

[Review] Anne Wesemann (2020) Citizenship in the European Union: constitutionalism, rights and norms

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Book Review

Citizenship in the European Union: Constitutionalism, Rights and Norms

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Abstract

Wesemann offers a refreshingly insightful and theoretically sophisticated analysis of the jurisprudence of the Court of Justice of the European Union (CJEU) on EU citizenship by framing her analysis within the theory of constitutional rights developed by German theorist Robert Alexy.

Keywords

Citizenship, Alexy, pluralism, constitutionalism, constitutional rights, Court of Justice of the EU, judicial activism

Published in 2020, Anne Wesemann's book *Citizenship in the European Union: constitutionalism, rights and norms* is a refreshingly insightful and theoretically sophisticated analysis of the jurisprudence of the Court of Justice of the European Union (CJEU) on EU citizenship. Building on her doctoral thesis submitted at the University of Sussex,¹ Wesemann offers a much welcome addition to the fields of legal theory, constitutionalism, and EU (and) citizenship studies. Despite the never-ending body of literature on the topic of EU citizenship,² Wesemann successfully offers something new to the field.

In Chapter 1, Wesemann introduces and contextualises the topic, namely an exploration of the CJEU's jurisprudence on citizenship from the prism of the theory of constitutional rights developed by German theorist Robert Alexy.³ Wesemann identifies a clear gap in research, namely the application of Alexy's legal theory to the field of EU citizenship. While Alexy's work has already been explored in relation to the Charter of Fundamental Rights, Wesemann addresses for the first time the relevance of Alexy's work in the context of the CJEU's jurisprudence on EU citizenship. Moreover, Wesemann wishes to make a contribution to the debate on 'judicial activism', something of which the CJEU is often accused. Finally, Wesemann rightly points to the topicality of EU citizenship, especially in light of the UK leaving the EU and UK nationals without any other EU nationality losing their EU citizenship (p. 12).

Alexy's theory of constitutional rights is presented and analysed in detail in Chapter 2, offering a clear picture of Alexy's work of relevance for the book's topic. Despite having been developed in reference to the case law of the German Federal Constitutional Court (*Bundesverfassungsgericht*), Wesemann highlights the broader relevance of Alexy's theory to positivism, morality, argumentation and constitutional rights (p. 21). Wesemann focusses on the distinction between rules and principles, how the optimization requirement (i.e. the need to be fulfilled to the optimum extent legally and practically possible) applies to principles, what is to be done in cases of conflicts between norms, and the role that the principle of proportionality plays in this legal theory. Wesemann also usefully addresses several critiques to Alexy's work (including by Jakab, Yaz and Klement),⁴ and cogently defends that these critiques do not undermine in any significant way Alexy's work, in particular his functionality argument.

To facilitate the use of Alexy's (imminently domestic) legal theory in the context of EU law, Wesemann frames her view of EU law as a form of legal (constitutional) pluralism. She thus uses Chapter 3 – especially by drawing on the work of Patrignani, Bianchi, Tamanaha, Menéndez and Walker –⁵ to analyse different forms of pluralism and to what extent they suit the EU, the activity of the CJEU, the notion of citizenship and the work of Alexy. Wesemann shows awareness of the complexities in this field and addresses them promptly. The chapter thus draws from broader debates on EU constitutionalism to effectively contextualise the nature and characteristics of EU law, which proves useful for subsequent analysis. Indeed, the analysis in this chapter ultimately justifies applying to the EU law context a legal theory that was developed in reference the (German) domestic legal context and applying Alexy's legal theory to EU citizenship in particular.

Similarly, Chapter 4 provides further useful contextualisation by exploring the origins, evolution and notion of EU citizenship, always remaining clear that the focus of the book is placed on *how* the EU citizenship treaty norms work (i.e. their structure) rather than what content they entail (i.e. their substance). Building on the scholarship of Barbalet, Bellamy Habermas and Eleftheriadis (among others), Wesemann discusses EU citizenship as a form of post- and trans-national form of citizenship. Wesemann concludes that Articles 20 and 21 of the Treaty on the Functioning of the European Union (TFEU) are constitutional rights norms, as well as part of the EU's constitutional legal framework.

By the same token, Chapter 5 provides an important discussion of the activities of the CJEU, how it is seen by commentators, and how it decides on cases. Through the prism of

the Court's reasoning and methods of interpretation, Wesemann focusses in particular on the (un)fairness of accusations of 'activism' frequently addressed to the Court. By tackling the critique produced by scholars such as Rasmussen, Kmiec, Schmidt, Beck, Sarmiento, Sakari and Conway, Wesemann argues that what is often perceived as 'political' or 'activist' is indeed in most cases the result of the structure of the norms being used. Accusations of 'activism' are thus over-simplistic and fail to grasp the structural nature of the norms in question.

Having laid down such solid foundations for the book's main focus, Wesemann then deals with its core analysis in Chapter 6: how the CJEU uses EU citizenship norms – namely Articles 20 and 21 TFEU – as constitutional, open-textured principles (as understood by Alexy) in its legal reasoning. For these purposes, Wesemann draws from both judgments and opinions by Advocates General, and selects the *Grzelczyck*, *Rottman* and *Zambrano* cases as key examples of EU citizenship working as a constitutional norm in the Court's decision-making. This is particularly visible in the way the Court deals with Articles 20 and 21 TFEU as open-textured principles and optimization requirements, how it carries out the balancing of rights and interests (namely individuals' rights and interests, on the one hand, and States' sovereignty over immigration matters, on the other hand) and how it applies the principle of proportionality. The 'genuine enjoyment' test, for example, can be seen as an example of a legal mechanism devised by the Court to operate the balance of interests required by the constitutional nature of Articles 20 and 21 TFEU. This is not, contrary to what is claimed by some, a means to use Articles 20 and 21 TFEU to always favour the individual, as decisions in cases such as *McCarthy*, *Dano*, *Petruhhin* and *Tjebbes* show that the Court may find it more appropriate to decide the case on the basis of more specific rules rather than the Treaty norms, or simply decide that the balance of interests in question cannot favour the individual. Decisions in cases such as *Chavez-Vilchez* and *Lounes*, instead, confirm the way the Court works with Articles 20 and 21 as constitutional norms, as understood by Alexy.

Wesemann does not aim to replace other perspectives on the Court's jurisprudence on EU citizenship (which generally focus on the content of this legal status), but rather complement those perspectives with a methodological, similarly valuable view. She thus adds 'an objective and structural argument to the list of substantive and subjective reasons why cases are decided in a particular way' (p.139). She does so admirably, while also engaging with and deconstructing the 'judicial activism' criticism addressed to the CJEU. Wesemann presents a sound and much neglected view that the CJEU's jurisprudence on EU citizenship is the result (to a significant extent, at least) of the structure, function and characteristics of the Treaty norms in question rather than the product of a (more or less) hidden agenda. This, Wesemann hopes (p. 11) and I would agree with her, can help us produce more objective analyses of the Court's decisions relating to citizenship.

Much of what Wesemann says in her book will probably resonate with CJEU judges and legal scholars educated in the German legal system or who draw inspiration from Germanic legal literature. Yet, more generally, it will also resonate with all those who see the 'constitutional depth and potential of EU law' (p. 3) and has the potential to enhance our understanding of the workings and dynamics of the CJEU and its decision-making.

Although I was familiar with the work of Alexy, having used it in my own doctoral thesis,⁶ I found Wesemann's exploration of Alexy's legal theory (especially through Chapter 2) not only clear but also enlightening for both expert and uninitiated audiences. This book thus has the potential to help raise further awareness of the work of Alexy outside Germany. Furthermore, this book opens the way to the exploration of Alexy's work in relation to other legal fields and topics, including other policy fields in EU law, as Wesemann points out (p. 144).

In short, Wesemann presented us with a concise, elegantly written and nuanced monograph, which can be of great interest to academics, judges and policy-makers across

disciplines and jurisdictions. It will certainly appeal to legal, constitutional and European theorists as well as to scholars interested in citizenship and CJEU debates. It is overall an authoritative, solid and convincing application of Alexy's theory of constitutional rights to the CJEU's jurisprudence on EU citizenship and, as Wesemann says, 'we may not agree on the detail, but we agree to debate' (p. 147).

BIBLIOGRAPHICAL INFORMATION

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ENDNOTES

¹ For the sake of transparency, I want to acknowledge that I have acted as main supervisor of Anne Wesemann's doctoral studies towards the end of her time at the University of Sussex, more precisely between March 2017 and September 2018.

² For a recent example, see Dora Kostakopoulou (2020) *EU Citizenship Law and Policy: Beyond Brexit*, Edward Elgar.

³ Wesemann draws from both the original German language version and the English language translation of Alexy's main works, including Robert Alexy (1994) *Theorie der Grundrechte*, Suhrkamp, and Robert Alexy (2002) *A Theory of Constitutional Rights*, Oxford University Press.

⁴ András Jakab (2016) *European Constitutional Language*, Cambridge University Press; Joseph Raz (2007) 'The argument from Justice, or How Not to Reply to Legal Positivism', in George Pavlakos (2007) *Law, Rights and Discourse. The Legal Philosophy of Robert Alexy*, Hart; Jan Henrik Klement (2008) 'Vom Nutzen einer Theorie, die alles erklärt: Robert Alexys Prinzipientheorie aus der Sicht der Grundrechtsdogmatik', *JuristenZeitung*, Vol. 63, 15/16. pp. 756-763.

⁵ Emma Patrignani (2016) 'Legal Pluralism as a Theoretical Programme', *Oñati Social-Legal Series*. Vol. 6, 3. pp. 707-725; Andrea Bianchi (2016) *International Law Theories*, Oxford University Press; Brian Z. Tamanaha (2011) 'The Rule of Law and Legal Pluralism in Development', *Hague Journal on the Rule of Law*. Vol. 3, 1. pp. 1-17; Augustín José Menéndez (2011) 'From Constitutional Pluralism to a Pluralistic Constitution? Constitutional Synthesis as a MacCormickian Constitutional Theory of European Integration' in Augustín José Menéndez and John Erik Fossum (eds) *Law and Democracy*

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⁶ Subsequently re-worked and published as Nuno Ferreira (2011) *Fundamental rights and private law in Europe: The case of tort law and children*, Routledge.