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Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed

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Abstract
While ideas on 'earned citizenship' have been around in discussions on the co-existence of freedom of movement and nationally-bounded welfare states in the European Union, both the concept and the process it entails have hardly been explored in connection to EU (case) law. This contribution identifies earned citizenship as a technique of government in the broader political strategy of neoliberal communitarianism, requiring Union citizens to 'earn' access to the welfare system through an emphasis on their individual responsibility to fulfil the economic, social and cultural conditions of membership. Analysing economically inactive Union citizens' access to social assistance benefits, it argues that earned citizenship has been visible since the Court's early citizenship jurisprudence, but has been reconstructed with the recent *Dano*-line of case law.

Keywords: European Union, earned citizenship, social citizenship, social assistance, free movement, welfare state

I. INTRODUCTION

When the curbing of welfare rights of Union citizens took prominence in former UK Prime Minister David Cameron's reform agenda for the European Union, he received support from a rather unexpected direction.[1] In a dense series of cases, the European Court of Justice convinced the Western-European Member States that the right to freedom of movement is not equal to an unrestricted right to claim social benefits in other Member States, stressing in its *Dano* case that Member States have

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[1] For a comprehensive overview of Cameron's reform agenda in the context of EU free movement law see J Shaw, 'Between Law and Political Truth? Member State Preferences, EU Free Movement Rules and National Immigration Law' (2015) 17 *Cambridge Yearbook of European Legal Studies* 247.

'the possibility of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement *solely* in order to obtain another Member State's social assistance'.[2] Despite being supplemented with three more restrictive judgments, this message proved not strong enough to prevent the British electorate from voting in favour of leaving the European Union.[3] Generally seen as constituting a major restriction to economically inactive Union citizens to move, reside and engage in any meaningful way with the welfare system of their host Member State,[4] this *Dano*-line of case law stands out oddly in the light of the Court's 'activist' legacy, leading one scholar to conclude that the 'heydays of citizenship case law are over'.[5]

The 'heydays' of Union citizenship were probably situated around the turn of the century, when the Court employed the primary right of equal treatment attached to Union citizenship to extend social welfare entitlements to mobile Union citizens regardless of their economic status, thereby including the 'economically inactive', 'simply' on the basis of their being citizens of the Union.[6] As this bold move was neither anticipated nor considered politically and historically neutral, it was no surprise that it provoked a lively debate on Union social citizenship.[7] Since the start of this debate, discourses on Union citizens' 'earning and deserving' have featured prominently and have re-emerged in the context of debates on 'welfare tourism' and the British referendum. An early critic, for example, submitted that by offering

[2] *Dano*, C-333/13, EU:C:2014:2358, para 78 (emphasis added).

[3] *Alimanovic*, C-67/14, EU:C:2015:597, *García-Nieto*, C-299/14, EU:C:2016:114 and, delivered a week before referendum, *Commission v UK*, C-308/14, EU:C:2016:436.

[4] N Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) *Common Market Law Review* 889. CR O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) *Common Market Law Review* 1.

[5] AP Van der Mei, 'Overview of Recent Cases before the Court of Justice of the European Union (July–December 2015)' (2016) 18 (1) *European Journal of Social Security* 74, p 77.

[6] *Trojani*, C-456/02, EU:C:2004:488, para 31.

[7] See S O'Leary, 'The Social Dimension of Community Citizenship' in A Rosas & E Antola (eds), *A Citizens' Europe; in Search of a New Order* (Sage Publications, 1995). Optimistic readings have emphasised how the Court delivered on the promise of 'putting flesh to the bones of citizenship' and developed a 'real' or 'substantial' Union citizenship. See amongst others S O'Leary, 'Putting Flesh on the Bones of European Union Citizenship Court of Justice. Judgment of May 12, 1998, Case C-85/96 Maria Martinez Sala v. Freistaat Bayern' (1999) 24 (1) *European Law Review* 68 and F Wollenschläger, 'A New Fundamental Freedom Beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17 (1) *European Law Journal* 1. Critical discussions of this expansion of social rights to Union citizens range from the resilience of 'market citizenship', notably by M Everson, 'European Citizenship and the Disillusion of the Common Man' in R Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond* (Intersentia Publishing, 2010) and N Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 (6) *Common Market Law Review* 1597, the potential undermining of collective solidarity bonds, K Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 (5) *Common Market Law Review* 1245 and A Somek, 'Solidarity Decomposed; Being and Time in European Citizenship' (2007) 32 *European Law Review* 787, and the legal complexity and administrative uncertainty for Member States, H Verschueren, 'Free Movement or Benefit Tourism: The Unreasonable Burden of Brey' (2014) 16 (2) *European Journal of Migration and Law* 147.

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'radical equality' to those Union citizens who have not earned social welfare benefits on account of participation in the collective work process of a given society, the Court undermines the systems of reciprocity underpinning national welfare states.[8] Similar arguments, on excluding Union citizens from 'unearned' welfare benefits during their first years in the new country of residence, are currently put forward to 'save' both the welfare state and free movement.[9] With respect to its more recent case law, however, the Court is facing equal criticism from the opposite direction: by sacrificing the 'fundamental status' so dear to the Court in its earlier case law, it now presents a picture of the economically inactive migrant who is only one step above the 'alien' whose rights have to be '*earned* through wealth, health and good behaviour'.[10] Although different normative (and political) views exist on when, how and why Union citizens 'earn' or 'deserve' their place in their host welfare state, it is the role of EU law to articulate the associative connections emerging between Union citizens across borders and the commitments of and limits to solidarity following from such connections.[11]

While ideas on earned citizenship have been around for some time, both the concept and the process it entails have hardly been explored systematically and theoretically in connection with EU law and the case law of the European Court of Justice. This article therefore focuses on earned citizenship as a technique of government and its strategic underpinnings, as it is deployed to sustain the coexistence of free movement and the national welfare state in the EU. Drawing on sociological insights on immigration, naturalisation and integration policies, it argues that the model of transnational social citizenship advanced by the Court and emerging in both EU legislation and domestic practice can be situated within the broader political strategy of population management defined as 'neoliberal communitarianism'; it becomes the individual's own responsibility, expressed in the form of 'earning' citizenship, to convert to a bounded community of economic, cultural and social values.

The perspective of earned citizenship is employed as an analytical, rather than a normative tool to highlight both the continuity and discontinuity in the Court's legal approach to economically inactive Union citizens' access to social assistance benefits in their host Member State.[12] A critical revaluation of the early citizenship

[8] C Tomuschat, 'Case C-85/96, María Martínez Sala v. Freistaat Bayern, Judgment of 12 May 1998, Full Court. [1998] ECR I-2691' (2000) 37 (2) *Common Market Law Review* 449, p 455.

[9] Prominently by HW Sinn, 'Saving Freedom of Movement in Europe', *Project Syndicate*, 29 July 2016 https://www.project-syndicate.org/commentary/saving-free-movement-in-europe-by-hans-werner-sinn-2016-07.

[10] E Spaventa, 'Earned Citizenship: Understanding Union Citizenship through Its Scope' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, Forthcoming) (emphasis in original).

[11] As explored by F de Witte, *Justice in the EU: The Emergence of Transnational Solidarity,* (Oxford University Press, 2015).

[12] The analysis thereby seeks to avoid presenting a retrospective doctrinal explanation of the turn of the Court since *Dano* and ex-post rationalising the rather surprising path the Court has taken. With such an exercise the EU lawyer risks conforming to the jocular image often attributed to the economist as the expert 'who will know tomorrow why the things he predicted yesterday didn't happen today', generally

case law demonstrates that the Court not only constructed such a model of earned social citizenship at Union level, but also left room for Member States to design the 'bridging effort' expected from foreign Union citizens to become a social member of their national welfare community.[13] The Court's recent shift, as initiated with *Dano*, means a reconstruction of the model of earned social citizenship in, briefly, three directions. First, the earning of residence is increasingly shifting towards the earning of membership. Secondly, whereas early case law centred the assessment of the earning process on the subjective circumstances of the individual, recent case law objectifies and harmonises, Union wide, the 'bridging efforts' expected from Union citizens when they wish to become a social member of another Member State. Thirdly, and rather paradoxically, the case law points to a virtualisation of Union citizenship that goes beyond the formal vocabulary of residence and membership conditions. This article proceeds accordingly. The next section starts by theorising the concept of earned citizenship and situates it in the institutional and political confrontation between EU free movement and nationally-bounded welfare states. Part III provides an analysis of the legal construction of the model of Union earned social citizenship through a discussion of early citizenship case law and its creative reception in the Netherlands. Part IV discusses the recent line of case law in comparison with the earlier case law, sketching the newly emerging model of earned social citizenship and its implications. A final section summarises and concludes.

II. EARNING SOCIAL CITIZENSHIP

A. *Union citizenship, social citizenship and earned citizenship*

Nationals of EU Member States, especially those migrating within the territory of the Union, find themselves at the crossroads of two of the most important and distinctive institutional legacies of twentieth century Europe. As citizens of both their nation state and the European Union they enjoy civic, political and social ties to both political unities. Perceived from an external or global perspective, citizenship is a technique of population management, a practice of dividing the world into 'manageable' subpopulations within the modern state system.[14] From an internal

(F'note continued)

attributed to Laurence J. Peter (LJ Peter, *Peter's Quotations: Ideas For Our Time* (William Morrow, 1977)). Additionally, by stressing the adoption of the sociological concept of earned citizenship as an analytical, extra-legal, ie socio-legal, standpoint to evaluate judicial developments it hopes to counter the risk of compromising on established principles of legal hermeneutics and confusing the normative with the empirical. D Thym, 'Frontiers of EU Citizenship: Three Trajectories and Their Methodological Foundations' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, Forthcoming).

[13] In strong disagreement with Chalmers and Booth, who submit that 'only the most flagrant examples of abuse or high sums [of social assistance] are therefore likely to be able to be refused'. D Chalmers and S Booth, 'A European Labour Market with National Welfare Systems: A Proposal for a New Citizenship and Integration Directive' *Open Europe Policy Brief*, 3 November 2016 http://openeurope.org.uk/intelligence/immigration-and-justice/citizenship-and-integration/.

[14] B Hindess, 'Citizenship in the International Management of Populations' (2000) 43 (9) *American Behavioral Scientist* 1486.

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perspective, citizenship aspires to offer a status of equality to those who are full members of a (national) community with respect to the rights and responsibilities attached to that status, hence stimulating a direct sense of belonging and loyalty to this community.[15] TH Marshall is often referred to when discussing the concept of social citizenship. Connecting the formation of the post-war welfare state with the establishment of social elements within the concept of citizenship, he defined social citizenship as 'the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society'.[16] It is clear that Union citizenship does not offer such a right to a certain standard of welfare and social security, neither does if offer many civil and political rights.[17] In contrast, Union citizenship offers precisely those rights, liberties and imaginations that modern forms of national citizenship lack, namely those relating to cross-border movement and foreign residence.[18] When speaking about Union social citizenship, we therefore mean the body of rules governing the right of Union citizens to equal access to the welfare system of their host Member State when they exercise their free movement and residence rights.[19]

In this article, I claim that the model underpinning this supranational form of social citizenship can be seen as a particular manifestation of a strategy of population management defined by sociologists as neoliberal communitarianism.[20] In a response to globalisation and immigration, this – at first sight – contradictory strategy combines both neoliberal and communitarian techniques and rhetoric; it becomes the individual's own responsibility, expressed in the form of 'earning' his or her citizenship, to convert to a nation that is hallowed as a bounded community of economic, cultural and social values. As can be observed cross-nationally in Western Europe in the context of immigration, naturalisation and integration policies,

[15] See T Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (Ashgate, 1990).

[16] TH Marshall and T Bottomore, *Citizenship and Social Class* (Pluto Press, 1992).

[17] Except for those listed in Art 20 TFEU, including the right to participate in municipal and European elections, receive diplomatic and consular protection and the right to correspond with EU institutions and offices, these would include the implicit 'substantive' rights formulated by the Court in its case law. For an expansive reading see D Kochenov, 'The Citizenship Paradigm' (2013) 15 *Cambridge Yearbook of European Legal Studies* 197.

[18] Art 21 TFEU confers on every citizen of the Union 'the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.' It could be argued that modern national citizenship made cross-border movement a rather exceptional activity, see Hindess, note 14 above.

[19] Union citizens who have earned their social citizenship on a permanent basis can be described as 'denizens', immigrants holding permanent residence status enjoying virtually all civil and social rights. See T Faist, 'Social Citizenship in the European Union' (2001) 39 (1) *Journal of Common Market Studies* 37. The social protection offered by EU law also covers Union citizens who have not reached the status of denizen yet and are 'in between', as discussed in Parts III and IV.

[20] F Van Houdt et al, 'Neoliberal Communitarian Citizenship: Current Trends Towards 'Earned Citizenship' in the United Kingdom, France and the Netherlands', (2011) 26 (3) *International Sociology* 408.

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citizenship has been presented in the form of a contract between the prospective citizen and an ever more 'sacralised' collective. This development has therefore placed an individualising focus on the process of attaining citizenship – the newcomer is required to make a 'bridging effort' – and a deindividualising focus on the nation as a bounded community of values.[21]

The process of earning citizenship is hence one in which the newcomer bears the responsibilities of citizenship and can only look forward to enjoying the full rights and benefits of citizenship when he or she succeeds in fulfilling the economic, cultural or social conditions of community membership. Indeed, instead of conceiving citizenship as an 'automatic right' to membership by virtue of residence, citizenship is transformed into a status to be deserved as a result of fulfilling a series of criteria.[22] Apart from specific moral and cultural requirements posed on newcomers in the form of language proficiency and civic integration tests, economic self-sufficiency, law-obedience and active citizenship have come to constitute rather prescriptive requirements for potential permanent residents and citizens to demonstrate their positive contribution to the national community. However, this moralisation of citizenship is not confined to the 'newcomer'. It has also invaded integration discourses by virtualising the citizenship status of those persons who already possess formal (social) citizenship but supposedly lack integration in 'society'.[23] Social rights are especially earmarked as rights to be earned. In order to maintain the 'bonding' of the national social community, individuals outside the national community can only enter the national solidarity space through a bridging effort. Migrants are expected not to constitute a burden to the welfare system, have to prove themselves to be self-sufficient individuals, and 'pay their way' into citizenship. Only when permanent residence or citizenship is earned by negotiating the 'bridge of contribution', can the migrant enjoy full access to the benefits of the welfare system, and even then, they might still have to prove their worthiness as social citizens.[24]

B. Contesting logics, EU free movement law and the bridge of contribution

The model of supranational social citizenship emerging in the European Union can be conceptualised within the dialectical confrontation between European market integration and the national welfare state as identified by Ferrera. The 'Glorious Thirties' (1945–1975) created a particular political logic, recently defined in neo-Weberian parlance as *Wohlfahrtsstaatsräson*, that shifted domestic political agendas towards the goal of meeting the substantive socio-economic demands of a

[21] W Schinkel, 'The Moralisation of Citizenship in Dutch Integration Discourse', (2008) 1 (1) *Amsterdam Law Forum* 15. The concept of 'bridging' has been developed by RD Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster, 2000). W Schinkel and F Van Houdt, 'The Double Helix of Cultural Assimilationism and Neo-Liberalism: Citizenship in Contemporary Governmentality' (2010) 61 (4) *British Journal of Sociology* 696.

[22] Van Houdt et al, see note 20 above, p 420.

[23] W Schinkel, 'The Virtualization of Citizenship' (2010) 36 (2) *Critical Sociology* 265.

[24] Van Houdt et al, see note 20 above, p 413.

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growing number of distinct social categories.[25] With the institutions of the nation-state providing the 'closure' conditions for the development of an ethos of social solidarity and redistributive arrangements within a geographical territory, the logic of the welfare state rests on the creation of territorial and membership boundaries – demarcations of insiders and outsiders – around national political communities.[26] European integration initiated a movement in the opposite direction. Guided by the logic of 'opening', a supranational *Markträson* aimed at fostering free movement and non-discrimination by weakening or tearing apart those spatial demarcations and closure practices that nation states have historically built around and within themselves. As long as economic integration remained consistent with, and supportive of, the logic of domestic politics ('welfare from home, the market from Brussels'), national *Wohlfahrtsstaatsräson* and supranational *Markträson* could proceed hand in hand and even reinforce each other. However, under the changing socio-economic conditions since the 1970s both 'logics' increasingly rose to confrontation.[27] The emerging challenge has been formulated as one of finding a balance between facilitating individual opportunities, in the form of a freedom to choose to move in search for the 'good life', and sustaining the social bonds that allow for redistributive justice.[28] As the interests of mobile Union citizens are 'parasitic' on the redistributive commitments undertaken by citizens in the national context, it has therefore been submitted that for the sake of justice, and its own legitimacy, the Union must stabilise the access to positive welfare entitlements for both mobile and immobile citizens on the national level.[29]

The governmental technique of earned citizenship has been presented as a solution to this challenge. It is precisely in the government of the transnational right of access to nationally bounded welfare states that EU law already facilitates the construction of 'bridging efforts' expected from Union citizens to 'earn' their place in the host Member State. This bridging effort, as connected to the status of Union citizenship, emphasises the individual's responsibility to contribute to the host society either by employing 'effective and genuine' economic activities in the form of (self-) employment or by proving him or herself to be economically self-sufficient. In particular, the language of Directive 2004/38/EC ('Citizens' Rights Directive') emphasises both the closed nature of the national solidarity collective and the 'bridge of contribution' by granting Union citizens and their family members a right of residence throughout Europe 'as long as they do not become an unreasonable burden

[25] M Ferrera, 'Mass Democracy, the Welfare State and European Integration; a Neo-Weberian Analysis', Paper presented at the ECPR-SGEU Conference 2016, 18 June 2016.

[26] M Ferrera, *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection* (Oxford University Press, 2005).

[27] FW Scharpf, *Governing in Europe Effective and Democratic?* (Oxford University Press, 1999).

[28] See M Ferrera, 'The JCMS Annual Lecture: National Welfare States and European Integration: In Search of a 'Virtuous Nesting'', (2009) 47 (2) *Journal of Common Market Studies* 219; F de Witte, 'Transnational Solidarity and the Mediation of Conflicts of Justice in Europe', (2012) 18 (5) *European Law Journal* 694, pp 702–704.

[29] Ibid, p 704.

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on the social assistance system of the host member state'.[30] This very possibility, of an individual becoming a 'reasonable' or 'unreasonable' burden, reflects the threshold for Member States to either include the 'deserving' or exclude the 'undeserving' Union citizen. It is this image of Union social citizenship, as transpiring from both European law and national policies and practices, that reflects the strategic underpinnings of neoliberal communitarianism: it combines a communitarian care of the national welfare state with a neo-liberal emphasis on the individual's responsibility to achieve membership of that welfare community.

At its basis, the relationship between the 'host' society and the Union citizen is conceived of in a contractual rhetoric: Union citizens are deemed to contribute before they earn access to redistributive arrangements of the host society. Historically, the inherent tension between free movement and the bounded welfare state was reconciled by granting the right to move only to the economically active to the exclusion of the economically inactive and establishing a coordination regime for social security systems to the exclusion of social assistance.[31] Both distinctions are based on particular, historically contingent, ideas about contribution. Workers were assumed to contribute, or at least not to be a burden on the host welfare system, and the opposition between social insurance and social assistance relied on a dichotomy between welfare programmes that are legitimated by actuarial principles of civil exchange – hence appearing contributory – and those that offer unreciprocated aid to the 'innocent' and 'deserving' poor in the tradition of non-contributory charity.[32] Both due to institutional developments of welfare states, the rise of the 'working poor' and the growth in 'in-work' benefits in particular, and the gradual extension, by the European Court of Justice, of welfare access to the 'economically inactive' on the basis of transnational solidarity, these distinctions have grown untenable. As recipients of non-contributory benefits appear to 'get something for nothing, in violation of contractual norms', it is not surprising that in public debates on 'welfare tourism' these benefits are those most thoroughly debated.[33] In the words of an early critic commentator expressing his discontent with the extension of social rights to economically inactive Union citizens, 'social welfare benefits have not been earned by the claimant on account of his or her participation in the collective work process of a given society'.[34] In other words, attempts to lend a social face to the Union provoke responses that reproduce the distinction between the closed welfare state and the freedom of movement by reinforcing the dichotomy of contribution inherent

[30] Art 6 Directive 2004/38/EC.

[31] Art 7(2) of Council Regulation (EEC) 1612/68 [1968] OJ L257/2 provided equal treatment with respect to social and tax advantages, which include social assistance benefits. *Hoeckx*, C-249/83, EU:C:1985:139. Regulation (EC) No 883/2004 [2004] OJ L166, though extending the personal scope beyond the economically active population, still restricts its material scope to statutory social security benefit schemes. See F Pennings, 'EU Citizenship: Access to Social Benefits in Other EU Member States' (2012) 28 (3) *International Journal of Comparative Labour Law and Industrial Relations* 307.

[32] N Fraser and L Gordon, 'Contract Versus Charity; Why Is There No Social Citizenship in the United States?' (1992) 22 *Socialist Review* 45, pp 60–61.

[33] Ibid, p 60.

[34] Tomuschat, see note 8 above, p 456.

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in earned social citizenship with an, at least conceptually, remarkable result: Union citizens are deemed to contribute before earning their access to non-contributory social benefits.

C. Earning equal residence or social membership?

The path towards social citizenship in Union law is organised along the two classic boundaries of inclusion and exclusion that confine the modern national welfare state. The first domain of inclusion and exclusion relates to the territorial boundaries that are constructed by attaching conditions to the right of residence. A second domain governs the inclusion and exclusion of Union citizens by governing their social membership in the host Member State. Although the legal framework can be described as a mix of both dimensions and the case law oscillates between the two, a distinction between these two boundaries highlights two different models that are important for how Member States organise their bureaucracies and Union citizens experience 'social Europe' on the ground. These two models can be classified as 'residential egalitarianism' and 'stratified (social) membership'.

The model of residential egalitarianism nurtures a strong link between territorial presence and the principle of equal treatment. Once residing 'lawfully' in another Member State, the Union citizen should be treated equally with nationals of the host Member State in every aspect of life, including in terms of the enjoyment of his rights connected to the welfare system. Free movement rights here impact on the notion of modern 'national' citizenship as a territorial filling device, which is replaced by a 'residence-based locality as the demarcation line between outsiders and insiders participating in the formation and evolution of communities characterized by solidarity'.[35] Treating foreign residents differently would be costly and detrimental to the welfare state in the long run as dual standards would be established in working conditions, housing, education and social welfare.[36] This would create obstacles to social mobility and an acceptance of a type of class system with the newly arrived or those of foreign citizenship at the bottom without social or political rights.[37] At the same time, it is precisely the inherent principle of equality inherent in citizenship, so wonderfully formulated in Article 24 of the Citizens Directive, that requires welfare states to regulate migration in a very strict way.[38] Residential egalitarianism then requires a conditional freedom of movement. The enforcement of these conditions, which are formulated in Article 7 of the Citizens

[35] D Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 (1) *Common Market Law Review* 17, p 34. See also G Davies, "Any Place I Hang My Hat?' Or: Residence Is the New Nationality' (2005) 11 (1) *European Law Journal* 43.

[36] Hammar, see note 15 above, p 54. Cf Nic Shuibhne, see note 4 above, p 933, who submits that this strategy might reduce public spending on both social assistance and bureaucratic costs of expulsion.

[37] It was on this basis that Sweden in 2004 warned of a labour market divided into 'first team' and 'second team' players, see K Puttick, 'EEA Workers' Free Movement and Social Rights after Dano and St Prix: Is a Pandora's Box of New Economic Integration and 'Contribution' Requirements Opening?' (2015) 37 (2) *Journal of Social Welfare and Family Law* 253, p 261.

[38] Hammar, see note 15 above, p 54. Art 7 Directive 2004/38/EC lists these conditions.

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Directive, leads to the awkward situation that 'illegal' Union citizens can be expelled but are able to return in the context of a borderless Europe. In residential egalitarianism, Union citizens enjoy equal access to the welfare state, but their engagement can potentially have residential consequences, leading to uncertainty on the part of the migrant Union citizen and bureaucratic complexity on the part of the host Member State.

The model of stratified membership is a departure from the aspiration of residential egalitarianism and accepts that the individual Union citizen can enjoy a right to residence but may still be excluded from being a 'social member' of its various welfare programmes. EU law formally tolerates a social differentiation with respect to certain categories of Union citizens.[39] The Citizens' Rights Directive leaves Member States the possibility not to grant social assistance during the first three months (or longer for job-seekers) or study finance during the first five years to persons other than workers (or self-employed) and their family members.[40] In addition, Union citizens gradually accumulate longer periods for retaining their 'worker status' after becoming unemployed, a status that grants equal access to social assistance.[41] The room for manoeuvre within these provisions is often broader than might be expected at first sight. Not only can national authorities complicate the definitions of 'worker' and 'job-seeker', but also extend the meaning of social assistance to include a variety of social services provided in the Member States. Opinions have been expressed to, basically, push the model of stratified membership further in order to save both the welfare and free movement.[42] The potential price to be paid is precisely the one to be avoided in residential egalitarianism, namely of tolerating a marginal subclass of Union citizens and a degeneration of the labour market into two groups as a result of differences in pay levels, social security and social welfare.[43]

D. Eternal earning: social citizenship in the welfare system

Exploring earned social citizenship in the European Union requires taking account of an addition layer: Union citizens may have negotiated the bridge of contribution for the acquisition of 'formal' social citizenship, but the design and organisation of the welfare state can still require them to make a 'bridging effort' to be included in their host 'society'. Studying the responsibility imposed on migrating Union citizens in isolation would deny its relationship with similar trends of contractualisation taking place domestically in Western European welfare states.[44] Since the emergence of 'social contractualism' in the relation between the state and the citizen during the

[39] Hammar (see note 15 above, p 54) submits that welfare states can only tolerate a social differentiation for those 'who in a real sense are temporary guests … and then only for a short period, since no temporary stay can last more than short period.'

[40] Art 24(2) Directive 2004/38/EC.

[41] Art 7(3) Directive 2004/38/EC.

[42] Sinn, see note 9 above.

[43] Puttick, see note 37 above, p 261.

[44] O'Brien's discussion of the shared discourse of the economic responsibility imposed on EU migrants and the EU-wide responsibility model of welfare is exceptional in this regard. CR O'Brien,

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1980s, Western European welfare states have introduced measures that seek to have welfare claimants agree to seek work, accept work, training and other obligations in return for their grants, with enabling instruments increasingly being replaced by work-related sanctions.[45] According to Handler, this move towards 'active' labour market policies in Western Europe represented a fundamental change in both the meaning of social citizenship and the administration of social welfare; 'social citizenship … changed from status to contract'.[46] Whereas social benefits were once rights that attached by virtue of the status of citizenship (ie in a 'Marshallian' way) with the transformation towards the new regime, benefits have become conditional, rights attach only if obligations are fulfilled.

In this context, the welfare state can be reinvented as a tool for integrating the alien into an active, self-supportive citizen from whom particular efforts are expected to lead a meaningful existence in his or her 'host' society. The novel entry options for 'outsiders' generated by the dynamics of European integration may even guide Member States in a process of re-bonding welfare systems; transforming and renewing national conceptions of social citizenship.[47] Such Member State responses do not necessarily imply ethno-cultural closure and may even support changing self-perceptions of the 'society' in the context of transnational mobility and cultural diversity.[48] Nationality as the source for solidarity might then be replaced by a voluntary society based on membership and participation;[49] society becomes a 'society of the willing' and the 'non-willing' fall outside the contractual community.[50] Alternatively, it may lead to the politicisation of insiderhood and revive interest in membership of the nation state as a political theme.[51] It may then be correct that the use of welfare state building for nation building has become more difficult as a result of the Court's strict interpretation of the principle of non-discrimination, but it should be noted that Member States have found creative ways of re-nationalising social spaces by justifying indirectly discriminatory measures.[52]

(F'note continued)

'I Trade, Therefore I Am: Legal Personhoods in the European Union' (2013) 50 (6) *Common Market Law Review* 1643.

[45] A Eleveld, 'Work-Related Sanctions in European Welfare States: An Incentive to Work or a Violation of Minimum Subsistence Rights?' (2016) (1) *Access Europe Research Paper*.

[46] JF Handler, 'Social Citizenship and Workfare in the Us and Western Europe: From Status to Contract' (2003) 13 (3) *Journal of European Social Policy* 229.

[47] M Roche, 'Social Citizenship: Grounds of Social Change', in E Isin and B Turner (eds), *Handbook of Citizenship Studies* (Sage Publications, 2002).

[48] Thym, see note 35 above, p 36.

[49] Davies, see note 35 above, p 56.

[50] Schinkel, see note 23 above, p 277.

[51] M Ferrera, 'The New Spatial Politics of Welfare in the EU' in G Bonoli & D Natali (eds), *The Politics of the New Welfare State* (Oxford Scholarship Online, 2012). G Brochmann, 'Citizenship and Inclusion in European Welfare States' in S Lavenex and EM Uçarer (eds), *Migration and the Externalities of European Integration* (Lexington Books, 2002).

[52] Part III.B discusses language requirements attached to the reception of social assistance in the Netherlands. Member States can hold the view that such measures can be indirectly discriminatory, but

The 'active' welfare state aspires to bring the socially excluded back into the paid labour market and thereby restore 'true' citizenship in highly nationalised contexts.[53] Such programmes can have inclusive effect on the 'willing *and* able', but necessarily result in exclusion for those who cannot negotiate the barriers and cannot comply with the rules.[54] What is more, their universal application affects not only the foreign, mobile Union citizen, but also the immobile national of the Member State.[55]

III. CONSTRUCTING EARNED SOCIAL CITIZENSHIP

This section reviews the Court's early citizenship case law with respect to economically inactive Union citizens' access to social assistance benefits. It argues that the Court constructed an incipient form of Union social citizenship citizen that was underpinned by the rationality of neoliberal communitarianism in combination with a model of residential egalitarianism. Indeed, economically inactive Union citizens could earn their residence and, hence, equal access to social benefits, but this process was subjected to an assessment of the individual circumstances in the light of the specific burden they posed on the host welfare community. The Court, and subsequent codification in the Citizens' Rights Directive, opened the two sides of the equation of earned citizenship in the context of welfare benefits. After a brief outline of the case law, this argument is supported by a description of Dutch responses to this case law. The Dutch authorities have not only developed a 'sliding scale' for becoming a 'reasonable' burden on the social assistance system and a comprehensive procedure between administrative authorities, but now also expect foreign Union citizens to speak Dutch to earn their social assistance.

A. *Constructing the unreasonable burden*

In contrast to the (self-)employed, 'economically inactive' Union citizens have only enjoyed a right of residence of more than three months since the adoption of the so-called Residence Directives in the early 1990s.[56] In reference to the conditions

(F'note continued)

justified on the basis of a legitimate concern. See K Lenaerts and T Heremans, 'Contours of a European Social Union in the Case-Law of the European Court of Justice' (2006) 2 (1) *European Constitutional Law Review* 101, p 106.

[53] Although not 'duties' in the formal sense of the citizenship concept, such nation state guided processes suggest that the state has reinvented citizenship as a discursive tool for processes of inclusion and exclusion rather than departed from citizenship as a 'duties-inspired rhetoric and law'. Cf D Kochenov, 'EU Citizenship without Duties' (2014) 20 (4) *European Law Journal* 482, p 495.

[54] Handler, see note 46 above, p 230.

[55] It is then not only through a decrease of communal willingness to fund social structures that immobile Union citizens might lose out, but also by the reinforcement of the principle of reciprocity itself. Cf Witte, see note 28, p 703.

[56] Council Directives (EC) No 90/364 [1990] OJ L180, No 90/365 [1990] OJ L180 and No 93/96 [1993] OJ L317. Based on a broad reading of Art 7(2) Regulation 1612/68 (current 492/2011), the Court had already prohibited any discrimination, also with respect to minimum subsistence benefits, that might impede the mobility of workers. See *Hoeckx*, EU:C:1985:139; *Scrivner*, C-22/84, EU:C:1985:145; and *Kempf*, C-139/85, EU:C:1986:223.

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formulated in these Directives, it should be stressed that the Court has always upheld the possibility for Member States to protect their legitimate interests by requiring that migrant Union citizens (and their family members) wishing to reside within their territory, 'are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence'.[57] Drawing on a teleological reading of Union citizenship, as established with the Treaty of Maastricht in 1992, as being 'destined to become the fundamental status of nationals of the Member States', the Court restricted Member States' strict application of these conditions and extended the principle of equal treatment to all lawfully residing Union citizens.[58] It was 'purely' on the basis of being a citizen of the Union that a national of another Member State enjoyed a right to reside in another Member State's territory.[59] Attaching substantive meaning to this primary right of residence in the form of equal treatment within the host Member State, the Court stated that measures related to the enforcement of residence conditions, such as self-sufficiency and health insurance, should not become the automatic consequence of a Union citizen's recourse to social assistance.[60]

As a result, the Court has always left open the possibility for the host Member State to take the view that migrant Union citizens who apply for social assistance no longer fulfil the conditions of lawful residence and, as a consequence, withdraw their residence permit or take removal measures.[61] However, by deriving 'a certain degree of financial solidarity' from the Residence Directives, the Court found that Member States could only terminate residence when such Union citizens become an unreasonable burden on their social assistance system.[62] Here, the Court essentially opened up the two sides of the equation of earned citizenship by emphasising both the communitarian interest of sustaining a national welfare system and the possibility of the Union citizen-outsider to 'bridge across' by demonstrating a behaviour that is worthy in the light of the conditions attached to their residence. In the case of *Grzelczyk*, for example, the Court appeared to attach importance to the French student's self-sufficiency by taking on various minor jobs and obtaining credit facilities. It was only in his final, most demanding year of studies that he applied for payment of 'minimex', a minimum subsistence benefit that was granted to Belgian students in exactly the same circumstances.[63] The Belgian authorities should have shown 'a certain degree of financial solidarity', particularly in the light of expected temporary nature of Grzelczyk's difficulties.[64] In *Baumbast*, the Court again

[57] *Baumbast*, C-413/99, EU:C:2002:493, paras 87, 90; *Grzelczyk*, C-184/99, EU:C:2001:458, para 38; and *Trojani*, EU:C:2004:488, para 33.

[58] *Grzelczyk*, EU:C:2001:458, para 31. See also *Martínez Sala*, C-85/96, EU:C:1998:217, para 63.

[59] *Baumbast*, EU:C:2002:493, para 84.

[60] *Grzelczyk*, EU:C:2001:458, paras 42–43.

[61] Ibid, para 42. Most explicitly in *Trojani*, EU:C:2004:488, para 45.

[62] *Grzelczyk*, EU:C:2001:458, para 44.

[63] Ibid, paras 10, 11, 29.

[64] Ibid, para 44.

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emphasised the self-sufficiency of the Union citizen, who had sufficient resources, had been employed, had never been a burden on the public finances of the host Member State and even had a comprehensive sickness insurance. Hence, the sole fact that this sickness insurance did not cover emergency treatment in the UK could not form the basis for the UK to refuse the enjoyment of the right to reside as it would violate the principle of proportionality.[65] By contrast, in the case of *Trojani*, in which it was clear that the relevant Union citizen was neither economically active nor in possession of sufficient resources, the Court made it clear that his claim to social assistance benefits could legitimate a removal measure.[66]

Much of the Court's case law found its way into Directive 2004/38/EC.[67] While not present in the original proposal, the final text of the Citizens' Rights Directive incorporated the *Grzelczyk* principle that an expulsion measure should not be the automatic consequence of recourse to social assistance.[68] The Directive explicitly links the residence conditions of self-sufficiency and health care insurance with the objective that Union citizens should not become an unreasonable burden on the host Member States' welfare system for an initial period. When assessing such 'burdens', account should be taken of temporary difficulties, the duration of residence, the personal circumstances and the amount of aid granted.[69]

B. Implementing earned social citizenship: an illustration from the Netherlands

In order to illustrate the impact of this early citizenship case law, this section describes development of policies and legal practices with respect to Union citizens' access to social assistance in the Netherlands. It first highlights the remarkable implementation of the 'reasonable burden' in Dutch migration law through the construction of a 'sliding scale' that reflects the gradual accumulation of social rights by economically inactive Union citizens. It also describes the long process of administrative adjustment towards a model of residential egalitarianism. And finally, it discusses the introduction of a language requirement for the reception of social assistance as an example of earning social citizenship within the welfare system itself.[70]

Social assistance ('bijstand') provides a minimum income to every residing 'Dutchman' who finds himself in such circumstances that he lacks sufficient means to meet his essential living costs.[71] This rather rigid application of residence *cum* nationality as criteria for the personal scope is softened by 'equating' this right to all

[65] *Baumbast*, EU:C:2002:493, paras 92–93.

[66] *Trojani*, EU:C:2004:488, paras 39–45.

[67] See G Davies, 'The European Union Legislature as an Agent of the European Court of Justice' (2016) 54 (4) *Journal of Common Market Studies* 846, pp 856–857.

[68] Rec 18 and Art 14 (3) Directive 2004/38/EC.

[69] Rec 16 Directive 2004/38/EC.

[70] For an extensive analysis of the development of Dutch legal practice towards economically inactive Union citizens and their access to social assistance see: D Kramer, 'Verdiend Verblijf: EU-Burgers en de Sociale Bijstand' (2016) (2) *SEW, Tijdschrift voor Europees en Economisch Recht* 60.

[71] Art 11(1) Participation Act.

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foreigners who lawfully reside in the Netherlands, thereby including Union citizens who stay in the Netherlands on the grounds of EU law.[72] Before 15 January 2004, Union citizens would be issued a residence permit that warned the bearer that 'recourse to the public means invalidates the right to residence', signifying the automatic suspension of lawful residence when claiming social assistance.[73] As part of an infringement procedure that would be referred to the Court for another matter,[74] the Commission relied on the *Grzelczyk* judgment to argue that the withdrawal of a residence permit of a Union citizen should in no case become 'the automatic consequence of a Union citizen who is a student or inactive having recourse to the social assistance system' and, relying on the *Baumbast* case, should be subjected to a proportionality test.[75]

The Dutch authorities responded by requiring civil servants to apply a proportionality test between the recourse to the public finances by the Union citizen on the one hand and the sanction of termination of the right to residence on the other.[76] In order to assist the civil servant, policy guidelines provided a 'sliding scale' which constituted an assumption of an unreasonable recourse to the social assistance system.[77] Whether recourse to social assistance is 'unreasonable' depends on the one hand on the period of lawful residence of the Union citizen and on the other, on the period, frequency and amount of the claim on the public finances.[78] The Dutch 'sliding scale', applying to economically inactive Union citizens who have resided between the three months and five years, essentially forms a semi-automatic set of assumptions on the 'reasonableness' of the specific burden that the individual Union citizen poses on the Dutch social assistance system; the longer an Union citizen remains self-supportive, the less 'unreasonable' his claim and the more access he acquires to the Dutch solidarity collective. Presented in the light of a more restrictive policy towards Central and Eastern European migrants, the Dutch government

[72] Art 11(2) Participation Act in combination with Art 8(e) Aliens Act.

[73] Art 4.3.2 of Ch B10 of the Aliens Circular 2000.

[74] The position of the Dutch government that resources could only be considered 'sufficient' if they were available for at least a year resulted in *Commission v Netherlands*, C-398/06, EU:C:2008:214. The Court regarded this requirement disproportionate.

[75] Letter from the Commission to the Netherlands, infringement no. 1999/2029, C(2003)990, 2 April 2003, p 15.

[76] Art 4.3.2 of Ch B10 of the Aliens Circular. The warning on the residence permit would come to read: 'recourse to the public means *can* have consequences for the right to residence' (emphasis added).

[77] The sliding scale is not an exceptional technique of government in Dutch migration policy and a similar scale has been subject to an infringement procedure. According to the Court, the relevant national provisions made it possible to establish a systematic and automatic connection between a criminal conviction and a measure ordering expulsion with respect to Union citizens. See *Commission v Netherlands*, C-50/06, EU:C:2007:325.

[78] The 'scale' considered any claim to social assistance unreasonable during the first year of residence, a claim to social assistance for more than three months unreasonable during the second year of residence, a claim to social assistance for more than six months unreasonable during the third year, etc. Longer periods of reliance were tolerated with respect to supplementary claims to social assistance. When applying the proportionality test, account was also taken of other factors, such as the reason for the claim, the remaining ties with the country of origin, family ties and the medical situation.

described the social rights of Union citizens as being 'gradually accumulated'; migrant workers would only have access to social assistance in the second year of lawful residence, at which time they would have secured a job.[79]

Once introduced, a 'sliding scale' was found to be as a well-suited policy instrument to conduct a visible restrictive policy.[80] Unsurprisingly then, its restriction was one of the first measures proposed by an 'action package' targeting 'social assistance tourists' presented by the new centre right coalition government in 2011.[81] By making the 'sliding scale' more restrictive in 2012, the Dutch government narrowed the measure of willingness to support economically inactive Union citizen; for each time period under consideration, burdens on the social assistance system were considered to be more 'unreasonable' than previously.[82]

The impact of *Grzelczyk* also required a reconstruction of administrative procedures between welfare and migration authorities; a process which took almost ten years.[83] Bearing the financial responsibility for social assistance provision, it appears that municipalities regularly denied benefits to welfare applicants on the basis of conditions related to their lawful residence. It was only in 2013 that the Higher Administrative Court clearly decided that welfare authorities are not competent to reject social benefits to Union citizens on the basis of residence conditions.[84] Joining four separate cases, it held that municipalities are only responsible for assessing the right to social assistance while the Immigration Service is responsible for the assessment and eventual termination of lawful residence as a consequence of a claim to social assistance. As a result, welfare authorities can only deny social assistance to those categories of Union citizens listed in Article 24(2) of the Citizens' Rights Directive.[85] For other Union citizens, municipalities have to assume their lawful residence for as long as the migration authorities have not taken a decision on the legality of their residence on the basis of the signals they receive from welfare authorities.[86] In cases when the Immigration Service is uncertain about the legality

[79] Parliamentary document 2003–2004, 29 407, No 1, p 8.

[80] M Stronks, 'Een Bijna Ongebreidelde Beteugeling Van De Tijd; Een Analyse Van Aanscherpingen Van De Glijdende Schaal' (2013) (34) *Nederlands Juristenblad* 2306.

[81] The groups targeted were workers, job-seekers, the economically inactive, students and the homeless. Parliamentary document 2011-2012, 29 407, No 132, p 15.

[82] Since 2012, any recourse to social assistance within the first two years is considered reasonable, unless personal circumstances oppose such a decision. Even in the fifth year of residence, a claim to social assistance for longer than six months is assumed to be unreasonable. Age, reliance on other social benefits, the amount of social contributions paid, the degree of integration and future prospects are now also factors to be considered.

[83] A joint-investigation from 2008 revealed that cooperation on the link between social assistance and lawful residence was not effective. Between 2006 and 2008, the Immigration Service did not even assess the residence of Union citizens due to 'other policy priorities'. Inspectie Werk en Inkomen/ Informatie- en Analysecentrum IND, 'Bijstand, WW en verblijfsvergunning', V08/05, December 2008.

[84] Centrale Raad van Beroep, Case 12/165 and 12/166, NL:CRVB:2013:BZ3857.

[85] This derogation was implemented in the Social Assistance Act.

[86] PE Minderhoud, 'Bevoegdheid Vaststellen Verblijfsrecht bij Bijstandsaanvraag EU Burger' (2013) (86) *Rechtspraak Vreemdelingenrecht* 1.

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of residence, the Union citizen will be sent a letter listing 26 questions concerning his or her personal situation, ranging from their place of residence, family ties, medical situation to the ultimate question: 'Why do you think that you are not an unreasonable burden on the public resources and that in your case termination of your right to residence is a disproportionate measure?'[87]

A final measure worth discussing also stems from the 'action package' on 'Middle and Eastern European migrants' and concerns the introduction of a language requirement within the social assistance. As from January 2016, applicants (and from July 2016, recipients) of social assistance, are required to demonstrate a basic level of Dutch language proficiency. Those failing the language requirement, as testified by a language test, or those not putting in sufficient effort to master the Dutch language are sanctioned with reductions in the amount of assistance granted.[88] Although this law ('Wet Taaleis') was not presented as a specific measure targeting Union citizens, it is striking that many ideas for this language test were first articulated with respect to Union citizens and were moulded in a discourse that centred around the individual's responsibility to integrate in 'society' through self-investment and self-sufficiency.[89] In the explanatory memorandum, account is taken of the possible constraints of EU law. The government admits that language requirements may constitute indirect discrimination under EU law, but, referring to the *Brey* case, argues that a language requirement is justified by serving the legitimate concern of protecting public finances, namely by stimulating the outflow from social assistance and promoting labour market participation.[90]

C. Outcome: constructing (semi-)individualised bridges of contribution

The Court's early citizenship case law on the right to social benefits, read in combination with its implementation in the Netherlands, involved a close yet complex connection between a Union citizen's right to reside and his broader economic and social conduct in the territory of his host Member State. One could argue that this case law drew on a model of residential egalitarianism: the very reason that the conditions for lawful residence were formulated restrictively for the sake of 'protecting' the welfare system would also mean that those Union citizens residing in the territory of the Member State should be treated equally as long as their lawful residence is not terminated. This decision of terminating one's residence was not be taken light-heartedly, even when it is clear that the indigent Union citizen no longer fulfils the residence requirements of the secondary legislation. The fact that the

[87] Letter in possession of author.

[88] K Groenendijk and P Minderhoud, 'Taaleis in de Bijstand: Discriminerend, Disproportioneel en Onnodig' (2016) (3) *Nederlands Juristenblad* 183.

[89] Stating that 'all people have responsibility to independently raise a living and take part in society' which starts with 'investing in their own knowledge and skills', the Minister argues that an age-independent obligatory education can underpin the system of social security. Parliamentary document 2010-2011, 32 824, No 1, p 11.

[90] Parliamentary document 2013-2014, 33 975, No 3, pp 11–13. That the language requirement can be justified is disputed by Groenendijk and Minderhoud, see note 88 above.

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Union citizen's engagement with the welfare state can have residential consequences resembles the situation in Kafka's parable *Before the Law*.[91] The 'gate' towards social citizenship is open, but is characterised by a highly, maybe even over-personalised assessment of the relationship between the individual and the national solidarity collective. As the very reason for applying for minimum subsistence benefits might invalidate their right of residence, the law applies forcefully in its openness and may deter foreign Union citizens from engagement with the welfare system at all.

However, it was the very construction of this 'gate' towards equal access to social benefits that formed the Court's constitutive moment of social citizenship for economically inactive Union citizens. It entailed the setting up of a personalised procedural right, ie a right 'to be assessed at all',[92] and guidelines in the form of open and abstract concepts and criteria such as 'unreasonable burdens', 'sufficient resources' and 'genuine links' that required Member States to offer 'a certain degree of solidarity' towards foreign Union citizens. The 'unreasonable burden' forms the prime reflection of the principle that the closer the bond between the individual claimant and the Member State, the more secure will be the claimant's right to reside, free from the fear of expulsion on economic or financial grounds and the more extensive his or her right to equal treatment within the host society as regards welfare and other social benefits.[93] Rather than a particularly generous expression of supranational social citizenship, this principle forms a 'sliding scale' that shapes the relationship between the individual and the national solidarity collective in a contractual rhetoric while leaving room to Member States to develop specific national mechanisms of inclusion and exclusion of individual Union citizens who form an 'unreasonable burden' on the national solidarity collective.

By creatively exploring this 'legal corridor' of EU law, the Dutch authorities developed rules and administrative mechanisms that sought to accommodate the required link between residence status and the welfare state. In the context of both supranational and domestic political pressures, the Dutch government constructed a complex administrative procedure between welfare and migration authorities and a spectacular policy-example of earned social citizenship for economically inactive Union citizens. An actual 'sliding scale' represents the relatively objectified bridging effort expected from the Union citizen-outsider to enter the Dutch national solidarity space, thereby placing extra weights on certain factors in a way that seeks to balance 'tensions between an individual, personalised approach and an administratively easier, collectively fairer, generalised approach'.[94] A changed political environment

[91] As interpreted by G Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, 1998).

[92] C O'Brien, 'Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's "Real Link" Case Law and National Solidarity' (2008) 33 *European Law Review* 643, pp 650–656.

[93] M Dougan, 'Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the Field of Union Citizenship', in H-W Micklitz & B de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012), p 124.

[94] O'Brien, see note 92 above, pp 661–662.

triggered the Dutch government to not only test the limits of this sliding scale policy, but also to extend the Union citizens' earning process to the inclusionary and exclusionary mechanisms of the 'activating' welfare state by introducing general language requirements for social assistance recipients. Union citizens in the Netherlands can acquire their 'formal' right to social assistance, but may still be required to make a bridging effort to be included in Dutch 'society'. It might very well be that such social integration requirements offer genuine integration opportunities for the willing and able, but the duty-inspired rhetoric underpinned by a sanction-based system rather points at the establishment of new levels of social exclusion.[95]

IV. EARNED SOCIAL CITIZENSHIP RECONSTRUCTED

This section proceeds by reviewing the Court's recent line of case law with respect to Union citizens' access to social benefits in the light of its earlier case law. An extensive explanation of the Court's retreat from its earlier reasoning in citizenship cases is beyond the scope of this article. However, a number of factors can be highlighted when reading the case law as a traditional legal dialogue between the Court and the Member States in the shadow of broader political sentiments.[96] As we have seen in the previous section, Court rulings hardly ever describe a specific policy response, but rather circumscribe a 'legal corridor' that Member States may explore by creatively designing policies that simultaneously (seek to) comply and preserve a degree of autonomous domestic regulation.[97] When such 'exploring' slips into 'exploiting'[98] and 'compliance' slips into 'non-compliance'[99] is a matter of subjective appreciation, but ultimately, from a formal perspective, up to the Court of Justice. The ensuing interaction with national courts and Member States allows the Court to refine its earlier rulings by accommodating concerns and criticism of Member State governments and the broader political environment of European integration.[100] Such Member State responses feed back to the European level, spill over to other Member States and transform or 'update' the model of Union social citizenship.[101]

[95] As predicted by O'Brien, ibid, pp 662–663.

[96] For a perspective on the judicial transformation of Union citizenship as a long-term process of constitutional dialogue, see Dougan, see note 93 above, pp 139–145.

[97] See M Blauberger, 'With Luxembourg in Mind… the Remaking of National Policies in the Face of ECJ Jurisprudence' (2012) 19 (1) *Journal of European Public Policy* 109. Also M Blauberger and SK Schmidt, 'Welfare Migration? Free Movement of EU Citizens and Access to Social Benefits' (2014) 1 (3) *Research and Politics* 1.

[98] Cf O'Brien, see note 4 above, p 4.

[99] Shaw, see note 1 above, p 21.

[100] AJ Obermaier, *The End of Territoriality? The Impact of ECJ Rulings on British, German and French Social Policy* (Ashgate, 2009), pp 141–144.

[101] Member States may 'emulate' an 'ECJ-proof' template from other Member States, see Blauberger, p 114, note 97 above. From a critical perspective, such national 'distortions' of EU law feedback into and distort in turn EU law as its source, see O'Brien, see note 4 above, p 3.

From this perspective, the discussion in this section of the Court's recent case law on welfare access of mobile Union citizens suggests three explanations for the retreat from its former judicial activism. First, it cannot be denied that the Court's exposure to the political landscape in European societies has informed its judgments, if not in structure, than surely in rhetoric. In one case, the Court was even informed by the Advocate General about the 'unusual stir' it had caused in the European media and the 'importance and sensitivity of the subject'.[102] Secondly, the Court seems to demonstrate a certain awareness of the administrative struggles and uncertainties experienced by Member States, especially when it refines the requirements concerning the individual assessment.[103] And finally, the case law demonstrates that Member States simply became 'better' in designing reasonable policies within the legal corridor of EU law with the Court openly praising Member States for their clear rules.[104] This section first discusses the new relationship between the right of residence and the right to equal treatment. It then explores the various 'stages' of the newly emerging 'gradual system' for access to social assistance that fundamentally reconstructs the model of earned social citizenship for economically inactive Union citizens.

A. Equal treatment and right of residence; a purposive reversal?

In terms of structure, the argument could be made that the Court has very gradually reversed the order between the Union citizen's right to equal treatment and the right to residence. In its early case law, the Court strongly emphasised the Union citizen's right to equal treatment 'simply as a citizen of the Union';[105] if a Member State wanted to enforce the residence conditions it had to undertake a removal measure.[106] In *Dano* however, the Court stated that 'so far as concerns access to social benefits, a Union citizen can claim equal treatment only if his or her residence in the territory of the host Member State complies with the conditions for lawful residence of the Citizen' Rights Directive'.[107] In the words of one commentator, the Court poured the content of the primary right to equal treatment into a statement in secondary law, turning the *Grzelczyk* approach to residential requirements on its 'constitutional head – the latter no longer *temper* equal treatment rights; they *constitute* the rights.'[108] But whereas in *Dano* the Court still refers to the 'fundamental status' of Union citizenship and explicitly affirms Article 24(2) as an exception to the principle of non-discrimination, *Alimanovic* confirms the reversal by skipping any reference to

[102] Opinion of AG Wathelet in *Alimanovic*, C-67/14, EU:C:2015:597, para 4.

[103] See Part IV.B.2.

[104] See Part IV.B.1 and 2, but see especially *Alimanovic*, EU:C:2015:597, para 61, and *García-Nieto*, EU:C:2016:114, para 49.

[105] *Trojani*, EU:C:2004:488, para 31.

[106] Ibid, para 45.

[107] *Dano*, EU:C:2014:2358, para 69 (emphasis added).

[108] Nic Shuibhne, see note 4 above, p 909 (emphasis in original). Note that O'Leary, commenting on the *Martínez Sala* case, still assumed that the conditions imposed by the Directive (90/364) were constitutive; O'Leary (1999), see note 7 above, p 79. In a way, *Dano* meant a return to the position before *Grzelczyk*.

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Union citizenship and directly moving to residence conditions.[109] The resulting difference in treatment between unlawfully residing Union citizens and nationals of the host Member State was, according to the Court, justified to safeguard the objective of the Citizens' Rights Directive to prevent foreign Union citizens from becoming an unreasonable burden on the social assistance system of the Member State.[110] The reversal of order, also with respect to social benefits falling outside the traditional scope of social assistance, is confirmed in the recent case against the United Kingdom where the Court endorsed a 'right to reside test' preceding the grant of child allowance.[111] As this latest case and the description of the Dutch system (see Part III.B) demonstrate, this reversal of order is not only important at the symbolic level, but may have major implications for administrative procedures and how Union citizens experience their social rights in the host welfare state.

The emphasis the Court places on lawful residence preceding the right to equal treatment should be viewed within a similarly gradual shift from a purposive reading of the provisions of secondary law in the light of the primary law to a purposive reading of secondary law, the Citizens' Rights Directive in particular. It is true that the Court has always acknowledged that the protection of public finances was a legitimate interest to be pursued by the Member States, but the application and enforcement of conditions to such effect were limited by the broader purpose of facilitating and strengthening the right of free movement and residence.[112] Indeed, the right to freedom of movement was, as a fundamental principle of EU law, considered the 'general rule', whereas its residence conditions must be construed narrowly and in compliance with the principle of proportionality.[113] The Court has recently started to replace this teleological interpretation by emphasising the objective of preventing Union citizens from becoming an unreasonable burden on the social assistance system of the host Member State as the purpose behind its provisions.[114] In its *García-Nieto* judgment, the Court went so far as stating that the Directive's provisions were consistent with 'the objective of maintaining the financial equilibrium of the social assistance systems of the Member States'.[115]

B. The 'gradual system' of earned social citizenship

By declaring lawful residence constitutive for the right to equal treatment, the Court was forced to incorporate various elements of its previous case law in its recent

[109] *Alimanovic*, EU:C:2015:597, para 49.

[110] Ibid, para 50. *Dano*, EU:C:2014:2358, para 69.

[111] *Commission v UK*, EU:C:2016:436, para 75. See also O'Brien, see note 4 above, p 14.

[112] See eg *McMarthy*, C-434/09, EU:C:2011:277, para 32.

[113] *Brey*, C-140/12, EU:C:2013:565, para 70.

[114] In *Ziolkowski and Szeja*, the Court admitted that while 'it is true that Directive 2004/38 aims to facilitate and strengthen the exercise of the primary and individual right to move and reside freely … the fact remains that the subject of the directive concerns … the conditions governing the exercise of that right and the right of permanent residence'; C-424/10 and C-425/10, EU:C:2011:866, para 36. But see especially *Dano*, EU:C:2014:2358, para 77 and *Alimanovic*, EU:C:2015:597 para 50.

[115] *García-Nieto*, EU:C:2016:114, para 45.

rulings through a constructive interpretation of the Citizens' Rights Directive. Not only does it find a 'gradual system' safeguarding the right to residence and access to social assistance within secondary law itself, but it also internalises the 'individualised assessment' within this emerging gradual system. The big leap towards this new approach was made in the *Ziolkowski and Szeja* case, where the Court noted that 'the directive introduced a gradual system as regards the right of residence in the host Member State, which reproduces, in essence, the stages and conditions set out in the various instruments of European Union law and case-law preceding the directive and culminates in the right of permanent residence'.[116] In other words, whereas the Court previously expected from Member State authorities to make an individualised proportionate decision on the foreign Union citizen's worthiness of financial solidarity, the thresholds for earning social citizenship are now increasingly objectively determined by the Citizens' Rights Directive. For reasons of presentation, this section analyses this shifting regime of earned social citizenship in the case law of the Court by following these 'stages' of residence: short-term residents, mid-term residents and permanent residents.

1. *Short-term residents: unreasonable burdens* per se

The idea that social differentiation is tolerable for 'temporary guests' is expressed by EU law in Article 24 (2). Although this provision seems quite clear in the possibility for a host Member State to derogate from the principle of equal treatment by not conferring entitlement to social assistance during the first three months of a Union citizen's residence, some confusion was caused by the *Brey* judgement. After all, the Court scrutinized Austria's decision to reject a supplementary pension benefit to a retired German couple during their first month of residence. Here, the problem was that the Austrian authorities based their rejection on the residential conditions of Article 7(1)(b) and not on the derogation from the principle of equal treatment as provided by Article 24(2).[117] In doing this, the Austrian authorities automatically precluded foreign Union citizens from receiving a benefit regardless of the burden that they would place on its social assistance system 'even for the period following the first three months of residence referred to in Art 24(2)'.[118]

In this light, *García-Nieto* could be understood in the context of the Court's push for legal certainty and transparency in the field of Union citizens' welfare rights as initiated with *Alimanovic*. In its *García-Nieto* judgment the Court was faced with the question of whether Germany could exclude from entitlement to non-contributory welfare benefits those Union citizens who reside less than three months and are neither employed nor self-employed. The German authority responsible for social benefits had denied these benefits to a father and his son for an initial period as they resided less than three months in Germany and were neither working nor self-employed. Although they enjoyed a right to residence during this period on the basis of Article 6(1) of the Citizens

[116] *Ziolkowski and Szeja*, EU:C:2011:866, para 38.

[117] *Brey*, EU:C:2013:565, para 27.

[118] Ibid, paras 76–77.

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Directive, the host Member State may rely on the derogation from the principle of equal treatment under Article 24(2) of the Directive.[119] Since host Member States may not demand that Union citizens in this first period have sufficient means of subsistence and personal medical cover, it is legitimate, according to the Court, not to require those Member States to be responsible for those citizens during this period. A different interpretation would run counter to the objective of maintaining the 'financial equilibrium of the social assistance systems of the Member States'.[120] In an attempt to incorporate the 'individual assessment' as required by its *Brey* judgment, the Court resonates its logic of *Alimanovic* by not requiring this in the current situation, as the Citizens' Rights Directive itself already provides for a gradual build-up of social rights while taking account of individual circumstances.[121]

In sum, the Court concludes that the German rule excluding economically inactive short-term residents both guarantees a significant level of legal certainty and transparency and complies with the principle of proportionality.[122] The judgment therefore seems to be an example of the Court appearing to reward the correct and sensible application of the rules provided in the Citizens' Rights Directive for the sake of legal clarity with a rather uncompromising result: short-term residents requesting social assistance are unreasonable burdens *per se*. The Court can be criticised, however, for the counter-intuitive assertion that the personal circumstances of each applicant are safeguarded within the gradual system for the right of access to social assistance, but also for neglecting the possibility that father and son had a right to social assistance as family members of a worker.[123]

2. *Mid-term residents: any role left for the individual assessment?*

The second stage of the gradual system of social citizenship for economically inactive Union citizens covers the residence period between three months and five years. As established in Part III.A, the early citizenship case law was relatively consistent. From the mere application for social assistance, Member States could draw the conclusion that the residence condition of self-sufficiency was no longer fulfilled, but this decision could not be taken light-heartedly and had to be preceded by an individual assessment. Arguably, this requirement was taken to the extreme in the *Brey* case when the Court established that national authorities first have to carry out 'an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned.'[124]

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[119] *García-Nieto*, EU:C:2016:114, para 43.

[120] Ibid, para 45.

[121] Ibid, paras 46–48. A discussion of this reasoning is provided in the next section.

[122] Ibid, para 49.

[123] For this argument see D Kramer, 'Short-term Residence, Social benefits and the Family; an Analysis of Case C-299/14 (García-Nieto and others)' *European Law Blog*, 9 March 2016 http://europeanlawblog.eu/?p=3120.

[124] *Brey*, EU:C:2013:565, para 64.

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Indeed, any mechanism that automatically barred economically inactive Union citizens from receiving a social security benefit would prevent national authorities from carrying out this comprehensive personal assessment that is not only required by Articles 7(1)(b) and 8(4) of the Directive but also by the principle of proportionality.[125]

In *Dano*, however, the Court stated that Article 24(1) read in conjunction with Article 7(1)(b) does not preclude national legislation that excludes Union citizens who do not have a right to residence from entitlement to social assistance benefits.[126] The Court follows the findings of the referring court that the applicants do not have sufficient resources 'and *thus* cannot claim a right of residence in the host Member State'.[127] Although the Court remarks that 'the *financial* situation of each person should be examined specifically',[128] this is the closest it comes to the requirements of a comprehensive personal assessment, including factors such as the duration of residence and close personal ties, and an individual proportionality test, that had taken centre stage in its earlier case law.[129]

Three interpretations could be provided for this surprising deviation. One interpretation would be to argue that the Court blindly followed the referring Court in its finding that Ms Dano did not have sufficient resources and thereby assumed that the national authorities had duly conducted a personalised assessment before terminating her residence on the basis of her limited resources. This scenario, however, would be at odds with the Court's extensive description of the individual circumstances of Ms Dano, which rather supports a second interpretation, namely that it implicitly applied a proportionality test to the facts of the case. Citing the objective of preventing foreign Union citizens from becoming an unreasonable burden, the Court concluded that Member States must have the possibility of rejecting social benefits to economically inactive Union citizens who exercise their rights to free movement 'solely in order to obtain another Member State's social assistance benefits although they do not have sufficient resources to claim a right of residence'.[130] By using this formulation, it is clear that the Court refers to the general provision in German legislation that rejects granting social assistance to 'foreign nationals who have entered national territory in order to obtain social assistance'.[131] It is rather unclear however, how the Court derived from the facts of the case that it was indeed Ms Dano's intention to move to Germany for the 'sole purpose' of obtaining benefits, as she had lived in Germany for at least for a couple of years before applying for benefits, her son was born there and her sister had provided for them materially. By conflating the personal facts with the legal provision, the Court marked her as the

[125] Ibid, para 70.

[126] *Dano*, EU:C:2014:2358, para 82.

[127] Ibid, para 81 (emphasis added).

[128] Ibid, para 80 (emphasis added).

[129] In the context of minimum subsistence benefits, *Brey*, EU:C:2013:565, para 69. In the context of tide-over allowances, *Prete*, C-367/11, EU:C:2012:668, paras 50–51. In the context of the exportability of study finance, *Prinz and Seeberger*, C-523/11 and C-585/11, EU:C:2013:524, para 38.

[130] Ibid, para 78.

[131] Ibid, para 26.

'welfare tourist' *par excellence*.[132] In addition, the Court's mentioning of her low level of education, limited knowledge of the German language, lack of professional training and experience and, despite her ability to work, apparent reluctance to find a job, constructs an image of Ms Dano that emphasises her lack of motivation to integrate and escape from her marginal situation within German society.[133] A second interpretation of the case is therefore that the Court implicitly affirmed that persons in a situation such as that of Ms Dano form, without a doubt, an 'unreasonable' burden in which case exclusion from social benefits would be proportionate.[134] A third interpretation would be that the Court simply nullified the autonomous worth of the individual assessment and allowed Member States to enact a generalised exclusion as part of national legislation.[135] This 'broad' interpretation can definitely be derived from the rhetoric of the judgment, especially when reading is confined to the *dictum*, and might serve as a justification for Member States to refuse social benefits to all economically inactive Union citizens who lack sufficient resources.[136]

The latter interpretation is not very likely in the light of subsequent case law of the Court since the individual assessment found its way back with the *Alimanovic* judgment, albeit in a somewhat curious way. After having worked in temporary jobs for a period of 11 months, mother and daughter Alimanovic, both possessing Swedish nationality, were only granted social benefits for half a year by the German authorities. The Court agreed with the German authorities that Article 7(3)(c) of the Citizens' Rights Directive allows for national rules that provide for the retention of worker status for a period of six months after becoming involuntarily unemployed within the first 12 months of residence.[137] Union citizens can retain their right to residence as work-seekers after these six months, but the derogation of Article 24(2) allows Member States not to grant them social assistance anymore.[138]

Although the Court explicitly admits that it had previously held that account should be taken of the individual situation before Member States adopt expulsion measures or find that a person forms an unreasonable burden on its social assistance system, it states that in the present circumstances no such individual assessment is required.[139] By taking into consideration 'various factors characterising the individual situation of each applicant for social assistance and, in particular, the duration of the exercise of any economic activity', the Court considers the Citizens' Rights Directive itself to establish a 'gradual system' as regards the retention of the status of worker which seeks to safeguard the right of residence and access to social assistance.[140]

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[132] Ibid, paras 35–37.

[133] Ibid, para 39.

[134] H Verschueren, 'Preventing "Benefit Tourism" in the EU: A Narrow or a Broad Interpretation of the Possibilities Offered by the ECJ in Dano?' (2015) 52 (2) *Common Market Law Review* 363, p 374.

[135] Nic Shuibhne, see note 4 above, p 913.

[136] Verschueren, see note 134 above, p 380.

[137] *Alimanovic*, EU:C:2015:597, para 53.

[138] Ibid, para 57.

[139] Ibid, para 59.

[140] Ibid, para 60 (emphasis added).

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According to the Court, apparently, the Citizens' Rights Directive itself already embodies an individualised assessment, as a result of which an 'automatic exclusionary mechanism', as explicitly prohibited by *Brey*, is allowed when a national measure conforms with the 'gradual system' of the Citizens' Rights Directive. Although it can be seen how the Citizens' Rights Directive establishes a gradual system by taking account of 'the duration of the exercise of any economic activity', it is harder, not to say impossible, to see how the Directive takes account of 'factors characterising the individual situation of *each* applicant for social assistance'.[141] The fact, for example, that mother *Alimanovic* was born in Bosnia and Herzegovina and her children were born in Germany between 1994 and 1999 hints at her possible history in Germany as a refugee, escaping the violent conflict in her home country. These circumstances may potentially reflect a connection with German society and hint at the existence of family relations, circumstances which cannot possibly be taken into account by the Directive.

In the case of *Commission v UK*, the Court was asked to assess the compatibility of the so-called 'right to reside test' as it was applied by various welfare authorities in the UK with EU law. The case was confined to the question of whether relevant authorities can verify the lawful residence of economically inactive Union citizens when they claim child benefit or child tax credit but has broader implications for their access to social benefits. The Court considers the UK's requirement for a foreign Union citizen to possess a right to reside when applying for social benefits indirectly discriminatory.[142] However, it considers this difference in treatment with nationals applying justified by the legitimate interest of protecting the finances of the host Member State, especially as granting social benefits to economically inactive persons 'could have consequences for the overall level of assistance which may be accorded by that State'.[143] The Court then discusses the proportionality of the 'right to reside test' in the context of Article 14(2) of the Citizens' Rights Directive. Here, the Court appears to limit its proportionality assessment to the alleged systematic nature of the verification process, finding that because it is only in specific cases that claimants are required to prove that they in fact enjoy a right to reside in the UK territory this process is not carried out systematically.[144] The Court thereby neglects the Advocate General's submission that the economically inactive Union citizen may not automatically be denied lawful residence when claiming social benefits, but only when he has become 'an *excessive burden*', which requires taking account of the circumstances of the particular case.[145] A closer look at the administrative procedure reveals that the welfare authority carries out an individual assessment of personal circumstances, 'including in relation to the social security contributions which he has paid and to whether he is actively seeking employment and whether he

[141] Ibid, para 60 (emphasis added).

[142] *Commission v UK*, EU:C:2016:436, paras 76–77.

[143] Ibid, paras 79–80.

[144] *Commission v UK*, EU:C:2016:436, paras 83–84.

[145] Opinion AG Cruz Villalón in *Commission v UK*, C-308/14, EU:C:2015:666, para 97 (emphasis in original).

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has a genuine chance of being engaged'.[146] In addition to being rather limited in the context of the criteria developed by the Court and formulated in Recital 16 of the Citizens' Rights Directive for establishing an 'unreasonable burden', these criteria used by the UK administration appear to be those developed in the context of job-seeker's allowances and not of terminating residence on the basis of residence conditions.[147]

3. *What is left of Union social citizenship? On earning permanent residence*

With barriers raised for economically inactive Union citizens to acquire access to social benefits during their first five years of residence, the five-year benchmark has become the most important threshold in Union social citizenship. After having resided lawfully and continuously in the host Member State for five years, a mobile Union citizen acquires a right of permanent residence which grants him full equal treatment with respect to social rights, ie the enjoyment of social citizenship in its full *Marshallian* meaning.[148] In order to expand the right for Union citizens to remain permanently on the territory, the Commission proposed during the drafting of the Citizens' Rights Directive to confer such 'an upgraded right of residence' after four years of residence. This period was considered sufficiently long enough to assume 'that the Union citizen has developed close links with the host Member State and become an integral part of its society'.[149] Despite surviving the first reading of the European Parliament, these four years were extended to five years after negotiations in the Council. As both the common position and a communication of the Commission suggest, the period of five years was the outcome of ordinary political tit for tat bargaining between the opposing blocks of Member States.[150] During earlier discussions in the Permanent Representatives Committee (COREPER), a majority of Member States had been in favour of a four years' requirement on grounds of constructing a more favourable regime for Union citizens vis-à-vis Long-Term Residents, while a minority consisting of, *inter alia*, Germany, Austria and the Netherlands, argued for the acquisition of permanent residence after five years.[151] As another stumbling block concerned the question of whether students should be eligible for permanent residence status, the Presidency of COREPER proposed as part of its global compromise, text to extend the period of residence required in order to obtain the right of permanent residence from four to five years.[152] However, this

[146] *Commission v UK*, EU:C:2016:436, para 53.

[147] *Collins*, C-138/02, EU:C:2004:172, para 67.

[148] Art 16 Directive 2004/38/EC.

[149] COM(2001) 257, 25 September 2001, OJ C270E.

[150] Common Position (EC) No 6/2004, 5 December 2003, OJ C54E, p 31, and Communication from the Commission, SEC/2003/1293 final - COD 2001/0111, p 11.

[151] Council, Interinstitutional File 2001/0111 (OCD), No 12519/02, Outcome of Proceedings of the Working Party on Free Movement of Persons on 20 September 2002, point II.6.

[152] Ibid, point II.6.2. Reasons for the opposition to the inclusion of students can only be based on speculation. However, since the average study program takes up to four years, Member States may have been reluctant to grant foreign students automatic access to the social welfare system upon graduation. When conceiving of permanent residency as an economically conditioned entitlement, students may

extension was conditioned on the 'fact that students should not be excluded from the acquisition of this right'.[153]

The result has been that after five years of residence, the aim of integration takes precedence over the (financial) reservations of Member States, acknowledging that a Union citizen has settled there to such an extent that he or she should be allowed to integrate in the society of that Member State 'in the sense of a burden-sharing community'.[154] Permanent residence then appears to serve a double purpose: at once it provides evidence of a certain bond with the particular and nationally-rooted society and serves as a vehicle of further integration and development in that society.[155] However, it gradually becomes clear that 'mere residence', ie 'somehow being somewhere over time', is not considered sufficient by the Court.[156] In its *Ziolkowski and Szeja* case, the Court declared that 'legal residence' does not rest on national law, but should be regarded as an autonomous concept of European Union law for the purpose of the application of the Directive.[157] It therefore concluded that 'having resided legally' should solely be seen as a periods of residence that satisfy the conditions laid down in Article 7(1), which, are not met when relying on social assistance.[158] In *Dias*, the Court was even clearer in stating that the objective of integration is not only based on 'territorial and time factors but also on qualitative elements'.[159] That unlawful conduct of a Union citizen can diminish his or her integration in the host State from a 'qualitative point of view', was taken a step further in the *Onuekwere* case, where the Court found that the inclusion of periods of imprisonment for the purpose of the acquisition of the right of permanent residence would be contrary to the aim pursued by the directive as they showed the 'non-compliance by the person concerned with the values expressed by the society'.[160]

Acquiring permanent residence after five years of 'compliant' behaviour has then become 'earned citizenship' *par excellence*, placing an increased importance on the 'earning' of citizenship in an increasingly 'sacralised' national community. Yet, the technique of employing a qualifying period of five years is hardly new in the transnational government of mobile Europeans. When tracing the origins of the five years' period in EU law we can draw an interesting historical parallel with

(F'note continued)
not have 'contributed' to the national burden-sharing community before acquiring the right to equal treatment in the field of social assistance. This explanation is partially supported by an earlier proposal by Belgium to take into account the time spent as a student once a person changes category. See ibid.

153 Council of the European Union, Interinstitutional File 2001/0111 (OCD), No. 12538/03, Note from the Presidency to the Permanent Representative Committee, 16 September 2003, p 5.

154 See Opinion AG Trstenjak in *Lassal*, Case C-162/09, EU:C:2010:592, note 33.

155 The Court, while taking account of the *travaux préparatoires*, concludes that that the rationale for permanent residence is based on an integration objective, revolving around the link between a person and the host Member State. *Lassal*, EU:C:2010:592, paras 55–56.

156 See Somek, note 7 above, p 812.

157 *Ziolkowski and Szeja*, EU:C:2011:866, para 33.

158 Ibid, paras 40, 46.

159 *Dias*, C-325/09, EU:C:2011:498, para 64.

160 *Onuekwere*, C-378/12, EU:C:2014:13, para 26.

the drafting of Article 8 of the Employment Convention of the International Labour Organisation.[161] Concerned with the fate of the millions of foreign workers who were being 'repatriated' to their original countries on the back of the Great Depression, the drafters put forward the 'method' of a qualifying period to establish that a foreign worker would not be liable to repatriation for purely economic reasons, such as the situation of the employment market or his lack of means.[162] In this regard, the report mentions the Belgian–French Agreement, signed on 16 June 1935, as the first example of this principle, in which foreign workers who had been resident in France for more than five years would receive 'favourable consideration'.[163] A longer qualifying period than these five years would hardly offer minimum protection for workers who have become part of the local community, and still leave ample opportunity to authorities of the host state to carry out 'whatever enquiries may be necessary into the applicant's case and ascertain whether he is playing a useful part in the national productive or economic life … offering them sufficient time to bring migrant workers under effective supervision.'[164] It is probably here, during pre-WWII intergovernmental negotiations, that we find the clearest and most explicit rationale for permanent residence in the European Union, mentioning five years as the appropriate amount of time to provide security for the migrant with the aim of integration, while still effectively allowing for the supervision of the migrant.[165]

C. Outcome: stratified membership, objectification and virtualisation

When taking account of the newly emerging regime of welfare entitlements for the economically inactive Union citizen, one cannot but conclude that the Court has endeavoured to increase the legal certainty, transparency and (administrative) feasibility of an increasingly contested field of EU law. The implications for the process of earning social citizenship in another Member State are threefold. First, by declaring that Union citizens only have a right to equal treatment when they comply with the residence requirements of Article 7 of the Citizens' Rights Directive, the Court essentially departs from the aspiration of residential egalitarianism that underpinned its earlier case law. Although it is true that the Court has always held that administrative acts based on national law, such as the issuance of residence permits or certificates, are not constitutive for lawful residence under EU law, the earlier case law also appears to suggest that once foreign Union citizens are

[161] Interrupted by the Second World War, the entitlement to permanent residence would finally find its way into a final version of the Migration for Employment Convention in 1949, albeit narrowed down from all workers, as originally envisaged in the 1938 draft, to those workers who suffered from occupational incapacity. The domestic and international sources justifying five years in the run-up to the Long Term Residence Directive are provided by the Commission in COM(2001) 127 final 2001/0074 (CNS).

[162] Report III of the 24th Session, International Labour Conference, Geneva, 1938, p 160.

[163] Ibid, pp 113, 159.

[164] Ibid, p 160.

[165] On the supervision and data collection of the residence status of foreign Union citizens, see the *Huber*, C-524/06, EU:C:2008:724.

'tolerated' by national administrations they should also be treated equally.[166] It is then true that in a model of residential egalitarianism Member States are pushed towards rather crude removal measures, the alternative, namely to passively tolerate yet not actively support a class of Union citizens precisely leads to the type of stratified social membership within the territorial borders of a Member State that would be fundamentally against the ideas of the welfare state.[167] Although in *Dano* this can be justified with the submission that such Union citizens have no right to be there at all, it is with *Alimanovic* that the Court accepts the existence of a category of Union citizens who retain their right of residence but have no access to minimum subsistence benefits on the very basis of EU law. This implies a gradual shift from earning residence towards earning social membership.

Secondly, the *Dano*-line of jurisprudence means a radical downgrade of the formerly central place of the individual assessment in the early case law.[168] Within the conceptual framework of earned citizenship, two, rather paradoxical, trends can be highlighted. On the one hand, we can observe a process of objectification (or de-individualisation) of the process of earning citizenship. This is reflected by the Court's assumption that the Citizens' Rights Directive already takes into account the personal circumstances of the Union citizen; indeed the 'bridging effort' expected from Union citizens has become standardised, laid down in the 'transparent' thresholds of a 'gradual system', rather than being made dependent on the subjective circumstances of the individuals concerned. *Alimanovic* and *García-Nieto* then resonate the reasoning on legal certainty and transparency visible in *Förster*, which entailed a similar objectification of the criterion of 'a degree of integration' purely on the basis of a residence requirement.[169] Although the limits to this approach are formulated in Recital 16 of the Citizens' Rights Directive, citing both temporal difficulties and personal circumstances as factors to be examined by the Member State, the recent case law appears rather lenient towards a rather stripped down versions of the individual assessment, limited to factors and criteria of a purely economic nature. On the other hand, with *Dano* we observe a virtualisation of Union citizenship that rests on 'qualitative' elements that go beyond those formulated in the Citizens Directive. The way in which the Court legitimates the exclusion of Ms Dano from social assistance benefits, namely by deriving from her marginal situation and reluctant behaviour within German society her intention to move to Germany for the sole purpose of obtaining benefits, can be considered as a discursive act of suspending formal social citizenship through a problematisation of moral citizenship.[170]

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[166] Although the approach of the Court to residence permits and certificates could still be described as 'a systematic destruction of their worth and purpose', the Court appears to attach importance to them for the purpose of equal access to social benefits. See G Davies, 'Bureaucracy and Free Movement: A Conflict of Form and Substance' (2003) 4 *Nederlands Tijdschrift voor Europees Recht* 81. Compare for example *Dias*, EU:C:2011:498, paras 53–55 with *Trojani*, EU:C:2004:488, paras 37, 43, 46 and *Brey*, EU:C:2013:565 para 78.

[167] See Nic Shuibhne, note 4 above, pp 915–916, 933–934.

[168] Ibid, p 931.

[169] *Förster*, C-158/07, EU:C:2008:630, paras 50–57.

[170] Schinkel, see note 23 above, p 266.

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This leads us to the final implication. Imagine a situation in which Ms Dano did not apply for social assistance and instead spent five consecutive years in Germany without becoming a burden on the social assistance system while living in conditions that were considered (far) below the social standards prevailing in German society. What would be the proper criteria, rules and procedures for assessing her right to permanent residence status? Probably, she would not have been subject to an expulsion measure, but did she, therefore, comply with the residence conditions? But what about her reception of child benefits? And is it up to her to demonstrate the possession of sufficient resources for the entirety of her stay in Germany? By now, it is clear that the case law has evolved beyond mere 'time and presence' in a territory as a sufficient indicator of a degree of integration legitimating transnational solidarity.[171] Instead, cases like *Ziolkowski and Szeja*, *Dias* and *Dano* rather suggest that earning residence has become increasingly dependent on a review of socio-economic and moral conduct over the past 'qualifying period'. The instrument of permanent residence has been discovered as a way of achieving integration and disciplining the Union citizen through a re-inscription of loyalty in the vocabulary of Union citizenship; not only via the residence requirements of economic activity and self-sufficiency, but also via extra-Directive virtues such as law obedience and acts of 'active' citizenship.[172]

V. CONCLUSION: UNION SOCIAL CITIZENSHIP RECONSTRUCTED

In this article, I have adopted the sociological concept of earned citizenship as an analytical tool to study the development of the case law of the European Court of Justice on the access of economically inactive Union citizens to social assistance benefits in their host Member State. Identified as a governmental technique within the neoliberal communitarian strategy of population management, it has been argued that the image of Union social citizenship, as transpiring from both EU (case) law and national practice, reflects a particular manifestation of earned citizenship; it combines a communitarian care of the national welfare state with an individualised emphasis on the Union citizen-outsider's responsibility to achieve membership of the host welfare community. By extracting 'a certain degree' of solidarity from the status of Union citizenship, the Court's early citizenship case law shaped the relationship between an individual Union citizen present in the territory of another Member State and the corresponding national solidarity collective in a contractual rhetoric. Open and abstract criteria left room to Member States to develop national mechanisms of inclusion and exclusion of individual Union citizens who form an 'unreasonable burden' on the host social assistance system and can, for that reason, lose their lawful residence. The 'sliding scale' policy adopted by the Netherlands in response to this early citizenship case law represents, by signifying a semi-automatic gradual build-up to social citizenship, a spectacular example of a bridging effort

[171] Somek, see note 7 above, p 801.

[172] See also S Mantu, 'Concepts of Time and European Citizenship' (2013) 15 (4) *European Journal of Migration and Law* 447.

expected from the economically inactive Union citizen to enter the national solidarity space. The Dutch case also shows that the government of Union social citizenship through this intricate link between engagement with the welfare state and the enforcement of residence conditions is administratively challenging and may imply great uncertainty on the part of the Union citizens. Yet, it is a genuine attempt at offering equal treatment and a degree of solidarity to Union citizens in the context of free movement and sustaining the social bonds that allow for redistributive commitments in the national context.

Whereas Member States were previously provided with a legal corridor to construct bridging efforts for Union citizens before earning social citizenship, the cases of *Alimanovic* and *García-Nieto* suggest that such bridging efforts can now be found in the 'gradual system' of secondary law itself. This implies an objectification and de-individualisation of the principle of proportionality in balancing the Union citizen's claim to social benefits with the objective of protecting public finances, possibly encouraging a harmonisation of thresholds for earning social citizenship in various Member States and a downgrade of the previously extensive requirements of the individual assessment. At the same time however, the Court's ambiguous emphasis in *Dano* on the applicant's lack of language skills, education and willingness to find a job and the assumption that she had come to Germany for the sole purpose of claiming benefits suggests, at least rhetorically, the prelude towards a virtualisation of Union social citizenship. In other words, it might have become the Union citizen-newcomer's responsibility to demonstrate his or her worthiness of being a good social citizen. In times when claims to the fundamental status of Union citizenship seem anachronistic and the Court endorses national policies to protect their social assistance systems against 'welfare tourists', Member States can interpret such rhetoric as a justification for particular re-bonding efforts within the confines of the national welfare state itself. The newly emerging model of transnational solidarity in the EU might then stimulate acts of negative 'des-identification' and corresponding appeals to the Union citizen's individual responsibility to convert to the national community.[173] The justifiability under EU law of discriminatory measures such as language requirements in the welfare is then no longer completely unthinkable.

[173] Somek, see note 7 above, pp 808–809.

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