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VOICES ON LAW AND ACTIVISM

ADDRESSING THE WORK OF ADAM GEAREY

Editor: Maria Grahn-Farley

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Jonatan Schytzer*

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

* Doctor of Law, Faculty of Law, Uppsala University. Thanks are due to Joel Samuelsson and Maria Grahn-Farley for arranging the symposium from which this article springs and for their invaluable comments. Thanks are also due to Adam Gearey for his thought-provoking research and to the participants of the workshop for their fruitful comments. Finally, I would like to thank Autilia Arfwidsson and my other doctoral candidate colleagues who participated in the workshop for their useful feedback. Any and all misconceptions are my own.

[1] See Gearey, Adam, Poverty Law and Legal Activism: Lives that Slide Out of View, Routledge, Abingdon 2018, pp. 149–163.

[2] See for example Derrida, Jacques, Force of Law, Cardozo Law Review, 1990, pp. 961–963; Zahle, Henrik, Polycentric Application of Law, Andersson, Torbjörn (editor), Parallel and Conflicting Enforcement of Law, Norstedts Juridik AB, Stockholm 2005, pp. 239–241. See also Kennedy, Duncan, A Critique of Adjudication, Harvard Uni-

for her or his interpretation.[3] 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.[4] 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",[5] 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

versity Press, Cambridge-London 1997, pp. 23–38, who states that showing that law is made even in the most routine application of rule to facts is important. Cf. Wittgenstein, Ludwig, Philosophical Investigations, 4th ed., Blackwell Publishing Ltd, Chichester 2009, §§ 110–242. Cf. also Gadamer, Hans-Georg, Truth and Method, Bloomsbury Academic, London-New York 2013, pp. 318–350, who puts forward that to understand the meaning of a legal text and applying it in a particular legal instance are not two separate actions, but one unitary process. Gadamer also demonstrates that application is involved in all forms of understanding, see id., pp. 318–350.

[3] See Lindroos-Hovinheimo, Susanna, Justice and the Ethics of Legal Interpretation, Routledge, Abingdon 2012, pp. 123–158, especially pp. 144–148, who delves into this specific theme. See also Samuelsson, Joel, Tolkningslärans gåta, Iustus förlag AB, Uppsala 2011, p. 195, who states that the lack of rules for interpretation of contracts is not a threat to an objective interpretation, but rather that the objective interpretation is protected by the interpreter's effort to interpret. Samuelsson also states that the same applies to the interpretation of statutes and every other form of interpretation, see id., p. 195. See also Mellqvist, Mikael, Om empatisk rättstillämpning, SvJT 2013, pp. 493–501.

[4] Cf. Schlag, Pierre, The Aesthetics of American Law, Harvard Law Review, 2001–2002, pp. 1058–1059, who describes "grid thinking" as a similar mechanical application of law where the subject who applies the law is detached from the application.

[5] Other terms could be used instead of the *rise* of the claim, such as the accrual of the claim or the emergence of the claim. However, the term rise is used in various legislative guides. See for example The United Nations Commission on International Trade Law (UNCITRAL), Legislative Guide on Insolvency Law (2004), para. 12, under B "Glossary, Terms and definitions"; Draft Common Frame of Reference (DCFR) Outline Edition (2009), for example Book 3, 2:102, 2:110 and 3:508; European Law Institute, Rescue of Business in Insolvency Law (2017), Glossary of terms and descriptions in restructuring and insolvency, under "Claim".

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-

[6] See Madaus, Stephan, Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law, European Business Organization Law Review, 2018, p. 627, regarding this terminology.

[7] See for example Mellqvist, Mikael & Welamson, Lars, Konkurs, 12th ed., Wolters Kluwer AB, Stockholm 2017, pp. 193–195; Nordtveit, Silje Karine, Når oppstår en fordring?, Cappelen Damm, Oslo 2017, pp. 135–149 and pp. 157–216; Hellner, Jan & Radetzki, Marcus, Skadeståndsrätt, 10th ed., Norstedts Juridik AB, Stockholm 2018, p. 419; Gregow, Torkel, Preskription och preklusion av fordringar, Norstedts Juridik AB, Stockholm 2020, p. 47. For another opinion see Lindskog, Stefan, Betalning, 2nd ed., Norstedts Juridik AB, Stockholm 2018, pp. 87–99. Exceptions from the principal rule have been made previously by the Supreme Court of Sweden; see for example NJA (Nytt juridiskt arkiv) 1987 p. 243.

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

[9] See for a more thorough description of the doctrine Scheel, Anton Wilhelm, Privatrettens almindelige Deel, andra Bandet, C A Reitzels Forlag, København 1866, pp. 34–38; Schrevelius, Fredrik, Lärobok i Sveriges allmänna nu gällande civil-rätt, första delen, 3rd ed., Fr Berlings förlag, Lund 1872, pp. 138–146; Nordling, Ernst Victor, Anteckningar efter prof E V Nordlings föreläsningar i svensk civilrätt, Juridiska föreningen i Uppsala, Uppsala 1891, pp. 222–233; Torp, Carl, Hovedpunkter af Formuerettens almindelige Del, 2nd ed., I kommission hos Universitetsboghandler G E C Gad, København 1900, pp. 94–112; Platou, Oscar, Forelæsninger over udvalgte Emner af Privatrettens almindelige Del, I kommission hos T O Brøgger, Kristiania 1914, pp. 313–342; Lassen, Jul, Haandbog i Obligationsretten, 3rd ed., G E C Gads Forlag, København 1917–1920, pp. 10–12; Arnholm, Carl Jacob, Privatrett I, Johan Grundt Tanum, Oslo 1964, pp. 148–156; Ussing, Henry, Aftaler, Paa formuerettens omraade, 3rd ed., Juristforbundets forlag, København

tween "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.[10] In this case, 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.[11] 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

1978, pp. 445–454. See also Schytzer, Jonatan, Fordrans uppkomst inom insolvensrätten, Iustus förlag AB, Uppsala 2020, pp. 90–110, for a summary of the doctrine.

[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.

[13] See NJA 2009 p. 291; NJA 2013 p. 725; NJA 2014 p. 537.

[14] Legal culture is used in the meaning described in Tuori, Kaarlo, Critical Legal Positivism, Routledge, Abingdon 2002, pp. 147–196. See also Tuori, Kaarlo, Ratio and Voluntas, The Tension Between Reason and Will in Law, Ashgate, New York–Oxon 2011, pp. 66–67.

the consequences of various interpretations, including a concern for the individual's interests.[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).[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.

[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 kontinental substantialism, 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.

[16] See NJA 2012 p. 876.