

Boldizsár Nagy
**The Background Of The
"Rights Of Future Generations"
In Hungarian and International Law**

The history of the idea and its codification

My aim is to show where the concern for future generations and the representation of the interests of future generations come from by outlining a map of history of ideas. I will report on the emergence and the content of the doctrine of the common heritage of mankind with special regard to the protection of the interests of future generations. Moreover, I will also investigate what basis the Hungarian statutory law gives us besides the relevant decisions of the Constitutional Court.

The history of the idea of the common heritage of mankind is encouraging because it does not often happen that an idea becomes part of reality in less than a decade. In our case precisely this has happened. In 1967 Arvid Pardo, the representative of Malta in the United Nations, suggested in a memorable three-hour lecture that the treasures of the deep sea bed should be declared the common heritage of mankind as opposed to the prevailing world trend, the essence of which was the concept of "first come first serve", that is, the resources of the high seas were free for appropriation in 1967. Pardo warned us not to do so and suggested that the resources of the deep sea bed, including the polymetallic nodules be declared the common heritage of mankind. His idea included selling them on the world market and gradually closing the gap between the developing and the developed countries from the income. It was an absolutely Utopian thought even if we know that the 60s were a distinguished period regarding the development of theories, when the elimination of the differences between the developing and the

developed countries was a dominant motive. So it is really unique that in 1970 the General Assembly of the United Nations adopted the resolution that declared the deep sea bed the common heritage of mankind. What is more, a good decade later in 1982 the UN Law of the Sea Convention was adopted. One of the longest and most intricate chapter of it is Part XI. dealing with the area beyond national jurisdiction which became the common heritage of mankind.

The adoption of the text of the Law of the Sea Convention, partly due to other strategic reasons, was the result of a long struggle, hence sea lawyers were overtaken and in 1979 another treaty was born: the Moon Agreement which regulates the issues concerning the Moon, all the other celestial bodies of the Solar System, the orbits around them and the paths leading to them with the exception of the orbits of satellites around the Earth. All these celestial bodies and orbits were classified in legal terms as the common heritage of mankind. Both treaties are in force, consequently they are parts of living, effective international law.

In addition to these, a wide range of objects emerged in the international discussion as potential items of the common heritage of mankind. The geostationary orbit, the climate of the world, Antarctica, biological diversity, the genetic resources, the natural heritage of the Earth or its certain substructures and the cultural heritage were all recommended to become parts of the common heritage of mankind. Because of time limits there is no room here to evaluate the enormous conceptual leap which is constituted by the gesture of suggesting resources which are under national jurisdiction i.e. under the exclusive control of the state for this status. However the fact remains that resources which presently constitute the common heritage of mankind are all resources which do not belong to any state according to international law, like the deep sea-bed or the outer space and the celestial bodies.

The three arches of the doctrine: access, use, sharing of benefits.

Next, I would like to tell you what conclusions I have come to after several years of researching the question: what are the building stones, the pillars of the doctrine of the common heritage of mankind? The doctrine builds up from three arches, the arch of access, the arch of utilisation and , the arch of the sharing of benefits. Each arch in turn rests on three pillars. There will be nine elements altogether, a nice Hegelian structure, which at the same time corresponds to the three-by-three characteristic of fairy tales. Well, this coincidence may prove that it is true.... I call this batch of conclusions a doctrine, because it is partly based on existing rules, partly on comments related to them, on government statements and scientific documents. I relied on sources that the international lawyers generally rely on when observing the formation of customary law.

Access

We identify three pillars of access. The first states, as did the earlier law of the sea and outer space law as well, that no sovereignty may be extended over areas or resources which constitute the common heritage of mankind. If something is declared the common heritage of mankind, it will never be state territory again, it will not belong to the state any more, and the state will be deprived of the right to distribute the land and have legal title based on its sovereign legal order.

The second thesis is that natural resources must not be exploited freely. This is not to say that nothing can be moved. It is naturally an objective to mine the deep sea bed ores and to extract metal from them. So we do want to make use of the objects of this kind in the common heritage of mankind. If the geostationary orbit became part of it, it would not mean that we would not like to put satellites in it. But not as we like it based on the principle of "first come first serve". Fish in the high seas at present belong to the people who catch them. Certain agreements on fishing set limits to it, but the

basic idea is this. Here, in the case of resources declared to be the common heritage of mankind, a system must come into force: one may utilise them but according to a given system.

The third thesis claims, not without a nice and hence embarrassing ambivalence, that each state or person has the right of access to the management of the common heritage of mankind. Access for all may first seem to be a logical idea, but when the question arises why should Myanmar or Kiribati participate in setting the environmental standards of the Antarctic since people do not often visit the South Pole from there, or why should Togo contribute to the determination of the capacity of the geostationary orbit, then further considerations are sought. Many argue that only those should intervene who have money or expertise invested into the given object/area, but the doctrine is different. The doctrine says that each state, even individuals, can take part in the management. Not only the competent, those who are already there, actually utilising things. This is a far-reaching problem that I do not want to discuss in detail. As a matter of fact, the doctrinal position of access for all is enshrined in the Law of the Sea Convention which invests all the parties in the convention with the possibility to participate in the management, irrespective of the question whether the given state actually mines chrome, nickel or copper ores from a depth of 6000 metres or not. All of the one hundred and thirty-five participating states can have a say in the matter what sort of mining rules should be laid down, how much the royalty for mining should be, and so on (according to the state of 16 October, 2000, although Hungary has signed the convention and the supplementary agreement of 1994, it has not ratified them yet).

Use

Things declared to be parts of the common heritage of mankind can only be used for peaceful purposes. Several questions may arise here, for example: can passive military use be classified as

something with a peaceful purpose or not? When a state surveys from a satellite in the geostationary orbit how another state prepares for war, can it be considered a peaceful purpose or not?

The second pillar is the freedom of scientific research. We live in a culture which suggests with hypocrisy that scientific research is free. In reality if one of you decides to climb Mount Everest or to examine the coral reefs along the shores of the Philippines you will have to obtain a lot of licenses which you may or may not get. If we want to examine the sediment of the reservoir at Cunovo we will have to get complicated licenses. Otherwise we cannot scrutinise the sediment its polluting substances, although it is situated one kilometre from the border. So in practice the freedom of scientific research is realised in a very restricted form. The limitations are not always unwarranted, because if anybody was allowed to take any kind of material into space or to Antarctica and there the experiments or exploitation would cause damage, we would never be able to learn what the small planets or the South Pole are really like, since our research and activity may seem to be very primitive looking back from a perspective of one hundred years. We dissected and ravaged the body to be examined before the invention of the X-ray machine until we could see through it, like through Madame Chauchat's body. The progress has probably not stopped and in the future we will be able to learn more and more with less and less contact with the subject to be examined. So I do not argue for the absolute freedom of research but I mean to indicate that it is a complex problem. Anyway, a kind of reasonably free scientific research should be allowed in the case of the common heritage of mankind.

According to the third principle of use it is forbidden to change environment in a harmful way. If something becomes part of the common heritage of mankind, we have to treat it in a way that there should be no disadvantageous environmental change in it. It is evident that we cannot exclude changes totally, it is unwise to demand that the whole world and the environment should stay intact. Lawyers will

certainly argue about what is considered and what is not, but we do not have to go into these details now.

Sharing of benefits

In the case of each regime the great issues are the following: who can get access to the object of the regime (for example, to the fish of a fishing regime or in our case to the ores of the deep sea bottom or to the planets), how can it be used and if those getting access have been able to use it, who should have the benefit? It is not self-evident that the benefits belong to the users. Users may pass benefits by paying taxes, sharing knowledge gained from the use, or warning of an impending danger and so on. There are also three items in the arch of sharing the benefits.

According to the first thesis a regime must be established for the common heritage of mankind in order to regulate access, utilisation and sharing the benefits. A regime does not necessarily mean an international inter-governmental organisation. It can be a legal regime, a committee, as for example there exists one for whaling. As for the space, we do not necessarily need a large organisation even if it was established for the sea. The regime is essentially a complex set of material and procedural rules, which regulates and controls the activities affecting the given resource/area as a whole and in respect of all those interested in access to it.

According to the second pillar of the sharing of benefits, the whole mankind should have a share in the benefits coming from the exploitation of the common heritage of mankind. This is prescribed by the Law of the Sea Convention as well as the Moon Agreement. Either the knowledge or the resources gained through the exploitation should also be shared among those members of mankind who do not take part directly in the activity, and not only among those who are there and who can exploit the benefits, but how and in what way – it depends on the regime. The Law of the Sea Convention offers one possible answer. There are extremely complicated rules for mining and for sharing the benefits coming

from mining. Theoretically we, land-lubbers should have a share in it as well.

The last, the ninth point, is the most important here and now: we must pay due regard to the interests of future generations. Pardo imagined it as one of the five pillars devised by him. The states have ignored it by and large but not totally. The fourth article of the Moon Agreement provides that in the course of the utilisation of the Moon – and the word “Moon” means the planets and the orbits of satellites as well – "due regard shall be paid to the interests of present and future generations".

Summing up the nine pillars mentioned above I claim that if something is already the common heritage of mankind or it is to be declared that in the future, these norms should be applied here. The doctrine suggests these ideas, although in the details of the concrete legal realisation there can be certain differences. I would add it as a footnote that in legal thinking the common concern of mankind comes abreast here, but that term implies somewhat different emphases. But the theses concerning future generations are valid in both contexts where the common concern of mankind is codified, namely climate change and biodiversity.

Why to protect future generations?

Threats

What does paying due regard to the interests of future generations mean then? I am going to concur in the two lectures read previously. First, we must identify the threats. In three expressions these are as follows: we consume/deplete resources, we damage them or we provide access to them on a discriminative basis. Why do we do that, it would only be proper to ask. The answer lies in discounting, the degradation of the distant future. It is a common pitfall of both everyday thinking and political thinking that they regard future as less valuable than the

present and they are not willing to invest today in the hope of distant returns, because they do not have the confidence in the refund or they are not interested in the profits or benefits falling into the hands of the next governments, or their children that are beyond their own lives or political cycles. In my opinion the dispute related to the Gabčíkovo- Nagymaros barrage is mainly about this issue. In the eyes of the supporters of the power station the drinking water available in a hundred years does not seem to be valuable enough today, especially in the countries where water is in abundance, but the chargeable electric power promises immediate income.

The logic of political thinking following the cycles of elections and the pitfall of everyday thinking, which is known as the tragedy of the commons, show that if everybody performs their individually reasonable actions, altogether it can lead to an irrational result. I do not want to recount Hardin's example, so I will tell you a much simpler one. Imagine that you are at a large public festival where your favourite party or your favourite celebrities appear on stage and you want to see them well. What will you do? You will stand on tiptoe. If everybody went there to see their own favourites it is an individually rational action to stand on tiptoe, but if everybody does so, it will result in the same trouble: they will not be able to see well. Everybody is an inch higher than before. So there are situations where the individually reasonable actions if repeated by everyone will lead to common tragedy or failure.

Arguments supporting the duty to protect their interests

Why should we defend the future generations that are exposed to such dangers?

There are different ways of arguing. The question is not that we should establish a single norm about why we need a parliamentary commissioner protecting future generations or why we should care about our descendants at all. I claim that there are different

ways of arguing. I allow a consistently egoistic point of view, as well, according to which it is of no importance what is beyond the life of the mortal being. It can be defended philosophically as one of the possible (but not “the true”) positions. Our task is however, not to ponder why we should not protect but why we should protect the interests of future generations.

The different ways of arguing are the following: there are norms in the law which demand it from us, there are serious ethical reasons, there are philosophical-ideological arguments which are not necessarily ethical, and even in the great religions of the world and systems of belief it is a recurring idea that one must deal with the welfare of future generations. We do not have the time for dwelling on these arguments one by one, but we can see, there are well founded reasons for thinking about the interests of future generations. Where could this consideration lead? I think that the common heritage of mankind and within this the interests of future generations could be imagined as a kind of distributive mechanism. It would be proper to ask: what do the common heritage of mankind and within this the norms related to the protection of the interests of future generations demand from us? What will the parliamentary commissioner be able to do, what should he or she represent, does he or she have to know the preferences of the future generations?

Principles for the utilisation of renewable and non-renewable resources

When giving the answer we should separate the renewable resources from the non-renewable ones. In the respect of renewable resources we can define certain principles for utilisation which are not my invention, but were described by Edith Brown Weiss.

First we can say that the parliamentary commissioner should think about the preservation of the alternatives, so if there is a renewable resource, none of its possibilities of utilisation should disappear. A given form of utilisation of a river should not exclude other possible ways of utilisation; if it is used for watering plants, it

should be done in a way that later it could be possible to produce power by it or to make a reservoir there.

According to the second principle of treating renewable resources in relation to the protection of the interests of future generations, we must preserve the quality of the common heritage of mankind and the resources so qualifying. It is obviously not realised in a way that every single part of the environment is preserved in unchanged quality. The aim is that on a global or regional scale it should be true that the quality of the environment does not deteriorate as a whole. The parliamentary commissioner of future generations should not reconcile himself or herself to the fact that in the interests of other benefits we must pay the price of the degradation of the environment.

Regarding the non-renewable resources I'd like to propose my own formula. Let us divide the future into foreseeable future and not foreseeable future. Let us assume that the foreseeable future extends to seven generations, because a physical being can have direct contact with members of seven generations: he or she can meet his or her great-grandparents and can meet his or her great-grandchildren. Thus this seems to be a conceivable time-span. Let us give the half of the non-renewable resources to this foreseeable period, to the next seven generations. The other half should remain reserved for the infinite number of next generations. The calculation should be repeated after every generation's time, that is after 25-30 years. This method produces a decreasing graph. The first generation will have about 7 per cent of the given finite resource, the second generation will have 6.1 per cent, (related to the zero moment, but always 7 % in relative terms, i.e. from the remaining non-renewable asset.) and so on, decreasingly, and they can only hope that meanwhile alternative resources, better utilisation possibilities, etc. will be invented.

These were my suggestions concerning the principles the parliamentary commissioner could represent in the field of dealing with

resources without precisely knowing the preferences of future generations.

The future generations in the Hungarian legislation and jurisprudence

Next, I would like to draw attention to the points where the above mentioned wishes seeming to be dreams have already appeared as legal obligations or in a similar form, besides the decisions made by the Constitutional Court and cited in the previous lecture.

First of all, I would like to remind you that the Supreme Court in the Philippines accepted reasoning and acting in the name of future generations in a very famous lawsuit, that is, it recognised the capacity of the future generation to sue. The French president set up a council of nine members to represent the interests of future generations. An investigation of the Hungarian laws in force, from the aspect whether they know about future generations or mankind as such, led to a long list of binding rules. Just to refer to a few of them: The law on forest management states that “the forest may be used and utilised in such a way and at such a rate that the possibilities for forestry should remain available for future generations as well”. There are several other norms codifying the duty of the Hungarian government to care for the future generations. It may be surprising, but the latest law is a bilateral agreement between Hungary and Greece on friendship and co-operation. The starting point for the Contracting Parties is that environment protection is of high importance from the aspect of the welfare of the people of both countries and they promise each other “to take all the necessary steps in order to preserve natural heritage in the interest of future generations”. The law on child protection begins with these words: “the Parliament guided by the responsibility for future generations...” The law of nuclear power also recognises that nuclear power may only be used with regard to the protection of the health and living conditions of future

generations. Furthermore we can recall the great nature conservation treaties and their domestic counterparts and implementing rules. The game law for example, says, “being aware of the fact that the game living in the nature carries aesthetical, scientific, cultural, economic and genetic values and therefore it is a part of the treasure of our nation and of the whole mankind, we must preserve it in its natural state for the future generations, too.”

There are a lot of other rules of law as well, for example the law of nature conservation which uses a really fine phraseology, the Convention on Biological Diversity, and others. No doubt, the future parliamentary commissioner will be able to rely on the Hungarian rules of law besides the doctrinal arguments outlined above.

The scope of action of the parliamentary commissioner

At the end of my lecture there is one more rather conceptual question left. The parliamentary commissioner of future generations should not necessarily intervene only in environmental context. This exigency is reflected for example in the law of the protection of public documents, public archives and private archives which states not in the preamble but among its substantive articles that “those parts of archives of organisations or written bequest of natural persons which are of lasting value should be preserved for the future generations.” The law of social administration uses similar wording. Accordingly there is another dimension that we have not discussed here, and although I accept that the parliamentary commissioner of future generations should only deal with environmental issues, I emphasise that the protection of the interests of future generations should comprise a much larger area. The preservation of archives, the non-future-consuming nature of farming, essential infrastructural choices (car or railway!) do belong to this issue.

Conclusion

The conclusion from all this is the following: the statutory law provides several starting points for us to achieve our aims. Under the surface there are the statutory legal sources protecting the future generations; our task is to “seize” these sources, that is, to bring them to the surface, to draw public attention to them, making it possible for the parliamentary commissioner to derive ideas from these sources.