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.

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