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# University of Groningen Faculty of Law

## **EU Citizenship without Duties**

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# EU Citizenship without Duties

*Dimitry Kochenov\**

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*Abstract:* Many believe that duties should be at the essence of citizenship. This paper dismisses this view, using EU law as the main context of analysis, by making five interrelated claims. 1. There are no empirically-observable duties of EU citizenship; 2. Such duties would lack any legal-theoretical foundation, if the contrary were true; 3. Legal-theoretical foundations of the duties of citizenship are lacking also at the Member State level; 4. EU law plays an important role in undermining the ability of the Member States where residual duties remain, to enforce them; 5. This development is part of a greater EU input into the strengthening of democracy, the rule of law and human rights in the Member States and reflects a general trend of de-dutification of citizenship around the democratic world. If these conclusions are correct, it is time to stop categorizing EU citizenship duties among the *desiderata* of EU law.

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\* Many thanks to J.H.H.Weiler, who first made me think about citizenship duties seriously. The paper benefited from the comments of a number of academics. In particular, I would like to thank Daniel Augenstein, Carlos Closa Montero, Gareth Davies, Laurence W. Gormley, Dora Kostakopoulou, Niamh Nic Shuibhne, Giacomo Martire and Suryapratim Roy.

## I. Introduction and structure

This paper critically engages with the concept of EU citizenship duties, looking at the evolution of the substance and content of such duties, as well as their theoretical essence.<sup>1</sup> Besides being once mentioned in the Treaty,<sup>2</sup> the duties of EU citizenship are frequently invoked in the scholarly literature as a sign of immaturity of EU citizenship.<sup>3</sup> In the face of a strong presumption in favour of such duties, their scholarly assessment is long overdue.<sup>4</sup> If the lack of clarity concerning duties really harms EU citizenship as numerous scholars claim, it is imperative to scrutinize the essence of such duties, the actual role they play, and their likely contribution to the achievement of the goals of the Union. Alternatively, should such duties be yet another myth in a long row of legal notions glorified in EU law, while, in reality,

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<sup>1</sup> On EU citizenship see, *e.g.*, Kochenov, Dimitry, ‘The Cherry Blossoms and the Moon of European Citizenship’, 62 *ICLQ*, 2013, 97; Shaw, Jo, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism’, in Craig, Paul and de Búrca, Gráinne (eds.), *The Evolution of EU Law*, 2<sup>nd</sup> ed., OUP, 2011, 575; Wollenschläger, Ferdinand, ‘A New Fundamental Freedom beyond Market Integration’, 17 *ELJ*, 2011, 1; Kostakopoulou, Dora, ‘European Union Citizenship: Writing the Future’, 13 *ELJ*, 2007, 623.

<sup>2</sup> Art. 20(2) TFEU.

<sup>3</sup> Weiler, J.H.H., ‘Europa: “*Nous coalisons des Etats, nous n’unissons pas des hommes*”’, in Cartabia, Marta and Simoncini, Andrea (eds.), *La sostenibilità della democrazia nel XXI secolo*, Bologna: Il Mulino, 2009, 51, 59 *et seq.*; Condonazzi, Massimo et al., *Citizenship of the Union and Free Movement of Persons*, Leiden/Boston: Martinus Nijhoff, 2008, 19; Davis, Roy, ‘Citizenship of the Union... Rights for All?’, 27 *ELRev.*, 2002, 121; Neuwahl, Nanette, ‘The Place of the Citizen in the European Construction’, in Lynch, Philip et al. (eds.), *Reforming the European Union – from Maastricht to Amsterdam*, London: Longman, 2000, 191, 193; Shaw, Jo, ‘Citizenship of the Union: Towards Post-National Membership?’, 6 *Collected Courses of the Academy of European Law*, 1998, 343–344; Streek, Wolfgang, ‘Citizenship under Regime Competition’, *Jean Monnet Working Paper* No.09, 1997.

<sup>4</sup> What is meant by duties here, are the duties in the person of the citizen, not the duties of the authorities *vis-à-vis* the citizen.

boasting only a feeble substance in the Union context, be it justice,<sup>5</sup> democracy,<sup>6</sup> or equality,<sup>7</sup> this should be put straight: the presumption of importance of EU citizenship duties should be dismissed once and for all. To do this is the core ambition of this paper.

Unlike a myriad scholars claiming that, to quote J.H.H. Weiler, ‘la cultura dei diritti, che lo si voglia o no, indebolisce alquanto la contro-cultura della responsabilità e del dovere’<sup>8</sup> this article demonstrates that duties of EU citizenship only exist as one word in the Treaty, which does not happen to correspond to anything in either contemporary legal theory or in practice: both theory and day-to-day reality mandate a conclusion that there is simply no ‘contro-cultura’ which is at the centre of the regrets, expressed in current mainstream scholarship, which is most likely mistaken.<sup>9</sup> Moreover, the fact that there is no such ‘contro-cultura’ is a good thing, unlike what all the scholars listed in footnote three and their numerous associates claim.

Crucially, this situation is not specific to EU citizenship and boasts multiple parallels at the Member State level, where duties have been in marked recess during the last half a century at least. Speaking of citizenship duties,<sup>10</sup> scholars fail to take

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<sup>5</sup> De Búrca, Gráinne, Kochenov, Dimitry and Williams, Andrew (eds.), *Europe’s Justice Deficit?*, Hart Publishing, 2014 (forthcoming); Williams, Andrew, *The Ethos of Europe*, Cambridge: CUP, 2010.

<sup>6</sup> Weiler (2009) ‘Europa’, 51.

<sup>7</sup> Kochenov, Dimitry, ‘Citizenship without Respect’, *Jean Monnet Working Paper* No. 8/2010; de Búrca, Gráinne, ‘The Role of Equality in European Community Law’, in Dashwood, Alan and O’Leary, Síofra (eds.), *The Principle of Equal Treatment in EC Law*, Sweet and Maxwell, 1997, 13.

<sup>8</sup> Weiler (2009) ‘Europa’, 80. For more criticism of rights: Tushnet, Mark, ‘An Essay on Rights’, 62 *Texas L.Rev.*, 1984, 1363.

<sup>9</sup> Also, Joppke, Christian, ‘The Inevitable Lightning of Citizenship’, 51 *Eur. J. Sociology*, 2010, 37. For a sound glimpse of the future see also Kostakopoulou, Dora, *The Future Governance of Citizenship*, Cambridge: CUP, 2008.

<sup>10</sup> It is necessary to distinguish the legal concept from ‘industrial’, ‘ecological’, ‘social’ and other ‘citizenships’, not essentially connected to possessing a nationality regulated by law: Maillard,

into account the core function of ‘classical’ citizenship duties,<sup>11</sup> which consisted in the uniformisation of societies through punishing difference, as well as in the preservation of the *status quo* through providing a justification for sex and race discrimination, thus crushing individuality and silencing dissent. Once such ends have been made unacceptable with the rise of tolerance, inclusion, and respect, the tool for achieving them – duties – logically fell out of use in the citizenship context. EU Member States falling outwith the general de-dutification trend, such as Greece or Estonia with their conscription laws, or Belgium with its obligatory participation in elections, are now the odd ones out, providing exceptions to the mainstream picture, rather than reaffirming the main rule. This bears on the essence of citizenship as such: liberated from the ties of duties, it became less totalitarian, less intrusive and more inclusive.

The argument is structured as follows. The paper starts with the analysis of the socio-legal reality of EU citizenship to discover that no obvious EU citizenship duties are observable. A glance at the law of the Member States reveals that the situation in national law is largely similar: the lists of duties are getting shorter and shorter, being driven by identical socio-legal processes (II.). The argument then moves to theory, addressing – and dismissing – a variety of legal-theoretical explanations of the importance of the concept of citizenship duties.<sup>12</sup> The paper underlines that the popular tandem of duties-rights – ‘the greater the liberty, the more

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Sandrine, *L'émergence de la citoyenneté sociale européenne*, Aix-en-Provence : Presses Universitaires d'Aix-Marseille, 2008; Mundlak, Guy, ‘Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages’, 8 *Theoretical Inquiries L.*, 2007, 719. For an example of confusion: e.g. Streek (1997).

<sup>11</sup> See, e.g. parts of Mazzini, Giuseppe, ‘Dei doveri dell'uomo’, in *Opere politiche* (2nd ed.), Torino: UTET, 2005, 851.

<sup>12</sup> E.g. Simmons, John, *Moral Principles and Political Obligations*, Princeton: Princeton UP, 1981.

the duty'<sup>13</sup> – cannot be simply assumed: legal theory moved on.<sup>14</sup> Scholars attempting to import this orthodoxy into EU citizenship field failed to seriously scrutinize this untenable assumption.<sup>15</sup> Given the overwhelming consensus among scholars that even the would-be duty to obey the law – often presented as the core of citizenship – as such is deprived of any ethical foundation,<sup>16</sup> it becomes clear that the story of citizenship duties, is not alone, let alone exceptional: all duties-oriented thinking might be in decline<sup>17</sup> in contemporary rights-based secular legal culture.<sup>18</sup> While it is undeniable that codes of conduct can be equally successful, either based on rights, or duties,<sup>19</sup> there is a reason behind opting for rights as the starting point. Any system

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<sup>13</sup> Lieber, Francis, *Manual of Political Ethics*, (first published in 1838, 2<sup>nd</sup> rev. ed. by Theodore W. Woolsey, 1911), 383–384. Persuasive critique of this simplistic view appeared in legal-theoretical literature long ago: Hohfeld, Wesley, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, New Haven: Yale UP, 1920.

<sup>14</sup> For criticism: Hart, H.L.A., 'Are There Any Natural Rights?', 64 *Philosophical Rev.*, 1955, 175; Feinberg, Joel, 'Duties, Rights, and Claims', 3 *American Philosophical Quarterly*, 1966, 137; Williams, Granville, 'The Concept of Legal Liberty', 56 *Columbia L.Rev.*, 1956, 1729, 1750.

<sup>15</sup> E.g. Davis (2002), 123.

<sup>16</sup> E.g. Raz, Joseph, 'Authority and Consent', 67 *Virginia L.Rev.*, 1981, 103; Lyons, David, 'Need, Necessity, and Political Obligation', 67 *Virginia L.Rev.*, 1981, 77; Simmons, John, 'Moral Principles and Political Obligations', 67 *Virginia L.Rev.*, 1981; Wasserstrom, R.A., 'The Obligation to Obey the Law', in Summers, R.S. (ed.), *Essays in Legal Philosophy*, Oxford: OUP, 1979, 233; Raz, Joseph, *The Authority of the Law*, Oxford: OUP, 1979, 233; Smith, M.B.E., 'Is There a *Prima Facie* Obligation to Obey the Law?', 82 *Yale L.J.*, 1973, 950.

<sup>17</sup> This is acknowledged by critics: See Weiler's unpublished paper 'On the Distinction between Values and Virtues in the Process of European Integration'; Kuisma, Mikko, 'Rights of Privileges? The Challenge of Globalisation to the Values of Citizenship', 12 *Citizenship Stud.*, 2008, 613.

<sup>18</sup> So the classical Canon Law was built on the ideology of duties and the Papal *plenitudo potestatis*, leading the State theorists of the Papal States to deny 'the very principle of a constitutional government as an objectionable heresy': Van Caeneghem, R.C., 'Constitutional History: Chance or Grand Design?', 5 *EuConst*, 2009, 447, 457. Obligation is key to Jewish law too: Cover, Robert, 'Obligation: A Jewish Jurisprudence of the Social Order', 5 *J.L. & Religion*, 1987, 65. The consequences of the obligation-oriented pre-secular world-view are profoundly felt today: Anscombe, G.E.M., 'Modern Moral Philosophy', 33 *Philosophy*, 1958, 6.

<sup>19</sup> Hart (1955), 176; also Perry, Michael, 'Taking Neither the Rights-Talk Nor the "Critique of Rights" Too Seriously', 62 *Texas L.Rev.*, 1984, 1405.

based on duties necessarily implies a strong predetermined set of prescriptions of good and bad and right and wrong. To agree with H.L.A. Hart, ‘those who lived by such systems could not of course be committed to the recognition of the equal right to be free’:<sup>20</sup> the reason why duties-based systems are observable in the context of faith-inspired law of numerous democracies, or the *ethos* of control professed by totalitarian states (III.). The last part will show that EU law has strong potential to undermine the enforceability of the Member State-level duties of citizenship, thus indirectly promoting the supranational understanding of duties and thereby assisting their decline in all the Member States (IV.).

The conclusion restates the main findings: 1. There are no empirically-observable duties of EU citizenship; 2. Such duties would lack any legal-theoretical foundation, even should the contrary be true; 3. This situation is in no way different from the Member State level; 4. EU law plays an important role in undermining the ability of the Member States where residual duties remain, to enforce them; 5. This development is part of a greater EU input into the strengthening of democracy, the rule of law, and human rights in the Member States. If my conclusions are correct, it is time to stop categorizing EU citizenship duties among the *desiderata* of EU law, since it is clear that they are not necessary and, moreover, antithetical, to the goals of freedom, liberty, rights protection and individual empowerment that the Treaties set out to achieve.<sup>21</sup>

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<sup>20</sup> Hart (1955), 176, 177.

<sup>21</sup> See in the same vein Kadelbach, Stefan, ‘Union Citizenship’, in von Bogdandy, Armin and Bast, Jürgen (eds.), *Principles of European Constitutional Law*, Oxford: Hart, 2006, 453, at 484.



## II. The practice explained

Citizenship duties cannot be simply implied from rights.<sup>22</sup> Indeed, ‘if the law lays down no duty, it is generally indicated in legal works by making no reference to the subject’.<sup>23</sup> In other words, duties are necessarily explicit in the law. While the fact that ‘there is no entry of “breakfast, liberty to eat”, in the index to *Corpus Juris*’<sup>24</sup> does not indicate that there is no such right, the fact that the Treaty does not require the citizens, for instance, ‘to develop the scientific temper, humanism and the spirit of inquiry and reform’ – like the Indian Constitution does<sup>25</sup> – is a clear indication that there is no such citizenship duty in EU law. It is crucial to see which duties are set out in the law in order to understand the role they play in the legal system. While the existence of the duties named in the legal documents can be empirically checked, unnamed legal duties most likely do not exist.<sup>26</sup>

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<sup>22</sup> See Part III, *infra*.

<sup>23</sup> Williams (1956), 1130.

<sup>24</sup> *Id.*

<sup>25</sup> Art. 51A(h) of the Constitution of India. For a remarkably uninspiring (although official) analysis of this duty see Irani, C.R. and Lall, K.B. (on behalf of the National Commission to Review the Working of the Constitution), *Effectuation of Fundamental Duties of Citizens*, New Delhi, 2011.

<sup>26</sup> The most presumed citizenship duty in the context of EU law seems to be the unwritten duty to move or otherwise fall within the scope of EU law in order to benefit in full from all the rights provided by the Union legal system. Rather than an unwritten citizenship duty, however, the current reality where EU citizenship needs at times to be activated by the use of rights provided by the EU level is an anomaly related to the legal-historical approach to drawing the vertical boundary between the two legal orders in the EU, rather than a duty of citizenship. Viewed as such, it is more comparable to being present in the territory of the state in order to be protected by its police force. It is impossible to claim that a Dutchman in Angola has a *duty* to move to Amsterdam in order to be protected by the Dutch police. The trouble with the EU is that the jurisdictional boundary is frequently most unclear: nobody knows where Angola ends and Amsterdam begins, which often means that it is impossible to say who is and who is not to enjoy EU-level rights among EU citizens in each given situation: both the national and the EU legal orders are to blame, to which all the controversial case-law surrounding Art. 51 of the Charter testifies. If an argument that reverse discrimination amounts to *noxa liability* is made, it should thus be very carefully dissected. For analyses of collective responsibility and the blurred nature of the

It is not enough to demonstrate the absence of duties as such, however. An explanation of the reasons behind such absence is due, particularly given the prominent role that duties of all sorts have played in the past, from loving your King and not thinking bad things about him, or dying for him, to upholding the *jus primaev noctis* famously contextualized by Mozart in *Le nozze di Figaro*.

It is suggested that the liberation from duties-oriented thinking – rather than attempting to connect citizenship with duties – is what corresponds to the creation of a responsible citizenship based on respect. This is due chiefly to two considerations, valid both at the EU and national levels. Firstly, duties became unnecessary since they enjoyed a function of justifying largely arbitrary exclusion of large groups of citizens from the benefits of the status. Secondly, citizenship duties became unnecessary since their other function was the uniformisation of society, through the stigmatization of difference. Both are not acceptable aims any more. Consequently, with thick allegiances and identities receding at the national level too, the EU cannot be expected to be different. Moreover, given that the promotion of exclusion and the stigmatization of difference are straightforwardly antithetical to the objectives which the Union is set to achieve, there is no possible place for citizenship duties in EU law.

EU citizenship has matured greatly in the last two decades, shaping the legal situation of all Europeans and directly affecting national citizenship law and policy.<sup>27</sup> The fact that such a rise in *de jure* as well as *de facto* legal importance was not accompanied by any observable transfer of allegiance to the supranational level, or replication of all what is repugnant in state-mandated nationalist ideologies, is

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vertical jurisdictional boundary in the EU see, respectively, *e.g.* Miceli, Thomas J., ‘Collective Responsibility’, in Dari-Mattacci, Giuseppe (ed.), *Roman Law and Economics* (forthcoming) and Kochenov (2010) ‘Citizenship without respect’. I thank Niamh Nic Shuibhne and Suryapratim Roy for bringing this issue to my attention.

<sup>27</sup> Kochenov, Dimitry, ‘Rounding up the Circle’, *RSCAS Working Paper* No. 23/2010.

probably EU citizenship's strongest and most appealing side: the *Sonderweg* of European law.<sup>28</sup> Dispensing of parochialism of paternalistic patriotic mythologies, while crafting a sound legally-consequential status, potentially solves plenty of ugly issues left open by national citizenship. In such a context the initial dilemma undermining any national ideology does not even arise, namely, how can a system be based on the considerations which are obviously not true?<sup>29</sup> The implied idea of superiority – cultural, linguistic, moral, or otherwise *vis-à-vis* the 'other' – which seems to be a necessary component of national citizenships – is not necessary at the supranational level.

Thick identities are indispensable for the crafting of citizenship duties, but not for protecting rights. EU citizens have a number of important rights, many of which are listed in Part II TFEU.<sup>30</sup> These include non-discrimination on the basis of nationality as well as other types of non-discrimination, some political rights, free-movement rights within the territory of the Internal Market, entitlements to their human rights protection in the situations falling within the scope of the Charter of Fundamental Rights of the European Union<sup>31</sup> as well as, equally importantly,

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<sup>28</sup> Weiler, J.H.H., 'The Transformation of Europe', 100 *Yale L.J.*, 1991, 2403; Weiler, J.H.H., 'In Defence of the *Status Quo*: Europe's Constitutional *Sonderweg*', in Weiler, J.H.H. and Wind, Marlene (eds.), *European Constitutionalism beyond the State*, Cambridge: CUP, 2003, 7. See also Kostakopoulou, Dora, 'Nested "Old" and "New" Citizenship in the EU: Bringing Forth the Complexity', 5 *Colum. J. Eur. L.*, 1999, 389; Palombella, Gianluigi, 'Whose Europe? After the Constitution', 3 *I-CON*, 2005, 357. Also in this vein see Kostakopoulou, Dora, 'Citizenship Goes Public: The Institutional Design of Anational Citizenship', 17 *J. Pol. Philosophy*, 2009, 275.

<sup>29</sup> Miller, David, 'The Ethical Significance of Nationality', 98 *Ethics*, 1988, 657, 658.

<sup>30</sup> For the analysis of specific rights see e.g. Wollenschläger (2011); Kochenov, Dimitry, '*Ius Tractum* of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights', 15 *CJEL*, 2009, 169.

<sup>31</sup> Knook, Allard, 'The Court, the Charter, and the Vertical Division of Powers in the European Union', 42 *CMLRev.*, 2005, 367.

unwritten rights of citizenship formulated in the Court's case-law,<sup>32</sup> which are rooted in the nature of the idea of citizenship and reshape the vertical division of powers in the Union.<sup>33</sup> A right not to be forced to leave the territory of the Union<sup>34</sup> (but, ironically, not of your Member State of nationality<sup>35</sup>) and the right to additional procedural guarantees stemming from Union law in the cases when the very status of citizenship is at stake,<sup>36</sup> provide two most appropriate examples of such unwritten rights. In the light of these examples it is clear that more such unwritten rights can come to be discovered by the Court.<sup>37</sup>

With the duties the picture is drastically different: the Treaty does not in fact mention a single one. Scholars trying to find any are bound to concede that implied unwritten legal duties are hardly enforceable and, most likely, would be a bad idea. We are told that the Union does not command *enough* allegiance to impose duties,<sup>38</sup> which is viewed as a problem, as if the imposition of duties, as such, were a sign of meaningful citizenship. This doctrinalism full of regrets is rooted in the mistaken assumption that rights without duties are impossible. Instead of critically engaging with the notion of EU citizenship duties, scholars soothe their readers that the absence

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<sup>32</sup> Kochenov, Dimitry and Plender, Richard, 'EU Citizenship: From an Incipient Form to an Incipient Substance?', 37 *ELRev.*, 2012, 369. The scope of such rights is, expectedly, unclear: Kochenov, Dimitry, 'The Right to Have *What* Rights? EU Citizenship in Need of Justification', 19 *ELJ*, 2013, 502.

<sup>33</sup> Lenaerts, Koen, "'*Civis europaeus sum*": From the Cross-Border Link to the Status of Citizen of the Union', 3 *JFMW*, 2011, 6; Kochenov, Dimitry, 'A Real European Citizenship', 18 *CJEL*, 2011, 55.

<sup>34</sup> Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

<sup>35</sup> Case C-434/09 *McCarthy* [2011] ECR I-3375.

<sup>36</sup> Case C-135/08 *Rottmann* [2010] ECR I-1449.

<sup>37</sup> Through such rights EU citizenship is potentially capable of supplying the EU with an alternative paradigm of integration, to compete with the Internal Market: Kochenov, Dimitry, 'The Citizenship Paradigm', *CYELS*, 2012-2013 (forthcoming).

<sup>38</sup> Everson, 'The Legacy of the Market Citizen', Shaw, J. and More, G. (ed.), *New Legal Dynamics of European Union*, Oxford: Clarendon Press, 1995, 73.

of duties is a soluble problem and the duties will come,<sup>39</sup> even listing some examples, such as ‘the duty to obey the law; the duty to participate in the defence of one’s polity; the duty to pay tax; the duty to seek employment; and a duty to vote’.<sup>40</sup> In other words, among the numerous duties offered as likely entrants on the stage of EU law, the majority are confused misrepresentations of the idea. Such duties as to pay taxes, or abide by the law are of general application concerning all, no matter citizens or not, and can thus hardly be branded as citizenship duties. A duty to work or otherwise contribute to society cannot be proclaimed without cynicism when unemployment rates in some Member States reach 20% or more and when sad examples are at hand where the enforcement of such duties drove Nobel Prize winning poets to a Siberian exile.<sup>41</sup> And the duty to be proud of the Union and respect its values largely comes down to mongering thick allegiances which – besides an obvious point that one cannot be ordered to love and be passionate out of a rulers’ volition – also threatens all what the Union has achieved to date, in terms of liberation from indoctrination which reins at the national level: an attempted move, in Allott’s words, from “diplomacy” to “democracy”.<sup>42</sup> In short, EU citizenship duties do not exist. Moreover, it is not a problem at all. Rather, it is an asset for the Union legal system, which is much less unique, however, than it might seem.

The lack of duties at EU level reflects a general evolution of the relationship between the governing and the governed, which develops in a similar vein also at the Member State level. It is characteristic of all democracies around the world and falls

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<sup>39</sup> Shaw (1998), 343–344.

<sup>40</sup> Davis (2002), 123. See also Shaw (1998), 245.

<sup>41</sup> Nikolaj Jakimchuk, *Delo Iosifa Brodskogo: Kak sudili poëta*, St. Petersburg: Severnaja zvezda, 2005 (Joseph Brodsky was sentenced to Siberian exile as an idle layabout since his poetry was not good enough in the eyes of the State: Soviet law contained a citizenship duty to work).

<sup>42</sup> Allott, Philip, ‘The European Community is not the True European Community’, 100 *Yale L.J.*, 1991, 2485.

within the general trend of moving ‘away from ascribed statuses in all [...] areas’.<sup>43</sup> Although citizenship duties have always lingered in the background of the republican citizenship theory’s pairing of rights and duties, they never received much attention in the literature, becoming a ‘theoretical stepchild’<sup>44</sup> of citizenship theory. Even in the common language ‘duties’ and ‘citizenship’ parted ways long ago. The Oxford English Dictionary defines ‘citizenship’ as ‘the position or status of being a citizen with its rights and privileges’.<sup>45</sup> This fully reflects classical sociological works on citizenship, which do not speak of citizenship duties in any sense, which would be close to legal. The key account by T.H. Marshall, for instance, clarifies that citizenship duties mean that ‘[citizen’s] acts should be inspired by a lively sense of responsibility towards the welfare of the community’.<sup>46</sup> This is not a surprise, in the context of such a definition that compulsory duties enjoyed much lesser importance for Marshall and other theorists than voluntary obligations *vis-à-vis* neighbours and compatriots. Marshall outlined the following citizens’ duties: paying taxes, educating one’s family, military service, and promoting the welfare of the community.<sup>47</sup> All of these either do not exist anymore at all, or are hardly related to the legal status of citizenship in the contemporary context.

The ideology of duties accompanying historical accounts of citizenship is feudal in nature. The feudal world-order put at its centre the allegiance to the Lord, directly reflected in the duty of obedience. Through the doctrine of perpetual allegiance feudalism entered the republican citizenship world. The key reasoning

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<sup>43</sup> Shachar, Ayelet, *The Birthright Lottery*: Cambridge, MA: Harvard University Press, 2009, 9; For a general analysis of the maturation of this trend see *e.g.* Kostakopoulou (2007), chapter 1.

<sup>44</sup> Janoski, Thomas, *Citizenship and Civil Society: A Framework of Rights and Obligations in Liberal, Traditional and Social Democratic Regimes*, Cambridge: CUP, 1998, 219.

<sup>45</sup> *Oxford English Dictionary*, Oxford: OUP, 2012.

<sup>46</sup> Marshall, T.H., *Class, Citizenship, and Social Development*, Chicago: U. Chicago Press, 1977, 9.

<sup>47</sup> Marshall, T.H., *Citizenship and Social Class*, Cambridge: CUP, 1950.

dates back to 1608, when Lord Coke in the famous *Calvin* case, established the duty of perpetual allegiance: ‘the reason hereof [being the fact that] the law of God and nature is one to all. By this law of nature is the faith, ligeance, and obedience of the subject due to his Sovereign or superior’.<sup>48</sup> Simply by being born you would instantly owe a lot to the local Lord – the King of the land.<sup>49</sup> The promotion of the ideology of the *citoyen* did not fundamentally alter this state of affairs, since only the hypothetical beneficiary to whom the duties are owed changed – a feudal overlord came to be replaced with a ‘great’ nation. The context of allegiance – no matter whether to a nation or to a King – is entirely random and is deprived even of the vaguest semblance of choice. Mythologies of national exceptionalism and greatness are called in to justify the lack of such choice. Given their general ethical weakness, however, coupled with the rise in liberalism, tolerance and equality, such mythologies are powerless to back duties effectively, leading to the global recess of the latter. Unlike in a feudal polity, a modern state ‘must justify [its] demands to the anarchist, the skeptic and the honest enquirer’.<sup>50</sup>

A study of the history of citizenship reveals that it has undergone a drastic evolution through time. Roughly speaking, we witnessed a move from an extremely exclusionary republican status based on particular sex, race, wealth and other characteristics,<sup>51</sup> to the actual inclusive membership of the community. Although contemporary citizenship is struggling to become inclusive and to operate a notion of who the citizens are, which would drastically depart from the exclusionary patterns of the past, large numbers of *de facto* stateless people all around demonstrates quite

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<sup>48</sup> *Calvin* (1608) 77 Eng. Rep. 377 (K.B.), 392.

<sup>49</sup> Compare: Rembaum, Joel, ‘Medieval Jewish Criticism of the Christian Doctrine of Original Sin’, 7/8 *AJS Rev.*, 1982/1983, 353.

<sup>50</sup> Knowles, Dudley, ‘Gratitude and Good Government’, 8 *ResPublica*, 2002, 1, at 2.

<sup>51</sup> Abrams, Jamie, ‘Examining Entrenched Masculinities in the Republican Government Tradition’, 114 *W. Virginia L.Rev.*, 2011, 165.

clearly that we are only at the beginning of a long road. The direction of the contemporary evolution is quite clear, however. Once the nature of citizenship as a generally arbitrary engine of exclusion comes into light,<sup>52</sup> excluding those who are not in possession of a formal legal status of citizenship from the benefits it has to offer ends up regarded as almost untenable. While numerous approaches to demarcating citizens and non-citizens exist,<sup>53</sup> the line between those who are and those who are not formally citizens of the community is thinning very rapidly, just as the ethical foundations of exclusion.<sup>54</sup> We are witnessing a total shift of the border between persons and citizens in Constitutional thought.<sup>55</sup>

In the context of the on-going transformation two important functions of citizenship duties come to light. Unlike the common perception among observers today, the main function of citizenship duties in the past was an exclusionary one: duties were relied upon to outline second-class citizens – such as persons of colour, women, the poor,<sup>56</sup> the weak, and, crucially for the democratic outcomes, political dissenters – in order to justify their full exclusion from the actual benefits that the legal status of citizenship which they formally possessed was supposed to provide to

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<sup>52</sup> For analysis, e.g. Bauböck, Rainer, 'Global Justice, Freedom of Movement and Democratic Citizenship', 51

*Archives européennes de sociologie*, 2009, 1; Carens, Joseph, 'Aliens and Citizens: The Case for Open Borders', 49 *Rev. of Politics*, 1987, 250, 251.

<sup>53</sup> Gibney, Matthew, 'The Rights of Non-citizens to Membership', in Sawyer, Caroline and Blitz, Brad (eds.), *Statelessness in the European Union*, Cambridge: CUP, 2011, 41.

<sup>54</sup> Joppke, Christian, 'Why Liberal States Accept Unwanted Immigration', 50 *World Politics*, 1998, 266; also Freeman, G.P., 'Can Liberal States Control Unwanted Migration?', 534 *Annals AAPSS*, 1994, 17.

<sup>55</sup> Bosniak, Linda, 'Persons and Citizens in Constitutional Thought', 8 *I-CON*, 2010, 9. See also Kostakopoulou, Dora, 'Why Naturalisation', 4 *Perspectives on Eur. Politics & Society*, 2003, 1.

<sup>56</sup> It is crucial to realise that women were also necessarily among the 'poor' hidden behind the concept of *couverture*: hidden behind their husbands: Kerber, Linda, 'The Meanings of Citizenship', 84 *J. American History*, 1997, 833, 838–841.



‘everyone’.<sup>57</sup> Indeed, especially women were ‘sharply, normatively, and unequivocally excluded from the citizen-soldier tradition’.<sup>58</sup> Duties reduced ‘everyone’ – roughly the scope of *de jure* citizenship in an ideal polity,<sup>59</sup> to the group of loyal and well-off white males of the right religion, thus in fact stripping citizenship – as a legal status of equals – of its core content, failing both individuals and groups.<sup>60</sup> ‘Old enough to die – old enough to vote’ ideology, while helping racial minorities,<sup>61</sup> did not work well for women, proclaimed unfit for the military and thus also unfit for jury duty and, also, key rights, such as voting.<sup>62</sup>

When the benefits of citizenship depend on fulfilling the duties, the door is open for denying the essence of the status to those who either choose not to bother (hippies and vagabonds), behave contrary to what a particular interpretation of duties prescribes (Communists, disloyal by definition, just as flag-burners, polygamists etc.), or are simply announced as not good enough (women, too weak to be useful<sup>63</sup>). Plentiful examples of such developments are well-known and go back to the infamous US Supreme Court decision in *Dred Scott*, where Taney CJ argued that given that the service in the militia is clearly limited to a ‘free able-bodied white male citizen’, ‘the Aftican race’ is ‘repudiated, and rejected from the duties and obligations of

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<sup>57</sup> Citizenship is exclusion: Yong, Iris, ‘Polity and Group Difference’, 99 *Ethics*, 1989, 250, 254–255. The same holds for constitutionalism as such: Tully, James, *Strange Multiplicity*, Cambridge: CUP, 1995, Ch. 3.

<sup>58</sup> Abrams (2011), 176; Snyder, Claire, *Citizen-Soldiers and Manly Warriors: Military Service and Gender in the Civic Republican Tradition*, NY: Rawman and Littlefield, 1999.

<sup>59</sup> See Kochenov (2010) ‘Citizenship without Respect’, 12–27 (and the literature cited therein).

<sup>60</sup> E.g. Tyler, Imogen, ‘Designed to Fail: A Biopolitics of British Citizenship’, 14 *Citizenship Stud.*, 2010, 61

<sup>61</sup> DuBois, W.E.B. *Black Reconstruction in America*, 1935, 104.

<sup>62</sup> *Minor v. Happerset* 88 U.S. 162 (1874), 171–172.

<sup>63</sup> Karst, Kenneth, ‘The Pursuit of Manhood and the Desegregation of the Armed Forces’, 38 *UCLA L.Rev.*, 1991, 499.

citizenship’.<sup>64</sup> Crucially, upon this reading, where there are no duties, there are no rights and, consequently, no benefits citizenship – the possession of the formal legal status notwithstanding.

In fact, commonly invoked duties obstruct lives, rather than ‘creating citizens’.<sup>65</sup> While the modern take on citizenship is chiefly related to the respect to each person’s individuality, necessarily involving possible assistance in the accomplishment of individual life projects, this was not the case in the past. “[I]n August 1914, Australians and Germans, Frenchmen and Englishmen, flooded the enlistment offices, but we would not want to explain their military enthusiasm by reference to the quality of their citizenship [but rather] as a sign of the poverty of their lives and their lack of moral independence.”<sup>66</sup> Duties of citizenship is the main vehicle to nourish and preserve such lack, it seems, which is particularly evident now, in the ‘age of post-heroic geopolitics’,<sup>67</sup> where being slaughtered ‘for the nation’ is usually a sign of misery of one’s background, rather than heroism, unlike the German deaths at Stalingrad in 1943, American in Vietnam in 1972, or Russian in Budapest in 1956: the times have changed.

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<sup>64</sup> *Dred Scott* 60 U.S. 393 (1857), 420–421. The Supreme Court also used the reasoning evolving around duties in order to promote equality: Frankfurter J, dissenting in *Thiel v. Southern Pacific Co.* (328 U.S. 217 (1946)), underlined the importance of not excluding African Americans from juries ‘partly because sharing in the administration of justice is a phase of civic responsibility’(at 227). The same argument was applied by the Supreme Court to women in *Taylor v. Louisiana* 419 U.S. (1975), 530–531.

<sup>65</sup> Unless one believes that a citizen is the one who ‘by virtue of conscription [...] attain[s] and enjoy[s] the fruits of full citizenship’: Murray, Melissa, ‘When War Is Work: The B.I. Bill, Citizenship, and the Civic Generation’, 96 *California L.Rev.*, 2008, 967, at 996.

<sup>66</sup> Walzer, Michael, ‘Civility and Civic Virtue in Contemporary America’, 41 *Social Res.*, 1974, 4. See also Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship*, Harvard University Press, 1970.

<sup>67</sup> Falk, Richard, ‘The Decline of Citizenship in an Era of Globalisation’, 4 *Citizenship Stud.*, 2000, 5.

Consequently, the second function of citizenship duties can be outlined, which is at least as important as the first and consists in the uniformisation of the population and the suppression and humiliation of any difference and dissent, deploying citizenship duties to get rid of diversity, cultural, political, linguistic, or otherwise, building on the presumption that the State knows better what the citizens should want and should strive to achieve, denying citizens personality, respect and choice. This function of citizenship has lost any ethical significance during the criminal 20<sup>th</sup> century. It is impossible to have any doubts any more about a simple fact that the State does not know better.<sup>68</sup> Virtually any (mind-) uniformisation projects should arouse skepticism at best, if not be automatically dismissed as abuse of power.

All the recent developments in the understanding of citizenship, as well as the ideals of equality and inherent human worth make the duties-thinking untenable, since the lines duties helped to draw represent precisely all the shameful corners of the citizenship tradition, logically and predictably removing duties from the pedestal.<sup>69</sup> Engin Isin's theory of acts of citizenship can be deployed to illustrate the importance of this line of developments from yet another perspective. Isin divides citizens into passive, active and activist.<sup>70</sup> Roughly speaking, the passive do not bother, active are confined in their actions to what is permitted, supported, and pursued by the state: they fight wars for it, they are regulars at elections and are generally 'good guys'. The activist citizens, to the contrary, are those who destabilize the regime: they defy the draft, laugh at the eventual duties of 'good citizenship' and, in the long run, define and reinvent the essence of the polity by fighting and

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<sup>68</sup> Scott, James, *Seeing Like a State*, New Heaven: Yale UP, 1998; also Sissenich, Beate, *Building States without Society*, Lanham, MD: Lexington Books, 2007.

<sup>69</sup> Also the premises behind the duty to know the law 'appear ... suspiciously *ad hoc*': Husak, Douglas, 'Ignorance of Law and Duties of Citizenship', 14 *Legal Stud.*, 1994, 105, 108.

<sup>70</sup> *Inter alia*: Isin, Engin, 'Citizenship in Flux: The Figure of the Activist Citizen', 29 *Subjectivity*, 2009, 367; Isin, Engin and Nielsen, Greg (eds.), *Acts of Citizenship*, NY: ZED books, 2008.

criticizing it.<sup>71</sup> Although they are usually punished and branded as unworthy citizens, clearly, they are the driving force of positive change. US founders, just as Monnet, Schuman, De Gasperi and Adenauer were all activist citizens, who had to overcome duties, rather than be meek and comply.

### **III. Obedience and theory**

Citizenship plays an important role at both EU and national levels. This is mostly due to the concept of rights and is not disturbed by whatever is going on with the duties of citizenship. Consequently, approaching the matter empirically, there is no correlation between duties and citizenship. Moreover, given the emerging scholarly consensus that the moral duty to obey the law, including the hypothetical duties of citizenship, cannot be possibly justified, the moral worth of citizenship duties is nihil: compliance – just as non-compliance – with whatever the authority demands of you does not make you a worse or a better person in moral terms. In this context, there is simply no place for the glorification of diligently complacent citizens, let alone making the duties of citizenship the measure of the concept's success, as numerous scholars seemed to suggest. Indeed, following Isin, ignoring the proclaimed duties can be just as worthy an act of citizenship as respecting them.

To agree with Joppke, the reality itself 'exposes as empty rhetoric the *ritual notion* that citizenship rests on a "balance of obligations and rights"'.<sup>72</sup> Legal theorists tried to clean up the rights-duties correlation by separating liberties from rights<sup>73</sup> (the former not corresponding to any possible obligation even in principle) and duties from

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<sup>71</sup> Dora Kostakopoulou, in her outline of the constructive potential of citizenship connects citizenship with constant questioning of the authority: Kostakopoulou, Dora, 'Towards a Theory of Constructive Citizenship in Europe', 4 *J. Pol. Philosophy*, 1996, 337, 356. See also Walzer (1970).

<sup>72</sup> Joppke (2010), 40 (emphasis in the original).

<sup>73</sup> E.g. Williams (1956), 1729.

obligations<sup>74</sup> (the latter correlative to rights, but voluntarily assumed).<sup>75</sup> The fact remains, following H.L.A. Hart, that all these notions actually come from ‘different segments of morality, concern different conduct, and make different types of moral criticism and evaluation’.<sup>76</sup> The correlation between rights and duties, blurring all these divides, is thus particularly unhelpful, especially given that rights, essentially, are not negative claims on others, as Waldron has shown.<sup>77</sup> To establish that a right corresponds to a duty is to ignore that it can also correspond to simply having no right.<sup>78</sup>

The misleading nature of duties and rights pairing has long been recognized in the literature.<sup>79</sup> Feinberg provides a fine illustration: ‘we commonly enough hear talk of “owing obedience” to parents, police officers, and bosses, and these authorities speak readily enough of having a claim to our obedience. Does an authority then have a *right* to be obeyed by his inferiors?’<sup>80</sup> The question of correlativity of duties and rights is very relevant also because of another consideration. Should we believe that they are indeed correlative, interesting questions of the order of precedence arise. Do I have a right because you have a duty, or do I have a duty because you have a right?<sup>81</sup> Upon such reading we would only have duties because authority has a right – which is highly problematic. Moreover, firm correlation also threatens to deprive both duties

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<sup>74</sup> Hart, H.L.A., ‘Legal and Moral Obligation’, in Melden, A.I. (ed.), *Essays in Moral Philosophy*, Seattle: U. Washington Press, 1958; Rawls, John, ‘Legal Obligation and the Duty of Fair Play’, in Hook, Sidney (ed.), *Law and Philosophy*, NY: NYU Press, 1964, 4; Brandt, B.B., ‘The Concepts of Obligation and Duty’, 73 *Mind, New Series*, 1964, 374.

<sup>75</sup> The notion of duties is equally not monolithic: Feinberg (1966), 137.

<sup>76</sup> Hart (1955), 179, fn.7.

<sup>77</sup> Waldron, Jeremy, ‘The Role of Rights in Practical Reasoning: “Rights” versus “Needs”’, 4 *J. Ethics*, 2000, 115.

<sup>78</sup> Lyons, David, ‘The Correlativity of Rights and Duties’, 4 *Noûs*, 1970, 45.

<sup>79</sup> Hohfeld (1920); Hart (1955), 180; Lyons (1970), 48.

<sup>80</sup> Feinberg (1966), 141 (emphasis in the original).

<sup>81</sup> Lamont, W.D., ‘Rights’, 24 *Proceedings Aristotelian Society*, 1950, 75, 93–94.

and rights of any meaning, because of the risks of turning both into merely two different ways of describing the same phenomenon. Importantly, even if a right does not necessarily correspond to a duty, this does not imply that there are no responsibilities attached to the enjoyment of the right.<sup>82</sup> In Feinberg's words, 'a responsibility, like a duty, is both a burden and a liability, but unlike a duty it carries considerable discretion'.<sup>83</sup> Such responsibilities, however, should be clearly distinguished from the duties of citizenship.

The perceived correlation between rights and duties is so settled that scholars often use any pretext to uphold it, even if such attempts are obviously unhelpful, and even if the responsibilities attached to rights tend thereby to be either turned into duties proper, or dismissed outright. Uncritical approach is profoundly problematic in this context. The literature knows infinite examples where uncritical complacency and poverty of civility and personal autonomy, like in Walzer's example of enlistment of citizens during First World War, instead of being criticized, are glorified as examples of the virtues of citizenship duties. All the blindly accepted 'theory' of rights and duties implying the constant correlation between the two is in fact nothing more than an unconvincing justification of the repugnant roles the duties played, as discussed *supra*, which works *against* citizenship and, in particular, against the vital activist citizenship in Isin's understanding. Unable to find duties mentioned in the law, scholars presuming that the duties should be there no matter what in order to justify the existence of 'correlative' rights, which are clearly observable, go to great lengths in inventing possible duties. This leads to particularly flawed texts. Janowitz, in one example, proposed a citizenship obligation of 'participation in *voluntary*

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<sup>82</sup> Deigh, John, 'On Rights and Responsibilities', 7 *L. & Philosophy*, 1988, 147.

<sup>83</sup> Feinberg (1966), 141.

associations including, especially, community based organisations'.<sup>84</sup> It is regrettable, should one adopt this perspective, that lives are not lived for citizenship, instead, scholars are to be reminded that citizenship is there to facilitate personal projects and improve lives.

In framing citizenship and rights opposing a citizen to a State is not enough, it seems: the landscape of our interactions is much more complex, involving a strong social element which does not overlap with what the state offers.<sup>85</sup> There is no reason it seems, to equate citizenship with all the social aspects of our lives, since a society as such cannot possibly be based on state-supplied blessings and confirmations of someone's legal status. To the contrary, a society is a social fact – it exists and is observable in crude reality and necessarily involves citizens and non-citizens alike.<sup>86</sup> Speaking about societal obligations in the language of citizenship duties is misleading and should not be done, just as forging obligations out of voluntary activities, which is outright absurd.

The fact that citizenship duties are not necessarily correlated to rights in theory is in direct relation with the general lack of moral foundations that would require obedience to the law. Moral duties as such have very difficult time in contemporary legal theory. The matter is not confined to citizenship duties in any way. Indeed, there is a virtually universal consensus in the legal-philosophical literature that the moral duty to obey the law does not and cannot possibly exist.<sup>87</sup>

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<sup>84</sup> Id., 16 (emphasis added).

<sup>85</sup> Kutz, Christopher, 'The Collective Work of Citizenship', 8 *Legal Theory*, 2002, 471.

<sup>86</sup> Bauböck, Rainer, 'Citizenship and National Identities in the European Union', *Jean Monnet Working Paper* No. 1997/04.

<sup>87</sup> Indeed, 'Under the conceptual clarifications made by recent writers with regard to the thesis that there is a duty to obey the law ... any argument purporting to support that duty seems to me doomed to fail': Gans, Chaim, 'Comment', in Gavison, Ruth (ed.), *Issues in Contemporary Legal Philosophy*, Oxford: Clarendon Press, 1987, 180. This does not remove, however, the value of obedience in

This has important implications for the views of those, who place the duty to obey the law at the core of citizenship.

It is obvious that such a duty cannot be taken for a self-standing legal principle, since, to agree with Rawls, it would be highly artificial to imply that ‘when we find ourselves subject to an existing system of rules satisfying the definition of a legal system, we have an obligation to obey the law’.<sup>88</sup> A number of arguments has been raised by thinkers throughout the centuries in favour of such a duty, based on different moral-philosophical considerations, but all of them gradually came to be dismissed.<sup>89</sup> Indeed, to agree with Ladd, it seems like such externalist theories (*i.e.* presuming that the duty to obey the law comes from a non-legal source) are of little utility in justifying the obligation to obey the law.<sup>90</sup> The same, however, holds for the internalist theories, which take the law as an intrinsically moral conception: it is not, to which innumerable examples of repugnant or unjust laws going against the common or individual good or making no sense at all, testify. This is why justifications of a requirement to obey the law, which are external to the legal system as such, tend to receive much more attention from legal philosophers. Although this is not a proper forum for a detailed analysis of all of those, a brief mentioning of them is relevant here, since should no general moral obligation to obey exist, any legal duty of citizenship is not distinguishable from a politicized act of coercion, which would be justified in some systems better than in others, while remaining, essentially, what it is:

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numerous contexts, which is a different matter: Hurd, Heidi M., ‘Why You Should Be a Law-Abiding Anarchist (Except When You Shouldn’t)’, 42 *San Diego L. Rev.*, 2005, 42.

<sup>88</sup> Rawls (1964), 4.

<sup>89</sup> But see Klosko, George, *The Principle of Fairness and Political Obligation*, Boston: Rowman and Littlefield, 1993; Walker, A.D.M., ‘Political Obligation and the Argument from Gratitude’, 17 *Philosophy and Public Affairs*, 1988, 191.

<sup>90</sup> Ladd, John, ‘Law and Morality: Internalism vs. Externalism’, in Hook, Sidney (ed.), *Law and Philosophy*, NY: NYU Press, 1964, 61.



an imposition unworthy of any glorification and entirely independent of the citizenship rights' sphere.

In other words, an obligation *vis-à-vis* the State arises out of raw power, which it can deploy and does not have any decipherable moral component. Raw power is a result of political arrangements or, which is also possible, an act of abuse by the State. Missing the moral component, compliance does not make you a better or a worse citizen – either way is possible. Whether to be passive, active, or activist – in the sense of Isin's theory – is a choice left entirely to each individual. It is crucial to realize in this context that the triumph of activist citizens, even if shifting the direction or the scope of state coercion, is unable to generate any moral obligation: the inherent immorality of the state remains unchanged. This being the case, and particularly given the origins of States<sup>91</sup> and their frequently criminal nature,<sup>92</sup> it is only logical that the line of the duties of citizenship has been shrinking gradually through time.

Given all these observations, Lyons' rhetorical question 'why must we be asked to suppose that our moral obligations may routinely require us to be instruments of injustice'<sup>93</sup> is of particular importance in the context of citizenship duties. In this context, arguments like we have duties since there is no choice anyway, are particularly fragile.<sup>94</sup> Moreover, the fact that there is no strict separation between the law and morality, as has been underlined, *inter alia*, by Christie,<sup>95</sup> does not really undermine the conclusion that there is no general duty to obey, since acceptance of

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<sup>91</sup> Tilly, Charles, 'War Making and State Making as Organised Crime', in Evans, P.B. et al. (eds.), *Bringing the State Back in*, Cambridge: CUP, 1985, 169.

<sup>92</sup> Tanguay-Renaud, François, 'Criminalizing the State', *Criminal Law and Philosophy* (forthcoming).

<sup>93</sup> Lyons (1981), 77.

<sup>94</sup> E.g. Honoré, Tony, 'Must We Obey? Necessity as a Ground for Obligation', 67 *Virginia L.Rev.*, 1981, 39. Raz argues that a general obligation to obey the law should be voluntarily accepted: Raz, Joseph, 'The Obligation to Obey: Revision and Tradition', 1 *Notre Dame J.L. Ethics & Public Policy*, 1984, 139.

<sup>95</sup> Christie, George, 'On the Moral Obligation to Obey the Law', 1990 *Duke L.J.*, 1311, 1318–1322.

blatantly unjust and repugnant practices required by law as moral does not necessarily testify to their goodness.

In this context all those attempting to present obedience as morally dignifying, even if they attempt to distance themselves from the feudal origins of the humbleness ideal, fail to convince. To give a couple of examples, let us look at Rawls and Walker. The Rawlsean view that the duty to obey the law is a necessary extension of the principle of fair play<sup>96</sup> has been convincingly dismissed by a number of scholars.<sup>97</sup> So Nagel has demonstrated that fair play in fact is reducible to pure utility.<sup>98</sup> Moreover, not obeying the law is not necessarily free-riding,<sup>99</sup> just as the acceptance of benefits does not necessarily bind one, producing duties. As presented by Nozick, ‘You may not decide to give me something, for example a book, and then grab money from me to pay for it, even if I have nothing better to spend the money on’.<sup>100</sup> Also gratitude – popular among some philosophers as a reason to obey the law and the State<sup>101</sup> – does not withstand criticism. While the key arguments are simple: good governments create benefits, and the receipt of the benefits is a reason to be grateful,<sup>102</sup> numerous problems arise from them: it can be that the majority of governments are not actually good, moreover, many of them do not even govern,<sup>103</sup> benefits are not freely chosen, and, most importantly, the feeling of gratitude is not the same as a duty.

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<sup>96</sup> Rawls (1964), 3.

<sup>97</sup> E.g. Nagel, Ernest, ‘Fair Play and Civil Disobedience’, in Hook, Sidney (ed.), *Law and Philosophy*, NY: NYU Press, 1964, 72.

<sup>98</sup> Id., 73.

<sup>99</sup> Brandt, Richard, ‘Utility and the Obligation to Obey the Law’, in Hook, Sidney (ed.), *Law and Philosophy*, NY: NYU Press, 1964, 43.

<sup>100</sup> Nozick, Robert, *Anarchy, State, and Utopia*, Oxford: Basil Blackwell, 1974, 95.

<sup>101</sup> Knowles (2001); Walker (1988), 191.

<sup>102</sup> Knowles (2002), 5.

<sup>103</sup> Analysed by Green, Leslie, ‘The Duty to Govern’, 13 *Legal Theory*, 2007, 165.

Moreover, States actually constantly limit citizens' access to other States' services, thus seriously harming their own citizens on numerous occasions, if not literally requiring them to die for the ideology of sovereign statehood and grateful community – what happens in all the states with sub-optimal health services which do not allow for the portability of health benefits. Davies provided excellent criticism of the current state of affairs,<sup>104</sup> which nevertheless commands a lot of academic support by those who – absurdly – believe that the system in place is the best we can possibly aspire for, even if we believe that gratitude of the powerless to the powerful is not misplaced.<sup>105</sup>

#### **IV. EU law and national citizenship duties**

The situation with citizenship duties is such, that there is a clearly decipherable trend of moving away from duties-inspired rhetoric and law, since the functions of uniformisation and discrimination that duties have been traditionally playing are of no use anymore for the modern democracies. The lack of a legal-philosophical ground for being serious about duties makes the arguments of those favouring a duty-based approach to citizenship even less appealing, particularly when not only the general duties-rights correlation, but also the moral duty to obey the law as such are not there. This is the context against which the empty word 'duties' in Article 20 TFEU is to be read. Moreover the Union actually reinforces the trends described above by indirectly obstructing the ability of the Member States where residual duties remain to enforce those, thus shielding some of their nationals from abuse. The Union clearly limits the possibility of the Member States to empower government authority *vis-à-vis* the

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<sup>104</sup> Davies, Gareth, 'Services, Citizenship, and the Country of Origin Principle', *Mitchell Working Paper No. 2/2007*, 2.

<sup>105</sup> Card, Claudia, 'Gratitude and Obligation', *25 American Philosophical Quarterly*, 1988, 115.

individual. In this respect, what Weiler called the ‘fundamental boundaries’<sup>106</sup> is obviously affected by Union law. Weiler is absolutely right in stating that the balance between the ‘fundamental rights’ and ‘fundamental boundaries’ is at the core of any democracy and that joining the EU clearly narrows the ‘margin within which states may opt for different fundamental balances between government and individuals’<sup>107</sup> to a great extent. In fact, it means questioning the state on virtually any occasion – an additional guarantee against harmful or inexplicably regulation.<sup>108</sup>

In this context, Joppke is absolutely justifiably ironical while critiquing Weiler’s view of citizenship eroded by rights<sup>109</sup> and failing to act as a ‘shield against existential aloneness’.<sup>110</sup> Reality has to be acknowledged and it is quite unequivocal: thick attachments, and with them the duties are largely gone in practice and would not be justifiable in theory either. Given that the same processes are going on at the supranational *and* the national level, there is no reason to believe that the Union where there are no citizenship duties and where rights and freedoms play the essential role as a starting point of legal thinking, should tolerate radically different ideologies in the Member States. To claim that the Member States should be free to do whatever they want with EU citizens who happen to be their nationals is legally unsound. The whole point of the Union is that our core values are shared after all.

Being straight about the word ‘duties’ mentioned in the Treaty helps better understand the functioning of EU law *vis-à-vis* the citizens: Kymlicka is absolutely

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<sup>106</sup> Weiler, J.H.H., ‘Fundamental Rights and Fundamental Boundaries’, in Kastoriano, Riva (ed.), *An Identity for Europe*, NY: Palgrave Macmillan, 2009, 73.

<sup>107</sup> *Id.*, 79.

<sup>108</sup> Kumm, Mattias, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’, 4 *L. & Ethics Hum. Rts.*, 2010, 142.

<sup>109</sup> Joppke (2010), 42.

<sup>110</sup> Weiler, J.H.H., *The Constitution for Europe*, Cambridge: CUP, 1999, 338; Weiler (2009) ‘Europa’, 65, 78.

right, claiming that in essence EU law is busy diffusing liberal nationhood.<sup>111</sup> In the context of EU citizenship duties this means that by naturally opposing the totalitarian elements of the national conceptions of citizenship in the Member States, the EU also profoundly undermines their ability to have enforceable citizenship duties in place. Where such atavistic duties remain, EU law offers an easy escape, since its own fundamental freedoms always prevail. Classical case-law on requiring Member States to issue long-term residence permits to the Greek residents within their borders no matter what Greece thinks about these persons' duty to serve in the Greek military is informative in this regard. If Greek law humiliates its citizens by refusing them passports unless they submit to the draft, the reaction of the ECJ requiring the issuance of residence permits without any Greek passports presented is only rational:<sup>112</sup> liberty meets nationalism and prevails. By analogy, any time an EU fundamental freedom is in conflict with a local citizenship duty, the former is bound to prevail in the majority of cases. The decline in the Member States' ability to impose the duties of citizenship is thus directly connected to the very essence of the EU's constitutional arrangement, correlated with a necessary loss in the individual sovereign normative capacity.<sup>113</sup> The EU allows for voting with one's feet: those who dislike local citizenship duties are always free to go elsewhere. The EU thus functions as a promoter of the liberal de-dutification trend which is observable in the majority of contemporary democracies anyway.

It is not surprising that the Member States might view such developments as problematic: opening up citizenship to competition is akin to allowing the sale of

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<sup>111</sup> Kymlicka, Will, 'Liberal Nationalism and Cosmopolitan Justice', in Benhabib, Seyla, *Another Cosmopolitanism*, Oxford: OUP, 2006, 134.

<sup>112</sup> Case C-376/89 *Giagounidis* [1991] ECR I-1069.

<sup>113</sup> Streek (1997).

land<sup>114</sup> – thus removing another important feudal vestige – that happened in England, to give one example, less than a hundred years ago, which clearly threatened – and in the end was an important factor in changing<sup>115</sup> – the social order of the day. Similarly, liberating citizens from non-refutable state claims to duties seriously changes the rules of the game. Instead of being coerced into performing actions deprived of any sense only because the State so wants,<sup>116</sup> citizens are recognized as autonomous actors having the will of their own, of whom not only submission is required. When citizenship competition opens up, with national systems of citizenship losing, once and for all, their monopolistic status, this results in the creation of radically different bonds attachment between states and their populations, which is now based on choice, not only on the chance of birth. In the words of Davies, ‘Belgians are those who choose Belgium’.<sup>117</sup> Competition between the Member States for the citizens who freely choose to call certain countries their home is thus the key element of the operation of the Internal Market that is valuable as a promoter of freedom.<sup>118</sup> This kind of development is not contrary, but is in fact fully in line with a general trend in citizenship evolution described by Joppke, which co-accommodates increasing objective with decreasing subjective value of citizenship.<sup>119</sup>

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<sup>114</sup> Cohen, Morris, ‘Property and Sovereignty’, 13 *Cornell L.Q.*, 1927–1928, 8.

<sup>115</sup> *Id.*, 9.

<sup>116</sup> On the global professionalization of the military and military outsourcing: Singer, P.W., ‘War, Profits, and the Boundaries of the Law’, *Columbia J. Transnational L.*, 2004, 521; Leander, A., ‘Conditional Legitimacy, Reinterpreted Monopolies: Globalisation and the Evolving State Monopoly on Legitimate Violence’, *Copri Working Paper* 2002/10.

<sup>117</sup> Davies, Gareth, ‘Humiliation of the State as a Constitutional Tactic’, in Amtenbrink, Fabian and van den Bergh, Peter (eds.), *The Constitutional Integrity of the European Union*, The Hague: Asser, 2010.

<sup>118</sup> Kochenov, Dimitry, ‘On Options of Citizens and Moral Choices of States’, 33 *Fordham ILJ*, 2009, 156. Consequently, theorists aiming to shield EU Member States from competition aim at destroying the main added value of the EU: *e.g.* Streek (1997).

<sup>119</sup> Joppke (2010), 37.

## V. Conclusion

Basing a legal system on rights, rather than duties, is not an arbitrary choice: it reflects the essential assumption that people should be free, which also includes freedom to determine the meaning of right and wrong, failure and success etc. in the context of the personal projects they pursue – a gift of freedom unthinkable in a system of pre-existing prescriptions which necessarily underlie the concept of duties. Should citizenship be paled with freedom, there is no place for duties within the auspices of this concept. This is exactly what we observed in the context of citizenship's evolution. There has never been any 'shortage of sheep-like subjects'<sup>120</sup> that the duty-oriented vision of citizenship promotes. Yet, active engagement and the reshaping of the right and wrong in any given context, including a supranational Union, necessarily requires a rights-based approach to membership.

This article confined itself to making five interrelated points. 1. There are no empirically-observable duties of EU citizenship; 2. Such duties would lack any legal-theoretical foundation, if the contrary were true; 3. Legal-theoretical foundations of the duties of citizenship are lacking also at the Member State level; 4. EU law plays an important role in undermining the ability of the Member States where residual duties remain, to enforce them; 5. This development is part of a greater EU input into the strengthening of democracy, the rule of law, and human rights in the Member States, also reflecting an important general trend in law's development. In the light of these findings it is unquestionable that there is no room for EU citizenship duties in the edifice of EU law.

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<sup>120</sup> Green (2007), 166.