The Transgenerational Demos

ORCID: 0000-0002-3756-1835
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Annabelle Lever
Center for Political Research, Sciences Po, Paris
annabelle.lever@sciencespo.fr

As individuals, we inherit debts and benefits from the past legally and morally too. The same is true for collectivities, whether families, corporations or nations. The aim of this interesting book is to defend an approach to the puzzles generated by this practice – and moral attitudes to it -based on Rawls' political liberalism. It seeks to work out an account of constituent power implicit in Rawls' work, and then to use it to explain how a demos can operate over time in such a way that sovereignty is secured, along with political identity, and equality amongst generations. In essence, the idea is that we should think of the demos as inherently transgenerational, stretching forward and back well beyond the lives of those living now and their immediate predecessors and descendants, and then conceive our constitutional order as establishing the rules of legitimacy for all of us, without distinction. The constitution, therefore, is not something which each generation is free to alter as it sees fit – or as its conceptions of justice or prudence dictate because 'a constitution articulates a project for jointly living a political life over an open-ended time span'. (p. 260) Each generation is bound by norms of reciprocity to those that precede and succeed it and must therefore find ways of resolving disagreements about what the constitution means, and whether/how it should be changed, in ways that reflect the claims of the past as well as the future. Believing that present political majorities, however enlightened, are too transient and too self-interested to resolve conflicts of interest between the present, past and future, Ferrara argues for some form of constitutional court, whose job is to ensure that disputes about the constitution are resolved in ways that acknowledge and protect the transgenerational sovereignty of a people. (pp. 203-4)

There are many things to like about this learned and ambitious book, and the conception of democratic sovereignty which it elaborates. I can see myself dipping into it regularly for help in thinking through problems in constitutional theory, which is not a field I feel comfortable in,

or as a guide to the literature on a particular topic. Nonetheless, there is a great deal that is puzzling about its arguments and the way that they are meant to hang together. I will focus on four of them here: 1. Why do we need a theory of transgenerational sovereignty? 2. Why talk about 'reciprocity' in relationship to future and past generations? 3. What is *Rawlsian* about referring to transgenerational relations as reciprocal? 4. Why suppose that transgenerational democratic constitutionalism means that judicial review is *required* rather than just *permitted*?

We will look at these puzzles in more detail below. They are, however, connected to a central question about the assumptions animating the book. If at one level it can be understood as a welcome attempt to integrate intergenerational justice into democratic constitutionalism – thereby highlighting the necessity of responding to the worry in Jefferson, Condorcet and Paine about the hold of the past on the present (p. 207) – at another, the book has little if anything to say about intergenerational justice specifically. It is therefore unclear what implications it might have for property rights, taxation, pollution, fertility, immigration and so on. Instead, Ferrara assumes that the problem of transgenerational sovereignty is fundamentally one of constitutional theory. Hence, the reasons to prefer a 'sequential' to a 'serial' view of generational sovereignty form the core of the notion of intergenerational justice with which he is concerned[1] – on the implicit assumption that we must decide how to conceptualise sovereignty amongst generations before resolving other issues of justice between and within them. The assumption is not implausible, but nor is the alternative: that without a better sense of the scope for conflict amongst generations, we will not know what substantive and formal tests an account of transgenerational sovereignty must meet. So why should we prefer the former to the latter if we care about democratic sovereignty? An answer to that question would help to explain the assumptions about intergenerational justice implicit in the book, as well as the four puzzles with which we are more specifically concerned.

1 Sequential sovereignty is meant to instantiate a form of 'vertical reciprocity', one 'that binds all the generations of a democratic people, considered as a demos'; (p. viii) and to contrast with 'serial sovereignty', 'which vests exclusive sovereignty in the living segment of the people'. (p. 9) According to Ferrara, the former is based on a confusion of the demos with its present instantiation, in ways that overlook obligations to the past and future and license populist fantasies about the proper powers of politicians (and voters), as compared to judges.

Four puzzles

Ferrara's approach to sovereignty is resolutely concerned with it as a problem of constitutional theory, rather than a problem about the limits of capitalism, transnational organisations or, even, the limits of prudence, knowledge or virtue. The idea, in essence, is that constitutional essentials (p. 7) specify and embody the norms of justice and intergenerational reciprocity that constitute and limit sovereignty. Hence, questions about the rights and duties of one generation to another are to be understood as problems of constitutional theory and practice, rather than of moral or political philosophy more generally. The aim of the book, then, is 'to reconstruct Rawls's implicit view of constituent power…and to bring that view into dialogue with major constitutional theories of the twentieth century'. (p. viii) The reason to do so, for Ferrara, is that mistaken views of intergenerational sovereignty underpin populist threats to political liberalism (and democracy) and lurk, undetected, in familiar and apparently persuasive conceptions of law and politics. Hence, while at first sight the book is about intergenerational justice, its core concern is the nature of democratic sovereignty and its implications for constitutional law and the institution of judicial review.

The first puzzle generated by this book is why should we need a theory of transgenerational sovereignty to reject populist misconceptions of 'the people', and their connections to mistaken ideas on the relationship of law and politics? Populists may be unjust to future generations and insensitive to moral and legal obligations arising from the unjust acts of past generations – even while celebrating national glories. But they are also unjust to their contemporaries – both co-nationals and non-nationals. Perhaps an adequate understanding of their mistaken conception of sovereignty will illuminate how and why these injustices occur and recur —though, conceivably, this may have less to do with philosophy than with political advantage and some unattractive forms of group egoism. In short, why do we need an account of transgenerational sovereignty for that purpose, and how does extending the critique of populism to intergenerational relations improve our understanding of the conceptual, moral and political mistakes of populism?

Secondly, there is a puzzle about why Ferrara uses the language of *reciprocity* to refer to the forms of mutual respect and concern, to adapt a Dworkinian phrase, that he believes should obtain between the different generations of the same demos. This language implies forms of symme-

try amongst generations that are confusing. My predecessors may have created a constitution which, with certain amendments, now binds me and forms part of my sense of myself as their compatriots, whether I am born a citizen or naturalised, and whether I would have counted as a full citizen for them or not. In so far as I am a beneficiary of that amended constitution, I may owe them debts of honour and gratitude, as well as duties to preserve what they struggled to create- even while recognising the limitations of their political and legal ideas and the duties publicly to acknowledge their injustices and, perhaps, to try to rectify and/or compensate for them. But these duties seem very different in justification, moral weight and practical significance to those I owe future compatriots and foreigners who can be harmed by my actions– including indifference or contempt for the institutions and culture I inherited. In short, it is unclear how talk of reciprocity illuminates our forward- and backward-looking debts and their relative importance – in part because these debts seem so non-symmetrical and because so much of their *justification* and *content* is set by moral and political norms whose generality presumes no relations of inter-generational reciprocity, such as norms of human rights protection.

Indeed – and this is the third puzzle – it is unclear how far this language of intergenerational reciprocity and shared sovereignty fits with Rawls' understanding of reciprocity as limited to those who are normally functioning members of society and, therefore, full moral agents *now*, whatever they may once have been, or might become. (Rawls 1993, 20). I am no expert on Rawls, but this constraint on reciprocity appears to underpin concerns about the implications of his theory for those whose agency has been impaired by serious illness, congenital disability and the like (Putnam 2019) and to reflect Rawls' sense that while principles of justice will, of course, have something to say about their/our treatment in such circumstances, these are cases where we become *objects* of justice, not its *subjects*. (PL, p. 21)

It is true that Rawls thinks we should approach duties of just saving for future generations by considering what principles our predecessors should have acted on, without making assumptions about the specific social and political situation of our own generation. (PL, p. 273.) It may therefore seem that we are talking about principles of reciprocity amongst generations, albeit principles that must, inevitably, be seen from our perspective. However, what seems to be at issue in Rawls is how to approach justice to future generations in ideal theory, and there-

fore to insulate the future from *both* the injustices we inherited and those which, through partiality or ignorance, we are likely to create. Checking the principles we would adopt for future generations against those we would have chosen as dependents on our predecessors, then, is a way of promoting consistency within and between principles of justice, (PL, p. 274) rather than assuming claims of reciprocity and shared sovereignty amongst people who live at very different times.

We can illustrate the point by considering a recent Order by the German Constitutional Court, the FCC, on climate change of 29 April 2021.[2] Lax emission standards, they argued, unfairly shift burdens we face for stabilizing the climate to future generations and, in the process, make *them* more severe. Hence, the FCC required the legislature to amend existing German legislation. What is at stake, it assumed, is justice *now* and those duties are independent of whether future generations fulfil their duties to *their* successors. But this, surely, is as it should be, otherwise we risk recasting their duties to the future as duties of reciprocity that they owe *to us*. At best such a move is redundant, simply providing a further reason for them to do what they ought. More worryingly, however, it is likely to confuse us about the point and justification of intergenerational duties, and on whose behalf compliance might be enforced.

The fourth puzzle raised by Ferrara's account of transgenerational sovereignty arises from his defence of a specifically *judicial* approach to conflicts of interest between present, future and past generations over constitutional essentials. Rereading, in intergenerational mode, arguments familiar from jurisprudential and philosophical debates about judicial review, Ferrara argues that disputes over constitutional essentials should be resolved by judicial means and, indeed, by some form of Constitutional Court, whose rulings are binding on legislatures. He is agnostic about the way such a court should be institutionalised, and therefore sets to one side Samuel Freeman's suggestions on this point, (p. 204) because such matters are complicated and, he thinks, irrelevant to the central point: that sovereignty is not a matter of legislative majorities doing what they want, however popular they are, and however procedurally correct their actions. Rather, it is the exercise of a power

2 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html (accessed on September 21, 2025). I thank Oliver Gerstenberg for this example and for explaining the decision to me.

that is shared across time, albeit limited in space, and therefore cannot be identified completely with the current holders of legislative office.

Put simply, Ferrara argues that the demos is not reducible to the current population of voters, nor to the politicians they elect, but extends backwards and forwards in time such that current voters and politicians are only some of the people entitled to claim and exercise sovereignty *now*, thereby constraining our approach to constitutional, as other, matters. Specifically, he believes, constitutional disputes in general and constitutional change, in particular, cannot be decided by reference only to present views, interests or needs on pain of disenfranchising future generations and/or turning our predecessors into foreigners rather than co-nationals and citizens. Nonetheless, it is difficult for us not to be judges in our own cause, or to be unfairly biased towards the claims of the present, as distinct from the past or the future. Hence, Ferrara concludes, specifically judicial, rather than legislative or executive, ways of resolving disputes over constitutional essentials are necessary for democratic sovereignty and the transgenerational sharing of political power and obligations that this entails.

While interesting, it is hard to see what an intergenerational perspective adds to familiar arguments for (or against) judicial review, given that our contemporaries will, in the first instance, be the ones affected by its workings. But I am also puzzled why we are supposed to assume that judicial review is either constitutionally required or prohibited on democratic grounds – (or a conception of sovereignty that is suitably liberal, solidaristic, egalitarian and intergenerational). A long time ago, I argued that judicial review has a democratic justification, although it is not necessary for democratic government, and judges may be no better at protecting rights than legislatures. ((Lever 2009; 2007)).The justification I offered was procedural, not consequentialist: reflecting the ability of judicial review to express and protect citizens's interests in political participation, political equality, political representation and political accountability – and the difficulty of drawing any uncontroversial conclusions on consequentialist grounds. The point of judicial review, I argued, is to symbolise and give expression to the authority of citizens over their governors, not to reflect the wisdom, trustworthiness or competence of judges and legislators. Hence, I took issue with the defence of judicial review in Eisgruber and Brettschneider, as well as with the critiques of judicial review found in Waldron and Bellamy. (Eisgruber 2001; Brettschneider 2007; Waldron 2006; Bellamy 2007).

My arguments, like those of the authors with which I was concerned, were presentist in their focus and assumptions, though consistent with the idea that we may inherit debts of justice from the past and have debts of justice towards future generations, as well as foreigners and non-human animals. They reflected the reasons to be sceptical that injunctions 'not to be judges in one's own cause' resolve the case for or against judicial review, although Ferrara places a great deal of weight on such considerations.

Democratic courts are subject to many of the same pressures as legislators because their judgements are not self-enforcing and because courts risk legal and extra-legal punishment for straying too far from public opinion: they can be subject to impeachment, the threat of constitutional amendments, defiance, court-packing and the erosion of their salaries and budgets by inflation. Thus, in an image from Barry Friedman, we can think of public opinion as a bungee cord, supporting the judiciary, enabling it to stray a certain distance from public opinion, before being snapped back into line. (Friedman 2005, 323 -327) Democratic courts, then, cannot be immune to the pressures of self-interest that affect legislatures, executives, voters and other political actors. Hence, I concluded, while judicial review can be an attractive supplement to otherwise democratic institutions, enabling individuals to vindicate their rights against government in ways that parallel those they use to vindicate their rights against each other, there is no reason to think them mandatory on democratic principles.

Moreover, I suggested, because Court judgements can never be purely legal, it might be desirable for constitutional courts to include members with expertise in other matters, even if this were to come at some cost to their specifically legal training. Professional lawyers might be necessary to help citizens to articulate their judgements, so that these are clear and legally —just as, in Britain, professional draftsmanship is needed to help legislators frame Bills before Parliament. But if citizens can be expected to take a lively interest in, and to make considered judgements about complex legal arguments, it is unclear why a constitutional court should be populated only by lawyers. Hence, recognising the political dimensions of judicial politics can lead us to democratise the constitution and practices of constitutional courts.

In short, I find it hard to see how an intergenerational perspective significantly alters arguments for or against judicial review, or shows us why it is necessary, rather than permissible. Generations are

not discrete entities but overlap in ways that make sharp distinctions between past, present and future problematic on legal as well as political grounds. Above all, why should the claims of the past or the future alter the importance we attach to preventing and rectifying rights-violations against current people? Hence, while Ferrara's book can profitably be read by those who are not primarily interested in transgenerational sovereignty, how far his intergenerational perspective alters our conclusions about democratic theory and law remains to be seen.

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