

DEMOS PROBLEMS AND THE EUROPEAN UNION: AN EXERCISE IN CONTEXTUAL DEMOCRATIC THEORY

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Izvorni znanstveni članak
Primljeno: lipanj 2013.

Summary Debates concerning the ‘democratic deficit’ have been a prevalent feature of the normative literature on the European Union, but rather less attention has been paid to ‘demos problems’ constructed by the normative ordering of the EU and what such problems reveal about the nature of democratic citizenship in the EU, the character of the EU as a normative order and the institutional character of the relationship between the constitution of the EU as a normative order and as a structure of political incentives. This article addresses this topic by focusing on one such ‘demos problem’.

Keywords demos, citizenship, European Union, political membership

Introduction

In an article in the 8th December 2011 issue of the French newspaper *Libération*, Philippe Cayla, a former French civil servant who is currently President of Euronews Development, invited readers to join him in initiating a European Citizens Initiative which proposes that the European Union adopt a rule that all EU citizens living in another EU state than that of their nationality (so-called ‘second country nationals’ or SCNs) be entitled to vote in the national elections

of their state of residence.¹ Together with Catriona Seth, Professor in 18th-century French studies at the Université de Lorraine, Cayla also launched a debate on this topic at the European Citizenship Observatory with some rhetorical flourish:

Imagine being a law-abiding EU citizen, living in the EU, and having

¹ <http://www.liberation.fr/societe/01012376282-commencons-par-les-europeens> (28.3.2012).

no right to vote for the government whose decisions will impact on your daily life. Does this sound like an Orwellian nightmare? Think again. It is the fate of large numbers of your neighbours or friends.²

In a recent report, the European Commission also drew attention to this point, noting that one way in which it sees the EU-MS citizenship relationship as currently problematic is that:

some EU citizens who move to and reside in another Member State may lose their right to take part in national elections in their Member State of origin. According to the legislation of several Member States (Ireland, Hungary, Denmark, Malta, Austria and United Kingdom), their nationals are disenfranchised if they live in another Member State for a certain period of time. Many EU citizens informed the Commission and the European Parliament that they are not able to participate in any national elections, neither in the Member State of origin nor in the Member State of residence. (EU Commission, 2010)

The issue raised by Cayla and Seth, and acknowledged by the Commission, is more than symbolically significant for the EU and its member states, even if the number of SCNs is estimated at perhaps only 12 million out of 500 million EU citizens, not least because, in highlighting this specific issue, it also draws attention to the normative ordering of the European Union as generating what

we may term 'demos problems', that is, problems concerning the appropriate inclusion of persons within the demos of the EU. The issue of national voting rights for SCNs is only one of a range of such 'demos problems' that emerge in the context of the EU; others concern the MS-differentiated access to EU citizenship of third country nationals (TCNs) and to EU voting rights of EU citizens resident outside the EU. Each of these 'demos problems' has its roots in the normative ordering of the EU as a polity of polities; however, I will focus here solely on the SCN 'demos problem' and the different responses that arise in relation to it as well as the ways in which this issue reveals a misalignment of the constitution of the EU as a normative order and as a structure of political incentives.

I begin by sketching a generic account of democratic citizenship, before elucidating the precise character of the 'demos problem' in the context of the normative architecture of the EU. I then turn to consider and evaluate a range of possible responses to this problem (and their different implications for the EU as a polity), before drawing attention to the relationship of the EU as a normative order and as a structure of political incentives. In performing this analysis, however, I am also concerned to provide an exemplar of an approach to democratic theory that stresses the importance of contextualisation and attention to the normative and institutional issues that arise in elaborating and evaluating proposals for the resolution of 'demos problems'. Thus the second aim of this article is to demonstrate an approach to moving from ideal to non-ideal democratic theory.

² <http://eudo-citizenship.eu/commentaries/594-should-eu-citizens-living-in-other-members-states-vote-there-in-national-elections> (28.3.2012).

Democratic Membership

Citizenship as a political ideal is, fundamentally, conceived as equal membership in a self-governing political community. This ideal has two distinct aspects. The first involves seeing citizenship as the legal status of equal consociate in a democratic polity where that status is comprised of a schedule of rights and duties that aim to protect citizens from the fundamental threats to their private and public autonomy, thereby enabling citizens as private individuals to pursue their own reasonable conceptions of the good and as citizens jointly to govern the terms of their civic relationship and determine the collective projects to which they commit themselves (see Rawls, 2005; Habermas, 1994; Tully, 2002 for three variations on this theme). The second orients us to seeing citizenship as membership in a free community of equals characterised by special obligations between members that are internal to the non-instrumentally valuable good of membership and, insofar as they do not entail injustice to those excluded from this community (Scheffler, 2001: 48-65), are legitimate obligations of justice (Miller, 2007). Citizenship as a political institution is thus both instrumental for the realisation of, and a site for the expression of, the basic norm of democratic legitimacy in which, in some suitable sense, *the governed govern* – a form of *reflexive authority*, at once instrumental and expressive, in which the governed impose duties on themselves to act in accordance with the justice-compatible norms and rules that they have, as governors, determined (viewed under the first aspect) and in so doing express their freedom as equals and realise the good of membership in *this* political community (viewed under the second

aspect). In modern polities, such democratic citizenship is tied to, and symbolised by, possession of equal voting rights (although a democratic polity could in principle be structured in terms of ‘decision by acclamation’ or, more plausibly, through the decision-making of representatives chosen by way of sortition).

The considerations advanced thus far denote the abstract legitimacy norm for democratic polities regardless of the level of governance (municipal, state, supranational, etc.) at which they operate – and they articulate a basic norm of inclusion: all those who are subject to the collectively binding authority of the polity should be included as members of the political community. However, projected directly onto practice, this norm of inclusion is problematic in that it does not address the issue of who is legitimately entitled to count as a subject of political authority. Tourists are, however fleetingly, subject to the political authority of the state they visit. Irregular migrants are subject to the political authority of the state in which they reside, but formally lack an entitlement to presence within its jurisdiction. Second generation or third generation or yet more distant expatriate citizens are subjects of rule of their state of ‘nationality’ since they have a duty to comply with the norms and rules of the relevant political authority *whenever the conditions of application of these norms and rules are satisfied*, but they may lack any genuine connection to the state. What is needed to reflect on such cases is a contextualisation of the norm of inclusion that is sufficiently thick to establish criteria governing the legitimate acquisition or loss of the status of being a subject of rule in a democratic polity. Such contextualisation involves two elements: first,

reflection on the two aspects of democratic citizenship and, second, attention to the point and purpose of any specific kind of democratic polity.

Returning to the two aspects of citizenship as a political ideal, we can distinguish two general sets of reasons for valuing political membership. First, *protective/enabling reasons* which stress the instrumental value of political membership in terms of protecting/enabling the conditions of social and political autonomy. Second, *expressive reasons* which emphasise the non-instrumental value of standing in a relation of political community with others, of political membership as a source and site of political belonging. These general sets of reasons provide two general criteria for acquisition/loss of political membership:

1. An entitlement to a fair opportunity to acquire (or not to suffer the loss of) political membership insofar as one is subject to, and dependent on, the relevant political authority for the protection/enabling of the basic conditions of one's social and political autonomy.
2. An entitlement to a fair opportunity to acquire (or not to suffer the loss of) political membership insofar as the political community is a source of non-instrumental value for oneself conditional on the membership of persons who stand in the type of position that one occupies in relationship to the political community not undermining the good of membership.

The criteria of 'a fair opportunity' will be significantly determined by the point and purpose of the type of polity.³ To il-

lustrate, consider the contrast between municipal and state forms of polity.

The point and purpose of municipal governance is to provide a range of services (policing, health, education, sporting facilities, garbage collection, etc.) to those who live in a specified locality. Conceived as a self-governing polity, the democratic legitimacy of the municipality thus requires its inclusion of all competent lawful residents who are dependent on these services for the protection and/or enabling of their autonomy.

consider the example of the state. The first criterion provides a basis at the level of the state for addressing the distinction between refugees, regular and irregular migrants since what constitutes a fair opportunity of acquisition can vary according to different needs and circumstances of dependency. Thus, for example, it is *prima facie* reasonable that refugees have an accelerated/easier path to the acquisition of political membership relative to regular migrants and that irregular migrants have a slower/more difficult path to acquisition that regular migrants (though these judgements are defeasible and may be contextually variable on a case by case basis). The second criterion provides a basis for distinguishing different generations and categories of expatriates in terms of variable criteria of fair opportunity of not to suffer loss. Thus, for example, the criteria for 1st generation emigrants (at least those over the age of 5 on departure) will be much weaker (say, a simple declaration) than for 2nd generation emigrants who may, for example, be required to have spent a period of time in the state of nationality or otherwise demonstrated a commitment to it in order to retain political membership. Such criteria would presumptively become more demanding for the 3rd generation and may reasonably be taken to converge with criteria for non-citizen residents to acquire political membership (say 5 years residence).

³ It will also be affected by the relationship in which the person stands to the polity. Con-

This norm finds expression, as Bauböck (2007a) has cogently argued, in the legal principle of *jus domicile*. Thus, a fair opportunity to acquire citizenship in this municipal polity would require no more than lawful residence as signalled, for example, by being liable for local taxation. While it is true that membership of this local political community may be a significant site of non-instrumental value for persons, it is also true that the value of membership in the municipal political community is undermined for its membership if that membership is divorced from presence in the locality. In this respect, and given that maintaining membership only requires not leaving the locality, members who do leave can be legitimately stripped of membership. By contrast, if we consider the point and purpose of state governance, this involves, internally, a normatively deeper and more expansive structuring of the conditions of members' lives and, externally, the protective and expressive role of the state as an international actor. In this case, the democratic state is an intergenerational project of self-government in which, as a polity, it protects and enables the autonomy of its citizens (inside and outside the state's borders), while, as a political community, it gives expression to its distinctive political identity in the domestic and foreign policies that it enacts. Here a 'fair opportunity' to acquire citizenship entails reference to the demands of stability for such a community and hence the importance of a 'genuine connection' (*jus nexi*) with the state, of being what Bauböck has termed a 'stakeholder'. This supports the use of *jus sanguinis* and *jus soli* as principles of membership, albeit that the former is limited as the connection diminishes across emigrant generations (by the second generation born abroad,

a generation raised in another state by parents raised in another state, it is hard to maintain that a 'genuine connection' persists) and the latter may legitimately be qualified in terms of the length of the parent's residence (i.e., children born to tourists and temporary workers need not qualify since the normatively salient feature is the presumption that children will be raised in, and shaped by being raised in, the state of residence). It also supports the use of *jus domicile* when qualified by a relevantly extensive period of residence. Unlike the municipal case, it acknowledges that at least first generation emigrants maintain a stake in virtue of being shaped by the state of nationality and in virtue of the fact that the withdrawal of citizenship from them removes a source of non-instrumental value where this is not required to maintain the value of membership.

These considerations offer a framework for analysing democratic citizenship that is, as indicated, closely akin to Bauböck's 'stakeholder model' (2003, 2005, 2007b, 2009) in that, in contrast to the social membership model developed by Carens (2013: 158-169) and Rubio-Marin (2000, 2006), it ties membership directly to 'stakes' in the polity. However, it is not my purpose in this article to focus on these theoretical differences which I have explored elsewhere, rather my concern is with putting this account to work in analysing the demos problems of the European Union and it is, hence, to that task that I now turn.

National Voting Rights and SCNs

Second country nationals are persons who move from one member state of the European Union to another member state. To focus this discussion, we

will assume that the MS that they leave is the state whose nationality they hold and that they do not also hold the nationality of the state in which they now reside. To draw out the issue, we can consider the issue of national voting rights across three different contexts before we turn to the case of the European Union: (a) states that are not members of any wider form of political union, (b) states that are members of an intergovernmental union characterised by a joint commitment to free movement, and (c) states that are members of a federal union.

(A) *States that are not members of any wider form of political union*

A useful starting point from which to develop our normative framework for this question is provided by Dahl's argument for the 'principle of full inclusion': *'The demos must include all adult members of the association except transients and persons proved to be mentally defective'* (1989: 129), where 'adult members of the association' refers to *'all adults subject to the binding collective decisions of the association'* (*ibid.*: 120). As Lopez-Guerra helpfully notes, Dahl's specification of criteria of democracy can be summarised thus:

- (1) governments must give equal consideration to the good and interests of every person bound by their laws (principle of intrinsic equality);
- (2) unless there is compelling evidence to the contrary, every person should be considered to be the best judge of his or her own good and interests (presumption of personal autonomy); therefore
- (3) all adults [who are not merely transients (1) and are not shown to be mentally defective (2)] should be assumed to be

sufficient well-qualified to participate in the collective decision-making processes of the polity (strong principle of equality). (2005: 219, my insertion)

In the context of a democratic state characterised in part by authority over a territorial jurisdiction, Dahl's account implies that any competent adult who is habitually resident within the territory of the state and, hence, *subject to* the laws and policies of its government is entitled to full inclusion within the *demos*.⁴ Such an argument can be taken to underwrite Walzer's claim that the denial by a state of full political rights to legally-admitted habitual residents amounts to *citizen tyranny* (Walzer, 1983: 55).⁵ The justification of the exclusion of transient non-members from the *demos* appears somewhat unmotivated in Dahl's account – and this leads to a line of objection to the appeal of the normative recourse to subjection to collectively binding decisions as the sole criterion of civic membership. The objection is simply that the subjection criterion does not rule out transients but, as Dahl's own exclusion of transients reveals, it is counter-intuitive to include

⁴ Although Dahl talks of the principle of all affected interests, I agree with Lopez-Guerra (2005: 222-5) that, since it is being governed that is the normatively relevant issue for Dahl, the relevant principle is that of being *subjected to* rule rather than being *affected by* rule. For defences of the all-affected principle, see Shapiro (2003) and Goodin (2008).

⁵ Walzer links this claim to one in which the polity has the right to determine its own entry criteria as an element of its right to self-determination; for an excellent analysis of the difficulties that this conjunction generates, see Bosniak (2006).

them. I will address this criticism to bring out the importance of contextualising this abstract norm.

A first response to this objection is to deny that transients should be excluded. This response notes that the objection's intuitive force hangs on taking an equal right of participation in the demos to entail a right of equal participation in the demos. But this does not follow. If a person's autonomy is infringed by a law, that grounds an entitlement to be included in the demos with respect to that law; it does not imply, for example, the equal weighting of the votes given to transient and non-transient members of the demos. It does not do so because while it is the mere fact of subjection to coercion that grounds an equal right to be a member of the demos with respect to the relevant law (or range of laws), this does not license the view that the scope and degree of subjection has no normative significance with respect to what it is to treat persons as political equals. On the contrary, treating people as political equals requires both taking subjection as a non-scalar property in terms of entitlement to membership of the demos and as a scalar property in terms of, say, the weighting of their votes within the demos. Once we see this point, the intuitive force of the objection to the inclusion of transients in the demos is dissolved.

As a general point of argument in democratic theory, this response strikes me as cogent, but it operates at a non-contextualised level and elides the point that the state is a distinctive form of democratic polity, one that requires a relatively stable demos for its reproduction over time as a community of solidarity. This is where we need to turn from an emphasis simply on the demo-

cratic state as a protective/enabling regime (subjection to collectively binding laws) to the democratic state as a community of belonging. Once we introduce this second dimension of the state, an alternate justification of the exclusion of transient non-members becomes clear, namely, that transient non-members do not stand in the appropriate relationship of belonging to the demos of the state in which they are present. However, this justification has a necessary corollary: since transiently present non-members of one state are also transiently absent members of another state to which they do stand in the appropriate relationship, they should retain membership of the demos of the state from which they are temporarily absent. Furthermore, the specification of the concept of 'transient' requires that each of the two dimensions of the democratic state is involved in such specification. (One plausible view of the range of time required for non-transient presence/absence is four to eight years.) On the basis of these normative considerations, we can say that in the case of independent states, external voting rights are required for transient absentees (short-term temporary workers, students) and, we can add, also for those whose externality is a function of state roles (diplomats, members of the armed services) on the same grounds that they are ruled out for those who are merely transiently present (e.g., tourists, students, short-term temporary workers).

What of long-term expatriates who are not performing state roles? Here our normative framework supports the view that (a) such expatriates should be entitled, as non-transients, to membership of the state in which they reside and (b) that expatriate voting rights are permis-

sible for national legislative and presidential elections, and only required in the case of constitutional referenda. They are permissible in the former cases because inclusion in the demos is neither forbidden (residence is not a necessary criterion of subjection to collectively binding decisions nor having a present stake in the polity) nor required (expatriates are not subject to the comprehensive application of rules that characterises residents). In the latter case, they are required since constitutional referenda concern the character of one's legal personality as a citizen or, more generally, the terms of the political association of which one is a member. To give a dramatic example, if the UK held a referendum on withdrawal from the EU, all citizens – no matter where they reside – would be bound by this decision and (if this were their only MS nationality) their entitlement to EU citizenship would hang on the outcome.⁶ It might be objected that this example biases the case because it significantly affects the interests of non-resident citizens, so consider as an alternative the Irish 2004 referendum on constraining *jus soli* which by definition did not affect external citizens since their children born abroad still could claim Irish citizenship through *jus sanguinis*. In this case, it might be argued that since the outcome of the referendum would apply to external citizens

only in the way that domestic legislation applies to them, that voting in constitutional referenda would be treated like voting in national elections, namely, as permissible but not required. I would resist this conclusion since what differentiates the constitutional case from standard domestic legislation is that it concerns the basic terms of the political association. If citizenship is fundamentally membership in a self-governing political community and constitutional rules express the basic commitments of that political community, its juridical understanding of its own self-governing character, then all citizens should be entitled to a say in relation to those rules irrespective of whether they are individually affected by them.⁷

That the normative implications of political membership are changed by the shift in institutional context is most obviously demonstrated by the fact that, given the current institutional architecture of the EU, it is not compatible with the civic equality of EU citizens to have voting rights in national or EU elections in more than one MS, whereas in the case of independent states, there is no breach of civic equality in a person exercising votes in distinct and unrelated electoral contests. But it is important to note that the significance of the transformation depends on the type of governmental entity that the EU is, a point that we can explore by way of contrast with purely intergovernmental and fully federalised systems that are also committed to free movement within the territorial area that they cover.

⁶ This being the case, we may hold that under such circumstances the EU has, given its commitment to freedom of movement, a duty of justice towards those affected to ensure that they are disadvantaged as little as possible – for example, by granting them a secure EU citizenship status which enables them to regain EU citizenship through acquisition of the nationality of the MS in which they reside.

⁷ I am grateful to Rainer Bauböck for the example and for pushing me on this point.

(B) *States that are members of an intergovernmental union characterised by free movement*

In the case of a purely intergovernmental structure where the norm of free movement is grounded on a joint commitment to a shared aim or purpose such as, for example, a European market, the normative context remains largely but not wholly equivalent to that of independent states who are not engaged in such a project. The salient difference is that the shared purpose brings into play the principle of justice that the partners to this project should not act to frustrate this joint enterprise and should, where compatible with their distinct national contexts and projects, aim to facilitate it. Such a principle could be expressed, for example, by offering preferential treatment to the citizens of partner states for access to membership rights and for dual citizenship.

(C) *States in a federal union characterised by a right of free movement*

In the case of a fully federalised system, the norm of free movement may serve instrumental purposes, but is, fundamentally, a norm of social justice expressing a basic liberty of citizens as federal citizens and, as such, state citizenship is subordinate to federal citizenship in the sense that freedom of movement requires that anyone exercising their right to cross the borders of states within such a union *must not* be disadvantaged at any level of citizenship within the federal structure. A straightforward way to institute such a rule of justice is to adopt a residence-based rule for citizenship in the states that comprise the federal union. This is not the only way to institute such a rule but, given a

territorial mode of governance, it has the advantage of aligning voting rights with primary contexts of governance.

The EU stands between these intergovernmental and federal examples in an interesting way. First, the EU is formally characterised by what we may call the principle of *jus civitatis* such that citizenship of the EU is derived from citizenship of an MS (Bauböck, 2007c). Second, since its commitment to freedom of movement has moved from an economic model tied to a largely intergovernmental structure to a more civic model (which retains some features of the former) commensurate with its development of federal as well as intergovernmental features. While it is the case that this civic model now identifies freedom of movement as a right of EU citizens (although Article 21(1) TFEU specifies that this right may be subject to certain limitations and conditions) and not simply as workers (see, for instance, Cases C-413/99 *Baubast and R* [2002] ECR I-7091, paragraph 84, and C-200/02, *Zhu and Chen* [2004] ECR I-9925, paragraph 26, cited in EU Commission, 2010, fn. 4), it remains the case that the EU is a mixed type of governmental entity and consequently the relationship between EU citizenship and MS citizenship cannot be conceptualised simply in terms of the priority of the former or the latter but, rather, is to be seen as engaging a form of mediation between the two.

The problem here is not simply that MSs have different rules governing access to national voting rights for emigrant nationals in the EU and immigrant EU citizens, but also that the authority to determine these rules may remain largely at the discretion of the MS, although within the context of an EU principle of

solidarity. Whereas it is widely accepted, given their primary function, that residence is the appropriate criterion for local/municipal elections and it is clear that EU citizenship would hardly be meaningful if EU citizens resident in the EU could not vote (and stand for election) in EP elections, it is the case that in leaving national voting rights out of its requirements for mobile EU citizens, the EU and its MSs avoided having to agree on rules governing the self-constitution of the national demos by requiring MSs either to include resident non-nationals who are EU citizens or to include expatriate nationals. However, with the shift from an economic to a civic grounding of the norm of free movement, this position is no longer compatible with the requirements of political equality in the EU. It may be reasonable for there to be some limitations and restrictions on the freedom of movement of EU citizens, but it is not reasonable *given this right as a civic right* that such restrictions undermine the point and purpose of civic rights in securing political equality. The demos problem that may contingently confront SCNs is a *democratic wrong*. But while it may be relatively straightforward to see that, as a matter of justice, EU citizens resident in the EU should not be required to sacrifice national voting rights to secure the benefits of legitimately exercising their right of free movement, this point only raises the further question of *where* EU citizens who have exercised this right should be entitled to vote.

The SCN ‘Demos Problem’: Redressing a Democratic Wrong

In this section, I will lay out five possible responses to the SCN demos problem. There are four options available as

simple rules and one as a more complex rule that emerges from reflections on the limitations of some of the simple rules. Each of these rules would resolve the problem. I will start by addressing these rules in terms of (a) the ‘best fit’ with the current institutional structure of the EU before turning to (b) which rule is easiest to adopt and implement and (c) what are the likely costs and side-effects of the different rules?

The four simple rules are these:

- 1) National voting rights in the state of residence.
- 2) National voting rights in the state of nationality.
- 3) The choice between (1) and (2).
- 4) A time-differentiated combination of (1) and (2) which starts with (2) and, after a period of residence, switches to (1).

We have already noted that (1) is the characteristic feature of fully federal systems and has the advantage in such structures of ensuring that voting rights track the primary contexts of governance. The key normative issue raised by (1) is whether the political autonomy of EU citizens, who are not citizens of the MS within which they are resident, is adequately secured if they lack national voting rights in that MS. This is a serious consideration since the MS of residence is their primary context of governance, but it should also be noted that (1) has the disadvantage in respect of the EU of effectively severing the formal democratic relationship of such EU citizens to their MS of nationality. By contrast, (2) maintains that relationship, but means that such EU citizens cannot vote in what arguably constitutes their primary context of rule. Acknowledging these combinations of advantages and disad-

vantages may incline us to (3), namely, letting each individual decide for themselves, while (4) may be seen as an attempt to combine the advantages and minimize the disadvantages of (1) and (2) in a way that registers the salience of the 'centre of gravity' of one's life as it changes over time.

In response to the normative force of (1), it may reasonably be argued that insofar as such EU citizens enjoy local and EU political rights as well as the rights to join (or found) political parties/organisations in the state of residence and other general rights of political participation in the democratic political life of the state of residence, as well as secure conditions of residence, the conditions of their political autonomy are sufficiently secured. This is, I think, plausible if and only if such EU citizens also enjoy a right to acquire political membership of the state of residence within a reasonable timeframe. In the absence of such an entitlement, they are forced to trade off the good of political membership in a primary context of governance against the good of free movement. This right of membership need not be presented on the same terms as available for resident non-EU citizens. One could argue, for example, that a longer time-period would be justified in the case of resident non-national EU citizens compared to other resident non-nationals who do not enjoy the same protections as EU citizens, although my own preference (on the basis of arguments in Owen 2011) would not be to vary the timeframe, but to adopt an automatic conferral (with opt-out) for non-EU citizens and an automatic entitlement (with opt-in) for EU citizens as a way of registering the relevant normative distinction between their positions.

It should be noted that the form of this objection to (1) entails that (2), when appropriately linked to rights of naturalisation for EU citizens in other MSs, effectively accommodates (3) and (4) while ruling out the possible strategic voting complications that an unqualified version of (3) could introduce. Let us call this complex rule (5). Moreover, whereas (1) arguably both devalues national citizenship in a way that is not consonant with the institutional character of the EU and pre-emptively pushes towards a fully federal conception of the EU, (5) acknowledges the mixed character of the EU and the mediated character of citizenship in the Euro-polity composed of the relation between the EU and its MSs. Perhaps more fundamentally, (5) rather than (1) gets the current distribution of political responsibility right: since EU citizenship is acquired through citizenship of an MS, the primary responsibility for ensuring that an EU citizen is not politically disadvantaged by exercising the right of free movement lies with the MS through whom EU citizenship is acquired and not the MS in which the EU citizen is resident.

There are, then, good reasons to favour (5) as the best fit with the current institutional structure of the EU, but this cannot be the only criterion when we are confronted with a democratic wrong that requires urgent attention. For this reason, we need to also consider which rule is easiest to adopt and implement as well as the likely costs and side-effects of the different rules. I will focus on options (1) and (5).

Let us turn to the second criterion of evaluation: which rule is likely to be easiest to adopt and implement? This matters because it is relevant to ask not just what fits best but how long it will take

to remove the democratic wrong and harms at stake here. On this count, (5) does less well. It is certainly likely to be difficult to get all MSs of the EU to coordinate their national legislation in this way (particularly if they have constitutional provisions against expatriate voting). Here Cayla and Seth's ECI proposal of (1) looks more straightforward and exhibits greater continuity with existing EU practices such as resident-based voting rights for EU citizens in local and EU elections.

On the third dimension, namely, likely costs and side-effects, (1) has both strong positives and negatives. On the positive side, it provides political representation in an SCN's immediate context of governance and it would also resolve the political effects of the quite radical disparities between the implementation of the EU rule on local voting rights (consider the comparison of France and the UK, for example, where in France local voting rights are restricted to the level of the commune, while in the UK they include not only local and county council elections but also extend to voting in devolved assembly elections in Scotland, Wales and Northern Ireland), since it would remove any constraints that pertain to the linkage of local and national representation (as occur, for example, in France where members of the Senate are chosen through an electoral college comprised of locally-elected officials). On the negative side, (1) completely severs the *political* relationship between citizens and their state of nationality and also breaks the widely held link between citizenship of the state and voting rights (although this link does not hold universally even between EU member states, as the mutual granting of voting rights between the Republic of Ireland and the

UK illustrates). By contrast, (5) does not deliver the strong positives or negatives of option (1). It maintains the linkage between national citizenship and suffrage at the national level while allowing EU citizens to reflect the change in their primary contexts of governance through naturalization. A significant difference is that whereas (5) coheres with the institutional structure of the EU as it stands, (1) orients the EU to the *telos* of a federal political structure.

These considerations illustrate that there is a genuine political choice to be made between (1) and (5) – a choice which involves weighing the following range of factors: how to weigh the protective/enabling dimension of national citizenship against the identity/belonging dimensions of national citizenship, how to weigh the urgency of the democratic wrong and difficulty of implementation, how to weigh the potential costs and side-effects of the different rules. These are all issues on which reasonable people may reasonably disagree.

Normative Order and Political Incentives

Having identified and analysed the two primary candidates for the resolution of the SCN demos problem and, hence, redressing the democratic wrong that it embodies, let us turn to the question of responsibility for redressing this wrong and the resources available within the EU to support movement towards adopting either of these proposals.

What is the normative basis on which we can assign responsibility for redressing the SCN demos problem? Although as a matter of basic democratic justice, there is an obligation across the EU and its MSs to attend to this issue, the appro-

priate allocation of responsibility must acknowledge that the question of who has voting rights in national elections in each MS is constitutionally reserved for each MS, so, *prima facie*, responsibility lies primarily with the MSs and the normative ground of this MS responsibility within the EU as a normative order is its commitment to solidarity.

We can begin by noting that ‘solidarity’ has been a basic value of the EU acknowledged in its founding and re-founding documents from the *Preamble* to the Treaty Establishing the European Coal and Steel Community Treaty (1951) to the Single European Act (1986), the Maastricht Treaty (1992) and the Treaty of Lisbon (2006). The last of these documents explicitly places solidarity as a value that should govern both relations between MS and between EU citizens. Sangiovanni (2013) argues that solidarity names a special kind of associative obligation triggered by (among other conditions) *joint action*. On this account, solidarity binds agents together through joint and reciprocal action in the pursuit of a goal or set of goals – and in the case of the EU, these joint goals can be specified as a significant, if mediated, set of collective goods (including a single market, reliable system of supranational law, internal mobility, and regional stability) which the EU aims to provide and, thereby, the joint action required to provide such goods, the fair return that member states and European citizens owe one another can therefore be conceived as a form of specifically *co-operative* solidarity (Sangiovanni, 2013). These associative obligations encompass the intersection of democratic membership and the right of free movement (a point which has recently been brought to the fore in EU debates on the decision

of Malta to make its national citizenship – and hence EU citizenship – available for sale),⁸ and hence provide a normative obligation on the MSs of the EU to take responsibility for bringing about the adoption of rules that resolve the SCN demos problem.

Considered as a normative order, then, the EU provides a clear assignment of responsibility for MSs to ensure that SCNs are not disenfranchised at the level of national elections in virtue of exercising their civil right of free movement and, at the same time, the general obligation on the EU entails that the institutions of the EU should support and facilitate MSs in their discharging of this responsibility. Yet here we confront a tension or misalignment between the constitution of the EU as a normative order and as a structure of political incentives in that the political incentives constructed by the institutional architecture of the EU do not provide motivation for enacting these associative obligations. To see this, we should note that the weighting of representation (number of seats allocated to each MS) in the European Parliament and of voting rights in the Council are organised in a way that is related to ‘resident population’ sizes, albeit not in a directly proportional manner (and we should note there are arguments for adapting the norm; for example, semi-successfully by Italy in respect of its external vote). It is an implication of the institutional rule that MSs already enjoy the benefits of the counting of their resident SCN (and, for that matter, TCN) population in the determination of their weighted re-

⁸ For commentary, see <http://eudo-citizenship.eu/commentaries/citizenship-forum/990-should-citizenship-be-for-sale>.

presentation and voting rights. This not only adds insult to the injury suffered by SCNs who lack national voting rights in any MS; it is also both normatively and politically problematic.

We can first ask why population sizes should be taken to be the relevant consideration (even if qualified by various other factors). Consider that the distribution of seats in national and local elections in Europe (in contrast to the USA) is not typically a function of population sizes, but of numbers of eligible voters – and there is a basic reason for this, namely, that it is the *demos* and not the *population* that is the normatively relevant item for electoral purposes. The Liberal Democrat MEP Andrew Duff has argued in favour of the use of population sizes on the basis that the ‘Madisonian approach suggests that the European Parliament represents not only de jure EU citizens (as formally established by the EU Treaty) but that it also represents, and has a duty of care towards, anyone else who abides in the territory of the Union, including minors and denizens. That being the case, the traditional method of distributing seats in the Parliament on the basis of total resident population – to say nothing of counting votes in the council – is the right one and should not be amended’ (cited in Shaw, 2010). But is this justifiable? The fact that representatives’ duties of representation extend beyond those who can vote for or against them in no way implies that persons other than voters should count in determining constituency/seat distributions, although it may be an argument for differential resources for the offices of representatives. Thus, for example, a representative whose constituency contains a large vote-ineligible population can reasonably be given greater resour-

ces for his representative activities than one whose constituency is not so characterised. Imagine two towns, Procreatia and Condominia, each with 60,000 eligible voters, but where households in Procreatia have an average of 2 adults and 4 children, in Condominia the household average is 2 adults and 1 child. There are clearly grounds for arguing that Procreatia requires more schools, playgrounds and other resources than Condominia, but this does not provide any *democratic* grounds (that do not appeal to enfranchising children) for arguing that Procreatia should have more MPs than Condominia.

And this normative point has political bite. As already noted, the use of population as the key factor for determining levels of representation in the European Parliament and the weighting of voting rights in the Council entails that there is no institutional incentive for MSs to enfranchise SCNs (whether they are expatriate citizens or resident non-citizens), whereas a demos-based rule for the allocation of levels of representation in the European Parliament and the weighting of voting rights in the Council would align the political incentive with the normative argument by motivating MSs to discharge their responsibility to resolve the SCN demos problem.

It should, of course, be acknowledged that institutional incentives are not the only incentives that may be in play in the politics of the EU. However, given realistic assumptions concerning the motivation of MSs, it remains a serious problem of institutional design that the EU as a normative order and the EU as a structure of political incentives fail to cohere.

Conclusion

This article has sought to engage in two tasks. At a methodological level, it has been concerned with demonstrating one way of moving from ideal to non-ideal democratic theory through a process of contextualisation of the abstract critical norms of democratic theory and attention to the trade-offs between best fit, ease of implementation and costs and side-effects in evaluating proposals for democratic reform (in this case, proposals for resolving demos problems), as well as consideration of the relationship between the distribution of responsibility for achieving such reforms and the institutional structure of incentives within which the relevant actors are located. At a substantive level, it has attempted to identify and analyse one central 'demos problem' within the EU, to lay out and evaluate various proposals for resolving this 'demos problem', and to diagnose the obstructions that arise to such reform from the institutional character of the EU in terms of the misalignment of the EU as a normative order with the EU as a structure of political incentives. The upshot of this analysis is to suggest

that while MSs have primary responsibility for resolving the SCN 'demos problem', there is no institutional incentive for them to do so – in this respect, the burdens for the resolution of the problem become a test of the solidarity of EU citizens and their willingness to develop and support political campaigns for reform such as Cayla and Seth's use of the European Citizens Initiative.

Acknowledgements

I am grateful to Rainer Bauböck and two anonymous referees for comments in an earlier version of this essay. I also owe thanks to Enes Kulenovic and the other participants at a political theory symposium on Europe, Identity and Democracy held at the University of Belgrade for discussion and comments. This article arose from a presentation at the European Parliament as part of the EUDO Dissemination conference 'Inclusive Democracy in Europe' held in November 2011 which had, in turn, emerged from a EUDO Citizenship Observatory forum debate on the SCN demos problem sparked by Cayla & Seth's ECI. I am grateful to all those fellow participants in these earlier discussions.

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Problemi demosa i Europska Unija: vježba iz kontekstualne demokratske teorije

SAŽETAK Rasprave povezane s "demokratskim deficitom" uvelike su prisutne u normativnoj literaturi koja se bavi Europskom Unijom, no puno je manje prostora dano "problemu demosa" koji proizlazi iz normativnog uređenja EU-a i pitanju što nam taj problem govori o prirodi demokratskoga građanstva u EU-u, karakteru EU-a kao normativnog poretka te o institucionalnom karakteru odnosa između ustava EU-a kao normativnog poretka i strukture političkih poticaja. Članak se fokusira na "problem demosa".

KLJUČNE RIJEČI demos, građanstvo, Europska Unija, političko članstvo