I. INTRODUCTION

The idea of European identity is older than its legal acts and the European Union itself. Today, every citizen of a Member State of the EU is also its citizen, however few of them are aware that the privileges that come with this status are historically based on (pure) economic cooperation: the concept of EU citizenship and the related rights are a result of a long process of integration of the European community from a purely economically driven community towards the “citizens’ Europe”1. This article gives an overview of the major breakthroughs during the development of the citizenship of the EU until 2013 as well as recent changes in this process since 2014, especially with regard to social rights. It discusses whether a social union can actually be proclaimed or if it has already come to an end.

II. THE ROOTS OF THE CITIZENSHIP OF THE EUROPEAN UNION

One of the first indications in legislation for a deeper cooperation and the development of the idea of a linked identity was described as a long-term goal in the preamble to the ECSC Treaty2 of 1951 as follows: “to establish, by creating an economic community, the foundation of a broad and independent community

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2 Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951).
among peoples”3. The Treaty of Rome4 signed in 1957 was — apart from the development of the economic issues — also focused on a closer union between the Member States5. The next step towards European citizenship was the landmark case of Van Gend & Loos6 from 1963. Although the concept of “direct effect” was not mentioned in the EEC Treaty, the European Court of Justice (“ECJ”) stated that the provisions of the EEC Treaty contain rights which can be claimed by individuals before national and European courts. In other words, the Court established that not only the Member States are subjects of the legal order of the Community, but also nationals of these states, hence its citizens7. These rights, which have been further specified by the ECJ in subsequent judgments, particularly include fundamental freedoms of the Common Market. Thus, the status of an individual has been essentially changed. However, an individual is entitled to invoke these rights only as a member of the Common Market. In consequence, fundamental freedoms, in particular the free movement of persons, were always tied to economic activity8. This led to the formation of a new term: the “Marktbürger”9, or the “market citizen”. Originally, market citizens had almost no active citizen-referred and political rights10 in the Member State in which they lived without having its nationality11. In 1968, Regulation (EEC) No 1612/6812 came into force, which played an important role in the development of integration of migrant workers. Its main objective was to eliminate all obstacles to the mobility of workers13. The freedom of movement led to the foundation of a fundamental law for employees and their families. EU citizens had equal access to labour market in any Member State as citizens of that state, without particular permits, limits or other conditions14. Furthermore, this

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3 Cf. 5th recital in the preamble to the Treaty establishing the European Coal and Steel Community.
4 Treaty establishing the European Economic Community (Rome, 25 March 1957).
5 Cf. Art. 2 TEEC.
10 E.g. voting privileges and access to public service.
13 Cf. 5th recital to the Regulation (EEC) No 1612/68.
citizen had the status of a “market citizen”. This market-referred citizenship was still limited in its application. It did not contain much more than the right to choose the place of work within the Community. Finally, in 1969, the Hague Summit of the EU led to the creation of an idea of European Citizenry. Since this intergovernmental conference initiatives have been taken with the goal of establishing the “Europe of Citizens” which supported the idea of European identity. The subsequent summit in Paris in 1974 asked a working group of the European Commission “to study the conditions and the timing under which citizens of the nine Member States could be given special rights as members of the Community”. The Commission proposed the right to vote and stand as candidate at municipal elections. The Tindemans Report of 1975 suggested more political and social rights to the nationals of the Member States, such as equal access to public offices, gradual elimination of border controls and the establishment of a passport union, promotion of school and student exchange programmes, recognition of diplomas and better consumer protection. In the following years, the only implemented rights of the “Europe for Citizens” were the universal suffrage for the European Parliament and a passport of uniform pattern.

In February 1984 the term “Citizenship of the European Union” appeared for the first time in Article 3 of the Draft Treaty Establishing the European Union, also known as the “Spinelli draft”. Prior to that, the European Court of Justice

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16 The Hague Summit, a conference of heads of state and government in The Hague on 1 and 2 December 1969, is actually a precursor of the European Council.
20 Report by Mr. Leo Tindemans — Prime Minister of Belgium — to the European Council. Bull EC, Supplement 1/76.
24 Article 3: The citizens of the Member States shall ipso facto be citizens of the Union. Citizenship of the Union shall be dependent upon citizenship of a Member State; may not be independently
confirmed in the case *Luisi & Carbone*\(^\text{25}\) that the regulations regarding the free movement of services also guarantee a right to move to other Member States in order to receive services, particularly in respect of tourists, patients, business travellers and students\(^\text{26}\). This process included the gradual elimination of identity controls at national borders, which was finally specified explicitly in the first Schengen Agreement in 1985. A further step towards the European citizenship was the ERASMUS-Programme established in 1987. The Council Decision\(^\text{27}\) contained the term “People’s Europe” for the first time in a secondary legislation.

The key element in the development of the Citizenship of the European Union was the guarantee of political rights, especially the freedom of movement, which consequently became independent of the existence of an employment contract. In order to establish an area of real freedom and mobility for all citizens of the Community, the Council adopted three directives\(^\text{28}\) concerning residence rights for persons with no occupational activity in 1990. Until 1992, the status of EU citizenship was not guaranteed by primary law. This changed with the Maastricht Treaty\(^\text{29}\) in November 1993. The citizenship of the European Union was formalized in Art. 17–21 EC, introducing new rights for citizens, particularly allowing them to have influence on the construction of the EU by means of political vote. Thus, the individual became an active and legitimate holder of rights and obligations of the European Union. While the main element of EU citizenship has always been the free movement of persons, it also included the right of settlement and employment within every Member State of the EU, as well as the right to vote and to be candidate for European and municipal elections in the Member State in which they reside, the right to diplomatic protection by other EU-States’ embassies in a third country, in which the state of origin is not represented and the right to submit petitions to the European Parliament and to file complaints with the European Ombudsman.

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\(^{26}\) A.P. van der Mei, op. cit., p. 51.


Initially, the European identity was often called a “pie in the sky”\textsuperscript{30}, as it was considered an artificial idea with only symbolic character\textsuperscript{31}, rather than a legally substantial institution\textsuperscript{32}.

### III. EUROPEAN CASE LAW UNTIL 2014

In view of the legal and political status of EU citizenship, it was up to the European courts to fill the “bloodless construct”\textsuperscript{33} with life. But in the 1990s there was almost no judicial activity to consolidate the rights. This was probably due to the mere cause that the legal constellation was not brought up before the ECJ\textsuperscript{34}.

After that phase of judicial minimalism\textsuperscript{35}, the ECJ issued a line of landmark judgments (e.g. \textit{Sala}\textsuperscript{36}, \textit{Grzelczyk}\textsuperscript{37}, \textit{Baumbast}\textsuperscript{38}, \textit{Trojani}\textsuperscript{39}, \textit{Collins}\textsuperscript{40}, \textit{Zhu Chen}\textsuperscript{41}, \textit{Rottmann}\textsuperscript{42}, \textit{Zambrano}\textsuperscript{43}, \textit{Dereci}\textsuperscript{44}, \textit{Brey}\textsuperscript{45}) strengthening the concept of EU citizenship and developing different aspects of social rights and of the right of residence.

In particular, the cases \textit{Sala}, \textit{Grzelczyk} and \textit{Baumbast} extensively contributed in terms of outlining general principles and the legal sense of the concept of EU citizenship. In these cases, the Court took an individual-oriented approach and interpreted the concept of citizenship as a primary right with direct effect, meaning that every citizen is entitled to claim his rights directly on the basis of the provisions of the ECT\textsuperscript{46}.

\textsuperscript{32} L. Marácz, C. Versteegh, “European Citizenship as a New Concept for European Identity”, \textit{Acta Universitatis Sapientiae, European and Regional Studies} 1, 2010, no. 2, p. 166.
\textsuperscript{34} J. Scholz, op. cit., p. 3.
\textsuperscript{42} Judgment of 2 March 2010, \textit{Rottmann} C-135/08, EU:C:2010:104.
\textsuperscript{44} Judgment of 15 November 2011, \textit{Dereci and Others} C-256/11, EU:C:2011:734.
\textsuperscript{45} Judgment of 19 September 2013, \textit{Brey} C140/12, EU:C:2013:565.
In *Sala*, the ECJ ruled on the situation of a long-term unemployed migrant worker from Spain whose claim for child allowance in Germany had been rejected. The ECJ concluded that any national of a Member State is protected against discrimination on the grounds of nationality by another Member State due to his European Citizenship.

In the significant case *Grzelczyk*, the Court decided that students residing in a Member State other than their own have to obtain a minimum subsistence allowance on similar conditions as the nationals of the host state. The ECJ specified its interpretation of the interactions between Art. 18 and Art. 21 TFEU, which were only indicated in previous decisions. Unlike in the case of *Bickel and Franz*\(^47\), the plaintiff was not in a situation to invoke a fundamental freedom in the main proceedings. Moreover, he could not base his claim on the right of residence, as in the *Sala* case. Nevertheless, the ECJ declared in the first place that the provisions of the Treaty were applicable in view of Art. 18 para. 1 TFEU (ex. Art. 12 para. 1 EC). As to the substance matter, the ECJ based its argumentation on Art. 21 para. 1 TFEU (ex. Art. 18 para. 1 EC) — the citizenship regulation — and considered for the first time that this provision confers on European citizens the right to move and reside within the territory of the Member States. Moreover, the status of a citizen of the European Union was declared to be the fundamental status of nationals of all the Member States, allowing them to enjoy the same treatment in law irrespective of their nationality within the EU\(^48\).

In the *Grzelczyk* case, the relevant issue concerned the right to social benefits. Therefore, it was still unclear whether the ECJ recognizes the direct applicability of Art. 21 para. 1 TFEU.

Finally, the Court confirmed the direct applicability of Art. 21 para. 1 TFEU in the case *Baumbast*. However, in this judgment the ECJ also emphasized the legitimacy of secondary legal restrictions of the right of residence (the proof of sufficient resources and health insurance) and underlined the limits of application of these restrictions. This includes in particular the principle of proportionality.

The general principles formulated in the essential cases *Sala*, *Grzelczyk* and *Baumbast* have been applied in the consecutive judgments of the ECJ. Subsequently, the Court has further specified the legal content of EU citizenship. Based on the principle evolved in *Baumbast*, the ECJ decided in the *Trojani* case that an economically inactive EU citizen living in a host Member State is entitled to claim social assistance benefits on equal conditions as the nationals of that Member State. Despite the lack of sufficient resources (as required by Directive 90/364), the plaintiff is entitled to claim his right by direct application of the provision of the Treaty on Union citizenship under the condition of a certain period of residence or if a residence permission has already been granted\(^49\). The Court based its


judgment on the right of free movement for citizens of the EU (Art. 21 TFEU, ex. Art. 18 EC), which is determined by the principle of non-discrimination provided in Art. 18 TFEU (ex. 12 EC). To summarize, the Court elaborated the following formula: if a citizen of the EU makes use of his right of free movement by going to another Member State and staying there lawfully, he is protected by the principle of general prohibition of discrimination in Art. 12 EC50.

The dogmatic structure of the judgment in the Bidar case is clearly linked to the Court’s statement in Grzelczyk. The ECJ confirmed once again that the student’s right to reside in the host Member State is originally stipulated in Art. 21 TFEU and consequently the student enjoys the right to equal treatment under Art. 18 TFEU. For this reason, financial support can be claimed on the same grounds as in the case of nationals, provided that a certain degree of integration in the society of that Member State is proven51.

The aforementioned judgments outlined that EU citizenship was not automatically linked to the market economy of the Union. The ECJ clearly considers that a citizen of a Member State enjoys rights equal to those of any national citizen, due to the mere fact of their EU citizen status52. As such, the right to non-discrimination provided in Art. 18 TFEU (ex. 12 EC) can be claimed by every citizen of the European Union. The judgments were influenced by the principle of social and financial solidarity between the Member States to supply minimal financial aid to non-national EU citizens. Considering these judgments, the Court can in fact be perceived as the driving force for integration of the EU53.

In line with the historical and political process within the EU, the ECJ developed a new legal structure of the European citizenship, based on the “human capital” and resulting in a fully-fledged “citizen of Europe”54.

IV. ECJ JUDGMENTS SINCE 2014

In 2014, the nature of judgments changed noticeably. The latest judgments concerning the citizenship of the EU and the access to national welfare benefits in the cases of Dano55, Alimanovic56, García-Nieto57 and Commission v United

50 J. Scholz, op. cit., p. 5.
have become landmark decisions for the contemporary understanding of EU citizenship. The main question of these cases is whether or not economically inactive EU citizens should be entitled to certain social benefits from other Member States. The first three cases originate from Germany. Each of them refers to the German non-contributory social benefit “Arbeitslosengeld II”, also known as “Hartz IV”. The last judgment from June 2016 regards British legislation, specifically social benefits — including family benefits, such as child benefit and child tax credit.

In 2014, the Court of Justice had to decide by way of preliminary ruling whether economically inactive EU citizens who move to another Member State only in order to obtain social benefits may be excluded therefrom.

In the particular case, the ECJ dealt with the situation of Elisabeta Dano, a 25-year-old unemployed woman from Romania, as well as her five-year-old son, who had been residing in Germany since November 2010, where they lived at Ms Dano’s sister’s place, who provided for them. Ms Dano received child benefit and maintenance payments of 317 euros per month from the German State for her son. The Romanian applied for benefits according to Hartz IV-law, on the basis of a provision allowing jobseekers to claim benefits, although she was not looking for employment and although she did not enter Germany in order to seek work. After the job centre in Leipzig refused to grant her benefits, she filed a claim with the German Social Court. That Court referred the case to the ECJ to clarify whether the refusal of benefits is compatible with the EU law and asked in particular if Member States are precluded by Art. 18 TFEU and Art. 20 TFEU and Art. 24(2) of Directive 2004/38/EC, in order to prevent an unreasonable recourse to non-contributory social security benefits under Art. 70 of Regulation No 883/2004 which guarantee a level of subsistence, from excluding EU citizens in need from accessing those benefits in full or in part, which would have otherwise been provided to own nationals in the same situation.

The Court decided that for the purpose of having access to certain social benefits, nationals of other Member States can claim the same treatment as nationals of the host Member State only if their residence fulfils the conditions of the Citizens Rights Directive 2004/38/EC. For the period of residence between three months and five years, one of the conditions of Art. 7 of the Directive for a right of residence is that economically inactive persons must possess sufficient

resources of their own. Thus, the Court emphasized that the Directive intends to stop economically inactive EU citizens who exercise their right of freedom of movement solely in order to make use of the host Member State’s welfare system to fund their livelihood. Therefore, each individual case should be examined specifically, without taking account of the social benefits claimed, in order to determine whether it fulfils the condition of having sufficient resources to qualify for a right of residence under Art. 7(1)(b) of Directive 2004/38.

Ms Dano and her son did not have sufficient resources, therefore the Court confirmed they cannot claim a right of residence in Germany under the Directive on free movement of EU citizens. Thus, they cannot invoke the principle of non-discrimination either under Art. 24(1) of the Directive or under Art. 4 of the Regulation No 883/2004 on the coordination of social security systems.

In Alimanovic and García-Nieto the Court confirmed its findings from the Dano case. In the first case, the ECJ decided that a Member State may reject certain non-contributory social security benefits to EU citizens who move to that State to find work. In particular, EU citizens who arrive in Germany in order to receive social assistance or whose right of residence arises only from their search for employment are excluded from the entitlement to German “Arbeitslosengeld II” benefits. The second case confirms the last two recent judgments and implies that a Member State may exclude nationals of other Member States from certain social benefits, particularly social assistance similar to the German “Arbeitslosengeld II”, during the first three months of residence.

Finally, the Court continued its recent case law with the findings in the C-308/14 case Commission v United Kingdom, although it did not address particular non-contributory cash benefits as in Dano etc. The subject matter of the infringement proceedings were the conditions of entitlement to family benefits such as child benefit and child tax credit. The ECJ decided that also in case of applications for family benefits, Member States may introduce the requirement of lawful residence in their national social legislation. Consequently, the United Kingdom can oblige recipients of child benefit and child tax credit to have a title to reside. Although that condition constitutes an indirect discrimination based on...

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Art. 4 of Regulation (EC) 883/2004, it is justified by the need to protect the finances of the host Member State.

Since 2014, significant differences have arisen in the approach of the ECJ as to the legal findings in contrast to its judgments before that date.

Interestingly, the Court in Dano initially mentions the guiding principle constituted in Grzelczyk, i.e. that the status of a citizen of the Union is destined to be the fundamental status of nationals of the Member States68, but consequently decides to base its judgment exclusively on the interpretation of Directive 2004/883 with no regard to the general principles of the citizenship and non-discrimination regulated in Art. 18 and Art. 21 TFEU69. The judgments in Alimanovic and García-Nieto follow a similar approach70. In contrast, the judgments before 2014 were regularly construed to include considerations on secondary legislation and the general principles of EU citizenship defined by the Treaty provisions. Also in Brey71 the Court emphasizes the importance of fundamental principles of EU law and clarifies that the right to freedom of movement is the general rule, whereas the conditions laid down in Directive 2004/38 should be “constrained [only] narrowly” considering the limits laid down by EU law and the principle of proportionality.

Moreover, the Court bases its argumentation in Dano, Alimanovic and García-Nieto72 on the objective of Directive 2004/38, set out in recital 10 in its preamble, namely preventing the Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State, while in Brey the ECJ held that the general “aim of Directive […] is to facilitate and strengthen the exercise of the primary and individual right — conferred directly on all Union citizens by the Treaty — to move and reside freely within the territory of the Member States”73. In addition, the Court refers again to the principle of financial solidarity between the Member States74.

Similarly in Grzelczyk the Court mentions the sixth recital in the Directive75 preamble, which implies that beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State, but it

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71 Judgment of 19 September 2013, Brey C140/12, EU:C:2013:565, paragraph 70.
73 Judgment of 19 September 2013, Brey C140/12, EU:C:2013:565, paragraph 53.
74 Judgment of 19 September 2013, Brey C140/12, EU:C:2013:565, paragraph 72.
principally focuses the argumentation on “a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States.”

These examples show that the ECJ has deviated from its long-standing jurisprudence and chooses different explanations to justify its dissimilar judgments, which apparently depend on the current situation in the EU and the political will of the Member States. The fear of the so-called benefit tourism as well as losing the United Kingdom as a Member State of the European Union may have influenced the Court’s judgment.

In consequence, the aforementioned recent jurisprudence, in which the principle of equal treatment and the interest of the Member States to protect their social systems come in conflict, contributes to a state of certain hopelessness for the people who intend to make use of a “non-economic” freedom of movement. The entitlement to these social benefits corresponds to the right of residence. If the right of residence exists, the principle of equal treatment should be principally observed. Consequently, as far as the affected person secures sufficient resources, they do not need additional social benefits from the host Member State. In the opposite case, they have no right of residence and therefore they are not entitled to obtain non-contributory social security benefits. Thus, in the judgment of Dano it comes to an internal paradox. The Court grants the right to equal treatment in access to social benefits only to persons who have their own means of livelihood — i.e. persons who would not apply for social benefits. Such a structure essentially prevents the implementation of the right to social benefits, and, which seems even more staggering, it differentiates the situation of particular citizens of the European Union. As a result of such a situation, the institution of citizenship is on the way to lose its relevance.

In consequence, the current judgments lead to an impasse for underprivileged people, regardless whether they are searching for work. This is shown particularly in the Alimanovic case, which can be perceived as a judgment even stricter than Dano, mainly due to its central message, which is that job search does not protect from the exclusion of non-contributory social security benefits.

V. CONCLUSION

Through its latest four strict judgments, the ECJ points out that the heyday of a benefit-oriented social citizenship is behind us. The message the ECJ intends to convey in its rulings is clear: EU citizenship depends in fact on the participation

of an individual in the market economy and economically inactive EU citizens cannot profit from the same rights as those who are economically active. Does this mean they are *de facto* non-citizens? Are we back to the times, when the position of a “market citizen” was emphasized? If so, what may have caused this paradigm shift in the case law of the ECJ concerning EU citizenship and social rights? Interestingly, the rigorous argumentation in the judgments appeared shortly after the EU opened its doors to Romanian and Bulgarian workers. At the beginning of 2014, Romanians and Bulgarians received a full right to work freely across the Union. The change has prompted fears of mass migration or social tourism, particularly in Germany and Britain. In fact, the aforementioned rulings of the ECJ actually prevent foreign EU citizens from becoming an unreasonable burden for the Member States’ social assistance system; they also protect the States from social tourism. Regarding this, the Court determines in the *García-Nieto* case that an individual claim would not become an “unreasonable burden” for the national system of social assistance, “but the accumulation of all the individual claims which might be submitted to it would be bound to do so”78. Is this kind of judgment enough to convince the eurosceptics? Based on the example of Brexit and the previously given judgment in the *Commission v United Kingdom* case I very much doubt that.

Coming to a conclusion, it can be noticed, on the one hand, that politics may have well influenced the Court’s judgments — which certainly is not the way a court of law should function. On the other hand, some Member States could find themselves flooded by social migrants, whose movement is motivated solely by the intention to profit from foreign welfare systems. As long as the ECJ follows this rigorous rule while taking into account the principle of proportionality, the interests of all concerned should remain balanced. The Court is consequently reinforcing the guideline that EU law does not intend to create a common social security system with unlimited access for its every citizen, but aims to ensure a maximum level of market-oriented coexistence between the Member States.

Answering the main question of this article, it should be said that the Court in fact differentiates between EU citizens, particularly the poor and the rich or the working and the unemployed. It can be seen as a step backwards on the road to further integration of the Old Continent and as a division of EU citizens into those “equal” and “more equal”. One thing is certain; the recent judgments recalled the roots of the EU as primarily an economic union. It is a prime example that the legal relevance of EU citizenship cannot extend further than the political will of the Member States and their societies. In the present challenging times there might be no other way to arrange a balance between the stance of the national governments and the compliance of the EU citizenship.

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ŚWIADCZENIA SOCJALNE TYLKO DLA WYBRANYCH OBYWATELI UE? PRZEGLĄD ORZECZEŃ DOTYCZĄCYCH OBYWATELSTWA UNII EUROPEJSKIEJ ORAZ DOSTĘPU DO KRAJOWYCH ŚWIADCZEŃ Z ZAKRESU POMOCY SPOŁECZNEJ Z UWZGLĘDNIENIEM NAJNOWSZYCH WYROKÓW TRYBUNAŁU SPRAWIEDLIWOŚCI

Streszczenie

Niniejszy artykuł obejmuje przegląd przełomowych momentów w trakcie rozwoju obywatelstwa Unii Europejskiej do roku 2013, a także ostatnich zmian w tym procesie od 2014 roku, zwłaszcza w odniesieniu do praw socjalnych. Pierwsza część artykułu skupia się na korzeniach obywatelstwa UE oraz przełomowym w tej dziedzinie orzecznictwie, m.in. dotyczącym spraw Sala, Grzelczyk oraz Baumbast. Następnie — w drugiej jego części — autorka, przedstawiając najnowsze orzecznictwo TSUE dotyczące współczesnego rozumienia obywatelstwa w sprawach Dano, Alimanovic, Garcia-Nieto oraz Komisja/Zjednoczone Królestwo, rozważa zasadność określenia Unii Europejskiej mianem „unii socjalnej” oraz podejmuje dyskusję, czy unia ta wraz z najnowszym orzecznictwem dobiegła końca.