PÄIVI JOHANNA NEUVONEN, EQUAL CITIZENSHIP AND ITS LIMITS IN EU LAW: WE THE BURDEN? (HART PUBLISHING 2016)

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One of the most pressing issues concerning the free movement of EU citizens is from what moment in time mobile EU citizens are to be entitled to social benefits in the host Member State. This matter raises profound questions of justice, which have recently been attracting considerable attention. Like Floris de Witte's monograph Justice in the EU,[1] also Neuvonen's Equal Citizenship and Its Limits in EU Law: We the Burden focuses on the EU citizenship case law and does so through the discourse of justice. Both authors have their own take on these issues. While de Witte's perspective is more communitarian,[2] Neuvonen draws upon principles of egalitarian justice, offering a new and original perspective to the (case) law that governs the position of EU citizens who have moved to another Member State and claim benefits there. One of the novelty aspects of this book is the less doctrinal approach to the issue at stake. Looking at an array of non-legal disciplines, Neuvonen tries to explain why equality of treatment between EU citizens is important for the realisation of substantive justice within the EU. The book is to be commended for what it aims for. Yet, as I will explain, it suffers from several shortcomings and at times raises more questions than it answers. Before engaging in a critical discussion of the book, I will briefly set out the structure and main arguments of Neuvonen's analysis. The book is divided in two parts. The first offers an overview of the development of the non-discrimination principle and explains how this has created an equality problem: the equality principle remains premised upon individual

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1 See also: Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015). For a collection of essays on justice in the EU, see: Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015).

2 De Witte (n 1) 11.

responsibility, namely the responsibility to be economically or socially active. The second part offers solutions to this problem.

The first part comprises three chapters. The first offers a historical overview of the development of the principle of non-discrimination on grounds of nationality to a principle of equal citizenship within the EU and explains how these developments have given rise to an equality problem. Is the equality principle an independent principle of EU citizenship or does it remain dependent on the exercise of free movement?[3] The second chapter puts more substance to this critique and offers a detailed analysis of the right of the economically active and inactive EU citizens to equal treatment in the host Member State. This analysis, Neuvonen claims, demonstrates that the potential of EU citizenship has remained unfulfilled and that the equality problem remains: there is no adequate consideration of 'what differential treatment means for the equality of relationships between EU citizens'.[4] The third chapter concludes the first part and offers a theoretical critique. It is suggested, in essence, that the EU's equality principle is still premised upon 'ideals of individual responsibility and agency'.[5] This individualistic approach violates principles of egalitarian justice.

The second part builds upon the first and suggests a number of ways to create more just and equal relationships among EU citizens. The fourth chapter constructs EU citizenship as a source of subjectivity on the basis of feminist theory and, additionally, psycho-dynamic and phenomenological theories. According to Neuvonen, EU citizens' sense of subjectivity only emerges through social relations with other EU citizens. The last chapter explains what this ought to imply when applied in practice. Instead of an 'activity-based ideal of equality', 'more weight must be given to the impact which [legitimate differential treatment] may have on the equality of horizontal relationships between EU citizens'.[6] Such an interpersonal perspective would pay more attention 'to how the refusal to grant equal treatment, may create an obstacle to the Union citizen's ability to integrate into the society of the

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3 Päivi Johanna Neuvonen, *Equal Citizenship and Its Limits in EU Law: We the Burden?* (Hart Publishing 2016) 25.

4 ibid 87.

5 ibid 89.

6 ibid 176.

host Member State and to relate to the nationals of that state on an equal basis'.[7]

This brief overview does not do justice to the depth of Neuvonen's analysis, though the manifold theoretical perspectives introduced above will give the reader of this review an idea of the book's ambitions. As a result, the book offers an interesting and innovative perspective.

Having said that, the argument is not always convincing or clear. I will focus on four shortcomings here: (1) the project is methodologically not without problems; (2) the argument is not always consistent; (3) the argument remains obscure at times; (4) open ends remain.My first concern is about the project's methodology. I agree with Neuvonen that traditional positivist approaches, which offer an internal perspective but fail to take into account insights from other disciplines, are methodologically limited. The book therefore tries to complement a more traditional legal analysis with insights from non-legal disciplines.[8] Such an external approach to the study of EU citizenship indeed is beneficial. Unfortunately, the interdisciplinary perspective is not pushed far enough and was introduced too late in the analysis.

The first part of the book remains largely uninformed by theory, while this should have been the point of departure. Only following an outline of the theoretical premises an examination about whether the law complies with them should have been carried out, ideally, adopting an interdisciplinary and deductive approach from the very beginning. Instead, the book reverses this order. The first chapter, for example, reads like a very traditional account on the nature of EU citizenship. The existence of 'reverse discrimination' is seemingly criticised and seen as a limitation imposed upon EU citizenship;[9] EU citizenship's core rights are different from those of a traditional citizenship;[10] and EU citizenship will remain largely meaningless if it is not developed into a 'genuinely equal status'.[11]

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7 ibid 178.

8 ibid 7–8.

9 ibid 27–30.

10 ibid 36.

11 ibid 38.

Strikingly, these arguments are followed by the claim that 'the essence of the rights of EU citizenship depends on how we address the "still unanswered question of what Union citizenship actually is or ought to be"'.[12] Ideally, it should have first been explained what EU citizenship is indeed supposed to be, in view of the author, before an account of what is problematic about EU citizenship could be offered.

Notably, the claim that EU citizenship's core rights are different from traditional citizenship rights is profoundly disputable, and much depends on one's conceptualisation of EU citizenship. Some have suggested that EU citizenship is not unlike a 'federal citizenship', precisely because EU citizenship's core rights, the right to free movement and the right to non-discrimination, are like that of a federal citizenship.[13] Therefore, EU citizenship appears much alike a traditional citizenship. Of course, one may think that EU citizenship should depend less on the right to free movement, or that this right's current interpretation raises problems of its own. Whether that is the case, however, depends upon one's conception of justice, which is precisely why theory should have been the book's point of departure. Currently, theory merely serves to reinforce the arguments in the first chapters and, as I will explain below, does not do so with sufficient clarity.Unfortunately, the arguments seem inconsistent at times. The problem that informs the study is defined differently throughout the book and I am uncertain also about the precise solutions Neuvonen has in mind.

At least three different problem definitions are given by the author. At the outset, it appears that the equality problem concerns the question of whether the non-discrimination principle is to be dependent on the free movement principles or should have an independent meaning.[14] To me, it is hard to see how the principle of non-discrimination cannot, to a considerable extent, depend on the exercise of free movement by an EU citizen to another

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[12] ibid 39. Neuvonen quotes Anne Pieter van der Mei, 'The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look through the Lens of Union Citizenship' (2011) 18 Maastricht J. Eur. & Comp. L. 62.

[13] Christoph Schönberger, 'European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism' (2007) 19 Revue Européenne de Droit Public 61.

[14] Neuvonen (n 3) 25.

Member State, and it is perhaps fortunate that the problem is redefined a little later. Subsequently, it is suggested that '[t]he core of the structural EU equality problem is that the residence-based scope of EU citizens' general right to equal treatment can easily lead to circularity in the application of the EU principle of equality'.[15] This, I assume, also is not truly the equality problem Neuvonen wants to address in her book. Because if, as the author appears to argue, the circularity results from the ECJ's legal reasoning, all that would be required is for the Court to offer a more coherent and less circular argument. Only halfway through the book, after the principles of egalitarian justice have been discussed, does the problem that appears to truly animate the book truly emerge. This, in view of the author, is that 'the EU principle of equality suffers from a bias in favour of individual responsibility at the expense of just and equal relationships between EU citizens'.[16] These different problem definitions could have been avoided had a solid theoretical base been introduced from the outset and had the problem the book seeks to address been presented against the backdrop of egalitarian principles of justice from the very beginning. This third, egalitarian justice-based, definition of the problem could then have been used from the start.

Unfortunately, also the solution proposed is not entirely clear. From the reconstruction of EU citizenship as subjectivity, it follows that we should pay more attention 'to how the refusal to grant equal treatment may create an obstacle to the Union citizen's ability to integrate into the society of the host Member State and to relate to the nationals of that state on an equal basis'.[17] What remains unclear is what this ought to entail precisely. On the one hand, the suggestion is that limitations to the principle of equal treatment must be interpreted narrowly and that equality of outcomes is not necessarily the aim.[18] On the other hand, the same page offers the suggestion that the current interpretation of Article 18 TFEU implies that *those who belong deserve to be treated equally*, whereas viewing EU citizens as full and equal subjects of EU law would suggest that *those who are treated equally (will) belong.*[19]

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[15] ibid 59.

[16] ibid 112.

[17] ibid 178.

[18] ibid.

[19] ibid.

But this statement is, or at least very much appears to be, about equalities of outcome. Neuvonen appears to suggest that only by being treated equally do EU citizens belong and become full and equal subjects of EU law. Since the latter appears to be what Neuvonen's preferred conception of justice requires, it is difficult to see how derogations from the principle of non-discrimination can remain tolerable. After all, for as long as equal treatment is not extended to all, certain categories of EU citizens will suffer in their social interactions with other EU citizens. This is exactly what Neuvonen is concerned with and what is required to give substance to EU citizens' subjectivity.My third concern with the book relates to its level of theoretical complexity and the fact that obscure concepts are not always explained with sufficient thoroughness. The theoretical part draws upon a wealth of theoretical insights. The ambition is not without potential pitfalls. Most EU lawyers will be unfamiliar with the theories used, including those of psychoanalysis or development psychology. A careful articulation of these disciplines' theoretical premises and insights is required, therefore, and so is a clear argument of how to best translate them into EU law. Unfortunately, the terminology used is often quite cryptic and is not always clarified by the author, making the argument difficult to follow at times. The book's second part is written densely and the language not always clear. For example, there are pages of nothing but expert quotes, yet forgetting to add an explanation for the benefit of an EU lawyer, illiterate in these areas, like the author of this review, of what is meant precisely.[20] How the study of EU citizenship can benefit from insights derived from these disciplines, therefore, is sometimes hard to grasp.

In addition to the disciplines mentioned this far, Neuvonen regularly makes minor detours to other theoretical fields to enrich the argument. Her exposé on feminist theory, for example, is complemented by insights from care ethics.[21] Readers of this book can certainly expect an exciting rollercoaster ride through a variety of ideas. However, like many such rides, at times it may also evoke some feelings of dizziness. The book tries to do so much that it sometimes does too little. Due to the range of disciplines covered and the range of counter-arguments that need consideration, it sometimes seems like

[20] Page 153 provides a good example.

[21] Neuvonen (n 3) 143–144.

there is insufficient space to reflect in depth upon all the literature being discussed.

Take as an example the democratic critique of justice arguments, which somewhat unexpectedly appears on pages 116 and 117. According to this critique, 'objectively defining universally valid principles of justice seems impossible,[22] and individuals, who are living under different circumstances and having different talents and preferences, disagree about what it means for society to constitute justice. .[23] Therefore, it would be wrong to think that we can identify a correct conception of rights and justice and, therefore, also that judges are better situated to identify the correct or better view on the substantive results to be pursued by society. Theorists that have advanced this democratic critique tend to believe that disagreements about justice are, therefore, ideally to be resolved by our democratically elected institutions.

Considering that Neuvonen suggests that 'the theory of democratic equality (...) forms the basis of [her] critique of the EU principle of equality'[24] one would expect this democratic critique to be given full consideration. After all, would Neuvonen subscribe to the democratic critique, it should have great implications for her argument. Seemingly, she would have to acknowledge that her preferred conception of justice is ideally not imposed upon the EU by the ECJ, but to be adopted through more democratically legitimate procedures. Instead, she suggests that her solution to the equality problem 'must be constructed by EU law because [it] will not emerge otherwise'.[25] She does not specify in detail how this construction is to happen, but it appears that the Court should be made largely responsible for this.[26] Why precisely the democratic critique is irrelevant for the remainder of the book is never really clarified. The question that remains, therefore, is how her argument can be squared with her insistence on democratic equality. The argument seems vulnerable to critique pointing out that most legal scholars place great weight on promoting equality of concern and respect [yet] all too often ignore

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[22] Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) Chapter 8.

[23] Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2008) Chapter 2.

[24] Neuvonen (n 3) 110.

[25] ibid 174.

[26] This is what page 177 appears to indicate.

[individual's] intrinsic, as opposed to merely instrumental, links with the ability to participate on an equal basis to others in decisions concerning the very foundations of their political and social life.[27]

Neuvonen emphasizes the importance of equal social rights, but she also claims that democratic equality forms the basis of her argument. Unfortunately, she does not explain how democratic equality is best to be realised within the EU. Admittedly, this is a topic that warrants an entirely different study, but the tension in the book's argument is considerable. If democratic equality truly is at the heart of her argument, it is problematic whether the author's suggestion is, in fact, that the ECJ must realise equal treatment of social rights. Since Neuvonen demonstrates awareness of these counter-arguments, one would have expected a more persuasive rejection of them. Having said this, the book offers an interesting perspective. The ambitions and the methodological premises as formulated at the book's outset should serve as an example for others. The book demonstrates that there is value in new critical and constructive perspectives that challenge dominant narratives. New perspectives also bring about new challenges. The use of novel disciplines requires a careful exposition of those disciplines' concepts and terminology to make them accessible to EU lawyers and will require a careful application to avoid problems of consistency. Unfortunately, the book does not always successfully overcome these challenges. I am uncertain, therefore, how persuasive Neuvonen's account of justice is and what precisely is to change for EU citizenship to comply with her preferred conception of justice.

[27] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 152.