsian constructivism. In his recent work, Rawls relies on intersubjective agreement about certain political values by way of a reflective equilibrium strategy (1993, 95-97). See section 2.2 for further discussion of Rawlsian constructivism.

by an account of what the shared quality of values consists in.¹³

The contrast between values as absolute or relative is important because of the development of value relativism.¹⁴ Value relativism is primarily a position on the validity of values; it denies the absolute validity of values — the idea that values can be valid on their own account without the need to base validity on something else. Value absolutism, as the view that some values are valid without further justification, combines well with the epistemological view of rationalism: the idea that ultimate values are self-evident can be the basis for the claim that they have absolute validity. It can also be combined with versions of epistemological and ontological realism. The common denominator of different kinds of relativism is the idea that the validity of values is always relative to a certain context. The most well-known type of relativism makes values dependent on culture: values are only valid for those people belonging to the culture of which those values are part (Harré & Krausz 1996, 11). Thus, cultural relativism and an intersubjective ontology are natural companions. Relativism can be more radical than that, however. It can shade into subjectivism when the validity of a value is seen as relative to one person's belief or feeling. It is important to realize that relativism can be combined with either cognitivist or non-cognitivist claims.¹⁵ One can hold that value judgments can be true or false within a given culture, or that such judgments are a matter of shared sentiment.

All of these concepts play a role in this study. The theories I discuss, all use them with somewhat different meanings. I will use the conceptual distinctions made here as a framework to place them in. The focus on ideals makes for a specific perspective. My starting point is the relationship between ideal and reality, that is, I will try to answer the question: what is the ontological status of ideals? In Chapter 2, I will develop two distinct concepts of ideals,

¹³ The issue of objectivity, subjectivity, and intersubjectivity is further complicated because objectivity and subjectivity are sometimes used as mutually exclusive terms. For instance, Mackie, who denies value objectivity, calls himself a subjectivist but defends the view that values have an intersubjective basis (1977, 26).

¹⁴ For an overview of types of relativism, see Harré & Krausz 1996. Relativism is by no means limited to theories of value. Harré and Krausz distinguish two catalogues of relativisms: by subject (semantic, ontological, moral and aesthetic relativism) and by negation of types of absolutisms (23-24). It is the latter catalogue that is important here. Harré and Krausz distinguish between three absolutisms: universalism, objectivism, and foundationalism (4-5). Relativisms can be distinguished as to the kind of absolutism they deny. Objectivism corresponds to ontological realism, foundationalism to rationalism. Universalism is the view that values are valid for all human beings.

¹⁵ Cognitivist relativism is defended by Gilbert Harman and David Wong, see Arrington (1989, 202-247) for a discussion. Non-cognitivist relativism quickly shades into subjectivism.

connected to philosophical traditions. The distinction, which is based on the relation between ideal and reality, cuts across the typology of value theories sketched here, but I will use the positions indicated here to clarify variations of the two concepts of ideals.

3. MORAL IDEALS, LEGAL IDEALS

My interest is not in ideals as such, but in ideals that arise in a legal context. I have said that my aim is to investigate the concept of ideals, but that investigation is qualified by the focus on law. This raises the question whether a general concept of ideals suffices to understand ideals of law. Such a question can be understood in two ways: first, as the question whether there are special features of legal ideals creating the need for a specific concept; second, as the question whether to distinguish different categories of ideals, falling under the general concept of ideals. Is there reason to distinguish a special category of legal ideals or are all ideals equally relevant to law? Here, I want to explore whether the concept of ideals used in moral theory can be applied to ideals in a legal context as well. My reason to focus on moral theory is that this is the field in which the concept of ideals is used most often.

The dominant view of moral ideals is as follows. Moral ideals are usually contrasted with moral rules; they are said to differ in that rules specify what is morally required, while ideals indicate what is encouraged (Gert 1988, 172). Thus, ideals are exceptional moral standards, which ask for actions going beyond obligation (Beauchamp 1991, 242). In some respects, such a characterization of ideals seems easily transportable to other contexts than morality. In a legal context, we can also think of ideals as exceptional standards, which ask for actions going beyond obligation. However, there are a number of connotations that come with this concept as developed in moral theory that are less apt for a legal context.

The most important of these connotations is the attachment of the ideal to a particular person. In the accepted view, an ideal as a standard of laudable, but non-obligatory conduct is usually accompanied by an important distinction between the meaning of the ideal for the person following it and its meaning for others (Urmson 1958, 204). For the person committed to it the ideal generates moral demands but not for others. Generally, it is not a standard used to criticize the person holding the ideal either. An example is the case of a doctor volunteering to practise medicine in a war-zone. Such a person feels that his ideal of being a good doctor requires him to do his job under any