

1. Introduction

**Henriette Sinding Aasen, Siri Gloppen,
Anne-Mette Magnussen and Even Nilssen**

JURIDIFICATION

In recent years, there has been a wide-ranging debate among social scientists and legal scholars about juridification processes and their possible consequences (Blichner and Molander 2008; Hatland and Nilssen 2009; Langford 2009; Magnussen and Banasiak 2013; Østerud et al. 2003; Stone Sweet 2000; Teubner 1986; Van Waarden and Hildebrand 2009). However, the academic literature has been quite fragmented and ideological, hallmarked by a lack of rigorous empirical analyses, not least with regard to juridification processes in welfare states. The absence of empirical and multidisciplinary approaches leaves a gap in the common understanding of the role and implications of different legal regimes and instruments at work in the field of social welfare. Social and legal scientists often seem to grasp the phenomenon of juridification in very different ways, resulting in a striking lack of professional communication. The idea and design of this book aim to add empirical analysis as well as multidisciplinary and comparative perspectives to the fragmented and largely theoretical debate on juridification.

In the literature, there seems to be widespread agreement that juridification has occurred. A general trend towards more formal rules, rights, institutions and judicial power seems to be taking place both nationally and inter-/supranationally (Sunstein 1990). Authority and competence are also transferred to international institutions and the construction of corresponding legal authorities (Andenæs 2006; Askeland 2005). Legal regulation has increased in a range of areas, partly because of an increase in public legal regulation in general and partly because of an increase in formalized individual rights. However, the vast international literature on juridification is characterized by diverging views regarding the nature of the phenomenon, as well as its causes and consequences (Blichner and Molander 2008).

Across the different perspectives, however, there is agreement that juridification broadly refers to processes involving shifts towards constitutive regulations, increased judicial power, more autonomous judicial institutions, more detailed legal regulations, regulations of new areas, and conflicts and problems increasingly being framed in legal and rights-oriented terms (Blichner and Molander 2008). Juridification includes, but goes beyond, what is commonly referred to as judicialization – the increasing social and political role of courts – and also brings attention to the changing role and power of elected politicians, bureaucrats and professionals.

There is considerable international concern about the consequences of different juridification processes and what should be the proper use of legal instruments and bodies in addressing social challenges (Hirschl 2004). These debates have been concerned with a broad spectrum of problems, such as the relationship between the development of international law (for example, in the fields of European Union (EU) law, human rights and international conventions) and national democracy, and the relationship between law and politics at the national level. One important debate has focused on juridification within the framework of the welfare state. Various possible consequences of the increased exercise of individual legal rights and their implications for social citizenship in welfare policy have been of particular interest. For instance, the Norwegian White Paper on Power and Democracy (NOU 2003: 19) emphasizes the antagonism between individual welfare rights and democracy, arguing that such rights confine the scope of democratic politics at both national and local levels. On the other hand, other commentators have argued that individual welfare rights may enhance individual freedom and participation as well as the scope of political action (Lundeberg 2005; Nilssen 2007).

Welfare law differs between different countries concerning the scope and content of individual rights and duties, institutional obligations and competences, procedural rules, court competencies, judicial review and so on. Various fields of welfare law embrace a wide range of legal constructions with regard to political and institutional obligations, professional obligations and individual rights. The choice of legal construction has a significant impact on the legal status and rights of welfare clients and users of services, for example, with regard to both the scope of professional or municipal discretion and the content of individual claims and rights. In many areas of the welfare state, legal regulation has been characterized by broad object clauses and legal standards determining societal objectives and the general principles of the regulation, while other areas have been marked by more individualistic and rights-oriented

forms of regulation (Magnussen and Nilssen 2013). Simultaneously, public administration has become more professionalized, leaving more room for professional discretion and decision-making.

In this book, we analyse juridification processes by combining legal, social and philosophical approaches and perspectives, and using empirical as well as theoretical, normative and comparative methods of investigation. Some countries have seen a trend towards stronger individual social rights and simultaneously a move away from the more collectivist conception of social rights as universal obligations of the state and municipalities to provide welfare services. In these contexts, a key question is how legal individualism in terms of rights and duties affects the construction of social citizenship in modern welfare states.

Processes of juridification trigger questions about the role of legislation, about democracy and the connection and distance between the people at large and their representatives, about the scope for professional or municipal discretion and the relationship between international regulations and national legislation and domestic politics. Implications of juridification processes might be both complex and contradictory. For example, there may be a complex interplay between different kinds of rights, which may have different implications and consequences at different levels (Magnussen and Banasiak 2013). The main question asked in this volume is how new forms of legal regulations may affect particular groups in terms of their social citizenship.

CONCEPTION OF SOCIAL CITIZENSHIP

The concept of social citizenship has gained increasing attention among social scientists in recent decades (Betzelt and Bothfeld 2011; Hvinden and Johansson 2007; Kymlicka 1995; Taylor-Gooby 2009). However, there is no general consensus among social, legal and philosophical scholars on how to define the concept of citizenship in general or social citizenship in particular. Scholars operate with various differentiations of citizenship such as formal/legal, industrial, cultural/multicultural, sexual, political and social citizenship. Although conceptions of citizenship differ, most include theoretical dimensions related to political membership, individual freedom and social and political inclusion.

Following the classical work of T.H. Marshall, modern citizenship is constituted by different catalogues of rights. 'Civil rights' are closely related to the development of the Rechtsstaat and rule of law, 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 elements are 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], p. 32). 'Political rights' concern the democratic mediation between citizens and the state, highlighting the value 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' (Marshall 1950 [2000], p. 32). The most important institutions are national parliaments and councils of local and federal governments.

Analyses of social citizenship will naturally focus most specifically on the third catalogue of rights – 'social rights'. The main idea behind these rights is that citizens should be assured a basic material subsistence and provided services to be able to follow their own life projects and have the opportunity to participate in community life, in the labour market and in other areas of public and private life (Eide et al. 2012; Mikkola 2010). The most important institutions and services mentioned by Marshall and others are the education system and social services, including health care services. Hence, by guaranteeing the material wellbeing of 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. To function as free, equal and autonomous members of society within its political, economic and social structures, citizens need the right to access fundamental resources that secure basic living conditions and enable them to participate in society and make well-informed and conscious choices (Mikkola 2010; Rothstein 1994). Distinct from traditional charity and discretionary policies on poverty, social rights are regarded as individual rights anchored in the status of citizenship (Magnussen and Nilssen 2013, p. 231).

The three catalogues of rights are justified from distinct considerations and values. Civil rights and citizenship constitute necessary conditions for individual dignity, integrity and autonomy, while political rights and citizenship form the basis of public and political participation. Marshall argues that social rights are positively related to political and civil rights because they contribute to the opportunities of citizens to exercise their civil and political rights. Thus, according to Marshall, social citizenship is primarily justified on the basis of equal opportunities in relation to civil and political citizenship. Social citizenship is mainly seen as a counterbalance to the inequalities anchored in social class (Magnussen and Nilssen 2013, p. 232).

Commonly, the concept of citizenship refers to a legal and political status of a person within a nation-state, including 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, p. 9). Redistribution of resources through, for example, the tax system is considered an important means of securing universal access to basic goods and services and thereby enabling people to participate in society and to exercise their rights as citizens (Johansson 1992; Kildal and Nilssen 2011).

Hence, social citizenship can be defined as *a state's regulation of opportunities for citizens to exercise their autonomy and participate in social and political life*. This definition makes a distinction between the legal construction and institutional implementation of social citizenship (regulation of opportunities), on the one hand, and the possible implications of social citizenship, on the other hand (on individual and public autonomy). As noted, Marshall considered the citizen's capacity to act autonomously to be an important aspect of citizenship (Kildal and Nilssen 2011). Autonomy is understood as individual self-determination, that is, the citizen's ability and opportunity to pursue his or her own interests, values and life projects (Magnussen and Nilssen 2013).

From a normative political perspective, social citizenship may be seen as concerning questions about our collective ethical obligation towards those of our fellow citizens unable (temporarily or permanently) to exercise their individual or social autonomy (O'Neill 1996). For instance, Joseph Raz (1986) argues that the role of the state cannot be limited to protecting the individual against external harm or coercion: 'Governments are subject to autonomy-based duties to provide the conditions of autonomy for people who lack them' (Raz 1986, p. 415). Raz argues that not to fulfil a collective ethical obligation to improve the situation of a citizen often is the same as harming that individual (Nilssen 2005, p. 135). To a great extent, modern welfare states have adopted this or similar views or lines of argument in the justification of the welfare state (Gustafsson 2005; Kjørstad et al. 2000). The European Court of Human Rights has taken the view that *not* to provide a person with basic facilities or services may amount to inhuman or degrading treatment. See, for example, the case *Price v. the United Kingdom* (Application No. 33394/96, Judgment 10 July 2001), in which the Court found that to detain a severely disabled person in conditions where she was dangerously cold, risked developing sores because her bed was too hard or unreachable, and was unable to go to the toilet or keep clean without the greatest of difficulty, constituted degrading treatment contrary to the

European Convention on Human Rights (ECHR, 1950, Article 3). The European Committee of Social Rights, which oversees the implementation of the European Social Charter (revised 1996), has developed case law in the area of health protection, education, rights of migrants, minorities and persons with disabilities, and other fields of social welfare, thereby filling the gap left by ECHR's limited protection of social rights.

SOCIAL CITIZENSHIP AND SOCIAL RIGHTS

The conception of social citizenship outlined above highlights the close relationship between law, human rights and citizenship; that is, citizenship is understood as constructed by the institutionalization of individual legal rights (and duties), including social rights. As Ignatieff (1989, p. 72) points out: 'The practice of citizenship is about ensuring everyone has the entitlements necessary to exercise their liberty. As a political question, welfare is about rights, not caring, and the history of citizenship has been the struggle to make freedom real' (cited in Culpitt 1992, p. 16). Hence, juridification processes in the field of welfare policies and services influence the construction, content and implications of social citizenship.

Generally, the welfare state has caused a materialization of law (Habermas 1996; Teubner 1986); that is, social law has become a significant political instrument for obtaining social goals. Social citizenship has implied that people have acquired individual rights to welfare benefits and services such as old age, unemployment and disability benefits, education and some health services (Kjønstad and Syse 2012).

The concept of social rights is central in the construction of social citizenship, and may be interpreted in different ways. From a legal perspective, the concept of rights is closely connected to positive law. In a legal sense, a right must satisfy two conditions (Handler 2004): (1) it must be clear who is entitled to the benefit (with a minimum of field-level discretion) and (2) the benefit must be extended to all who fulfil the criteria. However, legal rights may differ according to a continuum from strong to weak rights, depending on how clearly they are formulated and how unambiguously they describe legal entitlements, duties and obligations (Kjønstad and Syse 2012, pp. 106–113).

Rights may be 'weak' in the sense that the legal regulation only expresses a political obligation to put resources, such as health services, at citizens' disposal. Citizens may have a legitimate expectation to be provided certain services or resources rather than having any legal claim on them. This also means that welfare professions may exercise a

considerable degree of discretion in the implementation of social rights. Courts may also enforce the rights through 'weak' forms of judicial review, ordering political and executive authorities to attend, for example, to insufficient protection of socio-economic rights (such as health rights of prisoners or right to housing for poor children), but refrain from specifying how (see Tushnet 2008).

Marshall's concept of social rights was primarily oriented towards the legal approach, although he gradually came to appreciate that a strong legal interpretation of rights was not very realistic for every part of the welfare state. This is particularly true of benefits in the form of a service. According to Marshall, services have the characteristic 'that the right of a 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 and Bottomore 1992, p. 34).

The Marshallian approach to social citizenship implies a positive relationship between social rights, on the one hand, and the possibility of exercising private and public autonomy, on the other; that is, to be an active citizen. However, this is a theoretical assumption that cannot be taken for granted. For instance, scholars such as Cohen and Arato (1992) have claimed that even though social rights are intended to serve the autonomy and social integration of citizens, they may have – or in fact have – the opposite effect. In opposition to Marshall, they assert that social rights bring individuals into the role of clients rather than active citizens. One aspect of this is that social rights strengthen the administrative apparatus of the state rather than that of civil society, and thereby create new forms of dependencies rather than individual and public autonomy (Cohen and Arato 1992, p. 378). When street-level bureaucrats and professionals are claiming expert knowledge in different areas and are supported with legal measures to fulfil these claims, Cohen and Arato maintain, it creates a dependency relationship between the citizen, who now has become a client, and the welfare-state apparatus. Others have claimed that the construction of extensive public welfare bureaucracies provides the state and the welfare professions with control and definition power over considerable parts of the population (Dahl 1992; Eriksen 1988; Eriksen and Weigård 1993; Kildal and Nilssen 2011). The welfare state is seen as a powerful apparatus paternalistically governing citizens' lives and where the possibilities of individual freedom and autonomy are strongly restricted (Rothstein 1994).

Hence, our Marshallian point of departure is primarily conceptual; that is, citizenship is understood to be constructed by the institutionalization of legal rights (and duties). The relationship between social citizenship,

on the one hand, and political and social action, on the other hand, is a theoretical one that has to be investigated empirically to provide knowledge about the consequences of different forms of welfare regulation. For instance, it is important to note that various fields of the welfare state embrace a wide range of legal and administrative structures that may affect the construction and implications of social citizenship in different ways for distinct social groups. This concerns both political and institutional obligations, professional obligations and individual rights. While some areas of the welfare state may be characterized by increasing legal regulations based on directly enforceable individual rights (strong rights), other areas may be distinguished by regulations based on broad object clauses and legal standards determining societal objectives and general principles (weak rights). Such differences imply that the legal construction of social citizenship may vary extensively between different fields of the welfare state and between different types of welfare states. Our main concern in this volume is that the choice of legal construction has a significant impact on the legal status and rights of the client (Magnussen and Nilssen 2013, p. 234). The implications of various structural and legal arrangements of social citizenship form the core problem of many of the chapters in this volume.

CROSS-CUTTING DIMENSIONS

The chapters of this book elaborate on the juridification processes and their implications for social citizenship on the basis of three interrelated, intertwined and cross-cutting dimensions: democracy; international law; and professional discretion.

Important questions are: How do international law and regulations impact upon the construction of social citizenship on a national level, and what are the implications for national democratic processes? How do different legal mechanisms and constructions of social citizenship affect the relationship between law and politics in various social fields? Moreover, how do different juridification processes affect the scope of administrative/professional discretion and power in the relationship between the welfare apparatus and recipients of welfare services?

Juridification and International Law

International organizations such as the United Nations (UN), the EU, the Council of Europe and the International Labour Organization play an increasingly important role as lawmakers with significant influence on

the content of national regulations and policies in the field of social law. The regulations of the European Council, including the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950) and the less well-known, but still significant, European Social Charter (ESC, revised 1996) are examples of regional instruments of great importance. Although the ESC is still struggling to gain momentum, it is the most significant treaty at the European level for the protection of social rights (Mikkola 2010). It guarantees a wide range of rights relating to housing, health, education, employment, social protection, non-discrimination and so on, and establishes a supervisory mechanism based on collective complaints and state reports.

As national law in many countries is increasingly influenced and determined by international law, the issue of juridification can hardly be examined without this dimension. Of interest are the existing tensions between the national and international levels of regulation, for example, between national law and human rights norms. One particular area of empirical as well as legal analysis is the possibility of prisoners to enjoy their right to freedom of religion according to international human rights provisions. Another example is taken from the labour market and concerns the relationship and tensions between European and national labour law and policies, on the one hand, and international human rights norms, on the other hand. A third area of investigation is the relationship between national and international regulations on access to health care services for undocumented migrants. National regulations on access to health care vary considerably across Europe, and there are tensions between European and international human rights sources, which contribute to the legal complexity and uncertainty. What implications do national, European and international regulations – and their interrelated relationship – have for individual enjoyment of social citizenship in various fields of the welfare state?

Juridification and Democracy

In a democracy, social citizenship is about the integrity, agency and influence of the individual citizen (Petersson 2003). The ideal of democracy is realized to the extent that the citizens themselves, individually and collectively, are capable of executing power over their own and the society's future (Olsen 1990). It is about influence in situations where citizens engage directly with representatives of the state in decisions affecting their lives, as well as influence decisions made by representative bodies in the shaping of legislation and policies. Democratic countries depend on active and capable citizens. This brings attention to

inequalities in power and the material basis of agency and influence, and to the responsibility for ensuring citizens have equal opportunities for democratic participation. The construction of social citizenship thus implies that the political system takes responsibility for solving problems that arise in the social welfare sector of society. New legal instruments and bodies regulate areas that previously were less extensively juridified, such as education and health (Magnussen and Banasiak 2013). This development is accompanied by the creation of new social rights within these areas. An important question is how and whether the use of legal instruments and bodies in addressing social challenges equips individuals with the necessary power and resources to protect their interests and act politically, and thereby strengthen individual autonomy (Magnussen and Nilssen 2013).

Too often the relationship between juridification and democracy is discussed as an either/or question, with some focusing on the tensions and the fear that juridification is undermining space for democratic decision-making, while others focus on how new regulations and rights enhance democracy. But juridification is diverse and multifaceted, driven by different domestic and international concerns and takes many forms. Democracy also has different aspects: juridification (for example, in terms of individual welfare rights) may enable democratic participation by strengthening the material conditions of vulnerable groups who would otherwise lack the ability to participate effectively. Furthermore, legal and quasi-legal institutions may serve as arenas for democratic deliberation. Whether juridification processes are at odds with democracy – and how – thus depends on which levels or aspects of democracy we have in mind, as well as on the aspects of juridification that are in focus: increased legal regulation, the growing emphasis on individual rights, juridification in the form of interests more often being framed as legal claims and so on. It also depends on how the processes play out in specific contexts, in particular, how the new opportunities for participation and influence that are opened up through juridification processes are used by different actors.

This cross-cutting theme addresses democratic implications of juridification processes in the chosen sectors, both empirically and theoretically. An important question to be explored is the relationship between law and politics in different fields of welfare services and labour market policies. For example, what kind of actions and decisions are regulated and clearly determined by law, according to rule of law principles? Which decisions are determined by political and professional discretion? Another question, which relates to the individual level, concerns the degree of influence, participation and agency that individuals experience with

regard to particular institutions and services. Important sectors that are examined empirically to form a basis for theoretical and normative analysis and reflection are the health care sector, the prison rehabilitation sector and the labour market sector.

Juridification and Professionalism

Juridification also concerns the relationship between citizens and public institutions with special expertise. One assumption is that more power has been transferred from democratic institutions to various groups of experts or professionals, such as health professionals, social service professionals, child protection workers and also to the legal professions. Welfare legislation often has the characteristics of general and broad object clauses that determine which societal objectives are to be protected in different areas of society (Magnussen and Nilssen 2013). This opens up for politicization of the application of the law in public administration as the government can give continuous instructions or political signals (Sand 2005). On the other hand, by using such forms of legislation, politicians have limited their legislative activities to the determination of broad objectives and procedural decisions. Simultaneously, they have often abdicated from their responsibility to interpret and implement these objectives in practice. If individual rights are formulated in a general and abstract manner, it leaves room for substantial professional discretion and may thus cause extensive variations in the practice of rights. Juridification in this context implies that the rights of citizens are increasingly administered and determined by professionals.

Another view is that juridification reduces the scope for discretion in a manner that is detrimental to the ability to base decisions on sound professional judgement. Definitions of legal rights may both strengthen the citizen's legal position against the welfare state and simultaneously limit the administrative/professional space of action (Magnussen and Nilssen 2013). 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 legal rights, for instance, in medical treatment or in education. Juridification may imply a bureaucratization of welfare services and in that respect may reduce the accuracy of professional practice (Rothstein 1994). A certain space of discretion may be a prerequisite for tailor-made services and for client influence in the provision of welfare services.

In this volume, the role of professionals in various social fields, and the related implications of different legal arrangements on the construction of social citizenship are empirically studied in the health sector, in prisons and in the field of welfare and work.

OUTLINE OF THE BOOK

The chapters of the book address differently the cross-cutting themes presented in the previous section. However, this will be the main subject of the concluding chapter (Chapter 15) and is set aside here. This outline gives a brief introduction of the content of each chapter and how they relate to the main concepts of juridification and social citizenship. The first four chapters (2–5) concern different aspects of the relationship between welfare and the labour market. The next four (6–9) deal with the health sector, while Chapters 10 and 11 focus on prisons. Chapters 11, 12 and 13 discuss problems concerning cultural diversity in different empirical fields. Chapter 14 concerns the relationship between international courts and social rights, with a particular focus on Latin America.

In Chapter 2, Even Nilssen elaborates on the legal and institutional development in Britain, Denmark and Norway in the field of welfare and work. From the early 1990s, the ‘work line’ has been of increasing importance in European welfare policy. Although the UK, Denmark and Norway have different traditions in the field of labour market policy, and partly belong to different welfare regimes, the chapter shows that there has been a legal and institutional convergence between these countries towards a proceduralization of social law. A general move away from regulations through substantive/material law towards activation policies strongly influenced by what is termed ‘new contractualism’ has taken place. This implies an increasing focus on individual obligations rather than social rights and an alteration of social citizenship from a Marshallian social rights approach towards a contractual social citizenship in all three countries. Nilssen points out that social citizenship based on contractualism may weaken the position of welfare clients and thus their autonomy in relation to the welfare state. This may vary according to the individual and social resources of the clients and the structure of individual activation measures applied in different countries.

Rising complexity of economic and social processes, on the one hand, and the requirement to include an increasing number of societal actors into the regulation of labour market issues, on the other hand, have raised the question of how labour market regulation can be adjusted to these new challenges. In Chapter 3, Silke Bothfeld and Stefanie Kremer

elaborate on this problem focusing on the introduction of 'reflexive law' in the field of German labour market policy (temporary agency work). In labour and social policy, the main challenge consists of the problem of how effectiveness, neutrality and social citizenship (social security/protection) can be assured at the same time, when decision-making on labour conditions is delegated to societal non-state actors. The authors argue that although reflexive law may well harbour the potential for fair and effective regulation of employment conditions, reflexive regulation entails potential conflicts, especially concerning the state's responsibility for securing basic social rights in accordance with constitutional principles.

In Chapter 4, Cornelius Cappelen and Eskil Le Bruyn Goldeng concentrate on the relationship between rights and duties in the construction of social citizenship and how the legal regulations of unemployment compensation schemes in different countries make a trade-off between the two considerations. The authors do this by classifying Organisation for Economic Co-operation and Development (OECD) unemployment compensation schemes on several indices (generosity, duration, entitlement, activation, compound strictness). EU countries differ significantly not only with respect to wages, but also with respect to the level of social security workers and their dependents receive from the state. The author argues that there are reasons to believe that increasing labour migration within Europe constitutes enhanced legitimacy threats to national welfare measures such as unemployment schemes. According to EU regulations, states cannot discriminate against resident EU nationals from other countries in the field of social security, and migrant workers can take out their benefit in a different country to the one where the benefit was earned. The authors maintain that the new wave of post-enlargement migration within the EU potentially increases the domain of people that citizens believe to be taking unrightful advantage of welfare arrangements. One effect of this may be a reduction in social benefits and thus a dismantling of social citizenship in some employment-importing countries.

Chapter 5 deals with another aspect of modern welfare states, namely state efforts to keep people active in the labour market in order to contribute to society and reduce the costs of unemployment. Tine Eidsvaag shows that the so-called 'activation line' in social security and social assistance has significant impact on social citizenship for unemployed or job-seeking persons, depending on how it is designed. The European Employment Strategy aims to 'make work pay and encourage the search for jobs' and urge member states to review 'conditionality of

benefits'. These policies have been enhanced during the current international economic crisis. Eidsvaag applies legal methodology and analyses how human rights norms may restrict states' use of economic sanctions to influence citizens' behaviour in relation to the labour market. She presents an interesting picture of work-line policies in five different European countries (from strict activation requirements to less strict, combined with either generous or less generous unemployment benefits). She finds that national law and practices differ significantly, and reflect the values of the different welfare regimes. Importantly, however, is that human rights law and practice related to work and social welfare benefits set clear material and procedural requirements to states' use of economic sanctions to promote activation.

In Chapter 6, Anne-Mette Magnussen and Lene Brandt take as their point of departure that prioritization of health care services is a major challenge in the modern welfare states. In Norway, the prioritization principles are laid down in the Patients' and Users' Rights Act, stating that a patient's rights to receive necessary health care from the specialist health service on certain conditions are laid down by the law itself, and are clearly restricted by the society's need to limit costs and prioritize the use of health care resources. The Norwegian case is used for a discussion of individual rights as a way of regulating access to health care services. Because the Patients' and Users' Rights Act is characterized by general and broad provisions, it leaves room for substantial professional discretion that may lead to extensive variations in the practice of these rights. A great variety in the ways in which the right to necessary health care is interpreted, applied and assessed is revealed. In line with the idea of social citizenship, people in Norway have acquired individual rights to health care, but the legal construction of the right to necessary health care also seems to enhance the professional scope of discretion rather than to strengthen citizens' legal position against the welfare state.

In Chapter 7, Octavio Ferraz, Siri Gloppen, Ottar Mæstad and Lise Rakner discuss a phenomenon that is sometimes referred to as a 'health litigation epidemic'. In many countries, particularly in Latin America, the courts receive thousands of cases on a monthly basis from individual citizens and patient groups who claim that their right to health is being violated. Some hail this as a great step forward in terms of social citizenship in highly unequal societies where state institutions are often unresponsive towards the needs of ordinary people, and the poor in particular, and where health systems are commonly plagued by corruption and mismanagement. Others fear that the judicialization of access to health care is benefiting better-off patients and/or skewing spending in favour of expensive treatment, and is thus serving to undermine efforts to

set health priorities rationally and fairly, which in turn is undermining the social citizenship of non-litigants, and the value of engaging in collective processes to democratically shape health policy. In this context, it is of great significance how the judges deal with these cases and to what extent they take cost considerations into account. The chapter analyses health rights cases and interviews key informants from Argentina, Brazil, Colombia, Costa Rica, India and South Africa, and finds systematic and significant differences, with clear implications for the realization of the right to health and social citizenship in these societies.

In Chapter 8, Kristine Bærøe and Berit Bringedal argue that social inequality in health has an impact on people's opportunities to exercise social citizenship. By making analytical distinctions between various types of juridification processes, they discuss what the medical profession can do to reduce the impact of social inequality and whether physicians' professional discretions should be restricted to counteract their influence. The authors argue that enforcing the right of access to health care through legal regulations is important in promoting social equality in health and suggest that legal regulation of the medical profession's discretionary space is a way to promote social equality in health. However, they also argue that juridification processes that involve a substantial narrowing of professional autonomy may involve reinforcing or increasing social inequalities in health at the point of care. To promote social citizenship, the legal instruments should secure sufficient room for professional medical discretion to allow for a reduction of social health inequalities.

In Chapter 9, Henriette Sinding Aasen, Alice Kjellevoid and Paul Stephens explore an urgent issue in many European welfare states, namely the question of 'undocumented' migrants' access to health care services. These individuals are not entitled to stay in a particular country and thus cannot claim rights to welfare benefits as ordinary citizens or as asylum seekers. Their 'undocumented' status therefore represents a general barrier to the enjoyment of social citizenship. However, human rights norms are by definition universal and apply to 'everyone'. Thus, an important question is to what extent international and regional (European) human rights instruments protect the basic rights of this marginalized group. The international human rights framework seems to provide the most comprehensive protection of 'undocumented' migrants' access to essential health care services, that is, emergency and primary health services. However, European countries display significant differences in their interpretation, application and implementation of the right to health, and significant differences in their degree of compliance with common human rights instruments. It is argued that the core obligations of the

right to health, understood as securing access to emergency and primary health care services, must be respected, protected and fulfilled also for 'undocumented' migrants, in line with international human rights standards.

In Chapter 10, Kristian Mjåland and Ingrid Lundeberg address a shift in the Nordic criminal justice policy, whereby human rights discourses and rehabilitation policies play a greater role. Based on ethnographic data from a study of a drug rehabilitation unit in a Norwegian prison, they examine the efficacy of rehabilitation in restoring prisoners as citizens in practice. Through an exploration of interactional processes that occur between prisoners and officers, they show the institutional and subjective dimensions of current drug rehabilitation practices and argue that hybridization is a concept that may capture the inherent complexities and uncertainties of such rehabilitation practices. By hybridization, they refer to a recent development in penal practice whereby rehabilitation measures and treatment have not replaced or become more important than control measures, but rather all these elements are expanding and have become increasingly interconnected. The authors argue that the political legitimacy of the increased focus on rights and rehabilitation measures to soften punishment and make it more humane is misleading as there is a comprehensive body of laws, rights and legal instruments at work in regulating the drug rehabilitation of prisoners. Nevertheless, in the drug rehabilitation unit they studied, these legal instruments did not play a very significant role. On the contrary, hybrid drug rehabilitation practices weaken the legal protection of prisoners and this has occurred despite a general juridification process in this field.

In Chapter 11, Susanne Bygnes looks at how ex-wardens and wardens in two Norwegian prisons approach questions of cultural and religious diversity. To understand processes of marginalization, inclusion and exclusion in a society, it is useful to look at how it treats stigmatized groups such as prisoners and in particular those belonging to ethnic, religious and racial minorities. The proportion of prison inmates from a minority background is steadily growing in most European countries, but the degree to which states accommodate different religious needs and address issues of racism and differential treatment varies greatly, and Bygnes looks at how this reflects different citizenship models. The 'Nordic passion for equality' and Norway's relative diversity friendliness could suggest that Norway is at the forefront of accommodating ethnic diversity in its prison population. However, Bygnes's study reveals a systemic reluctance to consider group differences among prisoners, and a weakness of legal regulation, that leaves the practical accommodation and recognition of minority rights in the hands of individual wardens,

resulting in an 'ad hoc approach' to multiculturalism. She argues that this presupposes prison staff's innovation and flexibility, and reflects structural and attitudinal obstacles to prisoners' equality of opportunity and social citizenship.

Chapter 12 explores how legal professionals in the Netherlands and in Norway deal with cultural diversity, and how it affects social citizenship. In this chapter, Katja Jansen Fredriksen and Wibbo Van Rossum focus on the interactions between legal professionals and lay parties in family conflicts with more than one legal order involved. They argue that the concept of citizenship needs to include the element of identity, and that the communications of legal professionals have an important impact on the legal consciousness of lay people, and thus contribute to their subjectively felt citizenship in today's culturally diverse society. By analysing and comparing one Dutch and one Norwegian custody case, the authors describe similarities and differences in how legal professionals handle the complex legal and cultural situation of transnational families with conflicting visions of custody over children. The authors argue that it is an important prerequisite for transnational actors' willingness to participate in social and political life that their customs and values are 'seen' and taken seriously. According to the authors, the identity citizenship of transnational family members (sense of trust and social belonging) will be enhanced when legal professionals consider the legal consciousness of people, show that they did so and can justify considering it. Mere attention to the formal structures of the law is not sufficient to enhance this understanding of citizenship. The two cases serve as practical illustrations of how this influence on the legal consciousness of lay people may take place in concrete cases.

In Chapter 13, Hugo Stokke discusses how a concrete juridification process in Norway, the 2005 Finnmark Act, is reshaping the conditions of social citizenship for the Sami indigenous minority. This novel legal construct established the Finnmark Estate, which strengthened the rights and collective control of the Sami over land and natural resources in the northernmost part of Norway. This creates differential citizenship rights for the population in the area – what Stokke terms 'devolution of citizenship'. He finds that this factor reflects a multicultural approach to social citizenship, by emphasizing the recognition of difference and the special relation of indigenous communities to the land. Stokke compares this to other citizenship models, and in particular the unitary understanding of social citizenship in the Marshall tradition, which is otherwise predominant in Norwegian society. Comparing the models along different dimensions, he concludes that the multicultural model – as expressed in the Finnmark Act – has been beneficial from the perspective of the social

citizenship of the Sami. It has enhanced their autonomy by securing their access to productive resources, and also strengthened their participation rights by securing greater influence in collective decision-making through the Sami Parliament – at least in principle; it is still too early to conclude how the law will function in practice.

In Chapter 14, Roberto Gargarella examines an increasingly important form of juridification, namely the influence of international judicial bodies. The chapter addresses the legitimacy of international courts as well as how international judicialization affects citizens' ability to participate in and collectively influence decisions shaping their life (social citizenship). At stake are both the space for democratic deliberation and decision-making vis-à-vis the role of legal professionals, and the authority of national versus international decision-making spaces. These questions are particularly acute in the context of fragile democracies – and Gargarella's focus is on the Inter-American Court of Human Rights (IACtHR) – but international judicialization is a matter of growing concern globally, not least in Europe with the increasing importance of the European Court of Justice and the European Court of Human Rights. Gargarella explores the dynamics of internationalized judicialization focusing on social and economic rights cases. He argues that the IACtHR, by not applying socio-economic rights, is failing the poor and marginalized in the unequal societies of the Americas and hampering their social citizenship. Furthermore, the IACtHR is unnecessarily disrespectful of national democratic processes, exacerbating counter-majoritarian tensions. The Court should learn from some of the region's national courts, constructively applying social rights, and engaging in dialogical processes with political actors on ways to protect and fulfil social rights, enhancing social citizenship both through the process and the outcome. Gargarella underscores that courts should not just accept political decisions of democratic bodies, but also address the democratic nature of the process, its inclusiveness and participatory and deliberative qualities.

REFERENCES

- Andenæs, K. (2006), 'Om maktens rettsliggjøring og rettsliggjøringens makt-potensial', *Tidsskrift for Samfunnsforskning*, **47** (4), 587–600.
- Askeland, B. (2005), 'Fra drivjul til tannjul – rettsvitenskapens makt etter EØS-rettens inntog', in M. Kinnander (ed.), *Makt og rett: Om Makt- og demokratiutredningens konklusjoner om rettsliggjøring av politikken og demokratiets forvitring*, Oslo: Universitetsforlaget, pp. 169–92.

- Betzelt, S. and S. Bothfeld (eds) (2011), *Activation and Labour Market Reforms in Europe: Challenges to Social Citizenship*, London: Palgrave.
- Blichner, L. and A. Molander (2008), 'Mapping juridification', *European Law Journal*, **14**, 36–54.
- Cohen, J. and A. Arato (1992), *Civil Society and Political Theory*, Cambridge, MA: MIT Press.
- Culpitt, I. (1992), *Welfare and Citizenship: Beyond the Crises of the Welfare State*, London: Sage.
- Dahl, T.S. (1992), *Barnevern og samfunnsvern: Om stat, vitenskap og profesjoner under barnevernets oppkomst i Norge*, Oslo: Pax.
- Eide, A., C. Krause and A. Rosas (2012), *Economic, Social and Cultural Rights: A Textbook*, 2nd revised edn, Dordrecht: Martinus Nijhoff.
- Eriksen, E.O. and J. Weigård (1993), 'Fra statsborger til kunde', in E.O. Eriksen (ed.), *Den offentlige dimensjon: Verdier og styring i offentlig sektor*, Bergen: Tano, pp. 183–208.
- Eriksen, T.B. (1988), 'Velferdspolitikken legitimitet og grense', *Nytt Norsk Tidsskrift*, **1**, 38–51.
- Gustafsson, H. (2005), 'Taking social rights seriously (I): Om sosiala rättigheters status', *Tidsskrift for Rettsvitenskap*, **4**, 439–90.
- Habermas, J. (1996), *Diskurs, rätt och demokrati: Politisk-filosofiska tekstar i urval*, edited by E.O. Eriksen and A. Molander, Göteborg: Daidalos.
- Handler, J. (2004), *Social Citizenship and Workfare in the United States and Western Europe: The Paradox of Inclusion*, Cambridge: Cambridge University Press.
- Hatland, A. and E. Nilssen (2009), 'Policy making and application of law: free movement of persons and the European Court of Justice', in R. Ervik, N. Kildal and E. Nilssen (eds), *The Role of International Organizations in Social Policy*, Cheltenham, UK and Northampton, MA, USA: Edward Elgar, pp. 94–110.
- Hirschl, R. (2004), *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, MA: Harvard University Press.
- Hvinden, B. and H. Johansson (eds) (2007), *Citizenship in Nordic Welfare States*, London: Routledge.
- Ignatieff, M. (1989), 'Citizenship and moral narcissism', *Political Quarterly*, **60** (1), 63–74.
- Johansson, R. (1992), *Vid byråkratiets gränser*, Lund: Aktiv.
- Kildal, N. and E. Nilssen (2011), 'Norwegian welfare reforms: social contracts and activation policies', in S. Betzelt and S. Bothfeld (eds), *Activation and Labour Market Reforms in Europe. Challenges to Social Citizenship*, London: Palgrave, pp. 218–39.
- Kjønstad, A. and A. Syse (2012), *Velferdsrett I. Grunnleggende rettigheter, rettsikkerhet og tvang*, Oslo: Gyldendal Akademisk.
- Kjønstad, A., J.F. Bernt, A. Kjellevoid and H. Hove (2000), *Sosial trygghet og rettsikkerhet*, Bergen: Fagbokforlaget.
- Kymlicka, W. (1995), *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford: Oxford University Press.
- Langford, M. (2009), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge: Cambridge University Press.

- Lundeberg, I. (2005), 'Rettsliggjøringens makt', *Nytt Norsk Tidsskrift*, **1**, 30–44.
- Magnussen, A.-M. and A. Banasiak (2013), 'Juridification – disrupting the balance between law and politics', *European Law Journal*, **19**, 325–39.
- Magnussen, A.-M. and E. Nilssen (2013), 'Juridification and the construction of social citizenship', *Journal of Law and Society*, **40** (2), 228–48.
- Marshall, T.H. (1950), 'Citizenship and social class', in C. Pierson and F. Castles (eds), *The Welfare State Reader*, Cambridge: Polity Press, reprinted in 2000.
- Marshall, T.H. and T. Bottomore (1992), *Citizenship and Social Class*, London: Pluto Press.
- Mikkola, M. (2010), *Social Human Rights of Europe*, Helsinki: Legisactio Oy.
- Nilssen, E. (2005), 'Coercion and justice: a critical analysis of compulsory intervention towards adult substance abusers in Scandinavian social law', *International Journal of Social Welfare*, **1**, 134–44.
- Nilssen, E. (2007), 'Politics, profession and law: the legal development of compulsory intervention towards substance abusers in Scandinavian social law', *Scandinavian Political Studies*, **30** (1), 20–37.
- NOU 2003:19, *Makt og demokrati. Sluttrapport fra makt- og demokratiutredningen*.
- O'Neill, O. (1996), *Towards Justice and Virtue: A Constructive Account of Practical Reasoning*, Cambridge: Cambridge University Press.
- Olsen, J.P. (1990), *Demokrati på Svenska*, Stockholm: Carlson bokförlag.
- Østerud, O., F. Engelstad and P. Selle (2003), *Makten og demokratiet*, Oslo: Gyldendal.
- Petersson, O. (2003), 'Den sista maktutredningen?' *Nytt norsk tidsskrift*, **20**, 351–62.
- Raz, J. (1986), *The Morality of Freedom*, Oxford: Clarendon Press.
- Rothstein, B. (1994), *Vad bör staten göra? Om välfärdsstatens moraliska och politiska logikk*, Stockholm: SNS Förlag.
- Sand, I.-J. (2005), 'Hva er rettens rolle i dag? Forholdet mellom rett, politikk og makt, belyst ved nyere teori og eksempler fra globaliseringsdiskusjonen og Makt- og demokratiutredningen', in K. Andenæs, A. Hellum and I.-J. Sand (eds), *Rettsliggjøring, kvinner, makt og politikk*, Stensilserien No. 101, Institutt for kriminologi og rettssosiologi, Universitetet i Oslo, pp. 15–39.
- Stone Sweet, A. (2000), *Governing with Judges: Constitutional Politics in Europe*, Oxford: Oxford University Press.
- Sunstein, C.R. (1990), *After the Rights Revolution: Reconceiving the Regulatory State*, Cambridge, MA: Harvard University Press.
- Taylor-Gooby, P. (2009), *Reframing Social Citizenship*, Oxford: Oxford University Press.
- Teubner, G. (ed.) (1986), *Dilemmas of Law in the Welfare State*, Berlin: de Gruyter.
- Tushnet, M. (2008), *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton, NJ: Princeton University Press.
- Van Waarden, F. and Y. Hildebrand (2009), 'From corporatism to lawyocracy on liberalization and juridification', *Regulation and Governance*, **3** (3), 259–86.