The Rise of the Claim. Highlighting the Ever-present Ethical Dimension of Law in a Technical Setting

Poverty Law and Legal Activism: Lives that Slide Out of View gives a fascinating insight into the practice and theory of poverty law from the 1960s to the present day. Among other things, Gearey depicts the importance of ethics in poverty law. For example, how the encounter between the poverty lawyer and the poor has ethical dimensions. How poverty law can be seen as the broken middle between law and social justice, and how this broken middle finds its expression in the ethical praxis of being with the poor.¹ Ethics is also ever-present in the praxis of law. This is the case in legal interpretation and in adjudication, since the legal material cannot determine its own meaning, and thus the legal material cannot decide the case; the case is merely based on the legal material, as many scholars have shown.² Therefore, the interpreter has to take responsibility

for her or his interpretation. However, this ethical dimension can easily slide out of view. Certain legal interpretation can obscure its potential consequences, especially if the interpretation is situated in a technical setting. If such interpretation is used in a ruling, the ethical dimension of adjudication can also be obscured. This obscuration can be noticed in the traditional interpretation of the concept “the rise of the claim”, particularly if the traditional interpretation is contrasted with a recent case from the Supreme Court of Sweden, where the court interpreted the aforesaid concept and highlighted the potential consequences of different interpretations.

Several statutes in Swedish private law include the concept “the rise of the claim”. For example, the concept is used to determine whether a claim is included in an insolvency proceeding, as well as to assess which
claims a composition (concordato, accord, abatement of debts)\(^6\) includes in a reorganization (which to some extent is similar to a Chapter 11 proceeding in the U.S.). Moreover, the general statute of limitations commences when a claim arises. Therefore, it is necessary to be able to state a precise point in time for when a claim shall be regarded as arisen.

Pursuant to the traditional principal rule, a claim arises when the contract is concluded or, in the case of a claim for damages, from the time of the act which gives rise to the claim.\(^7\) This rule primarily originates from an autonomous doctrine of the concept “the rise of the claim”. It is not possible or even desirable, to give an in-depth description of the doctrine in this chapter. In short, the doctrine is based on interpretations of concepts, such as definitions of the terms “claim” and “duty”,\(^8\) according to which a claim is equivalent to a duty and a duty exists when the debtor is bound to the duty. Under the doctrine, a claim is, therefore, considered to have arisen when the debtor is bound to the claim (for example, when the contract is concluded).\(^9\) The doctrine can be described as a bridge be-


\(^8\) Cf. Schlag, Pierre, Formalism and Realism in Ruins, Iowa Law Review, 2009–2010, pp. 201–204, especially his account of conceptualism.

between “the rise of the claim” and contract formation. Yet, the structure of this autonomous doctrine means that the influence of other arguments, such as arguments specific for insolvency law, is hindered, as the structure does not open up for other types of arguments. The structure is in that sense closed. The closed structure also means that the consequence of the application of the doctrine cannot be taken into account.

In a recent case from the Supreme Court of Sweden, namely NJA 2018 p. 103, an exception was made from this traditional principal rule. The Swedish state had wrongfully withdrawn the Swedish citizenship of the plaintiff, something for which the state can be liable according to the previous case law of the Supreme Courts. The plaintiff had a claim for damages according to this case law, and the question was if the claim was time-barred. Pursuant to the general statute of limitations, a claim is time-barred ten years after it has arisen. The plaintiff acquired Swedish citizenship at birth in 1981. However, his citizenship was withdrawn in 1989. In 2004 and in 2008 the plaintiff applied for retrieval of his citizenship, which was denied. When the plaintiff thereafter applied for Swedish citizenship in 2012, he was informed that the decision to withdraw his citizenship in 1989 could have been unlawful. He later retrieved his Swedish citizenship in 2013, and in 2014, he sued the Swedish state for damages.

In the previously mentioned case, the Supreme Court of Sweden stated that the principal rule, regarding claims for damages, is that the claim arises through the act that causes the damage. The court also noted that a claim can arise gradually if the act is pending. Such a traditional interpretation of “the rise of the claim” would have meant that the plaintiff’s claim from the period between 1989 and 2004 would have been time-barred. However, the court explicitly stated that it was not content with such an interpretation because of its consequences. The court actually altered the legal question compared to the question in the autonomous doctrine. Instead of raising the question of whether the claim had arisen at a certain point, the court raised the question of whether the claim was


10 See NJA 2014 p. 323, where the Supreme Court of Sweden found that such a withdrawal could make the state liable. See also RÅ (Regeringsrättens årsbok) 2006 no. 73, where the Supreme Administrative Court of Sweden found that it was unlawful to withdraw the citizenship in certain cases.

11 The period of limitation can be interrupted.
time-barred at a certain point, which brought forward the potential consequences of different interpretations of the concept.

The Supreme Court of Sweden found that the traditional interpretation of the concept would have made the right to compensation illusory in these circumstances. The court noted that in this case, the plaintiff would have been forced to take measures to renew the limitation period, which at the time would have seemed pointless. It was, namely, several changes in the case-law of the Supreme Courts that made the withdrawal of the citizenship unlawful and also made the state potentially liable for such withdrawal.12 Instead, the Supreme Court of Sweden found that in the case at hand, where the state was the debtor and the claim concerned a violation of a central right for the individual (here the right to citizenship), the purpose of the limitation rules was not a particularly strong argument. The court also stated that the individual must have an effective possibility to claim her or his right. In conclusion, the court found that the limitation period did not commence until the plaintiff had an opportunity to claim his right, which was when he retrieved his citizenship.

In this specific case, the shift in the interpretation of the concept “the rise of the claim” is by no means fundamental; the principal rule remains the same according to the Supreme Court of Sweden. However, in a number of cases, primarily concerning insolvency law, the court has stated that the question of when a claim arises mainly depends on the purpose of the statute, which the rule featuring the concept is included in.13 This description is not controversial. It is in line with what is considered rational in our legal culture of private law.14 There is a resistance to use the meaning of concepts in legal argumentation, such as the autonomous doctrine of the concept “the rise of the claim” in our legal culture. Instead, the purpose of the statute is put forward as the main argument, which creates an openness towards arguments that concern

12 See supra note 10.
the consequences of various interpretations, including a concern for the individual's interests.\textsuperscript{15}

Still, the autonomous doctrine of the concept “the rise of the claim” is represented in the legal sources. Apart from a number of older cases from the Supreme Court of Sweden, there are also newer cases that reproduce the doctrine (such as the aforementioned NJA 2018 p. 103).\textsuperscript{16} This pluralism of possible interpretations of the concept highlights the ethical dimension of adjudication, where judges have to choose between different arguments and different consequences. The ethical dimension is also brought forward by altering the way the legal question is phrased: By asking if the claim should be time-barred, instead of whether the claim has arisen, the consequences of different interpretations are highlighted. In the traditional principal rule of the concept “the rise of the claim” and the traditional way of phrasing the question this ethical dimension of adjudication could easily slide out of view.

\textsuperscript{15} Many scholars have discussed this approach. It is often referred to as the functionalistic approach. See for example Andreasson, Jens, Inlösen, äganderättsövergång och “legal transplants”, SvJT 2005, pp. 522–538; Sandstedt, Johan, Sakrätten, Norden och europeiseringen, Nordisk funktionalism möter kontinentalsubstantialism, Jure förlag AB, Stockholm 2013, passim; Martinson, Claes, The Scandinavian Approach to Property Law, Described through Six Common Legal Concepts, Juridica International 2014, pp. 16–26; Schytzer, Fordrans uppkomst inom insolvensrätten, pp. 137–163. See also Samuelsson, Joel, Om harmoniseringen av den europeiska privaträtten och funktionalismens funktionalitet, Europarättslig tidskrift 2009, pp. 63–86, for a discussion regarding how functionalistic the functionalistic approach is.

\textsuperscript{16} See NJA 2012 p. 876.