

Can We Rule the Future (and Does It Matter)?*

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Abstract

I assess whether we can “rule” the future, with possible consequences for democratic legitimacy requirements. I build on comparisons with extra-territorial jurisdiction (time-space comparison) and retroactivity in the law (ruling the past vs. the future). In both cases, issues of feasibility are separated from questions of desirability. Possibilities of ruling the past and the future beyond the overlap come up against the impossibility of extra-generational enforcement. I then explore the significance of the overlap and its implications for the issue of intergenerational legitimacy. I conclude on lessons learnt for the debate on the “boundary” problem in democratic theory.

Keywords: Future generations, Democratic/inter-generational legitimacy, All-affected-principle, Climate litigation, Extra-territorial/extra-generational jurisdiction, Retroactivity.

Introduction

Can a generation exercise *jurisdiction* over a later generation with which it will never coexist? Consider those who consolidated the *Codex Justinianum* nearly 15 centuries ago or those who ratified the Treaty of Rome more than 60 years ago. Can't they be said to be still *ruling* us today? Consider constitutional provisions and their elements of rigidity or ordinary laws and the fact that no expiry date is attached to them. Isn't it true that we can rule the future through them beyond the generational overlap? A recent example is

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the March 24, 2021 Order from the German Constitutional Court about the Federal Climate Change Act:

[F]undamental rights are violated by the fact that the emission amounts allowed until 2030 [under the German Act] substantially narrow the remaining options for reducing emissions after 2030, thereby jeopardizing practically every type of freedom protected by fundamental rights. As intertemporal guarantees of freedom, fundamental rights afford the complainants protection against comprehensive threats to freedom caused by the greenhouse gas reduction burdens that are mandatory under Art. 20a GG being unilaterally offloaded onto the future [...]. The challenged provisions have an advance interference-like effect (*eingriffsähnliche Vorwirkung*) on the freedom comprehensively protected by the Basic Law. [...] In order to be constitutional, the advance interference-like effect of current emission provisions – an effect that arises not only *de facto*, but also *de jure* – must be compatible with the objective obligation to take climate action as enshrined in Art. 20a GG¹.

Do phrases such as “intertemporal guarantees of freedom”, “unilaterally offloaded onto the future”, “advance interference-like effect” and “but also *de jure*” imply a positive answer by the German constitutional Court to our “possibility of ruling the future” question? I will leave it open here. Our climate casualness is shocking and there is no doubt that we are able to mess things up for the future. Yet, various *conceptual* questions can be asked, some of which of potential practical implications. One issue is whether our climate inaction can meaningfully be said to *harm* (and wrong) the future – which involves the “non-identity” problem². Another issue is whether going for a given climate policy can ever be *democratically legitimate* in the absence of any active involvement of future people³. The core question of this paper sits in between those two questions. It asks whether we can meaningfully claim that at least some of our current legal decisions are *ruling* the future.

What do I mean by sitting “in between” the “harm” and the “legitimacy” issues? About the “harm-ruling” nexus, I assume that “ruling” refers to a subset of cases, within the broad “affecting the future” set⁴. I leave it open whether rejecting the possibility of invoking a concept of harm towards future people blocks the possibility of ruling the future. About the “ruling-legitimacy” nexus, the sense of “ruling” (or “governing”) relevant here is the one triggering a requirement of *democratic legitimacy* with respect to future generations. Bracketing whether such legitimacy requirement *can* actually

¹ Excerpts from the press release (consulted on June 4, 2021): <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-031.html>. Other relevant ideas from the law include “the right to property is eternal” or **that** “states are entities of infinite existence”.

² See Parfit 1986, Boonin 2014.

³ Karnein 2016.

⁴ Goodin 2016.

be met, my question is whether it *should* be met at all⁵. If government *by* the people is only required in case of government *of* the people, one should find out whether we *can* govern the future.

Let me expand a bit on democratic legitimacy. I am assuming that whenever people are being subjected to legal rules, they should have a prior say about these rules (“no taxation without representation”). There is a growing literature discussing how to define the “boundaries” of a demos – *not* to be understood in a merely geographical sense. It aims at telling us who should be enfranchised for a given type of political decision. Should e.g. non-resident citizens or patients with dementia have the right to vote?⁶ Finding this out cannot be done on a merely procedural basis. If the issue is whether children should vote, we cannot simply ask them to vote about whether they should vote. To block the procedural regress, substantive criteria are needed. Through focusing on a triggering factor (here: “being ruled by x”) for the legitimacy requirement, this paper is meant to contribute to the debate about the extension of the demos, which includes the more inclusive “all-and-only-those-affected” camp and the less inclusive “all-and-only-those-subjected” camp⁷. It will speak to those endorsing the latter view and potentially serve to support or challenge it.

Yet, we should not caricature the less inclusive view and rush to conclusions. We need to map the respective demands of morality, justice and legitimacy. Consider the morality-justice demarcation first. All theories of justice are concerned to some degree about separating, within what we owe each other, obligations that should be enforceable by the State from those that shouldn’t. Libertarian views are typically sensitive to this, sometimes combining strict views about what should be enforceable with surprisingly demanding views about the moral obligations we have towards each other. Hence, a theory of justice can be both minimalist in terms of what the State should be entitled to enforce and maximalist in terms of the extent of our moral duties towards each other.

Consider then the justice-legitimacy demarcation. A “minimalist” theory of democratic legitimacy is compatible with demanding duties of morality and justice towards the non-enfranchised. For instance, if a country decides to build or prolong the life of a power plant, does democratic legitimacy require that the neighboring states be included in the decision-making process?⁸ A

⁵ Compare with whether something can be unjust without us having an obligation to fix it (Gosseries 2019). Here, we are dealing with something that, in order to be legitimate, should meet a standard, while that standard cannot arguably be met.

⁶ Goodin 2007, Beckman 2009, Lopez Guerra 2014, Arrhenius 2018.

⁷ Goodin 2016, Beckman 2019.

⁸ See the 2021 trans-border public consultation in the context of the Environmental Impact Assessment about postponing the deactivation of the Belgian Doel 1 and 2 Nuclear

negative answer does not necessarily bar demanding requirements of morality and justice⁹. By extension, concluding that democratic legitimacy *does not* require the inclusion of future people would not necessarily erase significant obligations to the future. It could simply put even more stress on obligations of justice. The division of labor between legitimacy requirements, obligations of justice and moral duties should remain at the back of our minds.

This paper is about the scope of democratic legitimacy demands, more specifically across time. It addresses a challenge expressed e.g. by Beckman:

[...] [A]ny legal framework applies only to the extent that the government currently in power affirms it. If future people wish to modify the laws passed down by us, they are of course free to do so. If future people do not modify these laws, this is presumably because they do not want to. Only the future can enforce the law on the future. Thus, no law ever applies to the future unless affirmed by future people themselves. Following this view, the idea of one people exercising legal power over some future people would consequently be incoherent¹⁰.

Under a narrow understanding of who should be included in the demos, one might argue that future generations do not need to be included if they cannot be said to be ruled by us. To find out whether we can meaningfully be said to rule *the future*, I will draw on analogies between nations and generations, and between geographical areas (“territories”) and temporal units (“periods”)¹¹. I begin with the simplifying assumption of territories being each occupied by a single nation and periods being each occupied by a single generation. I will then relax this assumption in section 4 and explore the implications.

1. Extra-territorial Jurisdiction

I begin with a strictly intra-generational setting and with the idea of extra-*territorial* jurisdiction (hereinafter “ETJ”), in the spirit of a time-space comparison. I am interested in what renders ETJ *possible*. This could put us on tracks to understanding precisely whether and when its temporal equivalent, i.e. extra-*periodical* jurisdiction, is *possible*. Note that the issue of what renders ETJ possible is distinct from two related issues. First, is the expansion of ETJ *desirable*? Second, can ETJ be *democratically legitimate*?¹² While

Power Plants: <https://economie.fgov.be/fr/themes/energie/securite-dapprovisionnement/projet-de-report-de-la> (consulted on June 4, 2021).

⁹ Goodin 2007.

¹⁰ Beckman 2013: 781.

¹¹ On the concepts of nation/generation: Gosseries 2015.

¹² On extra-territoriality and the boundary problem: Abizadeh 2008, Saunders 2011, Goodin 2016. See as well: Stiltz 2009.

these two extra questions are clearly important, I limit myself to looking into the basic enabling factors of ETJ.

What does ETJ mean exactly? It involves a State claiming to impose the legal rules that it adopted *beyond* its own territory. Example 1: A state unilaterally adopts a criminal provision that binds or protects its *own* nationals, regardless of the fact that the criminal act takes place outside the State's territory (e.g. Art. 113-6 to 113-8 of the French criminal code). Example 2: A state unilaterally imposes economic sanctions on economic entities, *regardless* of their country of registration, as soon as they engage in business *on* the territory of a targeted State or *with* economic agents that are registered in that targeted State (e.g. US Executive Order 13876 of June 24, 2019 imposing sanctions with respect to Iran).

Here, I focus on a subset of ETJ situations, restricting myself to ETJ claims that are both *unilateral* and *prescriptive*, excluding claims of *enforcement* ETJ. Diplomatic immunity or extradition cases typically imply an *agreement* between the states involved. The existence of such agreements is compatible with each state involved still ruling on its own territory. This holds true at least if we leave aside the deeper fact that, under international law, territorial sovereignty ultimately depends on state recognition by other states¹³. In contrast, what interests us for our comparison are situations of *unilateral* extra-territorial jurisdiction in which no inter-states agreement obtain. For we are assuming on the temporal side of our comparison that no actual agreement *can* actually be signed by non-overlapping generations.

The second restriction – besides unilaterality – involves limiting ourselves to cases involving *prescriptive* jurisdiction abroad, i.e. *without* extra-territorial *enforcement* claims. There are two ways in which extra-territorial laws are enforceable without us intervening abroad. Either they are enforced by *foreign* authorities on their own territory. This does not qualify as *unilateral* prescriptive jurisdiction since such enforcement will be backed by some form of local prescriptive jurisdiction abroad. Or we are enforcing our extra-territorial laws *back home*, which is central to us here. I take *enforcement ETJ* claims to refer to claims about being entitled to go and enforce our own laws *ourselves* on *foreign* territory, leaving aside the possibility that our laws be enforced on foreign territory by foreign authorities or with their help (as in extradition agreements). Hence, I am assuming here that while a state may claim that those subjected to them should respect its rules that apply abroad, it is not seeking to unilaterally *enforce* them *abroad*. Of course, in a standard international setting, both prescriptive ETJ and enforcement ETJ are *possible*, leaving aside issues about the latter's desirability or legality. Our

¹³ For a critical approach: Szigeti 2017.

limitation to prescriptive ETJ anticipates the difficulty of a generation to posthumously *enforce* its own laws *into the future*.

Through which “enforcement-enablers” can unilateral and prescriptive ETJ *be enforced* without *extra-territorial* enforcement? In fact, sanctioning a rule violation that took place abroad will require either having you in *person*, or having control on some of your *assets*. The enforceability back home of unilateral prescriptive ETJ claims hence seems to rest on *two* options (“person back home” and “goods back home”). These two options are enabled in turn by “deeper” facts.

First, the possibility of sanctioning someone in person back home for an illegal act that took place abroad and to which ETJ applies presupposes the *geographical mobility of persons*. If the person committed the act abroad and were never to come back home, she could never be sanctioned in person in a unilateral and prescriptive ETJ setting. Importantly enough, there is no equivalent *temporal mobility* of persons in the intergenerational world. We are unable to time travel outside our period of existence and in a direction and at a speed other than the flow of our existence. Shifting from space to time, we realize that members of a generation are stuck within their period of existence. This impossibility of time travel deprives us in the realm of generations of the “person back home” enforcement-enabler that renders enforcement at home for ETJ rules possible¹⁴.

Second, enforceability can also apply to goods back home despite their owner not currently residing on the enforcement territory. Consider a tenant residing abroad and renting a house back home. Authorities back home could seize the house. What deeper fact enables enforcement on “goods back home”? A good can spread across several territories which enables a person to enjoy it from abroad. In the house example, the international bank system allows a person abroad to enjoy the money from the rent of a house back home. So, there is some material element (the money from the rent) that is located where the person resides and allows her to “enjoy” it, while the rest of the good at stake is located back home. We could say that what allows for ETJ is the fact that *goods can spread across territories*, the good in our example being the full “house-plus-rent-money”¹⁵. In contrast, while our bodies can *move* across territories, they cannot *spread* across territories. And while our bodies can “spread” across time, they cannot do so beyond the generational overlap.

¹⁴ On the potential implications of the absence of *intergenerational* mobility (not to be confused with social mobility across generations): Gosseries 2015.

¹⁵ Note that in “existence value” cases, a person may enjoy a good through the mere knowledge that this good is hers and exists somewhere. She may then be sanctioned by being deprived from this good even in the absence of any prior physical link between her and the good.

Hence, it is plausible to claim that “goods can spread across time and periods”. Some currently existing durable goods will of course be enjoyed in the future. And we could imagine to anticipatively deprive the future from their enjoyment. However, the future violation of current laws can only be sanctioned *after the fact*, rather than anticipatively. So, the “dispersibility” of goods across time does not suffice. Instead, what plays a key role here is the immobility of persons – and of enforcers in this case – across time.

While extra-periodical enforcement seems blocked, how far does the impossibility of time travel affect the possibility of *prescriptive* jurisdiction beyond our own existence? Consider the following commemoration example. Imagine ourselves in 2021. The Armenian law in force today states that on April 24, 2115 and April 24, 2215 a very special commemoration of the Armenian genocide should take place. Imagine that the current territory of Armenia does not change over the coming 500 years and that in 2114, Armenian people end up deciding to abrogate the commemoration duty.

We could say that today’s prescriptive jurisdiction claims will vanish with the death of their authors, as they will no longer be able to *utter* such claims. Yet, there is also the alternative view according to which it is not meaningless to think that today’s prescriptive jurisdiction claims could still be in force after the death of all those alive who endorsed it. This would not be more absurd than a State claiming extra-territorial prescriptive jurisdiction in a setting in which moving from a territory to another has become physically impossible. For instance, in a world in which the free movement of people has vanished because of repeated pandemics, the Armenian state could still impose on its diaspora citizens to commemorate the genocide, even if it is unable to enforce this abroad. Of course, this view could possibly lead to conflicts of prescriptive jurisdiction claims in cases such as the commemoration one. However, the main problem comes from the enforcement side, not from the prescription side.

Claiming enforcement jurisdiction beyond our existence is meaningless, if understood strictly as enforcement by ourselves rather than future enforcers. For it is meaningless to claim that I am able to go and enforce my laws on another territory or during a future period if I am physically unable to do so due to either my lack of mobility or my mortality. Being *entitled* to act in a way in which we are unavoidably *unable* to act is not terribly meaningful. This is why we do not insist on whether people are entitled to e.g. resuscitate.

To conclude, the core problem of claiming jurisdiction on the future has to do with the relationship between prescriptive and enforcement jurisdiction. In the standard (spatial) setting, the mobility of persons or the dispersibility of assets allow for unilateral prescriptive ETJ *without* the need for unilateral enforcement ETJ. In contrast, post-periodical prescriptive jurisdiction cannot work at all in the absence of post-periodical enforcement jurisdiction.

The latter turns out to be out of reach because those in charge of enforcement in a non-overlapping generations setting can neither do so before law violations actually take place (as future wrongdoers can't travel backward in time), nor act posthumously once violations will have taken place (as present law enforcers can't travel forward in time). If we add that prescription without enforcement cannot qualify as ruling, we have to conclude that ruling the future is out of reach. We are of course bequeathing goods and rules to the future. But "bequeathing rules" does not amount to "ruling", as we can always decide to change such rules or to leave them unenforced.

2. Retroactive Law

I have just rejected the idea of ruling the *future* in a *non-overlap* setting. I accounted for the reasons through a comparison with ETJ. In order to double-check our diagnosis, let me consider, symmetrically, whether we can *rule the past* beyond the generational overlap. While new laws usually don't have a term or an automatic expiry date, they always have a date of entry into force. Yet, knowing its date of entry into force, i.e. when it became part of a given legal system, does not necessarily tell us to which period the law is *applicable*. For, we can set up delaying mechanisms allowing citizens to adjust, be it through a general *vacatio legis* or through targeted versions of it, temporarily exempting specific categories of people.

While a new act's applicability can be delayed *after* its entry into force, it can also be *retroactive*, claiming to extend *before* its entry into force, applying to past events and situations. As in the case of extra-territoriality, one should clearly distinguish two issues about legislative retroactivity: "to what extent is it *feasible*?" and "to what extent is it *desirable*?". While both are relevant for the study of intergenerational relations, I limit myself to a few words about the latter, before focusing on the former.

On the *desirability* of retroactivity, standard objections differ in part from those targeted at extra-territoriality. In both cases, there are concerns about the *confusion* generated by spatial or temporal conflicts of laws whenever two mutually incompatible legal regimes apply to an event taking place abroad (extra-territoriality) or to a past event (retroactivity). We could also insist on the respective *sovereignty* of the two legislatures (retroactivity) or countries (extra-territoriality) at stake.

In addition, retroactivity raises *distinct* concerns that do not necessarily apply to extraterritoriality. For instance, if a rule is meant to act as an incentive or as a disincentive, it should be known at the time of action, not afterwards. Along the same lines, the unpredictability generated by the possibility of retroactive legislation may lead to problems of inefficiency

associated with risk-averse actors. Besides such issues of efficiency, there is one of impartiality. In allowing legislators to observe a course of action first before deciding which rule to adopt, we increase the risk of partiality through opportunistic *ad personam* scope definition. Think about ex post facto legislation through which a legislator aims at immunizing friends from the application of a new law¹⁶.

Let me now look more closely at the *possibility* of ruling the past. Remember that by “ruling”, I mean “prescribing + enforcing”. In line with the previous section, the issue is whether retroactive prescription and enforcement are possible *beyond the overlap*. Let me begin with an overlap setting. Imagine a society that legalizes same-sex marriage and that decides to do so retroactively. Newly celebrated same-sex marriages would of course become legal. The law would also consider past same-sex marriages as effective from now on, with all the legal consequences associated from today onwards. However, it would even go as far as retroactively regarding past same-sex marriage contracts as legally valid *from the very moment of their signature*¹⁷. This would allow married couples to seek remedies for past rights that would have been denied when their marriage was legally invalid. It may include e.g. certain fiscal advantages or some social benefits. Such form of retroactivity entails a clear clash with the position adopted by past legislators on same-sex marriage.

Legislative jurisdiction – which is the retroactivity equivalent of “prescriptive jurisdiction” in the extra-territoriality literature –, *can* extend back and forth well beyond generational overlap – in the sense that there are no physical or semantic obstacles to such a claim. Yet, what about *enforcement* jurisdiction into the past beyond the overlap? The current generation is actually unable to enforce the marriage provision into the past. Or at least, it only disposes of limited enforcement options. In the *proactive* case discussed in the previous section, one thing that was available is *enforcement through deprivation*. Future agents are deprived of some of the means of violating the law, rendering that law less violable. This is what is typically at stake in opposing e.g. research on some forms of AI or of geoengineering. In contrast, in the *retroactive* case, what remains available is limited to *enforcement through compensation* as the past cannot be undone. Some forms of reparation are offered to citizens who suffered from the past unlawfulness of the now lawful act. But the reader will note that this option depends on the existence of an overlap and that it cannot impede past acts from happening.

To sum up, enforcement is key. If we accept the notion of enforcement through deprivation, it is conceivable to claim to effectively enforce some

¹⁶ Munzer 1982.

¹⁷ Fisch 1997: 1071, Munzer 1977.

laws to some degree beyond the overlap. The same does *not* hold for enforcement through compensation. **Once those** who engaged in same-sex marriage at a time when it was unlawful cannot be compensated post-mortem. And these notions of “enforcement through deprivation” and “enforcement through compensation” are stretching the enforcement concept quite a bit. For plain enforcement requires the coexistence of enforcing agents and those subject to their laws. Non-overlap prevents such coexistence. Hence, we should conclude that it is clearly not possible to rule the past beyond the overlap. In terms of legitimacy, it could follow, under plausible metaphysical assumptions, that the dead are not owed any post-humous right to vote, be it by proxy, because there is no meaningful sense in which *we* can be said to *rule* the dead¹⁸.

3. Multi-generational and Multinational Entanglement

At this stage, I stressed the importance of co-existence for enforcement. In addition, while enforcement *through deprivation* (or possibly self-enforcement) can contribute to ruling the future beyond the overlap, enforcement *through compensation* cannot rule the past beyond the overlap. Let me further tease that position, based on two observations, stressing our permanently *multigenerational* and *multinational* condition¹⁹.

The first observation is that future generations will, like us, live in *multigenerational* societies. Generations *always* operate in jurisdiction periods that they share with other generations. Even if our existence does not overlap with the one of the vast majority of other generations, it always overlaps with the existence of at least *some* of them²⁰. The fact that our reality is always multigenerational seems to prevent the sovereign exercise of generational jurisdiction of any single generation over any single period. While periods always host several generations, territories may in some cases host only one nation. So, our multigenerational condition is a more pervasive feature than the multinational nature of territorial sovereignty – again, leaving the important aspect of international recognition of territories themselves aside.

Now, consider a *constitution* inherited from founding fathers that no longer live with us. Imagine that one of the currently living generations wants

¹⁸ Mulgan 2003.

¹⁹ For a relevant paper: Nine 2014.

²⁰ We may perhaps want to resist the necessary nature of our multigenerational condition through *segregating* territories along generational lines. For the difficulties this raises: Gosseries 2016.

to amend or get rid of some of this constitution's provisions. This will be procedurally possible if there is a required majority among the living. And different generations among the living may actually disagree on amending the constitution. Now, I don't think that this multigenerational condition significantly challenges the view that the past cannot rule us. For the divide within society can also cut along other lines that are non-generational. If e.g. men and women don't agree on amending the constitution, the problem will be exactly the same. Hence, it does not seem that the multigenerational nature of our societies adds a distinct form of rigidity such that the past could in fact rule us. It simply allows for still another division line among the living on whether and how the constitution should be amended.

Consider however our *multinational* condition. Imagine this time a *foreign debt* inherited from a generation that has now completely vanished. We may want to repudiate our foreign debt and simply claim that we won't pay it back and that we don't feel legally bound by it because it was decided by others on unjustified grounds. This would be a way of freeing ourselves from legal ties imposed on us by past generations.

Here, freeing ourselves from legal claims from the past requires that we also free ourselves from legal claims made by others in the present, i.e. claims made by foreign entities about the debt we owe them. If we could insulate our territory from any extra-territorial claims by other countries, we could conclude that it is possible as living generations to free ourselves from debts inherited from the past. Hence, this would be in line with the claim that the past cannot rule the present.

At the same time, we know that, legally speaking, we are tightly linked with the rest of the world through our global ecology but also through our globalized polity and economy. Does this entail that the past can rule us, i.e. exercise *prescriptive* and *enforcement* jurisdiction on us? No. I would rather say that, in our example, whenever a currently living foreign party wants to invoke an entitlement inherited from the past, it acts as an enforcing agent of the past contract. More specifically, the inherited debt may be loaded with the authority of its initial contractors and be subjected to the prescriptive jurisdiction of the past contract law that applied at that time, mixed with an endorsement by the latter that rules inherited from the past still apply unless agreement to the contrary.

In the end, our question is this: in our two examples (inherited constitution and foreign debt), there is always a group in the present that may want to stick to the inherited rule. And this divide among the living may cut along generational lines (we assumed it to be the case in the constitution example, for the sake of argument). However, the fact that there is support for a past rule among some in the living group does not need to be interpreted as the sign of any enforcement authority *of the past*. It can simply be read as a sign

that some of those currently alive are willing to confirm the legal validity of this legal instrument and are willing to enforce it.

As a result, our permanent multigenerational and multinational entanglement does not affect the prescriptive authority of the past. It makes rules more difficult to change. It renders them more “sticky” and may significantly increase modification costs. Yet, the nature of this difficulty ultimately comes from the recognition of a *general* default applicability rule for inherited rules by at least some of the living (i.e. rules inherited from the past are presumed to remain in force until we change them), and from the disagreements we have about whether a *specific* rule should remain in force or not, and should be enforced or not. And it follows that even if the past does not rule us in the strict sense, it may not be easy to get rid of the system of rules that we inherited from it.

Before we move to the next section, I wish to discuss an alternative view to the idea of extra-generational *prescriptive* jurisdiction surviving the death of their authors. What I have in mind here is the idea of *re-enactment*. We have assumed so far that there is no obstacle to the possibility of claims of *prescriptive* jurisdiction extending beyond their author’s life. Yet, we could also consider that when rules survive those who enact them, their authority *does not* come from their original enactors’s prescriptive jurisdiction. It would rather come from an implicit re-enactment by the current generation of these inherited rules. In that case, we would be dropping both the idea of extra-generational enforcement and the one of extra-generational prescriptive jurisdiction. To use our territorial analogy, if we are imposing a given language on our own territory (e.g. France) and that some other state also imposes this very same language on its own territory at some point (e.g. Quebec), it does not necessarily follow that *we* are imposing that language on that *other* territory, even if the language is the same. The *default rule* according to which rules stay in force until their abrogation does not change anything to this because that rule would equally need to be endorsed by the present as part of one’s legal system. This re-enactment reading would lead to the view that our mortality entails that even the idea of extra-generational prescriptive jurisdiction should be dropped. I think that both the surviving *prescriptive* jurisdiction idea and the re-enactment views are plausible. Yet, the main problem remains  the *enforcement* jurisdiction side.

4. Is Ruling Special and Significant?

In this final section, I would like to take stock and return to the implications for legitimacy requirements towards the future. Under an “all-and-only-those-subjected” principle of legitimacy, if we don’t rule the future, there

is no requirement to involve them in decision-making. We have assumed that “ruling” implies “enforcement”. And I have examined two alternatives to standard, *ex post facto*, “detect-and-punish” enforcement. I pointed at enforcement by deprivation (or preventive enforcement). And I stressed the fact that our multigenerational and multinational entanglement may render inherited rules especially “sticky”. Yet, an “all-and-only-those-subjected” advocate may still conclude that no intergenerational legitimacy requirement applies since we cannot rule the future in the standard sense, regardless of whether inherited rules are hard to get rid of and of whether the future will be massively affected by our decisions or not. I would say the following.

First, on reflection, the idea of narrowing down the boundary requirement to those subjected to legal rules raises questions about its meaningfulness. The nature of what we are subject to (here: legal rules) does not necessarily capture the magnitude of what we are subject to. So, in theory, and assuming that the criterion allows us to narrow down the franchise in comparison to the “all-and-only-those-affected” principle, we could very well be much more affected by actions that do not consist in the enactment of legal rules than by being subject to these legal rules. This insensitivity to the magnitude of effects is surprising. For we would expect a narrower franchise to concentrate on those who are especially affected. For instance, destroying an island will render it much more certainly inaccessible than merely prohibiting entry on it. And yet, in the intergenerational context, the “all-and-only-those-subjected” criterion does not seem to reflect this concern. This problem is especially important when considering existential risks, i.e. current actions that jeopardize the very survival of humankind. Why would we have to fulfil democratic legitimacy requirements to rule the color of (future) ice creams and not to decide on the very existence of humankind?

Second, it is also unclear whether rule-based impacts can be distinguished from non-rule based ones. For there is a sense in which actions that are merely *allowed by* rules can be said to be rule-based too. Also not adopting certain rules also leads to what could be called “rule-based” impacts. We know that (not) adopting certain rules will entail possibly huge *lock in* effects. This is true e.g. for our built or digital infrastructure or for our absence of reaction to global environmental degradation. We may not technically be claiming that rule x should be complied with by future generations. However, we put in place the material conditions such that this will be the only option for them. In what sense should we give special weight to the fact that the vehicle constraining us be a rule or simply a state of affairs rendered possible by the absence of a rule, if in both cases our freedom is equally restricted?

I pointed at the difficulty of justifying the isolation of an affectedness vehicle (subjection to the law) that neither tracks levels of significance in

impact, nor offers sufficient clarity about what is meant by legal vs. non-legal modes of action. The latter brings us directly to our third point. For besides meaningfulness, there is the issue of *difference*. Does going for one of the two dominant schools in the “boundary” debate make a significant difference in practice?

On the one hand, in an intragenerational setting, I agree that we tend to underestimate the range of people who are actually subject to our rules. For instance, if asylum seekers are considering to cross the sea towards the Italian island of Lampedusa, there is a sense to which Italian immigration law applies to them even when they remain outside Italian territory, in the same way as I am subjected to the law of property even if I don’t illegally enter anyone’s house. Hence, as has been argued in the literature, the gap between those enfranchised under the “all-and-only-those-subjected” criterion might not be as significantly different as expected from the range of those enfranchised under an “all-and-only-those-affected” principle.²¹ On the other hand, I think that in an intergenerational setting, this gap remains significant, for the enforcement-related reasons pointed at above.

My fourth point is the following: regardless of whether legitimacy requirements apply to some of our decisions, it is reasonable to claim that such requirement, were it to apply, cannot be met towards the future. There is no way we can involve the future in our current decisions. The question is then whether this should be seen as a strength of the “all-and-only-those-subjected” view. In other words, is it preferable, in the face of a requirement that cannot be met, to adopt a theory that does not impose such a requirement? I don’t think so. It simply means that depending on our theory, the range of decisions qualifying as legitimate will differ.

Conclusion

I started with a comparison with extra-territorial jurisdiction, involving both the prescriptive and enforcement dimensions. This opened the gate to the idea of *prescriptive* extra-generational jurisdiction. Still, I insisted on the importance of co-existence for the exercise of “detect-and-punish” enforcement. I also considered the retroactivity case. While I concluded there as well that ruling the past was prescriptively possible beyond the overlap, my conclusion was also that the main problem remained at the enforcement level. I explored in section 3 two ways of trying to save the possibility of ruling the future, insisting on the multigenerational and on the multinational nature of our societies. Yet, **that** this didn’t fix our problem either. In section 4,

²¹ Goodin 2016.

I came back to the significance of this impossibility of enforcement beyond the overlap.

In the end, I think that the difficulties faced by the “all-and-only-those-subjected” criterion are not limited to the intergenerational context. And the fact that it relaxes the legitimacy requirement in an intergenerational setting should not be seen as an extra reason to support this specific account of the boundary problem. We may not be able to enforce rules into the future in the standard sense. And yet, we can very significantly lock the future in (path dependencies) or even rule it out (existential risk). The magnitude of such impacts would call for some procedural legitimacy requirements involving the future if they were possible. But they are not.

What are we left with? Basically three things. First, a requirement of democratic legitimacy *among the living*, including for future regarding decisions. Second, a requirement of intergenerational *justice*, even if such rules of justice **cannot** neither be democratically enacted in an intergenerational sense, nor be enforced on us by future generations. Yet, we can self-enforce such requirements of intergenerational justice on ourselves. This will count as enforcement to the extent that we are enforcing rules as a society on specific individuals. Third, demands of *morality* that do not coincide with duties of justice may apply too, to the extent of which they should not be enforced on the members of society.

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References

- Abizadeh, Arash. 2008. “Democratic Theory and Border Coercion. No Right to Unilaterally Control Your Own Borders.” *Political Theory* 36 (1): 37-65.
- Arrhenius, Gustaf. 2018. “The Democratic Boundary Problem Reconsidered.” *Ethics, Politics & Society* 1 (34), <https://doi.org/10.21814/eps.1.1.52>.
- Beckman, Ludvig. 2009. *The Frontiers of Democracy. The Right to Vote and its Limits*. London: Palgrave MacMillan.
- 2013. “Democracy and Future Generations. Should the Unborn Have a Voice?.” In *Spheres of Justice. Vol. 2. Fair Distribution. Global Economic, Social and Intergenerational Justice*, edited by Jean-Cristophe Merle, 775-788. Dordrecht: Springer.

- 2019. “Deciding the Demos. Three Conceptions of Democratic Legitimacy.” *CRISPP* 22 (4): 412-431.
- Boonin, David. 2014. *The Non-Identity Problem and the Ethics of Future People*. Oxford: Oxford University Press.
- Fisch, Jill. 1997. “Retroactivity and Legal Change: An Equilibrium Approach.” *Harvard Law Review* 110 (5): 1055-1123.
- Goodin, Robert. 2007. “Enfranchising All Affected Interests, and Its Alternatives.” *Philosophy and Public Affairs* 35 (1): 40-68.
- 2016. “Enfranchising All Subjected, Worldwide.” *International Theory* 8 (3): 365-389.
- Gosseries, Axel. 2007. “Should They Honour the Promises of Their Parents’ Leaders?.” *Ethics and International Affairs* 21: 99-125.
- 2015. “Les générations, le fleuve et l’océan.” *Philosophiques* 42 (1): 153-176.
- 2016. “Generational Sovereignty.” In *Institutions for Future Generations*, edited by Iñigo González-Ricoy, and Axel Gosseries, 98-113. Oxford: Oxford University Press.
- 2019. “Are Inequalities Between Us and the Dead Intergenerationally Unjust?.” *CRISPP* 22 (3): 284-300.
- Karnein, Anja. 2016. “Can We Represent Future Generations?.” In *Institutions for Future Generations*, edited by Iñigo González-Ricoy and Axel Gosseries, 83-97. Oxford: Oxford University Press.
- Lopez-Guerra, Claudio. 2014. *Democracy and Disenfranchisement. The Morality of Electoral Exclusions*. New York-Oxford: Oxford University Press.
- Mulgan, Tim. 2003. “La démocratie post-mortem.” *Revue philosophique de Louvain* 101 (1): 123-137.
- Munzer, Stephen. 1977. “Retroactive Law.” *Journal of legal Studies* 6 (2): 373-397.
- 1982. “A Theory of Retroactive Legislation.” *Texas Law Review* 61 (3): 425-480.
- Nine, Cara. 2014. “When Affected Interests Demand Joint Self-Determination: Learning from Rivers.” *International Theory* 6 (1): 157-174.
- Parfit, Derek. 1986. *Reasons and Persons*. Oxford: Oxford University Press.
- Saunders, Ben. 2011. “Immigration, Rights and Democracy.” *Theoria* 58 (129): 58-77.
- Stiltz, Anna. 2009. “Why Do States Have Territorial Rights?.” *International Theory* 1 (2): 185-213.
- Szigeti, Peter. 2017. “The Illusion of Territorial Jurisdiction.” *Texas International Law Journal* 52 (3): 369-399.