The Rise and Decline of Fundamental Rights in EU Citizenship

Adrienne Yong
V. The Three Ages of EU Citizenship

Nic Shuibhne coined the notion of ‘ages’ of citizenship. She separated the case law of citizenship into three distinct time periods by identifying when the Court adopted distinctly different judicial reasoning in its decisions. She also identified two events in citizenship’s historical timeline that were the clear driving forces behind the shifts in normative judicial thinking. The first is the Sala case, a widely accepted landmark of EU citizenship law, which demarcated when the first age of *homo economicus* reasoning ended and when the second age of *homo civitatis* reasoning instead began. The second is the introduction of the only other formally codified legal instrument specific to EU citizenship, the Citizenship Directive 2004.155 Nic Shuibhne argued that the specificity of the provisions and codification of principles in the Directive led the Court down a different judicial route, and this now drives the Court’s decision-making process. Whilst this book adopts the notion of distinct periods of normative reasoning exemplified by the Court to demarcate ‘ages’ of citizenship, it will not use the same indicators to separate the ages. Instead, it argues that the Lisbon Treaty and the binding status of the Charter have changed the Court’s judicial direction. Therefore, in reference to the three ‘ages’ of citizenship, this book identifies the first age to be case law before *Sala* in 1998, the second age to be the decade of citizenship case law after 1998 leading up to 2009, and the third age to capture the case law after the Lisbon Treaty entered into force.

At this juncture, it may be worth noting that this book has been written in a very interesting political timeframe for the EU itself as well as for various Member States. It marks the first time that a Member State has chosen to trigger the withdrawal provision, Article 50 TEU, and begin the process of withdrawing as a Member State of the EU.156 In this regard, it seems relevant to also add a ‘fourth’ age: the Brexit age. The UK’s EU referendum vote’s outcome in mid-2016 has led to a flurry of activity within the EU and the UK as they negotiate the very complicated and unprecedented process of withdrawal. There have been a great number of serious effects on many different areas. One of the most controversial has been the area of citizens’ rights in the context of fundamental rights protection. This has gone hand in hand with the discussion applicable human rights protection post-Brexit, and also forms a large part of this book’s analysis.

However, returning to the earlier history of citizenship, what can be said to be a dominant feature of the cases in the first age of citizenship is that they can also be situated within the scope of the internal market.

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156 Letter from Theresa May to Donald Tusk (29 March 2017).
is criticised because the Court used approaches already employed under the fundamental freedoms to advance EU citizenship. The Court was seen to apply internal market principles to situations that would otherwise have fallen under citizenship case law by extending the scope of workers’ rights.157 It continued with this even after citizenship was introduced,158 giving rise to concerns that the status was nothing more than an empty political statement.159 The protection of fundamental rights had been a general principle of EU law for many years, and only later did the Court decide that these rights should be protected where relevant.160 Cases on fundamental rights did not distinguish between the economically active and inactive. However, the Court in pre-1998 EU citizenship case law seemed to favour those who had contributed economically.161 It will be argued that the reason for this is part of the legal culture of the Court, which is defined by the influence the political situation has on its decision making.162

The doubts surrounding EU citizenship before 1998 primarily derive from comparing the provisions’ scope *ratione personae* and *ratione materiae* to the scope of the fundamental freedoms in the internal market. Because the Court simply extended workers’ rights in scenarios concerning citizenship for a time after EU citizenship status was established, it appeared to replicate what was already in existence. This neither differentiated nor legitimised EU citizenship status. The legitimisation of the status was all the more crucial, especially given the novelty of a political EU. By failing to substantiate EU citizenship as its own concept and constantly requiring it to be linked with internal market values, the original objective of an indiscriminate and uniting status within the exclusive EU community was lost. Furthermore, because the scope of fundamental rights was significantly broader in terms of also protecting the economically inactive, it seemed incongruous that the scope of EU citizenship was more limited if the two concepts were to interact coherently.

The second age of EU citizenship for this book starts in 1998 and ends in 2009. Citizenship’s restrictive scope *ratione personae* and *ratione materiae* were gradually broadened in these 11 years. It did not happen immediately; the gradual disintegration of strict ties to the fundamental freedoms seemed difficult at the beginning. However, after *Sala* and *Grzegczak* were decided, and the Court in
Grzelczyk declared that ‘Union citizenship is destined to be the fundamental status of nationals of the Member States’, a new direction for citizenship became clear. This was applied most effectively in cases in the early to late 2000s and culminated in the codification of the Citizenship Directive 2004/38. After many years of steady case development for EU citizenship law, the Court also began to introduce the idea of fundamental rights to its decisions, which strengthened the position of both concepts and the future constitutionalisation in the Lisbon Treaty of fundamental rights.

When the Lisbon Treaty came into force in 2009, fundamental rights permeated a vast number of areas of the EU, which included cases where fundamental rights would not previously have featured. When the Charter was raised in equal status to the Treaties, the Court could legally raise concerns of fundamental rights and require that the rights be adhered to. EU citizenship complemented fundamental rights, more so after cases like Chen, which applied fundamental rights reasoning to citizenship rights. The Zambrano case, which was about third-country national (TCN) family members and derived rights to residency, was one of the first opportunities to link fundamental rights in the binding Charter and EU citizenship provisions. The claimants in Zambrano believed that their situation was comparable to that of the claimants in Chen. By invoking their claim not only to EU citizenship rights to residency but also to the fundamental right to private and family life, the claimants in Zambrano were in a good position for a favourable decision. However, whilst the Zambrano family were successful on this occasion, the outcomes of cases following this have restricted Zambrano to its facts. This prompted speculation in the literature as to why this was the case, given how fundamental rights and EU citizenship had developed up to this point.

Fundamental rights in EU citizenship featured heavily in AG Sharpston’s Opinion on Zambrano, adding to the criticism that followed from the case itself when the Court did not engage with the question of clarifying the relationship between fundamental rights and EU citizenship. It was especially anticipated

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163 Grzelczyk (n 9) para 31.
164 This was also complemented by the codification of fundamental rights in 2000 in the Charter of Fundamental Rights, which were indicative of a progressive step for the constitutionalisation of fundamental rights in the EU.
166 Zhu and Chen (n 30).
167 Article 7 of the Charter.
169 See Adam and van Elsuwege (n 168); von Bogdandy et al (n 94); Wiesbrock (n 74).
after the Lisbon Treaty equated the status of the Charter to its own Treaties. Van Eijken and de Vries even argued that ‘rather than extending the scope of application of fundamental rights, Ruiz Zambrano may just as well entail a “levelling down” of fundamental rights protection in the Member States’ because of the questions raised by the judgment. This was particularly difficult to reconcile when considering other areas of the EU where there was a proliferation of fundamental rights and expansion of the EU’s scope of competence, which demonstrated the impact that the Lisbon Treaty’s new provisions had on the EU’s legal order. In EU citizenship, case law subsequent to Zambrano was not as accommodating to fundamental rights or to clarifying the new independent legal status as established by the Court in Zambrano.

Fundamental rights, especially for citizenship cases, were a way in which the Court further legitimised the status of EU citizenship. In common scenarios where claimants were TCN family members of EU citizens and did not have rights under EU law, fundamental rights and newly liberalised EU citizenship status had the potential and capacity to bring these TCNs within the scope of the Treaty. Having allowed this in cases in the past, it did not continue to do so in the third age. It is argued that the reason for such hesitance recently is because the Court has been unable to find a concrete solution to the tensions finally being recognised because of the new constitutional nature of both concepts – the universality of fundamental rights against the exclusive nature of citizenship. The expansion of the scope ratione personae and ratione materiae of citizenship in line with fundamental rights protection has been halted. This book argues that it presents a regression of sorts.

It is thus the main objective of this book to look at the developments in a relationship between fundamental rights in the EU and the concept of EU citizenship through the Court’s case law. The discussion will first follow the development of EU citizenship from its beginnings, where initially the Court mostly interpreted citizenship rights as an extension of economic rights. It will argue that despite these economic beginnings, there was an underlying fundamental rights discourse that drove the development. It will then follow the case law to demonstrate that gradually, the scope ratione materiae and ratione personae of EU citizenship was expanding and fundamental rights were becoming more explicit in the Court. This is argued to be directly related to the constitutionalisation of fundamental rights as a concept on its own, which this book will also discuss in relation to its impact on EU citizenship. This generated legitimate anticipation for a more
integrated relationship between the two concepts of rights and is designated as the rise of fundamental rights in EU citizenship. Recently, however, the development has taken a different turn. This book will ultimately argue that there is a possible correlation between the Court's behaviour and the EU's political situation due to the eurozone crisis, which is the hypothesised reason for a decline in fundamental rights protection in EU citizenship. It will also argue that this cannot continue in the discussion on EU citizens' rights in the UK after withdrawal. An integrated fundamental rights and EU citizenship relationship has disappointingly not materialised, and at the heart of these contentions is the Court's legal culture.

A. The Age of Uncertainty: The UK's Withdrawal from the EU

As mentioned above, it is important to highlight that there is a potential 'fourth' age of citizenship that has been brought about by the unprecedented decision of the UK to withdraw as a Member State of the EU, having officially triggered Article 50 TEU on 29 March 2017. This has started the countdown of a two-year negotiation period, which as it stands at the time of writing is currently under way between EU and UK representatives. It is not the aim of this book to retrospectively analyse reasons for the EU referendum result. It will instead situate the question of how to negotiate and govern a fair and just Brexit for EU citizens in the context of their citizenship rights and their deserved protection of human rights after the UK is no longer bound by EU law. Whilst a fairly crucial question, this has thus far proven to be a controversial topic because of the sheer difficulty in coming to a middle ground between what the EU and the UK seem to normatively agree is a good compromise for EU citizens' rights.

What has been a particularly difficult part of the process of withdrawal so far is that everything related to Brexit is dominated by uncertainty. It is apt to consider this 'fourth' age as the age of uncertainty, since even the discussion to follow this book will be somewhat tentative. The entire process so far has been subject to considerable change and debate in a very short space of time. Whilst this is the nature of law in any case, it has been more pronounced during the Brexit negotiations and is worth highlighting here as a result. However, there are some things which are less uncertain in the UK's withdrawal from the EU. These are its external obligations – particularly to human rights protection – which are unaffected by the UK's withdrawal. In the human rights context, this is a reference to the ECHR, which will play a stronger role once the EU's framework no longer applies.174

174 See ch 6.
VI. Methodology and Outline of the Analysis

This book takes an approach that has been described as a ‘history of the present’.\textsuperscript{175} It does not purport to simply describe past and present, but rather to contextualise the current situation in its past to help explain why certain phenomena have occurred today. For this reason, the book’s ultimate conclusion addresses why fundamental rights, though now deriving from an explicit and legally enforceable foundation in the Charter, have not been able to legitimise and substantiate the now-independent EU citizenship status. The answer can be found by looking at the five guiding legal instruments of EU citizenship – the principle of non-discrimination, the principle of proportionality, the genuine link test, the purely internal situations rule and the deprivation of genuine enjoyment test – and other general principles that shaped EU citizenship, fundamental rights and their founding entity, the EU. When speculation surrounding the meaning of EU citizenship status occurred in 1998, it was said that ‘putting historical contexts of experience, expectation and practice into perspective contributes to understand the contextualised meaning of citizenship of the Union’.\textsuperscript{176} This is the approach that will be taken in this book.

By looking at the history of citizenship case law in the EU, the Court can be seen to have reshaped several general principles and judicial instruments in EU law, putting their orthodox interpretations under stress. Though this unorthodox approach was met with some hostility at the outset, this eventually became the accepted approach adopted by the Court. Normative shifts in the mindsets of the EU institutions had to occur in order for this to happen. It was a slow process because the designers of the EU had originally set out an economic, not political, direction for the EU. Furthermore, the Court had to respect the specific boundaries laid down by the Treaties to protect national Member States’ authorities. The Court succeeded in reshaping the scope of some of the judicial instruments through its interpretation of provisions in EU citizenship case law. However, more recently, the trend has indicated that there are questions surrounding these interpretations, particularly of principles and rules related to EU fundamental rights. If this is to continue, then serious questions need to be addressed in relation to the status of EU citizens in the UK after it exits the EU. The argument is that there is a resistance to a shift away from integrating fundamental rights and EU citizenship.

This book is also written in the age of Brexit, and therefore the notion of a ‘history of the present’ is still relevant as it carries out this analysis. Another objective of this book is therefore to situate the analysis on the relationship between fundamental rights in the EU and EU citizenship status in the context of the UK’s

\textsuperscript{175} David Garland, \textit{The Culture of Control: Crime and Social Order in Contemporary Society} (University of Chicago Press, 2012) 2.

withdrawal from the EU. This involves looking at the plans for treatment of EU citizens in the UK (and, more tangentially, British citizens in the EU) post-Brexit and analysing whether these are consistent with human rights protection that will still exist after withdrawal. This is rather than lamenting the loss of the EU framework of rights, as this book does not intend to look backwards at the political events that have led to the Brexit vote or attempt to rationalise them. Instead, as a dynamic process subject to change, this book is a fluid analysis of an ever-changing process looking at the static rights and obligations that will exist post-Brexit to account for the dynamisms of the withdrawal process. It is therefore more forward-looking, at least in the context of Brexit.

However, the earlier parts of the book, particularly Chapter 2, will explain the early interaction of the Court with the rights under EU citizenship. Prior to EU citizenship developing its own judicial instruments, the Court relied heavily on the internal market values of fundamental freedoms to determine how EU citizens would enjoy EU citizenship rights under Article 21 TFEU. This approach was found to be unsuitable to the aims behind a political concept like EU citizenship. By considering whether there was an obstacle to free movement to determine whether EU citizenship rights were triggered, it seemed that the Court did not distinguish between protection offered by the fundamental freedoms and protection under citizenship status. It was unable to move away from this market-based reasoning until 1998. The legal principle of non-discrimination in Article 18 TFEU was introduced in Sala to replace the obstacle to free movement. Instead of being economically active, the citizen needed only to be legally resident. The Court found a successful balance in emphasising legal residency and non-discrimination, recognising that limiting citizenship provisions to an elite group of individuals would be against a citizenship status aimed at uniting its community. This idea is supported by the increasing number of direct references to fundamental rights by the Court, particularly under Article 8 ECHR, which entails rights to respect for family life and rights to one’s identity.

Chapter 3 moves on to focus on fundamental rights pre-Lisbon and its rise in the case law of EU citizenship. It emerged after the Court had established non-discrimination for social welfare and residency as part of the scope ratione materiae of EU citizenship, and when the scope ratione personae had been extended to citizens who were legal residents in Member States other than their home states. This chapter will analyse the three AG Opinions identified earlier as being the first indicators of a potential relationship between fundamental rights and EU citizenship. There is a noticeable rise in the fundamental rights questions, especially on TCN family members and the right to family life, from Article 8 ECHR and its

178 Citizenship rights also extended to include social welfare benefits for ex-workers who were legally resident in the host Member State as part of the principle of non-discrimination.
equivalent in Article 7 of the Charter of Fundamental Rights. It is argued that there is a correlation between the rise of fundamental rights in the EU generally and its influence in the Court in cases on citizenship.

Chapter 4 presents the first signs of the decline of fundamental rights in EU citizenship law after its notable rise. The focus here will be on this phenomenon of regression after progressing towards integrating fundamental rights protection into EU citizenship status. Anticipation was built initially in the *Rottmann* case, which led to AG Sharpston’s Opinion in *Zambrano*, and then the highly anticipated *Zambrano* judgment itself. This chapter will analyse these developments individually to emphasise how indicative they were to the original hypothesis of an integrated rights discourse in citizenship jurisprudence. These cases are the culmination of the fundamental rights and EU citizenship relationship. Attention will then turn to the cases of *McCarthy* and *Dereci* that immediately followed *Zambrano*. Looking closely at these cases will highlight the slow but gradual disconnect between fundamental rights in EU citizenship despite the apparent indications from the anticipation surrounding *Zambrano*. There is also a contemporary contextualisation of the discussion thus far with a focus particularly on the current case law. From this, it becomes especially clear that what the Court decided to implement in the jurisprudence of *McCarthy* and *Dereci* was not an exceptional line of reasoning. Most recurrently in the context of conferring welfare benefits to non-economically active individuals, this chapter will demonstrate that the Court is departing from favouring an empowerment of the individual through protection of fundamental rights to now deferring more to Member States’ own national interests.

Chapter 5 will offer a potential explanation for this in the context of the increasing Euroscepticism amongst Member States and the political crises this has instigated. Because its legal culture is known to be influenced by the political atmosphere in which it operates, this book argues that there is a strong correlation between the eurozone crisis, rising nationalism and increasing Euroscepticism, and the decline of fundamental rights in EU citizenship. It seeks to analyse the history of the present set out in the previous chapters and to address the question posed at the outset – why, despite becoming binding and constitutionalised in the Lisbon Treaty, has the Charter failed to have the intended impact on EU citizenship case law in the Court? It will suggest a solution and note its limits. It argues that the reason why the relationship between fundamental rights and EU citizenship has not met expectations is that despite both fundamental rights and EU citizenship becoming noticeably more constitutional, the Court is unlikely to fully integrate the two sets of rights because this would expand the scope of the Treaty too much. Although there were legitimate expectations set by the Court in case law leading to this hypothesis, another unforeseen factor has changed the direction for

179 Particularly strong examples include *Zhu and Chen* (n 30); *Garcia Avello* (n 92); *Carpenter* (n 22); Judgment of 4 June 2009, *Vatsouras* C-22/08, EU:C:2009:344.
the Court. This has led to the most surprising of the developments – the UK’s vote to leave the EU. This chapter will provide clarity to a confusing situation to argue that EU citizens’ rights should be preserved in a defensible manner, even to the exiting UK authorities. The idea is entirely premised on the protection of EU fundamental rights, which has fallen by the wayside in more areas than just citizenship.

Chapter 6 is the Brexit chapter, which will continue in the vein of being a ‘history of the present’, with a heavier focus on the present. However, because of the book’s political context, this chapter will be more forward-looking than the others. The analysis of the EU citizenship and fundamental rights case law as a rise and decline is pertinent for this discussion because of the patterns that can be identified between the two distinct legal authorities – the UK and the EU. In particular, the decline in the fundamental rights discourse is argued to have done no favours for the UK’s perception of the value of EU citizenship status and its rights. As such, whilst there can be no proven correlation between the vote in favour of exiting the EU from the British electorate and the CJEU’s declining interest in engaging with fundamental rights protection, the argument is that it suggests an overall undermining of human rights in general. The chapter will also consider the justice of Brexit for EU citizens, as their rights are at stake and there are a number of human rights mechanisms that should be of relevance. In particular, this needs to be made more clear to the negotiators, otherwise there could be grave consequences. However, the overall underlying argument that this chapter is intended to further support is that of this book.

There is tension between fundamental rights being universal in nature and EU citizenship rights promoting EU exclusivity. This much is clear. The situation is made even more complicated having to respect boundaries established by the EU. Fundamental rights are universal; however, they must still remain within the boundaries of EU law. In EU citizenship case law, the Court has not confirmed that fundamental rights are freestanding rights in and of themselves. Instead, it opted to adhere strictly to the boundaries set out in the Charter, as well as to adopt a narrow interpretation of what an independent legal basis of rights for EU citizenship means after Zambrano. This book will explain that there is underlying irreconcilable tension for reasons uncovered by the historical account of the development of both concepts, by assessing their political objectives and by explaining their situation with the unique supranational entity that is the EU. This will uncover that the rise and decline of fundamental rights is potentially linked to the EU’s own constitutional developments; the rise occurred during a more

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180 There are limitations on fundamental rights in the EU in terms of the scope of their application, especially in arts 51–53 of the Charter.
181 In fact, in Opinion of 12 December 2013, O and B; S and G C-456/12 and C-457/12, EU:C:2013:842, it is confirmed that they are not.
positive time where fundamental rights were becoming more constitutional and the scope of citizenship was expanding, whilst the decline presented itself when the EU began to face greater economic troubles and, later, political ones as well. This is an unacceptable change of position, and attention must return to the protection of fundamental rights in the light of Brexit if the EU intends at all to argue a defensible position to protect its citizens in the territory of the UK.