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The Rights of Future Generations, and Representing them in the Present

Abstract. The *Védegylet*, a civic organisation for environment protection presented 1990 a private draft for an Act on the Ombudsman of Future Generations. In this article the author of the Draft Law describes the background to the Law. After a short survey of the development of the idea of a guardian of future generations in international law the author discusses whether future generations can have “rights” and whether future interests can be anticipated. The article raises structural questions of the proposed ombudsman (who represent whom, before what institution) and points out the differences between the existing ombudsmen defending individual rights and the speaker of future generations, the latter being rather a representative of environmental interests and a mediator. Finally the author shows how the Hungarian Constitutional Court created favourable conditions for introducing the new institution.

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When former students reunite to pay their tribute to the memory of their Master, they bear testimony to the fact that Gyula Eörsi’s work lives on and is transmitted to future generations not only in the books he wrote but also in the memory of the members of the school of jurisprudence he once headed, their work and the personal affection that many of them still cherish. Once again, it is Professor Eörsi’s spirit that is able, if only for a moment, to conjure up the scholarly community, which used to be His intellectual home as well as ours. The atmosphere was at once imbued with the strength of personal example, which counterbalanced the lack of a “director”, with the cult of originality and performance. All this was supported by the practice of reading and commenting on every sketch and piece of work we did, a general tenor of detachment tinged with irony, and still some rare heart-to-heart conversations with the Boss about the role that he had chosen as his life mission.

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Personally, I am particularly indebted to Gyula Eörsi. After my first publications he declared me a “private scholar”, giving me dispensation from participating in the collective projects of the Institute. I could pursue whatever interest I came to have. (In those days we would have added that this was happening in *machtgeschützte Innerlichkeit*). On one exceptional occasion, he asked me—“a man of leisure”, as he put it—to write an essay for the collection of papers on environmental law, which was imposed on the Institute as an obligatory exercise. Little did I, or anyone, know that this paper was to involve me in the movement for environmental protection and to be the source of instituting an unlimited access for everyone to the Constitutional Court. This *actio popularis* deeply influenced the entire style of the political transformation of 1989. I find it most appropriate to express my gratitude by publishing in this volume another offshoot of that felicitous imposition rather than a paper on a freely chosen topic.

1. The idea of a speaker for the environment and the future generations entered the public opinion in Hungary in connection with two events: directly on the occasion of debates on introducing the institution of the ombudsman in Hungary, and indirectly through international law. In conclusion to his book on the 'ombudsman' (of 1992), László Majtényi reflects upon arguments that came up around the change of regimes, formulating a demand for an ombudsman to represent each and every right and interest, from the disadvantaged, through hospitalised patients to prisoners and also the environment. Majtényi pointed out that an environmental ombudsman differs from other parliamentary commissioners who defend a concrete, and already acknowledged right. The role of the environmental ombudsman would focus on the safeguarding and representing general environmental interests, rather than defending individual rights. Consequently, he/she is a mediator. However these thoughts were not taken up. The problem that the right to a healthy environment lacks in an individual subject was left to the Constitutional Court to interpret, and to draw consequences from. The Constitutional Court also discussed the nature of the right to life. In both cases the verdicts took a line favourable to introduce a commissioner for future generations into the Hungarian legal system, even though the Constitutional Court itself was not concerned with this.

Important events in international law occurred in the meanwhile. At the 1992 Rio Conference, the representative of Malta made the case for a guardian of future generations, whose role would be to keep our sense of responsibility to the future generations alive. A number of scientific groups adopted the suggestion, producing a profusion of literature on the subject,

which brought all the related theoretical and practical problems to the fore. International law is better suited to incubate such plans and to solve its problems, as its distance from political life does not allow for the exploitation of these problems for everyday politics. But no official sign of any State's willingness to institutionalise the guardian has been given. The development of the law shows however a clear trend. The thought, that mankind as whole can be the subject of international law has gained ground. International law has brought about the concept of "the common concerns of mankind," as well as "the common heritage of mankind." Though the institution of a commissioner has not been accepted, the UNESCO issued a declaration on the responsibility of the present generation towards future generations in 1997. Guaranteeing the freedom of choice to those who come after us is the theme of this declaration, and it states the responsibilities of our generation in regards to the protection and handing over of a heritage in the fields not only of our environment in its traditional sense, but also that of biological diversity, the human gene, and cultural heritage.

In spite of these developments advance has been made largely in the theoretical fields. Apart from taking its own professional stance on the subject, international law has placed the idea of the guardian of future generations within the current theories of justice, and introduced it into debates on democracy, posing it as a question of participation, that is the future taking part in the decision making today. The question was raised, whether we should have to make concrete choices in the name of future generations (representing them), or whether we must make sure they will have the opportunity to make a choice once they are born. Would it not be better to save certain goods and to hand them down to the future generation instead of "representing" them? (As is commonly understood, whales and rain forests are such 'goods' today.)

2. How can the legal personality of future generations be recognised, taking their uncertain notion? It is evident to a student of private law that anyone or anything can be given legal personality; if these are not individuals or natural persons, then legal entities are legal subjects. The subjects of international law however could originally only be states. Steps away from this position have been taken in two directions: individuals can also be subjects of international law (see the example of the war criminals brought to trial in the Hague), and in the opposite instance, mankind—as a whole—can also be legal subject in international law, having respecting rights.

The question, which may help to elucidate the status of future generations as legal persons is, what kind of rights would they be provided with? It is appropriate to look at the “rights” we believe future generations deserve as symbolic, and to think of the legal discussion dealing with them as metaphoric. What is present for us today of the future rights of those who are yet to be born, is the responsibility, the legal obligations we have towards them. International law assumes that future generations have “rights” in order to establish corresponding duties, for all rights are balanced by obligations. (We will see that according to the Hungarian Constitution the State may have responsibilities towards future generations, without giving them rights.) We are the ones who decide the rights of humankind in the future, based on our ideas, knowledge and needs. Respect for their autonomy requires that we make as few essential decisions for them as possible, passing on the freedom of choice instead.

The indefinable notion of future generations—especially in terms of time—shall warn us not to handle instead of the unborn generations. Let's hope there will always be future generations—but how far can we look ahead, and take responsibility for the future? What time limit can we claim, for our decisions to be proved correct and justifiable? Two points of conflict come up when we base our responsibilities and duties on social justice.

First we have to negotiate the clash of interests between present and future generations. What weight must we give the rights of the future generations, to place it over and above the poverty, and indeed life threatening circumstances (e.g. hunger in Africa) of generations alive today, belittling the later, and putting the future forward as the more important? The interests of the future generations cannot be brought up in itself, separated from the solidarity and responsibility for all of mankind in the present. We can find some amusing examples in the literature: if it has been discovered that a comet will hit the earth in two hundred years, a certain percentage of the global GDP must be set aside throughout those years, to avert the catastrophe, and everyone must accept this pledge. The inclusion of rights of the future generation in the legal system is justified through democracy. But who is to decide, what load should be born by whom in the name of the future?

The other controversial point is a clash of interests between future generations. A similar choice may come up between the fourth and fifth generations, or the fifth and the tenth. A beneficial decision for the next five generations may be lethal to the sixth. And why should all interests be global. Something beneficial to future Siberians and Alaskans can spell catastrophe in South-Asia. We may be able to bring sacrifices and even

force others to make sacrifices in order to save a species, but a virus it carries may wipe out future generations. For these reasons Rawls, a leading authority in social justice theory writes that we can only extend our guardianship to the next generation. One can put in the balance benefits to one's self, ones contemporaries and the future within the limits posed by this view. It is natural that we look after our own children—there is no need to go any further. Yet decisions made today, affect many generations to come—can a fair decision be taken without considering them?

“Goods” being conserved for future generations, rather than the anticipation of their rights and interests may partly solve the problems outlined above. This has a serious impact on the way the institution is built up.

3. Who represents whom, and before what court or authority? And how many ombudsmen shall we say are needed? The answer to the question put forward in the previous point—whether “goods” are to be saved or actions in the name of the future generations to be made—will define the way the institution of the ombudsman will be structured. If the speaker is a guardian of future generations in general, than the person would have to be knowledgeable in all fields, but essentially someone universally respected on moral grounds. (Yet is the moral authority of the person and universal respect enough? Will everybody bow to his/her position on a controversial subject such as abortion, or population explosion? Nothing affects the rights of the future generations and especially their right to life more than these both problems.) But if the protection of particular goods, i.e. certain objects such as the oceans or the whales is at stake, than an expert who can tell what is best for a whale is needed. In this case, we need as many speakers, as the number of protected goods. Who should be the speakers: a person or an institution, a State, a public authority or a NGO? Where should the platform be given for this speaker: should he/she make his/her case to the nation-states, international institutions, to both or neither, bringing the case instead before a court? (Though would the process then no longer be the representation of certain interests, but an enforcement of rights.) And as we proceed, one feels more and more lost in a maze of questions. Even the question of how an ombudsman would relate—in terms of prestige—to the organisations already at work has come up. After all, every organisation in the field will claim to be serving the interests of future generations. Nor can it be argued that people working on stopping a virus (even in a single country or region) will not influence the well being of generations in the future. Another factor to be reckoned with is the claims of established ombudsmen who may feel that a speaker of future generations will trespass on their field of

competence. And governments may see the new ombudsman as another attempt to limit their powers.

Following these structural questions, we can address the problems of the powers of the guardian of the future generations, and the nature of his/her activity.

The role of this ombudsman is different from that of all others. For this reason this office does not involve any competition with commissioners of civil rights and data protection. The latter protect the constitutional rights of the individual: clearly defined rights in a legal process that is also clearly defined. It must be mentioned, that presently the only environmental ombudsman of the world, employed in Ontario Canada, has the responsibilities traditionally associated with the ombudsman, helping citizens fight for their environment related rights. A speaker for the future generations however, as I have said, will not be defending legal rights, but will have the office of representation. The term guardian, used in international law, makes its mark for this reason. Minors and those unable to take action in their own name have guardians. Future generations are not able to make a case for themselves, and therefore the speaker must do it in their name. On the one hand, the guardian helps to bring the issues touching on them to the legal recourse. On the other hand, the guardian influences the political decision making, as a representative, as well as by using public pressure. The fact must be stressed that the speaker for the future generations is not a decision maker. He/She seeks to orient the politics of decision makers. This may also be considered a weakness. But the symbolic “rights” of the future generations are quite different from the fundamental constitutional rights protected by other ombudsmen. The other ombudsmen are not authorities either; their recommendations take effect with a measure of the strength of the argument and the publicity given to it, and the personal prestige of the ombudsman. A smaller role is being proposed for the guardian of the next generations in the literature of international law: the right to speak out for the future generations—and of course full access to information. The Hungarian draft law for the setting up of the institution of a parliamentary ombudsman for future generations, which I prepared at the request of *Védegylet*, a civic organisation for the environment, goes to the limits of what is possible.¹ Half-way between the Canadian and the Hungarian conception lies the Israeli parliamentary ombudsman whose office was created after the publication of the Hungarian draft,

¹ The Draft Law on the Ombudsman of Future Generations can be found in www.vedegylet.hu in the 3. item of the menu: jövő nemzedékek képviselője.

and who is empowered to undertake preliminary norm control from the legal point of view of future generations.

4. Why am I convinced that the situation in Hungary is conducive to the establishment of this institution, in spite of all the questions we have left open, and all the apparent difficulties? Firstly the legal environment is suited for the introduction of such an ombudsman. Secondly I trust, that both public opinion and lawmaking bodies recognise our responsibilities to future generations. The story of data protection, and its commissioner gives some cause for circumspect optimism. It has taken twenty years to reach from the conception of integrated records, ready plans for registers on the population, and the general acceptance of the personal identification number to the declaration of the fundamental right of informational self-determination by the Constitutional Court in 1991, the establishing the office of the data commissioner, and the conscious everyday use of information rights. Our cause may run a similar course if we come to be aware of our responsibilities towards the generations of the future, and the attention of decision-makers is constantly drawn to the issue.

The present legal background is favourable, because the Constitutional Court has declared the state's duty to protect the condition of life for future generations. The Court also solved the question of how future generations can be a subject of law, a question that caused some difficulty in the international legal theory.² The Constitutional Court has dealt with this question in all of its sentences that had anything to do with life and death: abortion and death penalty. According to the judgement of the court, right to life, which is a basic individual right, stands balanced against the obligation of the State, to protect life. The duty of the State goes beyond its obligation not to violate the individual's right to life. It must also protect human life and its condition of existence in general. This latter duty is qualitatively different from aggregating the rights to life of individuals; it is human life in general, consequently human life as a value that is the subject of protection. Hence, the State's duty to protect human life extends to those lives, which are in their formation, just as it extends to the protection of living conditions of future generations. In 1998, the Constitutional Court put particular emphasis on the fact that not only individual rights must be brought under legal protection, but life and its

² For the relevant decisions and further explanation see Sólyom, L.—Brunner, G.: *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court*. Arbor, A.: The University of Michigan Press, 2001.

natural conditions must be institutionally protected beyond this given circle, i.e. the protection of the right to life does not only apply to the rights of (now living) individuals. The Constitutional Court has therefore declared that these objective duties of the state *always* extend beyond insuring the rights of the individual. Every person has the right to the freedom of speech. The responsibility of the State is to create and sustain the conditions that enable the formation of and upkeep democratic public opinion. Therefore the State is for example limited to a few, well-defined cases as regards the penalisation of the expression of an opinion or is obliged to pass a Media Act. In other words, we have here a rather extensive and impersonal protection of rights through institutions. With a similar reasoning from the right to life follows that the State is responsible for the protection of the environment and the living conditions of future generations. Environmental rights are concentration of duties of the State, according to the Constitutional Court. When we consider this responsibility, we may speak of corresponding “rights” only in symbolic terms: as the Court put it, nature itself could be the beneficiary of this right. So is no need to use the language of “the rights of animals and plants.” We might however add: there is a need to bring up the question of whether the future generations have rights or not, because it is valuable as strong propaganda.

5. The Hungarian legislative draft I have mentioned was published a year ago. Since the theoretical difficulties in connection with the future generations are avoidable in Hungary only practical objections were raised and discussed. The ombudsman of future generations will be modelled on the parliamentary ombudsmen who are already established. The question we may expect will come up is: why is a new institution needed when so many seem to be dealing with these problems already? According to the draft, the commissioner for the future generations would have the powers to conduct examinations in the private sector as well (similarly to the data protection commissioner), while the general ombudsman is only able to examine State institutions. For this reason, the field of work planned for our ombudsman would not be fully accessible to the general ombudsman. The numerous authorities that look after the rights of our descendants as one among their many duties would also not be able to replace the speaker for the future generations. These are government agencies, acting in the strict framework of their competences, duties and procedural rules. In contrast, the ombudsman for the future generations has a free hand in the selection of cases to be dealt with, which she/he believes to be most important in terms of representing the future generations, drawing not only the attention of

various authorities to the matters, and making his/her case with them, but also the attention of the general public, giving the sense of responsibility a chance to develop. An *actio popularis* completes the institution: any person can put in a motion for an investigation.

The draft act does not limit the powers of the parliamentary commissioner of the future generations to environmental protection. The tasks of the commissioner cannot however be defined without reference to the Environmental Protection Act and the Natural Conservation Act. These in turn refer to a number of areas from the cultural environment and protected historical buildings and monuments to education. The field of investigation and activity for the ombudsman is very wide. Apart from the right to a choice in matters related to nature, the UNESCO declaration of 1997 mentioned earlier lists cultural, political and economic choice among the opportunities for decision that must be saved for the future generations. In the preamble to draft act all these are included; freedom of choice, quality of life, free access to energy resources; these are areas to which the powers of the ombudsman are extended. While the commissioner is invested with the powers to investigate these legally definable fields, the office is never itself an authority. The powers of the parliamentary commissioner for the future generations are built on publicity, influence and pressure. He/she has the right to call for a public hearing, to give counsel on international obligations concerning the common heritage and the common concern of mankind, nature or environmental protection and resources, prior to entering them. Neither State, nor business secrets can hinder the commissioner's access to data related to the state of the environment.

As the cause of the *guardian* was not embraced by the States after 1992, the Hungarian political establishment rejected the proposal for the institution of an ombudsman for future generations. That the draft law made its way to Parliament and reached the stage of committee discussion was itself the result of political manoeuvring. However, government and opposition were of the same opinion: there were enough ombudsmen already. Yet if we come to think of the number of years it took the cause of data protection to get from official resistance to constitutional recognition and to the institution of the independent ombudsman for data protection, we have no reason to give up hope.