

Welfare Law and the Construction of Social Citizenship

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Summary

The paper elaborates on the relationship between social citizenship and juridification. Departing from a Marshallian understanding of social citizenship, juridification processes concern the institutional construction of social citizenship by combining collective political obligations on the one hand and individual rights and duties on the other. One important intention of the paper is to elaborate on how social citizenship is constructed in the possible tension field between political, administrative and legal institutions. How does welfare law affect the relationship between welfare administration/professions and individuals (e.g. social and civil rights) and between law and politics (e.g. social and political rights)?

The institutionalization of social citizenship has to be studied on the basis of different areas of welfare law. This is exemplified by two empirical cases: the legal development in the field of work and welfare on the one hand and health services on the other. In the field of health services it seems reasonable to say that a juridification process has taken place in Norway - implying a reinforcement of individual patients' rights and thus a strengthening of social citizenship. The expansion of rights within the sector encompasses claims to certain services and through the legislation patients are granted procedural rights and an increased opportunity to decide on questions concerning medical examination and treatment. In the field of social policy individual legal rights to social benefits have increasingly been comprehended as to render people passive, leading to a stronger coupling between individual rights and duties expressed through the establishment of quasi-contractual legal arrangements. It may be argued that contractualism implies de-juridification in the way that it emphasizes tailor-made services and increased local discretion in the preparation of the content of welfare policies (weak legal control).

Sammendrag

Dette paperet retter søkelyset mot forholdet mellom rettsliggjøring og sosialt medborgerskap. Med utgangspunkt i et Marshalliansk perspektiv kan rettsliggjøringsprosesser sies å berøre den institusjonelle konstruksjonen av sosialt medborgerskap gjennom å kombinere kollektive politiske forpliktelser på den ene siden og individuelle rettigheter og plikter på den andre. Et viktig mål med dette arbeidet er å undersøke hvordan sosialt medborgerskap konstrueres i spenningsfeltet mellom politiske, administrative og rettslige institusjoner. Hvordan påvirker velferdsretten relasjonen mellom velferdsadministrasjon/profesjon og den enkelte borger og mellom rett og politikk?

Institusjonaliseringen av sosialt medborgerskap må studeres med utgangspunkt i konkrete deler av velferdsretten. I paperet er dette eksemplifisert gjennom to empiriske case: rettsutviklingen på områdene helse og arbeid/velferd. På helseområdet er det rimelig å si at det har foregått en rettsliggjøringsprosess i Norge hvor individuelle pasientrettigheter har stått sentralt. Utviklingen omfatter både en utvidet rett til bestemte tjenester, nye prosedurale rettigheter og en større rett til å velge når det gjelder beslutninger som angår medisinske undersøkelser og behandling. På området velferd/arbeid har retten til velferdsytelser i større grad blitt sett på som passiviserende i forhold til den enkeltes deltakelse i arbeidsmarkedet. Dette har resultert i en sterkere kopling mellom individuelle rettigheter og plikter blant annet uttrykt gjennom en økt bruk av kvasi-kontraktuelle arrangementer i iverksettingen av velferdspolitikken. Det kan argumenteres for at en slik kontraktualisme innebærer en materiell avrettsliggjøring i den forstand at den innebærer økt individualisering (skreddersøm) og større rom for lokal skjønnsutøving i utformingen av velferdstjenester (svakere rettslig kontroll).

Preface

The paper is written as a part of the research project «Judicialisation¹ and Social Citizenship», funded by the Norwegian Research Council (the Welfare, Work and Migration programme (Vam)). It was presented at the conference «Challenging Citizenship», Coimbra Portugal, 3–5 June 2011

¹ In this paper we have chosen to use the more general concept «juridification» instead of «judicialisation».

Introduction

After the presentation of the Norwegian Power Report («Power and Democracy») in 2003 (NOU 2003:19) there has been a broad debate among social scientists (legal scientists, sociologists, political scientists etc.) about different kinds of juridification processes in Norway and their possible consequences. The concept of «juridification» is not a simple one and has been interpreted in various ways. Generally, however, juridification processes may be understood as more detailed legal regulation, legal regulations of new areas, conflicts and problems increasingly being framed as legal claims and a development where a judicial way of thinking and acting penetrates new social fields (Blichner & Molander 2008).

This paper elaborates on the relationship between social citizenship and juridification. Departing from a Marshallian understanding of social citizenship, which is closely attached to ideas of social rights, juridification processes concerns the institutional construction of social citizenship by relating collective political obligations and individual rights and duties.

One important intention of the paper is to elaborate on how social citizenship is constructed in the possible tension field between political, administrative and legal institutions. Our main empirical spotlight is turned on welfare law. Social rights are, however, also discussed in relation to other rights such as political and civil rights. How does welfare law affect the relationship between welfare administration/professions and individuals (e.g. social and civil rights) and between law and politics (e.g. social and political rights)? Our goal is confined to pinpoint some possible problems for further empirical and theoretical investigation. The institutionalization of social citizenship has to be studied on the basis of different areas of welfare law. This is exemplified by two empirical cases: the legal development in the field of work and welfare on the one hand and health services on the other.

Social Citizenship

The modern concept of citizenship (citoyen²) originates from the autonomous European city-states and is constituted on the basis of those kinds of rights that could be deduced from a person's status as a member of a city (Kalberg 1993). While in the city-state only specific groups were carriers of citizen rights, citizenship in modern nation states has a more universal scope. Citizen rights are founded on a general status of belonging, i.e. on membership in a particular political community. The *status of citizenship* is compounded by what has been described as different catalogs of rights (Cohen & Arato 1992). On the theoretical level the most well known differentiation between such catalogs is T H Marshall's concepts of civil, political and social rights.

² As different from, for instance the German (and similar Dutch) Bürgertum (bourgeoisie) that was a special status group attempting to develop a new type of personality regulated by the discipline of education (members of the bourgeoisie class and bourgeois society) (Turner 1993:10).

According to Marshall *Civil rights* are closely related to the development of the *Rechtsstaat* and are oriented towards a differentiation between the state on the one hand and civil society and the market on the other. Property rights, freedom of contracts, freedom of speech, freedom of assembly, equality before the law (and due process of law) are important aspects of civil rights. The civil element is composed of the rights necessary for individual freedom and the institutions most directly associated with these rights are the courts of justice (Marshall 1950/2000:32). *Political rights* concern the democratic mediation between citizens and the state, highlighting the values of collective self-determination. By the political element Marshall means «the right to participate in the exercise of political power as a member of a body invested with political authority or as an elector of the members of such a body» (op.cit:32). The most important institutions are parliaments and councils of local government.

Analyses of social citizenship will, of course, focus most specifically on the third catalog of rights – *social rights*. The main idea behind these kinds of rights is that citizens have to be assured a basic material subsistence in order to be able to follow their own life-projects and have the opportunity to participate in community life and in the work of mutual concerns (Nilssen 1997). In order to function as free, equal and autonomous members of the society within political, economic and social structures citizens need to have rights to fundamental resources that make them capable of taking well informed and conscious choices (Rothstein 1994).

In Marshall's theory there is a strong relationship between social citizenship and autonomy (Kildal & Nilssen 2011). Marshall (1950/2000) considers the citizens' capacity to act autonomously as the essence of social citizenship. Freedom has to be positively secured if everybody should have a fair chance to exercise it. This cannot be fulfilled solely by distributing resources through the institutions of civil society or the market. Governmental redistribution of resources is considered as an important means in enabling people to participate in society and making use of their citizen rights (Johansson 1992). By the social element Marshall means:

«..the whole range, from the right to a modicum of economic welfare and security to the right to share the full the social heritage and to live the life of a civilized being according to the standards prevailing in the society» (Marshall 1950/2000:32)

The most important institutions mentioned by Marshall are the educational system and the social services. Hence, by guaranteeing the material well-being of the citizens through social rights rather than arbitrary benevolence, the welfare state aims to protect citizens against social risks that reduce their ability to act as independent persons (Kildal & Nilssen 2011). As distinct from traditional charity and discretionary policies on poverty, social rights are regarded as individual rights anchored in the status of citizenship.

From a legal point of view the concept of rights is closely connected with positive law. In order to speak about a right in a legal sense two conditions have to be satisfied (Handler 2004:248). 1) Eligibility has to be fairly clear-cut, with a minimum of field-level discretion and 2) the benefit have to be infinitely divisible. The concept of rights may, on the other hand, be given a weaker legal foundation. It may only express a political obligation to put some kind of resources at the citizens' disposal (for instance health

services) without citizens having any legal claim on such resources. This means that different welfare professions may exercise a certain scope of discretion in the implementation of social rights. Marshall's conception of social rights was primarily oriented towards the legal approach although he gradually appreciated that a strong legal interpretation of rights was not very realistic in every part of the welfare state (Marshall 1965; Marshall & Bottomore 1992). This is particularly valid for benefits in the form of a service. Such benefits have this characteristic:

«... that the right of the citizen cannot be precisely defined. The qualitative element is too great. A modicum of legally enforceable rights may be granted, but what matters to the citizen is the superstructure of legitimate expectations» (Marshall & Bottomore 1992:34)

Handler (2004) points out that citizenship commonly refers to a legal/political status within a nation state which has certain entitlements such as the right to hold property, to vote and hold office. Social citizenship:

«... refers to welfare state provisions – the supports that are designed to lessen the risks of sickness or disability, old age, unemployment, lack of income» (Handler 2004:9).

Taylor-Gooby (2009:5) also includes the duty to finance «... the provision of benefits and services designed to meet social needs and enhance capabilities» as a part of social citizenship. Regarding the relationship between rights and duties Marshall considered the duty to pay taxes and insurance contributions as the most significant one. Other duties were more vaguely formulated and could be included in the general obligation (virtue) to live the life of a good citizen. However, the duty to work was of paramount importance. This did not only comprise the duty to have a job and hold it, but «...to put one's heart into one's job and work hard» (Marshall & Bottomore 1992:46).

The idea of social citizenship has been criticized by several scholars in recent years. Social rights are regarded as promoting passivity and dependency among the poor caused by the absence of any obligation to participate in society (Kymlicka & Norman 1994), the welfare state has been criticized for social paternalism, interventionism, the creation of new structures of dependency, moral decay and economic destructiveness (Habermas 1986; Eriksen 1988, Mead 1997 a, b). Cohen & Arato (1992) assert, for instance, that even if social rights intent to strengthen individual autonomy and reproduce social inclusion, they have the opposite effect. In opposition to Marshall the authors claim that social rights provide individuals advantages as clients rather than citizens and that they are strengthening the administrative state rather than individual autonomy. Bureaucratic administered social rights are creating new kinds of dependencies between the clients and the welfare professions/administration.

Thus, Marshall's theoretical/normative notion that social citizenship will enhance individual and collective autonomy, participation and social inclusion cannot be taken for granted – this is primarily an empirical question. We will, however, maintain the Marshallian conception of social citizenship as constituted by the construction of social rights.

This paper will focus on how social citizenship is shaped within the context of the Norwegian welfare state. The core of social citizenship rights is fundamentally moral

and primarily worked out politically at the level of the nation state although supra-national institutions such as the EU and the UN may impact on the national institutionalization of social rights. In the next section of the paper we will give a broad account of the legal and institutional construction of social citizenship following a juridification approach.

Juridification and social citizenship

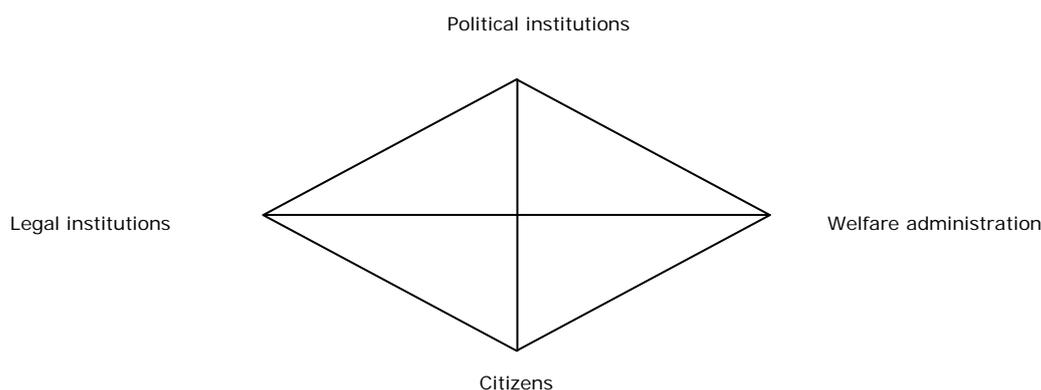
Far-reaching processes of juridification are perceived to be at work in Norwegian society (and globally), with increasing legal regulation and authority shifting from political bodies to courts and other judicial and quasi-judicial bodies, and with legal rights discourses playing a greater role in political mobilisation and decision-making in various social fields. Juridification processes comprise more detailed legal regulation, legal regulations of new areas, and conflicts and problems increasingly being framed as legal (cf Blichner & Molander 2008). Seen from the perspective of social rights, welfare policies contain one important field of juridification. Generally, the welfare state has implied a materialization of law (Habermas 1996; Teubner 1986) i.e. social law has become a significant political instrument for obtaining different social goals. In line with the idea of social citizenship people have acquired individual rights to welfare benefits and services such as old age benefit, unemployment benefit, disability benefit, education and some kinds of health services. On the other hand the legal development of the welfare state includes several areas where institutional obligations are more conspicuous than individual legal rights, such as social assistance, social care, health services and housing policy.

Kjønstad and Syse (2005:97) link the concept of rights in welfare law to a distinction between legal claims on the one hand and competing for scarce resources on the other. Based on this distinction the authors develop a model for analyzing the existence of legal rights based on five questions. 1) Does the act itself state a right – obligation relationship? 2) Does the act use unambiguous and concise words and concepts or does it use general and vague formulations? 3) Can the administration or the courts in their decision making emphasize the financial situation of the debtor? 4) Are there any legal guarantees to secure that the citizen can attain his/her legal right. 5) Can the administrative decision be taken to court and are the competence of the court and the scope of judicial review extensive? From this model a legal social right in a strong sense implies that a citizen can make legal claim, that the act states a right – obligation relationship using concise concepts and formulations, that the financial situation of the debtor is irrelevant, that legal guarantees secure the attainment of the right and that the courts have far-reaching opportunities altering administrative decisions. This should mainly be regarded as an ideal-model of legal rights. Very few fields of welfare law fulfill the conditions of rights in a strong version (examples may be old-age pension and family allowance). On the other hand, welfare law that does not fulfill any dimension of the ideal model cannot be regarded as legal rights at all (but still be considered social rights in a general political sense).

In this paper juridification concerns the institutional construction of social citizenship by defining collective obligations and individual rights and duties. Social rights cannot, however, be discussed in isolation from other rights such as civil and political rights. Constructing social citizenship involves a relationship, and a possible tension, between the values of the welfare state, the *rechtsstaat* and the democratic state. As we have seen a main argument for social rights offered by T H Marshall was that they would enhance equal individual (civil) and public (political) autonomy among citizens, while other scholars have contested this argument. The Norwegian Power Report (Østerud m. fl 2003:116) stated, for example, that increasing social rights entail a curtailment in the scope of democratic politics.

As a result of the close connection between social citizenship and legal rights our approach emphasizes juridification as legal regulation and conflict solving. We perceive social citizenship as constituted in the relation between three institutional areas: politics, administration and law.

Figure 1. *The institutional construction of social citizenship*



This figure takes Marshall's three catalogs of rights and their institutional foundations as a starting point for analyses of citizenship. The construction of social citizenship potentially concerns the relationship between all these institutional areas.

Administration, profession and welfare law

As noted above the growth of the welfare state has resulted in a materialization, or instrumentalization, of public law. Kjønstad & Syse (2005) distinguish between several material areas of the welfare state: education, work and unemployment; social services and social assistance; health services, social insurances and pension. These fields of welfare law embrace a wide range of legal constructions concerning individual rights, political and institutional obligations, professional obligations etc. and they are directed towards the same or different institutional areas or groups. For example, the Norwegian Nav reform has involved an institutional integration of two governmental welfare agencies (the employment service and the insurance agency) and an institutional

partnership with the local social services, linking together several parts of welfare law (e.g. unemployment benefits, disability insurance, rehabilitation benefits and social assistance). Health law embraces services such as local somatic and psychiatric health services, somatic and psychiatric inpatient services and regulations of health professionals. Welfare law both constitutes and regulates the institutional fields of practice in the welfare state and is thus of great importance in the construction of social citizenship.

Welfare policies are traditionally centred around the distribution of money, services and other benefits from public agencies to citizens (Kjønstad & Syse 2005). In a legal perspective formal decisions about giving or refusing to give different kinds of benefits are of crucial importance. Different legal constructions determine how such decisions are regulated, e.g. the scope of professional or municipal discretion. Historically, health services, educational services and social services have not ascribed any legal rights to citizens although rights have gradually become more important in these areas too.

The modern welfare state is hallmarked by a fragmentation and de-hierarchicalisation of law in relation to different legal areas (e.g. social assistance, health, education) and administrative levels (e.g. state, counties, municipalities) (Nilssen 2007). An important aspect of this development is the connection between the expansion of the welfare state and the professionalization of public administration (Seip 1994; Terum 1996). Seip (1994:369) states that «The welfare state is in many ways its occupations». To attain the ambitious goals on care and treatment depended on growth in old occupations and the development of new ones. From the literature on professions we know that different occupational groups have search for control of certain lines of work in relation to other occupational groups – for instance, in the shape of what Abbott (1988) calls ‘jurisdiction’ or Johnson (1972) calls ‘self-regulation’. Hence, the welfare state forms a strong potential foundation for administrative and professional power. This may oppose the idea of social citizenship because it may imply other kinds of interventions than those based on social rights, for instance paternalism (Stang Dahl 1994; Nilssen 2005, 2007). The legal construction of the welfare state may enhance or confine the administrative and professional scope of discretion. Definitions of rights in a strong sense logically strengthen the citizen’s legal position against the welfare state and simultaneously limit the administrative/professional space of action. However, the implementation of social rights in many areas of the welfare state is dependent on professional discretion and cannot be regulated in accordance with the model of strong rights, for instance in medical treatment or in education. In many fields of social policy professional discretion may be a an important premise for the well being of many citizens and, in opposition to formal legal rights, contribute to enhance the accuracy of the distribution of welfare services (Rothstein 1994),

Although we have argued that welfare law increasingly can be characterized by individual rights, legislation within this area also has the characteristics of general and broad object clauses that determine what societal objectives are to be protected in the different areas of society. In the Norwegian Social Services Act Section 1–1, for instance, the legislator opens for general societal and political discourses in the way they are formulated within politics and within the different sectors (Sand 1995). On one hand, this means that the application of the law will be based on references to general

evaluations and standards within each area. This opens for politicization of the application of the law in the public administration as the government, as a political authority, can give continuous instructions or political signals (Sand 1995). On the other hand, politicians, by using such forms of legislation, have limited their legislative activities to the determination of broad objectives and procedural decisions. At the same time, they have often abdicated with regards to how these objectives are to be understood and implemented in practice. If individual rights are formulated in a general and abstract manner it gives space for discretion and this could result in a range of different interpretations of such rights and might cause variations in the practice of rights. The scope of discretion is, however, often curtailed by regulations and circulars formulated by administrative bodies.

It is also important to note that social law itself may reflect professional power. For instance, Stang Dahl (1994) states that professions in the welfare state have played a considerable role in the development of social law and what she terms 'the self producing social policy' (op.cit:320). The handling of social problems, including the preparation of social law, is often left to professionals or experts. Hence, social law may itself be based on professional paternalism built on an alleged commonality of interests between the distributor and the recipient of social policy which largely promotes the cause of the professionals. On the other hand professions may serve as advocates for the interest of their client groups in the formulation of public policy (Jacobsen 1965).

Analyses of juridification/de-juridification processes have to take into account the relationship between the development of welfare law in specific legal areas and the construction of social citizenship. The strength of social citizenship is certainly affected by the existence of legal rights, but there is not a one-to-one relationship between strong rights and social inclusion and participation. Welfare areas not covered by strong legal rights (for instance parts of the social services) may constitute very important conditions for social integration and participation for some people. Nevertheless, citizenship is closely attached to the concepts of 'autonomy' and 'participation' implying that paternal relationships with no individual rights can be seen as contradictory to citizenship both in a social and civil sense.

Our main point in this section is, however, that alterations in legal rights may affect the power relation between citizen and administration/professions and thus the construction of social citizenship. It is important to study the empirical implications of such processes in different legal areas.

Law and politics

In a democracy social citizenship is about the integrity, agency and influence of the individual citizen (Pettersson 2003). The ideal of democracy is realized to the extent that the citizens themselves are capable of executing power over their own and the society's future (Olsen 1990, SOU 1990) and developed countries depend on active and capable citizens. This capacity depends on individual identities, resources and the social circumstances, for instance the extent and quality of formal education (Marshall 1950/2000; Locke 1996). Our main question is how and whether the use of legal

instruments and bodies in addressing social challenges equips individuals with the necessary recourses to act politically and thus strengthen the autonomy of the citizens. The construction of social citizenship implies that the political system takes responsibility for solving problems that arise in society. Legal instruments and bodies are now in use within areas not juridified before, such as education and health (Magnussen and Banasiak forthcoming). This development is followed by an extensive creation of new social rights within these areas. The extent of such juridification processes and their consequences for democracy are controversial issues and the Norwegian debate echoes international concerns about juridification and the proper use of legal instruments and bodies in addressing social challenges (Hirschl 2004).

Reallocation of power, for example through rights and rules, has influenced on political decision-making on the societal level and on individuals' possibilities for and motivation to participate in both individual and collective action. Individual rights may increase individuals' capacity to make autonomous decisions with minimal interference from public authorities. As such juridification may equip individuals with tools to act collectively, thus enlarging their autonomous space for decision-making. At the collective level, juridification will strengthen democratic politics if it stimulates citizen involvement in initiating and implementing policy (such as by community action programmes) and the clients' participation in shaping health and social policy (Magnussen and Banasiak forthcoming). One example would be if citizens were granted participation rights in 'reproduction councils' to oversee and advise on troublesome issues for hospitals such as genetic testing and abortion (Hernes 1987). To the degree that rules and rights are formulated clearly they may protect vulnerable groups in society (Bernt 2003).

Individual rights may contribute to increased public attention towards the subordinate position of weak groups in society. For example, health and social services can be understood as fundamental resources necessary for individuals to make autonomous, favourable, and conscious choices, that is, to make use of their civil and participation rights (Lundeberg 2005). In this context, rights may ease patients' access to information about different opportunities to act and the procedural requirements that accompany each of the choices, thus increasing the predictability of the consequences of a given choice. Increasing the number of solutions might strengthen the power of individuals to hold authorities accountable, and might increase their sense of self-respect and integrity. Rights also constitute a legal safeguard for individuals. Legal activism—formulating individual and group interests as legal claims can therefore have an important function in a democratic society (Lundeberg 2008). It subjects private and public exercise of power to judicial controls (Lundeberg 2005), and counteracts arbitrary and deficient administration practices that can emerge within closed professional cultures. Violation of rights can be a basis for official complaints, and rights that are not fulfilled can be enforced through judicial lawsuits. Individual rights may both grant the resources to act collectively and improve the self-image of weak and fragile individuals (Lundeberg 2005), for example, those who have been exposed to coercive procedures. To take advantage of the possibilities offered by legal rights, resources such as money and time are often required. The establishment and expansion of individual rights might create a number of opportunities and expand the sphere of individual action, but only

for those individuals who are already equipped with the resources needed to apply individual rights-based strategies (Andenæs 2006, Kjøenstad 2004, Lundeberg 2008).

An increase in the juridification of politics implies that the space for collective action becomes narrower. At the collective level, democratic politics is about participation in decisions with the aim of achieving collective purpose and meaning. The tendency to open up more areas to regulation by rights might gradually reduce the space in which politics is practiced by collective bodies. As a consequence, the individual's motivation to participate in collective actions may suffer. We can observe an increase in individual rights, especially in the health care sector, in Norway during the past 20 years (Bernt 1997). This increase in the number of individual rights might lead to shrinking of the space for practicing politics in the sense of collective action. This is because increases in individual rights over time will reduce the spaces in which collective institutions can conduct politics. One example would be patients increasingly seeking individual problem-solving strategies to influence their situation (Lundeberg 2005), instead of being motivated to involve themselves in patients' interest groups (Janoski 1998), or to participate in hospital councils where collective decision-making processes take place. The political citizenship may be weakened since the individual is encouraged to behave as right owner, customer or client (Fimreite and Tranvik 2005). Individual social rights can also affect autonomy of local governments, making the court-room an important political arena. This indicates a shift away from traditional representative institutions and collective shaping of political opinions (Fimreite and Læg Reid 2005).

According to Marshall councils of local government constitute an important institutional foundation of political rights. Simultaneously municipalities are critical in the implementation of national welfare services. The Norwegian Power Report emphasized a possible contrast between juridification of social rights on the one hand and local democracy on the other. Generally, the argument is that strong legal rights to different welfare services (education, patient rights, right to social benefits, health services etc) transform welfare provisions into legal claims and reduces the influence of politicians in the shaping of welfare services at the local level. According to the Power Report the combination of juridification as individual rights, legal obligations and limited economic recourses at the local level, results in a reduction in the scope of action for local government (Østerud mfl 2003). This is interpreted as the main reason behind what is called «the crisis of local democracy» (NOU 2003:19, 28).

One of the conclusions in the Norwegian Power Report was that the increase in social rights increases the power of courts and other judicial and quasi-judicial bodies at the sacrifice of political and administrative institutions (Østerud mfl 2003:116). If institutions such as the courts of justice or the Norwegian Board of Health Supervision acquire responsibility for the content and quality of health services - an activity previously reserved for the political arena (Fimreite 2001), this could result in a situation where majority-based bodies no longer decide health rights, for example (Magnussen and Banasiak forthcoming). When political problems are solved by institutions as the courts, the decision making takes place without participation from the citizens. In addition the Norwegian courts appear to be increasingly basing their rulings on

«equitable considerations»³. This involves the making of decisions by reference not only to predefined rules—as expressed in structures or pre-existing legal practice—but also to policy considerations such as utility and fairness. Judicial decisions made with reference to political considerations imply that the courts are arrogating a role that democratic theory reserves for legislators (Eriksen and Terum 2000). These questions relate to the more fundamental relationship between law and politics. From a democratic point of view, it is crucial that this kind of judicial practice be subject to open and free debate.

Analyses of juridification/de-juridification processes have to take into account the relationship between law and politics and especially how and whether the use of legal instruments and bodies in addressing social challenges equips individuals with the necessary recourses to act politically and thus strengthen the autonomy of the citizens. It is necessary to study the empirical implications of such processes in different legal areas. As stated earlier the strength of social citizenship is certainly affected by the existence of legal rights, but there is not a one-to-one relationship between strong rights and social inclusion and participation. Our main point in this section is, however, that alterations in legal rights may affect the relationship between law and politics and thus the relation between political rights and social rights. Therefore social rights cannot be discussed in isolation from other rights such as civil and political rights. As such, political rights have the exceptional position of securing the autonomy and facilitating the access of citizens. For citizens, political rights imply their right to draw up the limits for how society is to be governed. On the other hand, a development characterized by a comprehensive juridification of politics may threaten these kinds of rights. An extensive juridification of politics may imply, for example, that the courts decide the context of social rights to a greater degree. If politics is formulated by institutions that are not under democratic control, we face the question of what to do if society develops in an unwanted direction.

So far we have analyzed the construction of social citizenship from the intersection point between political, administrative and legal institutions. We have argued that welfare law is differently worked out in different areas when it comes to definitions of individual rights and duties, institutional competences, procedural rules, court competencies, scope of judicial review etc. In the two next sections we therefore will focus more specifically on the construction of welfare law by presenting recent development in legal regulation within two specific fields of welfare policy; work and health

Legal development in the field of welfare and work

From the early 1990s the «work line» has been of increasingly importance in Norwegian welfare policy. Globalization, intensified economic competition and demographic

³ The term «equitable consideration» is a translation of the Norwegian concept «reelle hensyn» and refers to assessments of what is fair and appropriate.

development (ageing societies) has led to a reinforced focus on the relationship between labour market policy and social policy in Norway as in many other European and western countries (Ervik, Kildal & Nilssen 2009). Consequently, the institutional and legal construction of social citizenship has changed during the last 10–15 years. In this section we will concentrate on the most recent development in Norwegian welfare policy and the increasing influence of what have been termed ‘welfare contractualism’ (Nilssen & Kildal 2009). Contractualism both concerns how certain kinds of welfare policies are justified and the construction of socio-legal measures regulating the relationship between welfare agencies and clients.

The idea of a welfare contract as a justifying principle was promoted in the 2006 White Paper on Work, Welfare and Inclusion (St.meld.nr.9 2006–2007). A welfare contract refers to «..a mutual contracting process» that takes place before the administration makes its decisions, «between as equal partners as possible» (op.cit:16, 167). The concept is used as a common and systematic principle in order to concretize mutual expectations, demands and obligations between the welfare administration and the recipients (Nilssen & Kildal 2009). It is not used in a legal sense but as a pedagogical tool in order to underline the connection that exists between individual rights and duties (St.meld.nr.9 2006–2007:15–17). This sharpened focus on rights and duties, implying «no rights without responsibilities», is primarily expressed in a closer attachment between the right to different welfare benefits and the duty to participate in the labour market. The idea of stringing together social policy and labour market policy is conspicuous in the Norwegian welfare administration reform (the Nav reform). The integration of the governmental labour market agency, social insurance agency and parts of the municipal social assistance services at the local level (Nav offices) was based on objectives such as employment orientation, user orientation and efficiency. People on different kinds of social benefits should be helped into the labour market by individualized and tailor-made services. Participation in the labour market was also considered as the main instrument in the governmental action plans against poverty. Several legal changes mirror this development. In our view two socio-legal measures, based on contractual thinking, are of particular interest: the Qualification Programme (QP) and the Employment Clarification Benefit (ECB).

The QP was originally worked out as a basic action in the governmental fight against poverty. It was endorsed by the Parliament on October 19, 2007, and incorporated into the Social Service Act Chapter 5A (from 1.1.2010 into the new Social Assistance Act in the Employment and Welfare Administration (NAV) chapter 4). The QP is directed towards people of working age with substantially reduced working capacity, and who receive no or very limited contributions from social insurance schemes or from benefits anchored in the labour market. They should be, or at least be in danger of becoming, in a state of income poverty (mainly long-term social assistance receivers) (Nilssen & Kildal 2009).

The law regulates some aspects of the content of the QP, i.e. it defines some activities which are mandatory and gives some examples of optional measures. The programme has to contain employment-directed measures and activities, and may include other efforts towards supporting and preparing the transition from unemployment to work (Chapter 4 §30). Participation in the QP is at the outset

voluntary and the participants are free to end the programme whenever they want to. However, potential participants within the target group are initially not allowed to choose social assistance as a form of subsistence instead of the QP. Financial social security is considered a subsidiary contribution and a person who refuses to apply for a QP, despite the local services advice of such a programme, may have his/her social security benefit reduced (Ot.prp.nr.70 2006–2007:31). Assessing an application for social assistance, the municipality may refer to the QP and the qualification benefit as the main source of subsistence. The qualification benefit⁴ will be disbursed to the participants as long as they take part in the programme.

As a result of the Nav-reform objective of narrowing the gap between social policy and labor market policy, different kinds of material social benefits were more directly linked to work related services⁵. As a part of this process three of the traditional benefits – medical rehabilitation benefit, vocational rehabilitation benefit and temporary disability benefit - founded on the Social Security Act, were legally unified in one common measure: the Employment Clarification Benefit (ECB). The main objective of the ECB is to arrange for more people to take part in the labor market or work related activities. Compared with the temporary disability benefit more demands are made on recipients to participate in different kinds of activities. The intention of the law is explicitly expressed as to clarify which rights and duties the beneficiaries possess against the Welfare State (Ot.prp.nr.4 2008–2009). Each person's entitlement to ECB is to be assessed by the Nav-office on the basis of his/her need of support to enter the labor market or work directed activities. If this benefit is granted, the recipient has a right to an activity plan worked out on the grounds of his/her individual needs. The assessment of needs is to be accomplished by using a standardized evaluation method of individual needs and ability to work. Everyone has a right to this kind of systematic examination of their needs of assistance to obtain work or work related activities.

These rights are closely attached to some duties. The recipient has an obligation to participate in the preparation and following up of the activity plan. Continuous observation points are to be contracted between the parties in order to ensure that «the total amount of resources are used in the best possible way in relation to the objective of the ECB and to underline the obligations of Nav to follow up, and the receivers to take part in activities, which again will arrange for increasing transitions into the labor market» (ibid.:12).

The recipients have to send standardized own-reports to the Nav-office in order to make it easier for the welfare administration to identify those who need to be followed up beyond the contracted observation points. These reports shall ensure regular contact between recipients and Nav in phases where it is not considered important with frequent direct encounters between the parties. Violation of the duty of activity may be financially sanctioned.

⁴ The qualification benefit consists of a given amount based on the basic sum (G) defined in the Social Insurance Act: 2G for people aged 25 or more and 2/3 of 2G for people under 25 (reduced if the participant has other work income). 01.05.2010 1G= NOK 75 641.

⁵ The description of the ECB is derived from Kildal & Nilssen (2011).

In our view these new social-legal measures manifest a certain alteration in the construction of social citizenship. In what we may term a traditional model of rights the relationship between individual rights and collective obligations are weighted on the political level and institutionalized through clear legal statutes. The content of rights is established through social law. This is not the kind of juridification that has taken place in the field of work and welfare. Contractualism implies a more open and direct coupling between rights and duties, i.e. rights are attached to certain behavioral conditions. The main idea is that the content of different kinds of quasi-contracts (it is not legally binding contracts), such as the QP and the ECB, are worked out between the involved parties (e.g. the receiver and the social worker) locally. A person may have a right to a QP or a ECB but no right to any services included in the contract (plan, programme) if it is not specified in any other law (weak legal guarantees and a very restricted court competence and scope of judicial review). If a person signs this quasi-contract he/she is imposed certain duties and if these duties are not fulfilled he/she may be financially sanctioned. The contractual relationship is based on an individualistic and tailor-made relationship between rights and behavioural duties and is supposed to increase the client's influence on service delivery (cf Yeatman 1998). However, the contractual relationship is based on asymmetric power relations and can be seen as instruments for controlling client behavior in order to create an «active citizen» (Nilssen & Kildal 2009). Hence, this idea of active citizenship differs clearly from the Marshallian understanding of citizenship based on freedom and participation as a member of a political community (status). The contractual approach reduces to a large extent social citizenship to «economic citizenship» i.e. an autonomous citizen becomes synonymous with an economic active citizen (participation in the labour market). Individualization and a strong connection between benefits and services at the local level may increase professional/administrative discretion and paternalism and thus imply a kind of juridification (or maybe de-juridification) which weakens rather than strengthens citizen's social rights.

Legal development in the health sector

Legally enforceable rights for Norwegian patients have not been a significant part of the culture of the welfare state in Norway. Traditionally the public health service has been based upon a model of treatment where doctors and other health workers had authority to decide both about the form and distribution of health services, while citizens had few individual rights towards the public health service (Kjønstad 2004). Regulations within medicine were to a large degree formulated as abstract rules and did not dictate practice directly. This created a significant space for professional action and discretion (Berg 1991:170). Questions regarding access to health care services have been governed by health personnel based on their specialist knowledge, ethical premises and personal judgments. The assumption was that patients were sufficiently protected by the duties and role prescriptions that were imposed on health care personnel and units. In this section we will concentrate on a significant change that has taken place during the last fifteen to twenty year as the health sector has been exposed to a comprehensive legal

regulation. This includes regulation of health services, organ transplantation, contagious diseases, «bio-banks», artificial reproduction, prenatal diagnostics, ethical requirements on medical research etc. (Sand 2005a). New legal regulations comprise both the health service institutions, the workers and the patients. From the beginning of the 1970's and during the 1980's, however, there has been a vast expansion of patients' rights. It is especially this development that we pay attention to in this section. The topic of patient rights legislation has been under discussion in all Nordic countries during the last decade and from a European perspective, the Nordic countries have been particular active in the development of such rights (Winblad and Ringård 2009).

International human rights conventions introduced in Europe during the years after the Second World War classified the right to health service a human right (Kjønstad 1999). The debate about patient rights in Norway began in the 1980s and early 1990s and was related to the problems of waiting lists for elective treatment (Martinussen and Magnussen 2009). The development has primarily taken place through case law and culminated in the introduction of The Patients' Rights Act in 1999. The Patients' Rights Law was a part of a more comprehensive legislative change in the health sector. The following legislative acts, that changed the position of Norwegian patients and a structure of health care services offered, were adopted in 1999: The Patients' Rights Act, Specialized Health Services Act, The Hospital Enterprise Act, Psychiatry and Mental Health Act and The Health Personnel Act. Although the focus of this work is on the Patients' Rights Act and the way it is practiced within psychiatry field it has to be kept in mind that all of the above-mentioned acts are reflecting and complementing each other (St.meld nr. 23 (1996–97):11).

When the Patient Right Act was adopted it covered a broad package of rights. The Act was partly a simplification and consolidation of already existing legislation and partly an implementation of new rights. The objective of the Act was to give the population equal access to high quality health care by granting patients rights in their relations with the health service and aimed at promoting health and welfare politics based on respect for human dignity, fair distribution of rights and duties and equal access to health care services (St. meld. nr. 25 (1996–97), Ot.prp.nr12 1999:1). Patient autonomy and participation in Norway have also been given legislative attention. The expansion of rights within the sector also encompasses new claims to certain services. Through this legislation patients are granted procedural rights and an increased opportunity to decide on questions concerning medical examination and treatment (Syse 2004). Strengthening the rights of patients generally refers to patients being allowed a greater say in logistical matters (selecting physicians and hospitals) and in clinical matters (such as participation in elective medical decision making) as well as participation in local policy making (Saltman and Figueras 1997). The Act includes the right to choose hospital; evaluation within 30 days; reevaluation; participation and information; access to medical records; and special rights relating to children, complaints and to assistance from the Patients Ombudsmann (Vrangbæk et.al 2007). In 2003 and 2004 several amendments to the Patient Right Act were made. First child and youth psychiatric care was included in the scheme. Second, free choice of hospitals was also extended to include private hospitals that had entered into agreements with the regional health authorities. Third a time limit should be determined in line with sound medical practice

within which the necessary treatment must be provided. Fourth, the patient was given the right to be transferred to a private or foreign health care provider if the responsible regional health authorities failed to provide treatment within the time limit, and the right to treatment abroad if adequately treatment could not be provided in Norway (Vrangbæk et.al 2007). The Norwegian Patient Act is by its length and contents the most comprehensive patient rights act among the four Nordic countries (Winblad and Ringard 2009). The following rights are included in the patients' rights law:

- the right to necessary treatment and care.
- the right to an evaluation of the need for treatment within a maximum of 30 days.
- the right to an individual plan for treatment and care.
- the right to a second opinion.
- the right to choose where to receive treatment.
- the right to be heard, give consent to and to receive necessary information on treatment.
- the right to see the medical journal.
- an independent patients' ombudsman in all counties.

Kjønstad has categorized patient rights in three broad categories of rules: 1) those regulating the right to become a patient, 2) those regulating the rights patients have when they have attained the status of patients and 3) those providing patients with procedural rights.

Norwegian citizens also have many explicit rights when accepted as patients. These rights are based on the principle of patient autonomy (Kjønstad 2007).

If a Norwegian patient feels that any of his or her rights as a patient have been violated the patient may submit a complaint to an administrative body, the Chief County Medical Officer. The Chief County Medical Officer has a supervisory function with the purpose of withdrawing any decision by health care institutions that is not in accordance with the Patient Rights Act (MacKenney and Fallberg 2004). The decisions made by the county medical officer can be appealed to the Norwegian Board of Health Supervision. The Chief County Medical Officer's decision is also admissible in civil court, which can compel hospitals and physicians to comply with patient rights law (Molven 2002, MacKenney and Fallberg 2004). According to the Patients' Rights Act, every Norwegian county must also have a patient's ombudsman whose purpose is to safeguard patients' legal rights and interests in relation to specialist health care services. The ombudsman can, to a reasonable extent, provide information to anyone who requests it (Johnsen 2006). In Denmark and Norway patients have the formal possibility of appealing to a judicial court when their patient rights have been violated but only a small number of cases have reached the judicial system.

Though the individual rights of patients are anchored in the welfare law and the level of ambitions is high they are not without reservations. For example the right to specialized health care is limited by the capacity of the relevant institutions (Feiring 2002 et.al). Patients have a range of collective and individual ways of influencing health care services, but there is little evidence about the extent to which patients make use of these opportunities and their relative impact on system performance (Winblad and Ringård

2009). An important question is if there is a tension between increasing patient choice and more collective forms of patient and citizen involvement. In particular the question of whether promotion of individual «patient choice» is the best way to ensure responsiveness and flexibility in services because it potentially undermines the argument for user involvement a more egalitarian mechanism for securing these outcomes (Andersson et.al. 2007:109). Most likely patients of tomorrow will express greater demands for involvement in health care decision-making. They will want to take part in decisions concerning their treatments and the planning of their care and will also have higher expectations for the responsiveness of the system. Yet it is also likely that there will be significant differences in the exercise of these rights depending on socioeconomic status, education level and diagnosis. The increasing demands for responsiveness represent an important challenge for all Nordic countries as well as for other European countries. On the other hand this development may create new opportunities for practicing an active citizenship when health care services are developed.

In any case health policy is a complicated area where the professional also in the future will have great influence over the development irrespective of individual rights or not (Christensen 2004:19) Concerns that individual patient rights will make the relationship between patients and providers more bureaucratic have been expressed by health care professionals on several occasions (Molven 2002), and according to Kjønstad the later development in health reforms are more reserved when it comes to the defining the individual rights more precisely and that the medical profession still holds a strong power position and limits the local democracy more than the individual rights (Kjønstad 2007). On the other hand the patients' rights can have a democratizing effect exactly by contributing to reduce the power of the professionals.

Final remarks

From a Marshallian starting point we have emphasized that the relationship between citizenship and different kinds of legal rights constitutes the scope of individual freedom, public autonomy and the socio-economic prerequisites for participation and inclusion in society. The concept of «social citizenship» is closely attached to the development of modern welfare states but has to be perceived in relation to other catalogs of rights anchored in democracy and the *rechtsstaat* (political and civil rights). Our primary concern in this paper has been to elaborate on the legal construction of social citizenship within a Norwegian context and to outline some possible tensions between different considerations and values for further theoretical and empirical investigation.

Social citizenship is on a general level constructed politically by assessment of the collective ethical obligations of a certain political community towards its citizens (O'Neill 1996). However, in practice social citizenship is determined by the way such obligations are institutionalized. Highlighting rights as fundamental in the constitution of social citizenship, welfare law becomes a central focus point and the conception of juridification processes has formed an important analytical framework. The construction

of social citizenship has been analyzed from the intersecting point between political, administrative and legal institutions. One important question is how different constructions of welfare law affect the relationship between such institutions and the citizens.

Several possible outcomes are discussed in the paper. For instance, social law may strengthen the position of the client in relation with welfare professionals, but also lead to bureaucratic subordination. Strong legal rights may strengthen citizens' ability to participate in society and at the same time weaken the foundation of political citizenship by narrowing the scope of political action (both nationally and locally). Individual rights may increase individuals' capacity to make autonomous decisions and equip individuals with tools to act collectively, thus enlarging their autonomous space for decision-making. On the other hand this might lead to a situation where political decisions become permanent and thus weaken possibilities to execute participation rights and the individual's motivation to participate in collective actions may suffer. Individual rights may contribute to increased public attention towards the subordinate position of weak groups in society and to the degree that rules and rights are formulated clearly, they may protect vulnerable groups in society. On the other hand, to take advantage of the possibilities offered by legal rights, resources such as money and time are often required implying that the opportunities following the expansion of individual action may be reserved for those who are already equipped with sufficient resources. If individual rights are formulated in a general and abstract manner, it gives space for discretion which may result in a range of different interpretations of such rights, thus causing variations in the practice of rights. Welfare law which opens up for local political or professional discretion may increase the scope of paternal interventions and contradict the idea of both civil and social rights. Specified rules and rights may, on the other hand, contribute to increased trust between users and service providers by limiting the risk of differences in distribution of services. Juridification of social policy may increase the power of the courts at the expense of democratic institutions. On the other hand legal activism -formulating individual and group interests as legal claims - can have an important function in a democratic society as violation of rights can be a basis for official complaints, and rights that are not fulfilled can be enforced through judicial lawsuits.

Welfare law is very differently worked out concerning definitions of individual rights and duties, institutional obligations and competences, procedural rules, court competencies, scope of judicial review etc. Hence, it is important to study juridification processes on distinct areas of the welfare state. As shown by our two examples the development can be quite different in fields like health and social service.

In the field of health services it seems reasonable to say that a juridification process has taken place - implying a reinforcement of individual patients' rights and thus a strengthening of social citizenship (maybe at the expense of a more bureaucratic service provision). The expansion of rights within the sector encompasses claims to certain services and through the legislation patients are granted procedural rights and an increased opportunity to decide on questions concerning medical examination and treatment. Though patients have a range of collective and individual ways of influencing health care services, there is little evidence about the extent to which patients make use

of these opportunities and their relative impact on system performance. As stated earlier an important question is if there is a tension between increasing patient choice and more collective forms of patient and citizen involvement. It is also likely that there will be differences in the exercise of the rights depending on citizens socioeconomic status, education level and diagnosis.

In the field of social policy individual legal rights to social benefits have increasingly been comprehended as to render people passive, leading to a stronger coupling between individual rights and duties expressed through the establishment of quasi-contractual legal arrangements.

As we have seen the freedom of contract constitutes a core element of the Marshallian catalogue of civil rights, particularly the citizens' proprietary rights and the economic freedom of choice. Originally the realization of these basic civil rights was the responsibility of private law (constituting the 'lawful contract'). This is very different from the traditional laws of the welfare state (substantial social law), which are oriented towards a top-down (political) steering based on substantial social objectives and interpretations of the citizens' social rights. While contract law implies individualization, privatization, freedom of choice, mutuality and material de-legalization (proceduralization), the substantial public law of the welfare state implies political control, bureaucratization and material juridification. These apparently opposite features of private and public law are supposed to be reconciled when contract philosophy is introduced within the field of the welfare state.

It may be argued that contractualism implies a material de-juridification in the way that it emphasizes tailor-made services and increased local discretion in the preparation of the content of welfare policies (weak legal control). This may also entail a development towards de-politicization of social provision although quasi-contracts can be understood as a new mode of controlling behavior which are closely attached to political objectives (e.g. to create an economic active citizen). In the long run, however, «...contractarian conceptions of citizenship may weaken the kind of social solidarity on which the Scandinavian welfare states are based» (Nilssen & Kildal 2009:319) and thus leads to a further move away from social citizenship in the Marshallian sense.

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