The Impossibility of Upholding the Rule of Law When You Don't Know the Rules of the Law

The Norwegian Social Insurance Scandal

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14.11.2019 doi: 10.17176/20191114-205952-0

On October 28 2019, it became known that the Norwegian Labour and Welfare Administration has been systematically breaching the rule of law for years when it applied the EEA legislation incorrectly in cases of unemployment and sickness benefits and work assessment allowances. According to the Attorney General, at least 48 people have been wrongly convicted of social security fraud, 36 of whom have been sentenced to prison. Later investigations have revealed that the number is much higher. This blatant disregard of the rule of law illustrates what happens when political pressure meets legal professionals, judges and an administration who are blissfully ignorant when it comes to European law.

Conflicts of laws

In 1993, Norway entered into the EEA-Agreement with the EU and the agreement entered into force in 1994. Within the scope of the EEA Agreement, the rules of the internal market extend to the whole EEA, with the result that people, services, goods and capital can move freely. The EEA Agreement guarantees equal rights and obligations within the internal market for citizens and economic operators in the EEA. These rules were incorporated into Norwegian law by the EEA-act of 1993 and according to Norwegian law, legislation that is part of the EEA takes precedence over other rules of national law. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems article 21 states that "an insured person and members of his family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies."

Nonetheless, the Norwegian social security act prohibits recipients of certain work-related benefits to travel abroad. There are explicit rules prohibiting recipients of cash benefits to leave Norway without receiving prior authorisation from the Norwegian Labour and Welfare Administration. Such authorisation is in most cases refused. If a person travels abroad and withholds information and still receives benefits, this is an instance of fraud, punishable under the criminal code.

Under EEA law, however, an insured person and members of their family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits from the competent Member State. If you lose your right to benefits by moving from one EEA country to another, this is a restriction on the right to move freely within the EEA area to seek employment or to provide or receive services. The right to free movement is one of the fundamental rights of EEA law. Countries can impose restrictions on it, but only when restrictions are proportionate with regard to both the restriction itself and the sanction used to enforce it. The proportionality assessment must be based on an EEA legal assessment and not on Norwegian legal principles and Norwegian legal thinking.

This means that the Norwegian parliament enacted laws in violation of basic principles and rights of European law, the government and administration rigorously upheld these laws, and the prosecutors and courts sentenced persons to prison for not complying with orders that violate their rights under European

law. It even involved the Supreme Court. The extraordinary character of European law and its introduction into national law destroyed the judgement of the actors of the legal institutions. This reveals a fatal flaw in the Norwegian legal order and shows the importance of sound judgment in upholding the rule of law, and how this judgement is vulnerable.

Politics

The whole picture is still not clear, and the Government has set up a task-force with the mission to establish the facts and come up with explanations on how these dynamics developed. But what is known so far gives cause to ask how well the Norwegian judiciary can protect the rule of law in an extraordinary situation.

The political rationale driving this rule of law failure is clear. All political parties have agreed that exports of Norwegian social security benefits should be restricted as far as possible. which resulted in a provision in the National Insurance Act which, in its wording, is directly contrary to the EEA agreement. So while the administration was told to stay within the framework of the EEA rules, there was a clear message: People who reside outside Norway should not be entitled to benefits. This is double talk. The administration has been faced with an impossible task, as both instructions cannot be fulfilled at the same time.

The willingness to loyally fulfil the national policy was so strong that the Labour and Welfare Administration did not abandon the practice even when the Social Security Tribunal announced that it was illegal. In the first judgment from the Tribunal finding the practice illegal, it was significant that it was a young Judge who defied both the administration and the general opinion. Soon he was followed by several colleagues, but the illegal practice continued.

Legal overload

The incorporation of the EEA agreement into Norwegian law was in many ways a very extraordinary event. The law usually develops slowly and in small increments. Even major law reforms concern only one area of law, and are based on familiar concepts and an established system. A person who is well trained in national law will quickly recognize patterns in new legislation and be able to orient him of herself in unfamiliar areas of law.

This is different with EEA law. At one stroke, the entire *aquis communitaire* was incorporated into Norwegian law. There are a number of rules here that were, and still are, largely unknown to most Norwegian lawyers. The rules are presented in a style that is foreign, and not least with concepts, principles, values and purposes in a system that in many ways differs from national law.

With EEA law, a new principle came into Norwegian law and administration: the so-called room for manoeuvre. EU law gives the national authorities room for protecting public policy, public security or public health and other legitimate aims of overriding importance. In a political culture based on social solidarity and a recognition of the need for public regulation, it is important that political decisions can be based on legitimate national political processes and concerns. From one perspective, this is both natural and necessary. Where national solutions are desirable, the authorities should not renounce it on the basis of a misconception that they are not free.

This concept of a "room for manoeuvre" represents a challenge from a legal security perspective, however. Utilizing the room for manoeuvre can mean that the rights EEA rules give citizens, are restricted and challenged because it is politically desirable.

Lack of good judgment

The ways the judiciary has handled the issue is not reassuring. In a large number of cases, the police and prosecuting authorities have brought charges without question, and the judges have sentenced and imposed prison sentences far beyond the reasonable.

It is the task of the judiciary to enforce lawful administrative decisions. And it is its task to review the lawfulness of administrative decisions. The requirement for a legal basis for the decisions of the administration is established by the Constitution, as is the rule that no one can be convicted except by law and punished without a decision by a court. It is

primarily the responsibility of the courts to ensure this.

In principle, the police, prosecuting authority and the courts should expect that the administration's interpretation and application of a law is correct, based on the presumption that all the organs of state seek to fulfil the rule of law. But when the administration sees its task as challenging the rules to utilize a room for manoeuvre, the usual rules of the game cannot apply.

This is reflected in the Criminal Procedure Act: The judge is not bound by the parties' claims or submissions with regard to the application of law, and the appellate body can go beyond the appeal if the criminal law is incorrectly applied by the trial court. The court thus has an independent responsibility for the application of the law and the judicial system becomes the sole safeguard for legal security and observance of the rule of law. This protection fails if the judicial system accepts the administration's opinion unproven.

In this case

At this point, the extraordinary element of the EEA Agreement comes into play. If the administration had disregarded Norwegian legal principles and traditions, many prosecuting lawyers and judges would have been in a position to react and challenge the administration. However, these cases challenged principles and rules that many Norwegian lawyers are still unfamiliar with. Even the Supreme Court in 2017 lengthened the term of prison in a case that was appealed by the prosecution. The public defender tried to invoke the EEA rules, but was brushed off with the comment that the scope of the appeal was confined to the length of the sentence, and not the question of guilt according to the law.

The result is that the Supreme Court has measured out a prison sentence against a person who probably has not done anything punishable. This contradicts the basic requirement of *nullum crimen sine lege*, even if the fact was overlooked by the trial court and was not made part of the appeal due to ignorance on the side of the defence lawyer. The president of the Supreme Court publicly defended the Supreme Court's sentencing by stating that the appeal in the case only concerned the sentencing. In this defence of the court, she suggests that she does not see it as the Supreme Court's task to challenge the legal basis for punishment, as long as it is not subject to appeal. With such an understanding in our highest court, we cannot have high expectations that the court will protect us if the rule of law comes under attack by the authorities.

The relationship between our state powers has for a long time been based on the confidence that all do their best to build and preserve the rule of law, and that none of the powers of state systematically or consciously advocates undermining it. In the area of EEA law, it has evidently been trust without control, for those who must exercise control, have lacked the *fingerspitzgefühl* that good Norwegian lawyers have in judging matters under national law.

Trust, but verify

What we have seen shows the weaknesses of a trust-based system when the administration goes from being a caretaker of legal security to seeing it as their job to test the legal boundaries. I fear that what has been revealed shows a weakness in the Norwegian legal tradition when the judgement of the judiciary is weakened due to extraordinary circumstances. This time the lack of judgment was due to ignorance of EEA law due to its extraordinary character. Another time judgment may be weakened by a national disaster, a moral panic, or a populist constituency. Combined with a government that sees it as its task to implement a defined policy and to challenge legal boundaries, things can go wrong again.

Admittedly, judges often walk on a thin line between guarding the rule of law and judicial overreach and doing this under strong political pressure is demanding – especially when it is about the rights of people who lack sympathy and power. But when the legislature and the executive fail to uphold the rule of law it is upon the judiciary to take on this role.

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SUGGESTED CITATION
Graver, Hans Petter: The Impossibility of Upholding the Rule of Law When You Don't Know the Rules of the Law: The Norwegian Social Insurance Scandal, Verfassungsblog, 14.11.2019, doi: 10.17176/20191114-205952-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20191114-205952-0.