



Plural Approaches to Theorizing Justice and Legitimacy in Europe

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European politics and society and the project of European integration have been marred by a series of crises for over a decade. Rethinking the fundamentals of European politics using the tools of political philosophy has never felt more urgent. But with some notable exceptions, the domain of thinking philosophically about European politics and European integration is still sparsely populated. Furthermore, despite extensive debate on the nature of non-ideal theory in political philosophy and the so-called ‘realist turn’ in political theory, applied and engaged work in our discipline is comparatively rare. Our intention is for this volume to address both of those lacunae.

What contribution can political theorists make to important current political events in Europe? Can political philosophy offer solutions to Europe’s contemporary problems, such as migration, democratic decline, or economic and status inequality within the European Union? These are difficult questions. One traditional view holds that philosophy is not well suited to the analysis of such regional particularisms. Some may feel philosophy and political theory should be undertaken only in more abstract terms being in its nature more comprehensive in scope. We present here a collection of articles from a broad range of philosophical traditions and perspectives that—each in their own way—implicitly resist this view. Whether it is because of the *sui generis* nature of (certain) political practices or challenges in the European context, a more epistemic commitment to localism in philosophical analysis, or simply a commitment to the usefulness of more granular, empirically informed applied philosophy, we are convinced that there is much to learn from a pluralist approach. And

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it is in the spirit of pluralism that the precise scope and motivation of philosophical reflection on distinctly European problems is left deliberately loosely defined.

As collaborators in a three-year, interdisciplinary research project, ETHOS (Towards a European Theory of Justice and Fairness¹), the editors of this special issue sought to find ways that political philosophy can address Europe's political challenges. Together with colleagues Jelena Belic, Bert van den Brink, Simon Rippon, Sem de Maagt and others, our goal with ETHOS was to provide philosophical building blocks for a European theory of justice. That led to a series of exciting explorations of the possibilities and limitations of such a project, normatively and epistemically (van den Brink et al. 2018, 2020; de Maagt et al. 2019; Knijn et al. 2020; Zala et al. 2020; Rippon et al. 2018, 2020). However, the focus on a 'European' theory of justice raises deep philosophical questions about how a theory of justice—and indeed any normative philosophical theorizing—might be tailored for a European context. Is there anything particular about the institutions of the European Union or the institutional practices of European integration that are of philosophical relevance? Are there particular policy issues or socio-economic circumstances in Europe that warrant a specific, applied focus? For example, should the European Union raise its current redistribution rate? How can European institutions cope with the problem of democratic backsliding of some member states? How should the European Union treat immigration from third countries? What are the rights and duties of immigrants who are citizens of the EU?

In this special issue, we aim to explore these questions. Our contention is twofold. First, there is much to learn with respect to normative engagement with contemporary European problems, practices, and institutions. Second, a focus on the philosophical implications of European specificities can provide more general insight into how to go about applied and engaged political philosophy in different places and different political contexts. The volume is intended to showcase a range of issues pertinent to the European context and a plurality of perspectives and methodologies that political philosophers and political theorists can take to these matters. This stems from our firm belief that a single perspective on European justice or legitimacy could not capture the complexity of the challenges Europe and the European Union face today. Thus, we believe that the diverse ways the authors of the special issue approached their chosen topics together provide an illuminating snapshot of some of the most pressing questions Europe faces today and provide answers that will be food for thought for future Europe-related normative research.

Reflecting the breadth of the discipline, the articles in this issue front diverse claims using a wide variety of philosophical and theoretical methods spanning analytic and continental philosophical traditions and the history of political thought. In our view, this pluralism is a strength and appropriately mirrors the diversity of legal, political, and policy questions an engaged political philosopher studying Europe faces. The six articles for this volume tackle topical political issues of justice and legitimacy in Europe, specifically related to the democratization of the EU, access to

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welfare rights for inter-EU migrants, the legitimacy of the EU border regime, democratic decline in EU member states, the (in)justice of migration policies restricting entry into the EU, and reciprocity as a basis for distributive justice in the EU. The special issue will accordingly be of interest to anyone with an interest in these issues of justice and legitimacy in Europe and also demonstrates how political philosophy can speak to topical political issues.

We turn now to the brief discussion of each of the articles of the present special issue. Three of the special issue's articles cluster around the question of what justice demands at the EU level. Philippe van Parijs looks at justifications and dilemmas regarding migration into the EU (Van Parijs 2022), while Dimitrios Efthymiou argues that current restrictions on access to welfare rights for EU citizens migrating to other EU countries are unreasonable because they would not have been chosen by member states behind a veil of ignorance (Efthymiou 2022). In turn, Miklós Zala sheds some critical light on Andrea Sangiovanni's influential account of a reciprocity-based grounding of duties of distributive justice in the European Union (Sangiovanni 2013; Zala 2022). Three further articles depart more from debates in democratic theory to analyze European politics from the perspective of legitimacy. First, Aliénor Ballangé questions the usefulness of 'constituent power' in democratizing the Euro-polity (Ballangé 2021). Second, Hallvard Sandven and Antoinette Scherz analyze the normative legitimacy of the EU's border regime in the context of the deaths of thousands of migrants trying to enter the European Union (Sandven and Scherz 2022). Finally, Tom Theuns considers the legitimacy of responses to democratic backsliding in EU member states (Theuns 2022).

Starting with Philippe Van Parijs's essay, while it should be clear that everyone who is committed to global justice should support the idea of open borders, Van Parijs warns that this should not lead us to deny the existence of what he calls 'Europe's most cruel dilemma' (Van Parijs 2022). To wit, there is a tension between trying to maintain or develop a generous welfare state and being hospitable with people who wish or need to enter and reside within the European Union. In particular, Van Parijs worries that wishful thinking may easily make us dismiss the possible adverse effects that the bottom segment of the native population is subject to. While welfare state mechanisms could offset such effects, uncontrolled immigration could undermine the efficiency of these mechanisms, he argues. Thus, unscaled migration could undermine the very institutions that need to protect the interests of vulnerable people, be they natives or newcomers. Van Parijs also points out we need to acknowledge the fears of locals of losing control of their cultural environment, and their feelings of insecurity when the population of their country is shrinking, their language is difficult to learn, and their country is subject to a significant brain drain. In short: European institutions are fragile, and the politics of open borders would endanger the 'exceptional combination of freedom and peace, of prosperity and solidarity which European citizens currently enjoy'. In line with his long-standing commitment to prioritizing just outcomes over democratic-procedural purity, however, (Van Parijs 2011), Van Parijs argues we also should not simply accept the demands of self-interested democratic majorities. What can be done, then? He highlights two measures worthy of consideration: 'the efficient use' of the diasporas of cosmopolitan cities and transnational interpersonal transfer schemes. The former can offer

important monetary and know-how transfers back to the homeland and trust that fosters trade and investment. As far as the latter is concerned, there is a need for a permanent and efficient mode of worldwide redistribution ‘from the world’s centres to its peripheries’.

Continuing a rich research agenda on this topic (e.g. Efthymiou 2020, 2021), Dimitrios Efthymiou’s article challenges the standard argument based on reciprocity that justifies current restrictions on EU immigrants’ access to welfare rights in host member states (Efthymiou 2022). He argues that justice requires immediate access to welfare rights. According to the standard reciprocity-based argument, being an active member in a cooperative venture triggers duties of reciprocity characteristic of welfare rights. But newly arrived immigrants do not fit the relevant membership criteria because they have not relevantly contributed (for a sufficiently long period) to the system of social cooperation of their host country. Consequently, they do not qualify for having access to welfare rights in the host country. However, in Efthymiou’s view, the standard reciprocity-based argument is inconsistent with what he labels ‘duties of international reciprocity’. Efthymiou specifies the requirements of international reciprocity with the help of the well-known Rawlsian thought experiment of the veil of ignorance. Suppose EU member states did not know whether the recipients of welfare policies they need to choose behind the veil would be net contributors or net beneficiaries to the system of their social cooperation. What policies would they select in light of the fact that social cooperation is made possible by the EU’s four fundamental freedoms, especially the freedom of movement? Efthymiou argues that specifying reciprocity and its requirements in this way provides a better understanding of what should count as an ‘unreasonable burden’—alternative accounts of this term are also provided and discussed in the essay—on the welfare systems of host member states. He shows that, behind a veil of ignorance device, member states would accept that EU immigrants are a priori no more of a net ‘burden’ to their welfare systems than their own citizens due to the nature of human capital flows in the EU, and argues that the fair sharing of the benefits and costs of freedom of movement must primarily take the form of immediate access to welfare rights. Efthymiou also shows when and how the current institutional structure of the EU could take measures to manage unreasonable burdens by ‘preventing member states from gaming a comprehensive system of welfare rights protections across member states and by recognizing the achievements of those member states that best serve them’.

Miklós Zala’s paper aims to answer what distributive justice demands from the European Union (Zala 2022). His starting point is Andrea Sangiovanni’s reciprocity-based approach to international justice in the EU called ‘Reciprocity-based Internationalism’ (RBI) (Sangiovanni 2013). RBI holds that the point and purpose of the state is to provide a central class of collective goods (such as military defense, a well-functioning legal system, access to legally regulated markets, and so on) to its citizens. Justice can be considered as reciprocity for mutually providing this central class of collective goods. Consequently, the EU’s purpose is the same, but since the central class of collective goods it can provide is limited, justice at the EU level requires less than at the state level. Also, since the provision of the central class of collective goods at the EU level comes with risks inherent to EU integration, RBI

aims to provide member states against the risks with the help of Ronald Dworkin's hypothetical insurance scheme (Dworkin 2002).

Zala finds the type of reciprocity RBI operates with morally unattractive because it cannot cope with the case of member states' inability to reciprocate the production of collective goods at the EU level. He illustrates this with the case of disability that poses a theoretical challenge to RBI. Zala then contrasts RBI's understanding of reciprocity based on the idea of productive contributions with the 'relationship model'. He takes this position from Christie Hartley, and he holds that the relationship model can cope with the disability challenge (Hartley 2009). The two core normative features of the relationship model are fraternity and equal status. Due to these two prongs, the relationship model calls for a stronger type of solidarity than RBI does and it not only entails the willingness to support those worse-off members that cannot productively reciprocate other member states' efforts at the EU level but also calls for a higher redistribution rate within the EU. Zala provides three comparisons between RBI's productive reciprocity and the relationship model's relational reciprocity. The first concerns non-EU-integration-related disadvantages; the second concerns membership cases, such as accession to federations; while the third comparison examines EU-integration-related disadvantages. He argues that the relationship model is superior to RBI in all three respects.

Turning now to the articles that shift the focus from justice to legitimacy, Aliénor Ballangé questions the use of the notion of 'constituent power' as a tool that can be used to promote the democratization of the European Union (Ballangé 2021). While some regard the absence of a constituent power at the EU level as the cause of the 'democratic deficit' in the EU, Ballangé argues that a more democratic EU can only be achieved through the 'multiplication' of 'constituent moments'. Ballangé's critique takes shape through a careful analysis of the justifications of the concept of constituent power. She points out that this notion suffers from a 'structural aporia', by which she means that any constituent power is previously constituted by an external force, 'in order to claim the status of autonomous political subject'. That is, 'there is no, strictly speaking, popular constituent power, but only constituted powers with a constituent vocation'.

By analyzing key documents of European integration—such the '*Recensement volontaire du peuple fédérale européen pour la reconnaissance de son pouvoir constituant*'—Ballangé shows that 'no European constituent people can constitute itself by and for itself without first having been constituted for strategic purposes'. In other words, 'the foundation of constituent power' remains something external to the European people, and its democratic character is also compromised. Ballangé is thus concerned about losing the 'savageness' or the raw popular democratic force of European constitution-making because constituent power is the result of (European) law, or a top-down rather than a bottom-up process that could actually preserve the will of the people.

Ballangé's alternative for the democratization of the European Union is embracing 'constituent moments' in which the popular democratic forces are manifested in the claims of mass democratic movements that aim to 'continuously reinterrogate and perfect the principles, values, and norms of the EU'. Ballangé believes that such a process—exemplified by, for instance, the joint statement of the Syntagma Square

strikers in Greece, or the Podemos movement in Spain before it became a political party—has the potential to ‘give voice to individuals who would be excluded from an institutionalized constituent process’. However, as Ballangé acknowledges, these constituent moments are unpredictable and sporadic. Thus, she emphasizes the need for ‘democratic experiments’ such as the citizens’ panels organized in 2021 within the framework of the Conference on the Future of Europe. Together, constituent moments and such European democratic experiments can function as a vital process of ‘democratic transnational socialization’.

In their article, Hallvard Sandven and Antoinette Scherz examine the special case of the EU’s border regime and its agency, Frontex (Sandven and Scherz 2022). The authors point out that more than 15,000 people have died trying to reach Europe through the Mediterranean during the last seven years. The lack of success of both national governments and Frontex to save these human lives spurred NGOs and private actors to start rescue missions. However, these rescue missions have faced increasing persecution from governments, most notably Italy’s. Are would-be migrants and citizens of member states who dissent to the EU border regime justified in acting in opposition to it? Given the pervasive disagreement over what justice requires in migration, the authors hold that a shift to legitimacy can yield better normative results. Sandven and Scherz argue that the EU exercises more power than each of its member states otherwise would in the aggregate through its border regime. The EU can exercise authority over a larger scope of issues with its directly applicable rules, and these have a considerable impact on the autonomy of would-be immigrants. Then they argue that even assuming a minimal legitimacy standard for the state–migrant relationship, the EU’s border regime has unique features that result in a tension with even such a minimal standard. Through Frontex, the EU claims and exercises power over potential immigrants. But the asymmetrical delegation of state powers to the EU leads to an unaccountable exercise of state power at the EU’s borders, which is crucial for the legitimacy of the EU’s border regime (see also Scherz 2021). Finally, Sandven and Scherz’s essay provides a novel perspective on the morality of unauthorized rescue missions by examining the permissibility of resistance to the EU’s border regime.

The issue concludes with Tom Theuns’s paper ‘The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7’ (Theuns 2022). His essay examines the tough question of what the EU should do about the fact that some member states are backsliding on their commitments to democracy, supposedly a fundamental value of the EU. There has been ample criticism regarding the Treaty provisions under Article 7 TEU for their inefficiency in preventing such undesirable processes. In the paper, Theuns asks the question of whether these provisions are legitimate or not. Building on methodological tools developed in the context of a project on criminal voting (Poama and Theuns 2019), and an earlier critique of Article 7 TEU (Theuns 2020), Theuns argues that the ultimate sanction of Article 7 TEU falls into a ‘performative contradiction’. What Theuns means by that is the following: one of the main purposes of Article 7 is to express commitment to the fundamental values recorded in Article 2 TEU, such as equality and democracy, but Article 7 itself undermines these values. Thus, it cannot fulfill its purpose and it is impossible through Article 7 to coherently defend the fundamental values in

question. Theuns examines the literature on criminal disenfranchisement as a parallel, and he concludes that permitting backsliding member states to keep their voting rights in the Council ‘taints the democratic character of Council decision-making’. Theuns then looks at the ensuing paradox through the lens of militant democracy—could this approach to defending democracy under attack justify Article 7? Theuns’s answer is that it could not, because there is a more democratically coherent alternative: expulsion from the EU. Such a mechanism, whereby pro-democratic states would disassociate themselves from an autocratic member, he considers to be the appropriate and legitimate ultimate political sanction for democratic and the rule of law backsliding by a member state. Theuns closes his article by responding to the vital objection to an expulsion mechanism—that it would call for a treaty change and is therefore practically impossible.

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