Book Review

Anne Wesemann: Citizenship in the European Union Constitutionalism, Rights and Norms

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ABSTRACT

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Summary

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1. A BOOK WITH FOUR PLOTS

A good soap opera needs at least three plots to keep it entertaining. One doubts that is true for academic books yet it is the case for Anne Wesemann, *Citizenship in the European Union: Constitutionalism, Right and Norms*, Edward Elgar: Cheltenham, 2020. Indeed, its title is something of a misnomer: it is only in part about Citizenship in the European Union. Its subtitle, *Constitutionalism, Rights and Norms*, hints at more but still sells the book somewhat short.

The stories to be found in the book are indeed fourfold:

1. Can the constitutional rights norms theory of Robert Alexy be usefully applied to certain decisions of the European Court of Justice?
2. What is EU citizenship?
3. Is German constitutionalism useful outside its home jurisdiction?
4. Is the European Court of Justice overreaching itself?

They are interlinked stories, as they should be, although as we shall see only the first is dealt with convincingly, yet all have a value, if not as entertainment then as intellectual stimulus.

2. THE STRUCTURE

Before spoilers of those stories are ventured, the structure of the book as a whole needs review. Traditionally thesis-like, it has an Introduction with corresponding Conclusion, the former with methodology and outline.

With creeping scientism a methodology is now required of legal academic work even when that work is entirely and obviously within a prevailing discourse. Wesemann sets out her methodology thus:

... this book will follow a doctrinal methodology, analyzing Treaty norms through the lens of CJEU jurisprudence in order to determine the relevance or norm theory for the EU framework in the particular given context. Primary and secondary legal sources will be considered alike and evaluated in the context of constitutionalism and constitutional rights norm theory. Particular consideration will be given to the EU Treaties and the work of Robert Alexy, as well as the critiques of it produced by Jakab, Raz and others. (pp 1-2)

Doctrinal methodology is a matter practicing within the accepted norms and practices of the discourse of law, of working within the law to find out answers to the

question, 'What is the law?' Wesemann does not answer any such question. She does, however, answer such questions as, 'How are decision as to citizenship arrived at?' 'What is the role of the European Court of Justice?' 'What do those answers mean for the nature of the European Union?' And 'Can German jurisprudence be applied outside Germany?' She applies herself to these questions with the argumentative methodologies of the humanities rather than deploying the legal reasoning of deduction from rules or induction from cases. Rather, she tests her hypotheses against cases as data, a distinctly scientific approach. While such methodological confusion might have been fatal to a less comprehensive treatment of its subject matter, Wesemann's arguments survive simply because they lie well within the accepted conventions and norms of a discourse, although it may not be the one she thinks it is.

Each of the substantive chapters (episodes) provide material of more or less significance to the four stories. This is a sensible strategy and makes the book exceedingly useful as a resource kit for the four discrete subjects (Alexy's theory, European constitutionalism, Citizenship, the European Court of Justice) comprising that material. Yet Wesemann does not draw the four plots together in her Conclusion, there focusing entirely to the applicability of Alexy's theory to the jurisprudence of the European Court of Justice and the consequences that flow from that. Indeed, it appears at times she is not entirely sure as to what her book is about, although she sometimes hauls herself up and explicitly states that it is about "norm-theoretical analysis of Articles 20 and 21 TFEU governing EU citizenship" (p 115). Nevertheless, the place of German constitutionalism as jurisprudence and the role of the European Court of Justice in an inchoate institution are well and usefully discussed at appropriate points. These discussions seem missed opportunities for worthwhile originality claims.

Wesemann's first substantive chapter critically analyses Alexy's constitutional rights theory. German jurisprudence is a peculiar, even headache-inducing, thing to the Antipodean mind. There is a drive to deprive concepts of content, to create a science of law in the way that logicians deal with philosophy. That is no criticism, for there may be a point to the structuring of legal reasoning, it is just that it harks back to the jurisprudence of Julius Stone which dissolves in a tangle of individual mental tropes without ever dealing with the ultimate question of, 'Why this decision?' Nevertheless, the chapter convincingly argues that a norm

can be either a rule or a principle and in the latter form is subject to contestation by other norms. The resolution of such contestations should be viewed as measuring the principles against each other in the circumstances and determining which is more important.

The second substantive chapter (Chapter 3) is about the nature of the European Union. A variety of concepts of EU constitutional law and legal order, such as particularism, holism and federalism, are discussed with an ultimate focus on constitutional pluralism. Adopting the pluralist analysis allows Wesemann to apply Alexy's approach to EU constitutional norms. The discussion is a useful critical overview of EU constitutional theory and its development, although federalism is given a somewhat short shrift. Federalism comes in more varieties and with more diverse underpinnings than allowed. After all, the States of Australia and of the United States in themselves retain jurisdictional specificity and sources of law-making power—Australia and the United States are confederations rather than federations. A closer analysis of such constitutional structures might have reduced the seeming idiosyncrasy of the EU.

Chapter 4 is about citizenship. To the legal scientist, the content of concepts is irrelevant yet Wesemann surveys the idea in order to make possible the test of Alexy's theories against the jurisprudence of the European Court of Justice in relation to the citizenship articles of the European Treaties. Again, it is a useful discussion although somewhat limited by its refusal to engage with the concept as explicitly expressed in law. For example, the history of British citizenship is one of subjection rather than participation yet this in itself provides the core formative institution of the British state, allegiance, through the formulation of Lord Coke's constitutional vision in *Calvin's Case* ((1608), 77 ER 377, (1608) Co Rep 1a). Subjection and citizenship are formed through allegiance and thus concepts of *demos* fall away. Similarly, in Australia, belonging without citizenship has been accepted in *Love v Commonwealth*, *Thoms v Commonwealth* ([2020] HCA 3). The shattering of citizenship into a myriad part in that jurisdiction renders illusory the teleology for citizenship annunciated by Wesemann in the chapter. On the other hand, the retreat to a more doctrinal method, the interrogation of the notion of European citizenship, in this chapter and in Chapter 6 is most useful and illuminating, especially as it allows the constitutive effect of determinations of the meaning of citizenship on the EU as a polity.

The next chapter again steps back from the tram-tracks of the argument to fill in background, in this case to explore the status of the Court of Justice of the European Union. This is a most illuminating chapter, quite intriguing for its suggestion that a court may constitute a polity as much as a sovereign, act of revolution or some other congealing of law-making power. Autopoiesis leading to autochthony has a variety of mechanisms in human society as much as it has for plants.

These four chapters set up the argument with the material for Chapter 6. Wesemann takes a number of cases decided by the Court of Justice of the European Union and asks whether they fit the reasoning structure set out by Alexy's constitutional norm theory. Of course, she finds that they do and in Chapter 5 and the Conclusion fleshes out what that might mean for the nature of citizenship of the European Union, arguments about the overreach of the Court, and the applicability of Alexy's theories outside Germany. Wesemann's methodological confusions play out here, as scientific methodology would have it that that to test a hypothesis is merely to determine whether it is false rather than to establish its truth. The cases may well fit within Alexy's approach to norm application but may just as well fit within another approach. However, it proves to be a minor point because Wesemann does not in the end claim truth, merely applicability with what may be found to follow.

3. SPOILER ALERT!

At the outset of this review, the four stories to be found in this book were set out. Wesemann does bring the whole around to the application of the constitutional rights norms theory of Robert Alexy to certain decisions of the European Court of Justice. Of course, were the book so simple it would not have been necessary to take us through Chapters 3, 4 and 5. A theory can come from anywhere; it is tested against the data (the cases), and if it works what that means can then be deduced. Here it does work and indeed works well. It provides a useful way of thinking about rights and makes clear distinctions between rule application and rights determination.

Yet Wesemann has interwoven other stories, perhaps less convincingly but no less intriguing for that. One is about citizenship of the European Union as something with a less than determinate content but with generative capacity compatible with sovereignty of European states. Mind you, citizens of confederal nations would not find

this alien. The process of formation of a polity starting with a court and a jurisdiction rather than territory and force is worth observing. Maybe there is overreach and maybe Alexy's theory allows a defense; all in all the book provides us with insight. We are given the arguments, although not the solution as one cannot claim a theory to be the law.

Referring to Wesemann's third theme or story, taking a jurisprudence out of its home jurisdiction and applying it elsewhere is an exercise in comparative law. The whole book becomes an exercise of doing just that and as such is excellent. We see the utility of the contentless concept at the same time as exploring the limitations of this form of reasoning. Beyond the mere intellectual curiosity as to what Europeans are up to, it is this exercise which provides the attraction of the book to the world outside.

4. CONCLUSION

Overall, Anne Wesemann, *Citizenship in the European Union: Constitutionalism, Right and Norms* is useful both descriptively and argumentatively. Descriptively we learn a lot about the European Union and its processes and institutions. Argumentatively, the conclusions are more or less relevant outside the European Union. Alexy's theories are a useful tool of analysis and European citizenship is as context-bound as any. Comparative law will benefit from the argument. I would highly recommend this book for the non-EU reader as it introduces us to a way of thinking (not just Alexy's) which is dense, well-read, tightly argued and somewhat myopic. For the EU reader, I dare say it is a useful contribution to an important debate. I doubt that the British will want to know.