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How EU Juridification shapes Constitutional Social Rights

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Abstract

This article demonstrates how EU member states' distinct constitutional traditions shape the impact of EU juridification on national welfare states and social rights. These traditions come with different 'constitutional social rights norms' – that is, distinct distributions of obligation and power to protect social rights between judicial and political actors. The article argues that norms common to the political constitutional tradition are less compatible with the EU's juridified notion of rights than those distinguishing legal constitutionalism. To develop this argument, the article takes an in-depth look at Germany and Sweden, which represent the two constitutional traditions. This reveals how the Swedish constitutional understanding of social rights as politically defined collective rights has shifted towards a more juridified notion of rights, as EU law effectively makes social entitlements defined in national legislation more justiciable. The already significantly juridified understanding of social rights in Germany, in contrast, comes closer to that of the EU.

Keywords: constitutions; EU; juridification; welfare; rights

Introduction

The EU relies on a judicialized mode of governance (Cichowski, 2007; Kelemen, 2011; Kelemen and Pavone, 2018; Stone Sweet, 2004). Much research has studied the way in which this law-driven form of integration shapes national social policy capacities (Caporaso and Tarrow, 2009; Ferrera, 2005; Höpner and Schäfer, 2012; Leibfried, 2010; Offe, 2015; Scharpf, 2010). One strand of this research focuses on how EU legislation and Court of Justice of the European Union (CJEU) case law on free movement of persons and non-discrimination, and the associated cross-border social rights of mobile EU citizens, shape national welfare states. On the one hand, the 'opening' of national welfare states that follows from the supranational extension of access to national social rights has significantly altered the boundaries of all EU welfare states (Ferrera, 2005). On the other hand, the more specific impacts of EU cross-border social rights may depend on member states' distinct socioeconomic institutions and specific policies (see Erhag, 2016; Martinsen and Rotger, 2017; Palme and Ruhs, 2018; Scharpf, 2010). This has raised questions whether some types of welfare states are more compatible with EU integration than others (Erhag, 2016; Martinsen and Rotger, 2017; Palme and Ruhs, 2018; Scharpf, 2010).

The latter strand of research primarily looks at national social policies and the social benefits and services that these policies specify to understand the impacts of EU integration on national welfare states and their capacity to realize social rights. What such perspectives overlook is that the judicially driven development of cross-border rights has implications for more fundamental norms underpinning national welfare states, what are here called 'constitutional social rights norms'. Such norms, so the article argues, depend not on a country's welfare regime but rather follow from its *constitutional tradition*. Countries characterized by legal constitutionalism give more power to the judiciary in

defining and protecting social rights than countries belonging to the political constitutional tradition, which primarily allocate power to the popular sovereign in determining rights. This makes social rights more justiciable in legal constitutional countries, than in political constitutional countries. These in other words constitute two distinct models for protecting individuals and shaping national politics of social protection.

The argument advanced in this article is that the judicially driven EU extension and protection of rights make social rights norms associated with political constitutionalism more vulnerable in the context of EU integration than those linked to legal constitutionalism. This follows from the way that EU juridification has entailed the individualization and increased justiciability of entitlements defined in national social legislation where such rights have traditionally been weak, in the sense of being justiciable. In contrast, social rights norms in countries where national judicial bodies have played a strong role in protecting social rights more closely resemble the EU's juridified notion of rights.

This claim is demonstrated by looking in detail at two member states that represent the two different constitutional traditions: on the one hand Germany, a quintessential example of legal constitutionalism, and on the other hand Sweden, which is a country clearly characterized by political constitutionalism. The comparison demonstrates that there seem to be limits to the degree of diversity of social rights norms that are compatible with EU integration, and that norms appear to be converging. This is important not only for understanding how different ways of securing well-being are changing in the context of EU integration, but also for understanding the impact that EU law has on national constitutional law. Though constitutions are often treated in mainstream EU discourse as relatively monolithic sets of instruments that primarily serve to protect sovereignty, bottom-up perspectives can show that the effects of EU law on specific areas of constitutional culture vary (Albi and Bardutzky, 2019, p. 12).

The article proceeds as follows. The first part briefly reviews how the EU shapes national social policy through judicial means, with specific attention to the effects of EU free movement and non-discrimination jurisprudence. In connection with this, the concept of constitutional social rights norms is developed and the way that such norms are tied to different constitutional traditions explained. The article then proceeds to look at two concrete instantiations of such norms in Germany and Sweden and what the EU juridification of rights means for each country's distinct constitutional configurations of social rights. The penultimate section discusses the implications of the argument and country-specific observations. It should be clarified from the outset that the primary ambition is to understand how EU integration shapes social states, rather than normatively to assess the observations made.

I. Law-driven EU Integration and National Social Policy and Rights

The EU itself can neither 'do social policy', nor guarantee social rights. Firstly, the EU has only very limited competences in the field of social policy, according to the principle of subsidiarity (Art. 5(3) TEU; Craig and de Búrca, 2016, p. 95) and the member states remain the institutions that define and implement social policy. Secondly, the EU Treaties – the Union's *de facto* Constitution – do not contain any list of or reference to social rights (De Witte, 2005) that would allow the EU to demand positive action from member states. Rather, the Treaties remain limited to the functional purpose of creating and maintaining

an internal market (Isiksel, 2015). Thirdly, the Charter of Fundamental Rights contains many detailed social rights. This initially raised hopes that the Charter would fill the social rights gap in the EU's Constitution and balance economic imperatives (De Witte, 2005). However, the CJEU has limited the scope of the Charter by tying Charter rights to the corresponding Treaty provision or secondary law (Kornezov, 2017).¹ Its application in cases pertaining to social rights has also so far been very limited (Craig and de Búrca, 2016, p. 386; Kornezov, 2017). Finally, though the Court could, in line with the general principles of EU law, in principle refer to 'constitutional traditions common to the member states' and social rights in member states' constitutions as a source of unwritten social rights – which it has done in discovering other 'fundamental' rights, it has not done so (De Witte, 2005, p. 155). A critical reason for this could well be the lack of a common tradition of social rights (De Witte, 2005) as this article further demonstrates.

Despite this, the EU has had a significant impact on national social policy. It has shaped national policy both through soft measures such as the Open Method of Coordination and Commission recommendations, and influenced national capacities to do social policy through less soft eurozone measures, like macroeconomic supervision and bail-out rules (Höpner and Schäfer, 2012; Offe, 2015). Yet the most direct way in which the EU has come to shape national social policy is through the CJEU's interpretation and protection of the fundamental freedoms contained in the EU treaties (Isiksel, 2015, Chapter 5; Leibfried, 2010; Scharpf, 2010). This way, the EU has also created 'indirect' social rights by ensuring access for mobile EU citizens (under certain conditions) to social provisions in countries of destination, as well as the possibility of exporting benefits from the country of origin to that of destination (Pennings, 2015). With its adjudication on cases pertaining to the commercial mobility rights of EU citizens, the Court has been pivotal to demarcating the personal (who) and material (what) scope of mobile EU citizens' rights (Jacqueson, 2018). This has effectively circumscribed member states' autonomy to decide who has access to their social benefits and services and where they can be consumed.

The implications of this law-driven 'opening' for national welfare states (Ferrera, 2005) and national social rights have been addressed primarily through an analysis of its impacts on substantive social policies that deliver benefits and services, or 'social rights'. The extension of access to national social schemes has been seen to result in both political and economic challenges to the ability of member states to uphold such schemes (Martinsen and Rotger, 2017; Menéndez, 2007; Sangiovanni, 2013, p.15; De Witte, 2015, p. 70–74). Beyond such general impacts, this jurisprudence is understood to have diverse impacts on member states and result in distinct challenges, depending on their particular social system. For example, in his well-known piece, Scharpf (2010) argues that because priority is given to market-making norms over market-constraining ones, the values and norms that underpin national institutions and policy in continental and Scandinavian social market economies are harder to sustain than those of liberal market economies, as the latter tend towards deregulation and less generous welfare provision anyway. Equally, it has been stressed that member states with residence-based social insurances have reformed these schemes towards more contribution-based policy solutions, in response to EU case law and cross-border entitlements (Christensen and Malmstedt, 2000;

¹ Compare the point about circularity in the Charter, as some of the included social rights reflect the content of existing EC directives (De Witte, 2005, p. 164).

Erhag, 2016). Other authors argue that different types of welfare states may face different economic and political challenges in the context of free movement and anti-discrimination rules, depending on the core entitlement and distribution principles that they embody (Martinsen and Rotger, 2017; Palme and Ruhs, 2018).

These debates raise important questions of how and whether the EU shapes member states' ability to deliver substantive social protection. What is being overlooked in such accounts of impacts on national social policy, however, is how member states differ not only in terms of social policies that deliver substantive benefits and services, but also in terms of their fundamental understanding of social rights and how individual well-being is to be achieved. That is to say that they come with, what is here called, different constitutional social rights norms. These norms are articulated in national constitutional law and profoundly shape national welfare states, in that they define the allocation of responsibility to protect social rights between judicial and political actors. This shapes both the nature of rights and the politics of social policy. Similar to the arguments above about how different socioeconomic policies and institutions shape the impact of law-driven EU integration, recent legal research demonstrates that the impact of EU law on member states' constitutional law varies subject to their constitutional tradition (Albi and Bardutzky, 2019). This prompts the core question of this article; namely, how the EU juridification of rights challenges constitutional social rights norms associated with distinct constitutional traditions. What precisely is meant by such norms and traditions is described in the following two sections.

II. Constitutional Social Rights Norms

The term social right is often used to refer to social policies that provide some form of social protection to the individual, regardless of whether they are in fact rights in the legal sense of the word (Stephens, 2010). Judgements over social rights in different countries and welfare regimes are hence typically based on an assessment of the various social benefits and social services that they provide. From a legal perspective, however, whether a right is indeed a right depends on whether it is made justiciable and thus enforceable (King, 2012). The extent to which social rights are made justiciable has essential bearings not only on the character of the right itself, it also fundamentally determines where the responsibility to protect such rights is located. That is to say, how power to protect individuals' well-being is distributed between judicial or political actors.

The balance of competency between these two sets of actors reveals how a basic tension inherent in the concept of social rights is dealt with; namely, that between the individual nature of rights and the material, positive, nature of social rights. The protection of individual's rights may require their (judicial) protection from the will of majorities and the whims of legislators, executives and administrators. At the same time, however, the policies that substantiate social rights depend on collective endeavours and resources, and are the result of political struggle and compromise (Klausen, 1995).

The justiciability of rights is determined by a number of factors, including how they are defined in legislation and the availability of redress mechanisms if they are not met (Hollander, 1995; King, 2012). However, the essential basis for making rights justiciable is their constitutional embedding (King, 2012). Constitutions articulate a set of foundational political principles to which the institutions of the state are meant to give expression

(Wolfrum and Groter, 1971). These often include a list of human or citizens' rights, which may be justiciable or non-justiciable. Constitutions thus define the normative principles that govern governments' obligations in the fields of social (and economic) policies (Kaufmann, 2013, 65). Some constitutions contain only abstract principled commitments to social rights or social solidarity, or 'directive principles' that do not found claims in courts (King, 2012, p. 52). Such core political principles can serve an enforcement or remedial function by founding or supplementing claims in the courts or other institutions (King, 2012, pp. 51–57; Liebenberg, 2010).

The way social rights are expressed in constitutions and what that tells us about justiciability of rights is in this article seen to articulate constitutional social rights norms. These are fundamental principles defining and regulating states' pursuit of social goals. It should be noted that these principles do not tell us much about the substantive social policies of a country. These may be rather similar, despite being underpinned by distinct constitutional social rights norms.

Constitutional Traditions

Such social rights norms cannot, however, be understood by looking exclusively at how social rights are articulated in constitutions. The power and effect of such constitutional principles depends also on the broader *constitutional tradition* in which they are embedded, which determines how the power to interpret these rights and the responsibility to protect them is distributed. The dominant constitutional traditions in Europe are legal and political constitutionalism (Albi and Bardutzky, 2019, p. 12–13; Castillo-Ortiz, 2019, p. 51).² This distinction also largely corresponds to the distinction between historical and revolutionary constitutions (Besselink, 2006).

In legal constitutionalism, which is the more common form of constitutionalism in Europe, legal checks on power play an authoritative role in the political system. This approach defends the idea of a normative, entrenched constitution whose provisions are to be respected by political actors. Judicial review and 'constrained democracy' (Müller, 2015) are constitutive elements of the political system in countries following this tradition (Ginsburg, 2003; Stone Sweet, 2007). Accordingly, a judicial kind of institution, typically a constitutional court, has the power to invalidate laws based on their being incompatible with the constitution (Castillo-Ortiz, 2019, p. 52). These constitutions have often been enacted radically and in response to authoritarianism and totalitarianism in a way that has been formative for the state in question (Albi and Bardutzky, 2019, p. 14; Müller, 2015, p. 22).

Political constitutionalism is, in contrast, a tradition according to which the idea that judicial actors should overturn decisions of democratically elected politicians is rejected. Political conflicts are rather to be solved by political means and judicial actors submit to the democratically elected legislature when it comes to the decision on the general rules that regulate society (Castillo-Ortiz, 2019, p. 42). These constitutional systems are thus

²As Castillo-Ortiz (2019) has argued, this distinction to some degree loses its distinctive meaning in light of the recent political appointments of judges to constitutional courts in member states like Poland and Hungary, subsequent to which these courts have become a device to circumvent constitutional constraints and concentrate power in the hand of the ruling political elites. Bearing this important caveat in mind, we nonetheless stick to this basic distinction as it is well established in constitutional theory. Albi and Bardutzky (2019) also employ this distinction as a basis for deriving more specific sub-categories (pp. 12–13).

characterized by the predominance of parliament and the absence of a constitutional court or weak role for it, and tend to ‘have an institutionalized reluctance about bringing political decisions to the courts for clarification’ (Wind *et al.*, 2009, p. 74). These are typically old constitutions that have developed gradually over a long period, which tends to make them less binding or normative and just as political as legal in nature (Besselink, 2006; Nergelius, 2019, p. 316). This is, for example, reflected in their tendency to incorporate changes incrementally *ex post facto* rather than setting predetermined acceptable margins of institutional behaviour in advance (Albi and Bardutzky, 2019, p.13).

These different traditions also take different views on rights in ways that mirror the tensions just described. Following the legal constitutionalism tradition, courts have been empowered to enforce the constitutional catalogues of fundamental rights (Bellamy, 2007, p. 15; Stone Sweet, 2003, pp. 2767–2768).³ In contrast, because political constitutionalism tends to view courts as a counter-majoritarian force, delegating the protection of rights and civil liberties to courts is to place them above ‘the will of the people’ (Wind *et al.*, 2009, p. 72). Rights in this tradition have been viewed as no more than political claims, the consequence being that politicians rather than judges should be left to accept or reject them (Griffith, 1979, referenced in Castillo-Ortiz, 2019).

Without entering the ongoing debate on how to classify the EU Constitution itself (see Wilkinson, 2013) we can observe that the fact that the EU is extensively defined by law – so much so that it has been called a ‘law state’ (Kelemen and Pavone, 2018, see Mann, 1984) – makes it correspond more closely to the model of legal constitutionalism. The EU also resembles this constitutional tradition in the way the judiciary is central to defining and protecting rights. This leaves us with the question of how the EU’s juridification of social rights might affect norms associated with the respective traditions. To assess this, we first need to look in greater detail at what constitutional social rights norms look like in member states with legal and political constitutionalism, respectively.

III. Social Rights Norms in States with Different Constitutional Traditions

We should first note that the constitutions of all EU member state refer to social rights in some form (Fabr , 2005) and all can be referred to as social states (Katrougalos, 1995). The social state ideal is a normative principle that constitutionalizes governmental obligation in the fields of social (and economic) policies. This has led observers to argue that one thing that unites European states and differentiates them from the USA, for example, is that they have an ‘a priori conception of a public responsibility for the fundamental aspects of the welfare of all citizens’ (Kaufmann, 2013, p. 65); that is, that social policy has a constitutional foundation (Katrougalos, 1995, p. 278). Similarly, C cile Fabr , upon finding that all European constitutions make reference to social rights in some form argues, argues that ‘there is a European culture of social justice, with some variations between countries of course, but a common culture nonetheless’ (2005, 16).

Nevertheless, this encompassing concept incorporates a wide range of variation (Fabr , 2005), to the extent that it is difficult to speak of any common culture or shared constitutional tradition of social rights (De Witte, 2005, p. 155). In particular, we find

³The content of rights contained in constitutions varies somewhat between those that developed following the breakdown of totalitarian authoritarian regimes and that typically include justiciable social rights, and older legal constitutions that typically have bills of rights with more limited justiciability (Albi and Bardutzky, 2019, pp. 15–16).

significant variation with regards to the way in which constitutions oblige the state to protect and realize social obligations and thus also the degree to which constitutions establish the constitutional protection of social rights (Katrougalos, 1995). To illustrate such variation and explore further how social rights take expression in EU member states with different constitutional traditions and what social rights norms this results in, the next part of this article looks in depth at Germany and Sweden, which are quintessential examples of legal and political constitutionalism, respectively (Albi and Bardutzky, 2019). In addition, though they are underpinned by very different constitutional social rights norms, both countries boast extensive welfare states. Looking only at two member states allows us to consider each in greater depth. This comes at the cost of making the argument potentially less applicable to less clear-cut cases of either form of constitutionalism. Nevertheless, the penultimate discussion will touch on possible implications for such countries also.

Social Rights and Legal Constitutionalism: Germany

Beginning with Germany, which has a social state clause enshrined in its Constitution (art. 20[1]). The German Constitution (art. 20[1]) states that the German federation is a 'social federal republic'. This article is again repeated in article 23(1) in respect of Germany's involvement with the EU, and in article 28(1) in respect of the obligations of the federal states. As in other legal constitutions drafted in the aftermath of totalitarianism, the constitutional protection of the social state principle was deemed necessary, as economic insecurity and dependence were considered to be root causes for the emergence of authoritarian regimes (Somek, 2014, pp. 85–86). The importance of the social state principle (*Sozialstaatsprinzip*) is evident in that it is protected by an eternity clause (*Ewigkeitsklausel*) (article 79[3]), which means that it cannot be amended by constitutional procedure – only revolution can change it (King, 2014). The German social state principle binds the judiciary, the executive and the legislative branch. Though the principle defines social policy as an obligation of the state, it leaves the way open for political power and the legislature to decide the means by which it will fulfil this obligation (Katrougalos, 1995, p. 290). In other words, the German Constitution does not enumerate social rights (such as the precise types or amounts of benefits) that individuals should have.

The meaning of the social state principle was never clarified in the creation of the constitution (Stolleis, 2013, p. 58). Nevertheless, in line with legal constitutionalism this abstract principle has been defined by judicial actors, and this way concrete and justiciable social rights have been derived. The German Constitutional Court (*Bundesverfassungsgericht*) has done so by relating it to the (also) constitutionalized values of human dignity, social justice and equality (Katrougalos, 1995, p. 290). The human dignity clause (1[1]) – which declares that the 'dignity of man is inviolable. To respect and protect it shall be the duty of all public authority' – is of particular importance. Combining the social state principle with the human dignity clause, German jurisprudence has derived a constitutional right to minimum social subsistence (*Existenzminimum*).⁴ Accordingly, German courts have 'established a constitutional

⁴BVerfGE 40, 121, 133.

⁵BVerfGE 59 231, 84 133.

“floor” for the social legislation’, meaning that there is ‘a minimum level of social welfare provisions that the legislature is not allowed to withdraw’ (Katrougalos, 1995, p. 291).⁵ More generally, based on constitutional principles and institutionalized power, German courts have ‘attained maximum importance for the reality of the social’ (Zacher, 2013, p. 92) and administrative judges are entrusted to protect citizens against any violation of the law by the administration (Zacher, 2013).

An illustration of how German judicial bodies protect social rights from politics based on these constitutional provisions is when Germany’s Constitutional Court in 2012 ruled that a law on asylum seekers’ social entitlements was unconstitutional. The Court found the set level of benefits for asylum seekers to be ‘evidently insufficient’ to protect human dignity, and ruled that a differentiation of persons with respect to social minimum benefits could not be made based on their nationality or residence status, but only based on their need.⁶ Moreover, with reference to this ruling, advocates criticized the German government’s decision in 2016 to limit the access of economically non-active EU citizens to social minimum benefits for the first five years they live in the country (DPGV, 2016).

Social Rights and Political Constitutionalism: Sweden

The notion of a social state and social rights conveyed in the Swedish Instrument of Government⁷ stands in stark contrast to the German one. Swedish basic law does not contain an explicit social state clause. It also does not include a bill of rights, though it refers to some social rights. However, these rights are expressed as ‘goals for the common’ (*det allmänna*), which is to say, as social *aims* rather than rights that the state and elected representatives should strive to achieve. These goals are not directed at individuals and as a consequence are also not justiciable (Lind, 2009, p. 40). Article 2 of the Swedish Instrument of Government states that

The individual’s personal, economic and cultural welfare shall be fundamental goals for the public institutions [*den offentliga verksamheten*]. In particular, the common should ensure the right to work, housing and education and promote social care and security and for good conditions for health. (Proclamation (1974:152) of agreed new government form author’s translation)

From a constitutional perspective then, social rights are in Sweden considered to be part of the political realm and hence control by the courts has been avoided. What distinguishes social rights in Sweden is their character as ‘collective social rights’, that is, rights realized by a collective and guaranteed as a collective rather than rights in the legal sense of the term (individual, justiciable) (Svedberg and Trädgårdh, 2013, p. 229; Lind, 2009). Social rights in Sweden can be said to build on a much more functionalist than formalist – as found in Germany – understanding of rights (Katrougalos, 1995, p. 297). This follows from a ‘generally weak Swedish constitutional tradition, where the trust in the

⁵BVerfGE 59 231, 84 133.

⁶BVerfGE 132, 134.

⁷The Instrument of Government (*Regeringsformen*) together with the Government Decree (*Regeringsordningen*, author’s translation) constitute the Swedish Constitution.

norm-creating power of the constitution among political parties that have cared precisely for the social and economic rights has been close to non-existing' (Nergelius, 2006, p. 165). Review of legislation is formally allowed in Sweden but almost never practiced (Wind *et al.*, 2009, p. 72). Rather, Sweden (and other Nordic countries) have fostered 'a corps of judges who are unusually loyal to the legislator, never questioning his wisdom and not perceiving its task as protecting the rights of the individual against the state' (Nergelius, 2001, p. 88).

This allocation of power to parliament and tradition of abstract collective social rights is reflected in the way that, in numerous reviews of and changes to the Instrument of Government, Swedish political parties have refrained from tying social rights to the individual and making them justiciable (Lind, 2009, pp. 23–27). When the Instrument of Government was extensively revised in the 1970s, a broad political consensus existed that there was no need to include rules that would bind the state to ensure that the needs of individual citizen be met (Lind, 2009, p. 25). The governing social democratic party was especially resistant to the idea of incorporating social rights in the Constitution and setting constitutional limits to the power of government (Lind, 2009, p. 73). They were suspicious of judges recruited from conservative political strata and the prospect that these would supervise, and perhaps inhibit, social democratic reforms (Katrougalos, 1995, p. 295; Trädgårdh and Carpini, 2004). Including a social minimum in the Constitutions was, in the view of the social democrats, incompatible with their political project of expanding public spending in the social domain. In fairness, it should be added that the centre-right parties that governed Sweden in 2006–14 in no way diverged from this position.

Social rights and the social state principle (Katrougalos, 1995, p. 294) are, in other words, in constitutional and practical terms, only weakly protected by judicial actors in Sweden. Sweden has nevertheless developed what has often been viewed as the hallmark example of a universal welfare state, through which the majority has been comparatively well protected, indeed well beyond some constitutional basic social right. This demonstrates that certain constitutional social rights norms are not preconditions for a comprehensive social state. At the same time, this generous and encompassing system has often failed to protect the individual – especially those deemed to be undeserving or unfit for certain visions of society, as evidenced, for example, in the absence of social rights for marginalized groups (such as those who are HIV positive or addicts) and sterilization laws up until the 1970s (Svedberg and Trädgårdh, 2013; Trädgårdh and Carpini, 2004, p. 51).

Comparing Norms and Practice

Though it has been argued that 'it is a specific feature of the European foundations of the welfare state that the welfare under consideration is primarily *individual* welfare' (Kaufmann, 2013, p. 4), we see that the individual's well-being is pursued on the basis of profoundly different ideas of how it is to be achieved and who is responsible for ensuring it. In Germany, the individual is protected *from* the state through the power of the judicial system at the same time as the judiciary obliges the state to protect the individual. In Sweden, the individual is in contrast protected *by* the state, but not from it.

We have also seen how the different constitutional traditions shape the politics of social policy. In Sweden, elected politicians have deliberately avoided – and, indeed, have been able to choose to do so – making social rights justiciable to leave political scope for policy reforms. In Germany, political actors operate in a context where judicial review on the basis of constitutional norms are part and parcel of politics. These differences in how social policy is constrained or not by way of constitutionally defined rights would appear to be reflected in other forms of institutional design and practice, such as, for example, the strength of available mechanisms for legal redress. A recent study demonstrated that while social rights in the field of education, health care and social assistance are linked to mechanisms for legal redress in each member state included in the study⁸, the strength of redress varies significantly across countries (Stendahl and Swedrup, 2016). On a five-level scale ranging from non-existent to full, Germany is recorded as providing full social rights in all social fields, whereas rights in Sweden score between moderate and fair. Another example is research on the social rights of mobile EU citizens, which has shown that the non-for-profit organizations that support these citizens' social rights claims in Germany turned much more frequently to judicial bodies than their Swedish counterpart, which tended to revert to much less formal negotiation to solve similar issues (Bruzelius, 2017, pp. 170–175). This brings us next to the question of how these different constitutional social rights norms compare with the rights norms expressed in EU law.

IV. Creating Supranational Rights: Altering National Constitutional Norms

The EU has created social rights only indirectly by granting EU citizens access to social provisions defined by member states based on Treaty freedoms and non-discrimination, as described earlier. As a consequence, the EU protects citizens' access to social rights in so far as member states provide substantive rights and the citizens have exercised their EU mobility rights. Mobile EU citizens accordingly may appeal to rights enshrined in the EU Constitution to have their social entitlement in the country of destination protected by the EU judiciary.

This significantly influences and alters social rights norms associated with political constitutionalism, as exemplified by the case of Sweden. Though the EU's extension of entitlements defined in national social legislation has not required (though it has potentially prompted (Erhag, 2016; Kvist, 2004)) member states to change the substance of social legislation (such as the levels or duration of benefits), it has effectively changed the legal character of rights by individualizing them and strengthening their justiciability. Considering specifically the case of Sweden again, Lind (2009) has shown how EU integration has strengthened the legal claim to health care and social assistance in Swedish law. Based on non-discrimination provisions, EU citizens' can have their claims to respective benefits tested in Swedish courts. And as national courts apply EU case law, the individualization of national law advances (Lind, 2009, p. 440).

Though the personal scope of this juridification is limited – it is those who have used their EU mobility rights who can appeal in Swedish courts to EU law to have their access to social provisions in Sweden defended – it in principle affects all nationally provided social benefits and services, as EU citizens are entitled to all, according to the

⁸Denmark, Estonia, Germany, the Netherlands, Poland, Spain, Sweden and the UK.

non-discrimination principle.⁹ EU juridification would thus seem to shift fundamentally the Swedish constitutional understanding of social rights as collective abstract rights defined politically, towards a juridified understanding of social rights where more power to guarantee these rights is transferred to judicial actors. A Swedish constitutional law expert has described this shift more generally, arguing that ‘the country’s Constitution is currently going through a transitional phase, moving away from a traditional, total focus on popular sovereignty to a situation characterised by a separation or division of powers’ and that EU law has ‘developed the scope of judicial review in Sweden’ (Nergelius, 2019, p. 323). As to political constitutions more generally speaking, a pattern has been observed whereby ‘EU law has strengthened the protection of fundamental rights and the general principles of law and has expanded judicial review in countries with a political or historical constitutional system’ (Albi and Bardutzky, 2019, p.20). Moreover, this ‘has often come at the cost of a reduction in the priority of parliamentary and democratic processes’ (Albi and Bardutzky, 2019).

This development also introduces a curious stratification of social rights, as the justiciability of the same legislative social entitlement becomes dependent on whether the claimant has crossed national borders or not. Subsequently, the norms articulated in the Swedish Constitution, according to which political actors should aim to realize certain social rights, now pertain to a majority but not all of those accessing social entitlements defined in Swedish national legislation. A minority can meanwhile access the same social benefits and services on the basis of their commercial mobility rights as defended by judicial actors.

For legal constitutional states, the implications look different. The EU’s claim to social justice for free movers alters the distribution of powers for countries with this constitutional tradition, both by way of adding a supra-constitutional level and by making political decisions subject to the values expressed in the EU Constitution. Yet at a more fundamental level the juridification of social rights is nothing new, being inherent in the legal constitutional tradition. Others have suggested that the resemblance between EU and national legal culture is at play in understanding why some member states – namely, those with a legal constitutional tradition and a strong tradition of judicial review – tend to refer cases to the CJEU for review much more often than those characterized by political constitutionalism (Wind *et al.*, 2009). That said, there is a fundamental difference in the grounds on which social rights are juridified in the German national framework and the EU framework. The German judiciary defend rights on the basis of human dignity, whereas the CJEU indirectly generates access to rights based on the protection of fundamental market freedoms.

In other words, social rights norms common to legal constitutionalism, whereby rights are protected from political will by judicial actors, seem to be more compatible with the EU’s judicial notion of rights than those defined in political constitutions where political actors are tasked with protecting citizens. As social rights in the latter are effectively juridified, we seem to be witnessing a gradual convergence of social rights norms,

⁹Drawing on non-discrimination provisions, the CJEU has also intervened in wholly internal situations – that is, where none of the fundamental freedoms were invoked – to protect economic rights; namely, the equal treatment of men and women in the realm of employment (such as equal pay) (Ellis and Watson, 2002; Isiksel, 2015, pp. 200–202). However, supranational protection of access to social benefits and services is limited to those exercising mobility rights.

contributing to the ‘homogenisation and uniformisation’ of member states’ constitutional law (Albi and Bardutzky, 2019, p. 21).

This analysis shows that differences between political and legal constitutional traditions may be important for understanding how EU juridification impacts on national welfare states in distinct ways (and perhaps also how member states shape EU integration, as shown by Wind *et al.* [2009]). This has not received sufficient attention by those interested specifically in its impact on social policy. With a view to substantive policy, Germany and Sweden may both be considered social market economies, making them similarly incompatible with the EU’s prioritization of markets (Scharpf, 2010). Yet, with respect to their core understanding of social rights these countries clearly diverge and their capacity to remain social states in the particular way specified by their constitutions differs in the context of EU integration.

A perspective that incorporates constitutional social rights norms also lets us notice contradictions at the EU level. For example, this article demonstrates the poor congruence between the Swedish constitutional understanding of social rights and EU rights norms. The EU Commission is nonetheless rather keen on the so-called Nordic welfare model, and explicitly favours and actively promotes many of the social policies that are core to this model, as is very much evident in the European pillar of social rights (de la Porte, 2019; also Kjaer, 2019). Yet with its enthusiastic language of ‘citizens’ rights’ and simultaneous preference for Nordic policies, the Commission overlooks the fact that policies characteristic of the Scandinavian countries have been pursued in the context of weak rights and an institutional framework in which social issues have been much less juridified than in the EU. This is, of course, not the only or the primary explanation for certain social policies in Scandinavian welfare states, but – as the examples given earlier show, whereby suspicious social democrats kept the judiciary at arms length – it is part of the story.

The argument here is based on two ideal models and two ideal-typical cases. Some member states are, however, much less clear-cut cases of political or legal constitutionalism than Germany and Sweden. One example is Finland. This is a country that includes a detailed list of social rights in its Constitution and at the same time has no constitutional court. Rather, constitutional protection primarily assumes the form of *ex ante* review by the Constitutional Law Committee of Parliament (Ojanen and Salminen, 2019, p. 361), leading to a curious blend of politics and law. In this case, the changes to social rights norms brought about by EU law may not have as much to do with the juridification of rights, but with shifting the actors involved in defending them and further empowering judicial actors as the CJEU is added to the picture (see Ojanen and Salminen, 2019).

Conclusion

The argument sketched above suggests that certain constitutional configurations of social rights are more vulnerable to EU integration than others. Specifically, social rights norms associated with political constitutionalism cannot be sustained as power is shifted to the judiciary. This demonstrates how, as Isiksel (2015, p. 9) notes, the EU extraction of competencies from member states and their relocation at the supranational level in an institutional framework whose guiding commitments are not the same as those of the member states, at times, ‘changes the domestic distribution of powers and constraints,

destabilizes domestic constitutional values, and limits the extent to which member states can realize those values' (p. 9). Moreover, as the EU individualization of rights appear to result in convergence of constitutional social rights norms, it would seem to also prompt a reduction in the degree of constitutional pluralism (Walker, 2016).

There is most likely no alternative to this refashioning. The EU is modelled very differently from political constitutionalism, with law as its key mode of governance and with extensive power granted to the CJEU. However, the juridification of nationally defined social rights is in and of itself not necessarily a reason to reject this development. As alluded to, Sweden is an instructive example of how individual rights may suffer as a result of a collective understandings of social rights. Instead, the challenge is that EU juridification has thus far not involved the development of a supranational protection of fundamental social rights, but only of market freedoms (Isiksel, 2015). For the time being, substantive social rights in the EU continue to depend on member states and their particular institutional configurations. Allowing space for such differences may hence be important for a 'social Europe'. At the same time, however, EU integration offers reasons to reconsider some such institutional particularities. In light of negative integration and the incapacity of the CJEU to protect basic social rights judicially (Kornezov, 2017), welfare states developed by electoral bodies that historically saw no strong reason for anchoring these achievements in constitutionally protected rights (Scheinin, 2001) may now want to strengthen the justiciability of social rights in constitutional law. Indeed, one reason for the 1995 incorporation of judiciable social rights in the Finnish Constitution was 'constitutional self-defence' in response to worries of what EU membership might bring (Ojanen and Salminen, 2019, p. 376).

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