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The Role of Ideals in Legal Dynamics

1. Introduction

It is almost a platitude to say that we live in a highly dynamic world. The introduction of new information and communication technologies and biotechnology and the globalization of our economies are just two of the many factors that lead to rapid changes in our modern societies. Of course, the law tries to keep up with these changes, but often it is not very successful. Legislative processes take much time and new statutes are sometimes already partly outdated at the moment they enter into force. The judiciary may try to respond to the changes, but usually has limited possibilities to do so, especially when the social or technological changes are so fundamental as in the field of, for example, the Internet.

The rapid changes thus constitute a challenge to law. How can the law keep up with them? Are statutory changes and the gradual evolution of case law still adequate to adapt the law in the books to the reality outside? Or should we perhaps focus on different processes of legal change?

The rapid changes also present a challenge to lawyers and students of law. How can they keep up with them? One of the obvious responses is an increasing degree of specialisation, both in legal practice and in the academic world. By specialising, one may still hope to cover the whole field, even if this is becoming smaller and smaller; but specialisation has its limitations as the various fields of law influence each other. Another response is to revise legal books more frequently. Law professors still write books in which the positive law on an issue or field is systematically presented, but the revised editions have to follow each other up at increasingly shorter intervals. But this attempt to keep up by continuous revisions also has its limitations. It is significant that, in recent years, almost all encyclopaedias have abandoned their printed versions and switched to Internet or CD-ROM versions that can easily be updated. Perhaps it is time to abandon the encyclopaedic dream of legal scholarship too; the dream that a scholar can and should master all the sources of law of a certain field and be able to present them in a systematic fashion as 'the positive law'.

Such suggestions almost automatically lead us away from 'law in the books' to its traditional companion 'law in action'. Indeed, I believe that, to understand the dynamics of law, we should pay more attention to law as interaction or as a dimension of interaction.[2] However, that is not what I want to do today. I want to focus on law in the books and see what sources we may find there that enable change.

'Law in the books' may have two different meanings. It may refer to the collection of legal texts, statutes, treaties, and case law, and it may refer to the systematic presentation of the substantive contents of this collection, for example in a scholarly book on Dutch health law. In such a presentation, there is usually, either implicit or explicit, a threefold distinction between the basic principles, the rules and the specific implications for concrete cases. It depends on the (implicit or explicit) philosophical inclinations of the author and the national traditions in this respect, of course, where the emphasis lies, and whether there is also any attention to a fourth, even more abstract

1 The research for this paper was partly financed by a grant from the Netherlands Organization for Scientific Research (NWO).

2 Cf. my (1999).

category, that of the basic values or ideals behind the principles and rules. We may think of collective ideals such as justice, democracy, and the rule of law, but also of more individualist ideals such as privacy, or free speech.

The thesis I want to defend is that, to understand legal change, we must focus on the most concrete and the most abstract levels, that of the implications for new cases and that of the ideals. The first category may seem unproblematic. In the theoretical literature of the last decades, it is a recurring theme that application of legal or moral rules is not a purely mechanical process, but requires interpretation and thus re-construction of the meaning of these rules. Each new page that is written in the book of law may also change the meaning of the preceding pages; it may even show that the preceding pages led us on the wrong track. When new cases arise, they may challenge our current understanding of law and invite additions and even revisions to the set of rules and principles. The continuous confrontation of the existing legal doctrine with new cases may thus give rise to a stream of usually minor revisions. The empty pages need to be filled in.

The other, abstract category of ideals, however, is a much neglected one in legal theory.[3] Therefore it is time to pay attention to them.

2. The Concept of Ideals

First, what are ideals? I suggest the following stipulative definition:

> Ideals are values that are usually implicit or latent in the law or the public and moral culture of a society or group, which usually cannot be fully realised and which partly transcend contingent, historical formulations and implementations in terms of rules and principles.[4]

This definition includes the main characteristics which account for the role ideals may play in law.

First, they are embedded in our social reality; they are part of the law. The fact that they are not external, but internal means that they are connected to what we already accept and already do, and that we can build on that. As sources for criticism and reinterpretation of the law, they are not completely outside the law; they are part of it. Therefore, we can legitimately appeal to them in legal arguments.[5]

Second, they can never be completely realised and not even be completely formulated. Therefore, they always remain an inspiring aspiration and a source of criticism, challenging us to go beyond what we already realised, beyond what is already recognised as positive law. Moreover, they always have a surplus of meaning. They are like the horizon: once we have reached the point which once seemed to be the horizon, we see new horizons. In new situations, ideals have hitherto unknown and unexplored dimensions. That is why in the sixties, democracy could be used as an ideal not only for

3 The most important exceptions are Lon L. Fuller, Philip Selznick and Ronald Dworkin. It may be helpful to phrase my thesis in Dworkin's terms. Dworkin argued that we should distinguish between rules and principles, and that acknowledging principles is not merely introducing rules *manquées*, but has much wider ramifications because principles have some essential characteristics that make them fulfil other roles in legal argument than rules. Analogously, I would hold that, within Dworkin's category of principles, we should distinguish between principles and ideals, and that because ideals have some specific characteristics, they can play roles that principles cannot.

4 Cf. my (1997). To the definition in that article I added the word 'usually', because especially in law, for example in preambles to statutes or treaties, ideals are often mentioned explicitly.

5 This fits in with Michael Walzer's suggestion that, to be an effective critic, one should not be an outsider, but should be inside the common practice and appeal to sources within this practice.

the state, but also for companies or schools. It is particularly these characteristics of ideals which explain their role in situations of change, as I will show with respect to the European Convention on Human Rights.

Third and last, they are values. Therefore, they have a normative appeal, they are something we should try to realise, and, hence, may be the source of often powerful normative arguments.

This is one of the most problematic characteristics. In my definition, ideals seem a distinct subclass of values. But are they really distinct? Can we always replace ideals with values? It seems to me that Sanne Taekema made a valuable contribution to our understanding of this issue.[6] She argues that ideals and values are indeed largely replaceable, but that values may have a variable 'ideal' dimension, an ideal dimension which consists precisely in characteristics such as that they are not completely realisable and cannot be completely formulated. The distinction between ideals and other values then becomes not a categorical distinction but a matter of degree. When the ideal dimension is paramount, it may be useful to call these values ideals. Democracy may thus sometimes be called a value – when we refer to elements that have been realised – and sometimes an ideal – when we refer to elements that have not (yet) been realised and perhaps not even been fully grasped.

It may be clear why ideals play an important role in processes of change - and not only in the context of law. As they are always only partly realised and never completely formulated, they offer a critical perspective on reality and a source of inspiration for moving beyond reality. As our reality always fall short of our ideals, these ideals may help us to formulate what is still wrong with reality. Moreover, they also show us directions in which we may try to improve reality. New ideas, new concepts, new formulations of our principles and rules may follow from a thorough reflection on the meaning of our ideals.

This is also true of law. When judges need to reinterpret the law in order to deal with new cases, one of their normative sources within the law are fundamental ideals, such as the rule of law or privacy. Confronted with new developments, such as the Internet, we may discover new dimensions of those old ideals. I think the development of the European Convention on Human Rights presents a clear example of this potential for change that legal ideals offer.

3. The European Convention on Human Rights

Sometimes law is highly dynamic, usually it is not. One of the clearest examples where the dynamic character of the law is explicitly recognised and supported is the European Convention on Human Rights. The European Court has explicitly and repeatedly declared that the Convention is a living instrument which must be interpreted in the light of present-day conditions.

This implies, for example, that some activity which around 1950 was considered so immoral that its prohibition was necessary in a democratic society, may some years later no longer be subject to a justified prohibition. The prohibition of homosexuality is an example of such a shift, as expressed in the Dudgeon-case:[7]

6 Taekema (2002).

7 Although the early case in which a prohibition of homosexuality was accepted was a Commission case (*X v Federal Republic of Germany*, Appl. 104/55, Yearbook I (1955–1957), p. 228 (229), and the later cases, starting from *Dudgeon*, were decided by the Court, it seems no unjustified speculation that in the 1950s the Court would also have accepted the prohibition.

> As compared with the era when that legislation [against homosexual acts - WvdB] was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.[8]

This bold dynamic ambition is quite exceptional, especially from a civil law perspective. In Dutch law, I can find no parallel. In our civil law tradition, if we feel the need for legal change, the first response is to say we need a new statute. And if judicial interpretations and legislative modifications have changed the positive law too much, a project of recodification seems the natural response. Even in common law traditions, the dynamics is usually not sought in an extensive judicial interpretation of statutes or other legal texts, but in the continuing judicial reconstruction of the common law.[9]

Moreover, it is not merely an ambition, but it seems that the European Court has been quite successful in this progressive clarification and implementation of human rights. Its case law has indeed evolved in many ways and broadened the scope of human rights. In many member states, the decisions of the European Court have given rise to major legal reforms. It seems to me that one of the secrets of this success is that the European Convention is phrased in very broad and vague terms, at the same time clearly identifying the fundamental values at stake. Rather than a detailed code of regulations, it formulates the basic ideals.

The important point to notice here is that it does not merely formulate vague norms with a very broad open texture. That would not give much guidance. It expresses the basic ideals or values which are both at the core of those norms and at the core of the possible exceptions. Each of the human rights refers to a basic and uncontroversial ideal; and the exception clauses must be interpreted in the light of the ideal of a democratic society. This basic structure of the Convention made it flexible and progressive. The formulation of ideals – though from a more instrumentalist view looking very ineffective because of their vagueness and broadly formulated exceptions – has proven to be more effective in the long run.

It is, however, not only the formulation of the substantive norms which has promoted legal development. It is also the discursive structure of the procedures and the explicit attempt to formulate convincing arguments based on sound theoretical reflection. An example is the old two-stage procedure, where the Commission first, often more frankly, formulated the normative issues at hand before the Court dealt with them. It is also promoted by the possibility of dissenting and concurring opinions, which more clearly identifies the various arguments at stake, and also reduces the need to reach vague compromises in the decisions.

The formulation of ideals in legal instruments is therefore only one of the many factors that may promote change. It needs, for example, to be accompanied by discursive legal processes and responsive attitudes. This brings me to the second theme of this paper.

8 European Court of Human Rights, *Dudgeon case, Publ. E.C.H.R.*, Series A, vol. 45 (1982), par. 60.

9 The most important exception in the Common Law tradition is the judicial activism of the US Supreme Court. This is clearly not a coincidence, as it has many analogies with the judicial activism of the European Court.

4. Ideals and Debate

The second contribution that ideals make to legal change is more indirect: they foster open debate which may lead to legal change, through judicial interpretation and legislative action, but also by leading to shifting interpretations by society or by specific sectors, professions, or semi-autonomous fields in society. The surplus of meaning and the fact that they will never be completely realised even if they are at least partly realised in law, makes different interpretations possible of what these ideals imply for the societal problems we are confronted with, and what means would be the best way to realise them more fully.[10]

Ideals may provide a common frame of reference, a common starting point in a discussion or in a pluralist practice. This insight may also be used in legislative strategies. In societal fields and practices with great variation and change, such as the medical practice, detailed regulation is often impossible and ineffective. In such situations, legislators may switch from the level of rules and guidelines to the more abstract level of principles and ideals. They may choose to lay down these more fundamental ideals and principles. This may serve two functions.[11] First, they may express the basic commitments of the political community. And second, they may serve as common points of orientation for a discussion about how to interpret and implement these ideals in varying contexts and for the actual implementation.

For example, if the legislature is confronted with the need for legislation on research with human embryos, it may be a good strategy to abstain from detailed regulation. It would be better to focus on formulating the basic values or ideals at stake and on creating a procedure in which an open discussion is possible on what these values imply for specific research projects.[12]

Such a focus on ideals may fit into communicative approaches to legislation, which is a core theme of research in our Tilburg research group.[13] This newly arising communicative paradigm comprises, of course, more than just an orientation towards ideals. It requires new conceptions of the rule of law, of deliberative democracy, and of citizenship. In turn, developing these conceptions may also require reflection on the basic ideals and how these can be reinterpreted in the light of this new communicative paradigm.

5. Conclusion

In this paper, I have argued that, to understand legal change, we should pay more attention to ideals. Within legal doctrine, they are an important source for new interpretations, for adapting law to changing circumstances and for improving law in light of its internal and external aspirations, thus 'working itself pure'.[14] Moreover, their openness to varying interpretations also gives them an important role in stimulating public discussions both within legal practices in the narrow sense, and in society at large. In our highly dynamic society, we can therefore only ignore the importance of ideals at our own peril.

10 We should beware of a simple instrumentalist view of the relation between these ideals and the means. For a good analysis of the dialectic relationship between means and ends, see Westerman (1999).
11 See Van der Burg and Brom (2000); and my (2001).
12 Cf. my (1996).
13 Cf. Van Klink and Witteveen (2000).
14 Cf. Ronald Dworkin's analysis of this idea in (1986).

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