

LEGAL, ETHICAL AND ECONOMICAL IMPACTS OF INTERGENERATIONAL EQUITY (EDITORIAL COMMENTS)

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International law reflects the values shared by states and has helped them face the most consequential challenges of the day. After World War II, the most significant challenge was to preserve international peace and security, as well as to guarantee basic human rights. In the 21st century, states are facing a new challenge: climate change and its consequences, and, ultimately, the survival of mankind. Unfortunately, the consequences of climate change are highly visible – e.g. extreme weather conditions (droughts, heat waves and devastating storms, floods in areas where people have never experienced similar events before), melting ice in the Arctic and the extinction of some native plant and animal species and the appearance of unknown invasive species in the same area.¹

While climate change impacts can be localized, the main means of intervention against such impacts is through international law since, once these rules have been properly ratified, states are responsible for applying the provisions of international law fully and unconditionally within their own legal systems. This, however, requires intensive cooperation among the various fields of study. So, e.g. in politics and economy (including both the level of individual companies and that of the national economy), scholars and decision-makers alike accept that preservation of the environment and the responsible management of resources are as important as short-term political and economic advantages.

In determining the scope of interventions for preserving the environment, the latest results of research in natural sciences must also be taken into account. In this context, jurisprudence shall elaborate upon and apply new regulatory methods that encourage

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1 *Living Planet Report 2018*, pp. 11, 90 and 119 at https://wwf.panda.org/knowledge_hub/all_publications/living_planet_report_2018/; Camilo Mora & Peter Sale, *Ongoing Global Biodiversity Loss and the Need to Move Beyond Protected Areas: A Review of the Technical and Practical Shortcomings of Protected Areas on Land and Sea*, Marine Ecology Progress Series, 2011, pp. 251-255.

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economic operators, consumers and public authorities to manage resources responsibly and reward them for such responsible management. Such new regulatory methods can include supporting the introduction of new technologies, encouraging consumer awareness and conscious economic behavior through tax incentives or otherwise and applying consistently the 'polluter pays' principle as one of the oldest principles of international environmental law.

A further significant consideration is that the Earth's population continues to increase. Currently, the Earth's population is at approximately 7.5 billion, but according to UN estimates it may exceed 11 billion persons by 2100.² Population growth will require an increase in food production and agricultural lands, which may occur to the detriment of forests. According to a FAO report, the size of forests in tropical states decreased by 7 million hectares annually between 2000 and 2010, whilst the size of agricultural lands increased by 6 million hectares annually.³ At the same time, the reduction of forests automatically entails the increase of carbon dioxide in the atmosphere as forests play a particularly important role in carbon sequestration.

In its special report, the Intergovernmental Panel on Climate Change (IPCC) confirmed that the rate of global warming will reach the threshold of 1.5 degree Celsius between 2030 and 2052,⁴ and an increase of the temperature by 2 degrees Celsius is the maximum increase that humankind can tolerate. In case of an increase by 2.2 degrees Celsius, large African mammals are expected to become extinct, while an increase by 2.8 degrees Celsius would result in the destruction of Amazon rainforests and the coral reefs around Australia. An increase by approximately 4 degrees Celsius would result in the destruction of all mankind as in natural circumstances humans can tolerate a maximum temperature of approximately 35 degrees Celsius (the so-called wet bulb temperature).

At the same time, global warming triggered by the reduction of forests also decreases the average production of agricultural lands, therefore in order to maintain the production rates in the regions that are most affected by global warming and are overpopulated, additional lands must be subjected to agricultural production or production must be intensified by monoculture production and fertilizer use leading to a rapid depletion of soils.

It is, therefore, particularly important for today's generations to take into account the interests of future generations in all areas of life. Furthermore, it is essential to raise awareness about the fact that climate change is not an issue in the unforeseeable future, affecting generations that are yet to be born. On the contrary, the global consequences of current environmental changes will be felt within the next years or decades, so they also

2 *World Population Prospect 2019*, at <https://population.un.org/wpp/>.

3 *State of the World's Forests*, FAO, 2016, p. x.

4 *Special Report on Global Warming of 1.5 C, Summary for Policymakers*, IPCC, 2018, p. 6.

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will affect today's generations. This also means that if the circumstances remain unchanged, today's generation will not be able to fully enjoy the results of economic development in the next 30 years. In relation to the fight against climate change, the most important political guideline may be that "after a flood, it only matters who made the ship on time." Thus, while the history of past centuries centered on wars and conquests, today's statesmen may gain recognition and respect from next generations by thinking and acting responsibly in the interest of future generations instead of turning to the use of arms. In this context, policy and lawmakers need to take into account the interests of future generations mainly in the fields of ethics, law and economy.

1 ETHICAL ASPECTS OF INTERGENERATIONAL EQUITY

For centuries, the main driving force of human history has been that the world is gradually getting better and better, under the guidance of wise people. Technical means are becoming ever more perfect, the environment surrounding us is improving, and the quality of life is increasing, so everyone will live an increasingly better life and be able to consume more and more. This approach, however, may only be valid if it is assumed that resources are endless and can be used without limits. The phenomenon of climate change, however, has clearly shown that such an assumption does not hold true. Future generations will hardly be able to increase their use of resources and consume more than today's generations. On the contrary, a significant decrease of available resources for consumption is expected in terms of both their absolute value and their value *pro capita*. However, it follows from the responsibility of today's generations for future generations that we pose a fundamental question: if it is already certain that we cannot improve our lives and living conditions what sacrifice must we make in order not to impair the living conditions of our children and grandchildren and to provide them with the opportunity of free choice? Even though today's generations' responsibility for future generations is set out in an increasing number of legal documents, this issue can be considered primarily to be an ethical one.

Furthermore, the responsibility for future generations sheds light on an additional issue. The concept of future generations is linked to specific societies instead of specific individuals, therefore, responsibility for future generations can be understood as the responsibility of the entire society rather than that of specific individuals. However, the question of whether preserving the living conditions for future generations requires the same level or at least the same proportion of sacrifice from all members of today's generations regardless of whether they are citizens of a developed or a developing country remains unaddressed. In this situation, differences among living and other conditions in developed and developing countries should be taken into account in determining the scope of the responsibility for next generations. Intragenerational equity requires each nation to ensure

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the survival of their own descendants, knowing and hoping that the other nations are also subject to similar responsibility and sacrifice in connection with their own future generations. While ethically it may be expected that everyone will take necessary measures in the interests of their own descendants, the approach requiring action from today's generations in the interest of future generations of nations living in other parts of the world is undermined by significant economic, geographical, political and other objective differences.

The cornerstone of thinking about future generations is that members of a nation answer together the question of identity, shared cultural and ethical values that will be left to their children and grandchildren, and the question of how to change consumption patterns and lifestyles to allow these values to be passed on. In his encyclical letter *Laudato si'*, Pope Francis underlines that the sense of today's generations' life may be questioned if they leave an unlivable world to subsequent generations.⁵

It is generally true that the community is more willing to make a larger sacrifice where there is already a direct and institutionalized link between today's generation and the future generation. While international law introduced *inter alia* the category of intergenerational equity, it still lacks real means to support the implementation of such equity. On the contrary, the national laws of certain states already contain institutions (mostly falling within the scope of the social care system) which are aimed at implementing intergenerational cooperation. Such institutions include, e.g. old-age pensions or childbirth allowances. Therefore, while institutions of international law are suitable for determining the scope of intergenerational equity, nations and states should be responsible for determining its content.

2 LEGAL ASPECTS OF INTERGENERATIONAL EQUITY

Although responsibility for future generations may primarily be assessed at the national level, an approach beyond the state level must be applied in relation to the protection of human rights, including for the so-called second and third generation human rights. Article 1 of the ICESCR provides that “[a]ll peoples may [...] freely dispose of their natural wealth and resources [...]. In no case may a people be deprived of its own means of subsistence.” While states are required to enforce basic human rights within their own territories (with due consideration to their respective legal systems and cultures), the same states may fail to take into account whether, within their jurisdiction, economic operators (including in particular multinational companies) respect basic human rights in their foreign operations.

5 *Encyclical Letter Laudato si' of the Holy Father Francis on Care for Our Common Home*, 2015, para. 206.

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Similarly, where a state adopts a specific regulation in respect of its resident citizens or resident legal entities, such a regulation will not necessarily take into account the global impacts resulting therefrom. For example, a direct link exists where rules on water resources have an impact on neighboring states using the water base or where the emissions of pollutants effect the territory of neighboring states. An indirect link exists, however, if the effect on other states and citizens can only be demonstrated as a secondary impact. In this context, an international legal environment that allows for establishing responsibility not only for direct links but also in case of scientifically substantiated indirect links would also be suitable for enforcing responsibility for future generations, thereby promoting the responsible management of resources. In this case, taking into account the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, state responsibility may be based on non-compliance with the due diligence obligations⁶ in addition to responsibility for specific human rights violations.

Certain international agreements, primarily those on the environment or human rights, already apply monitoring requirements and from time to time analyze contracting parties' practices in relation to a treaty regime's terms.⁷ Extending the monitoring system beyond the purely human rights context to the specific issues of climate change and therefore to the issue of responsibility for future generations can provide the basis for a kind of global solidarity, thereby reducing intragenerational inequality.

Furthermore, determining the applicable legal consequences is a significant element of regulating the responsibility for future generations. The current rules of international law, in particular those relating to climate change, are much more focused on remedying the damage that has arisen than preventing damage or restoring the original condition (if applicable). So, for example, the inclusion of persons fleeing from impossible living conditions requires significant economic and social resources from the states concerned. With careful planning, such resources could also be used for preventing the reasons underlying the flight of populations and/or solving problems at their source. This is important because, while the living conditions of billions of people may become impossible due to climate change, the number of refugees the EU may be able to receive is not proportional to the climate activity of this organization.

Intragenerational solidarity, however, requires changing today's perspective that is primarily, and in many cases exclusively, based on economic interests. The classic liberal economic policy of Adam Smith and David Ricardo is based on the self-regulating power of the market and assumes that free market processes which are free from government

6 Timo Koivurova, 'Due diligence', in *Max Planck Encyclopedia of Public International Law*, 2010, at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034>.

7 Examples of monitoring: regular country visits by elected or appointed experts; ad-hoc inspections on-site by experts; evaluations based on questionnaires; written reporting, done by the member states themselves (self-assessment).

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interventions create an economic order that is ideal for everyone. While it is unquestionable that the extension of economic cooperation was successful in several instances (e.g. the EU or the WTO), intragenerational solidarity requires state and international law intervention and subjecting classic free market processes to legal and ethical constraints.

Two issues arise in this respect. On the one hand, legal and ethical constraints are missing from these systems. For example, it is hardly justifiable from a legal or ethical point of view that in the framework of the WTO, mineral water is a commodity just like any other product,⁸ therefore, based on market processes and interests only, the water resources of a developing country may also be used for supplying a developed country so that it may keep its own water resources 'in reserve'. Furthermore, the regulatory state (or, as the case may be, the community of states) should be strong enough even when, due to the rationalization of economic processes and the increased efficiency of production, the business interests of market players turn out to be contrary to the applicable legal and ethical rules and their lobbies try to soften such rules.

Similar trends apply where agricultural lands are acquired or leased by foreign market players. International law and EU law, as well as the national law of several states, allow for the lease and acquisition of arable land by foreigners, and certain developed countries may satisfy the needs of their citizens by using the resources of other states, thereby sparing their own arable lands. The importance of such an approach is well demonstrated by the fact that, for example, within the EU arable lands are regulated as an investment vehicle in connection with the free movement of capital and the Member States may only exceptionally subject them to restrictions. Furthermore, EU Member States shall allow for the acquisition of their arable lands by the citizens of other Member States, according to the provisions of EU law.

Another example of the conflict between legal and ethical aspects of intergenerational equity is the regulation and practices concerning the prohibition of child labor.⁹ In principle, all states support the prohibition of child labor, however certain states and international organizations have failed to take truly efficient action against multinational companies that obtain advantages on the market through the indirect use of child labor. Currently, action against such market players is primarily driven by the ethical stance of society.

This also holds true for the obligation to preserve natural resources for future generations. Several natural resources may be fully exhausted within the next decades if the level of their current use is maintained. Although several decades is a short period compared to human history, in the world of short political objectives, it is sufficient time for this

8 Mike Muller & Christophe Bellmann, *Trade and Water – How Might Trade Policy Contribute to Sustainable Water Management?*, International Centre for Trade and Sustainable Development, 2016, pp. 14-17.

9 The relevant ILO Conventions and Recommendations concerning child labor are available at www.ilo.org/ipecc/facts/ILOconventionsonchildlabour/lang--en/index.htm.

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issue to be put into the focus of political thinking. For example, in its Decision No. 28/2017. (X. 25.) AB, the Hungarian Constitutional Court found that the obligation to preserve biological diversity is “a peremptory norm of the international law and it reflects also the intention of the international community as a whole.”¹⁰ Legal solutions employing similar, existing legal means to preserve natural resources may serve as an example for legislators, those applying the law and courts (constitutional courts) globally.

Further to strategic documents, several national parliaments have a body which is mainly responsible for taking into account sustainable development (or, in a broader sense, the interests of future generations), including for example the National Council for Sustainable Development in Hungary, which was set up in 2008, headed by the president of Parliament. It is a consultative and advisory body of Parliament on matters relating to sustainable development.¹¹ What is common to such bodies is that their members come from professional and scientific research institutes, universities and civil society organizations in addition to politics, and they are responsible for *inter alia* taking positions on whether legislative bills comply with the concept of sustainable development and may, where appropriate, initiate legislative processes. Unfortunately, even though such institutions exist in several states, their findings are in many cases fully ignored by legislators.

Where certain strategic documents are to be adopted only at the national level, protection of the interests of future generations may also be realized universally. Several international civil society organizations requested the creation of a position similar to that of an ombudsman or high commissioner as an element of UN’s reform at the Rio+20 summit. Even though such an institution has not been established yet, the UN Secretary General was invited to prepare a report on the situation of future generations within the auspices of the UN.¹²

3 ECONOMIC ASPECTS OF INTERGENERATIONAL EQUITY

Today’s economic model is based on increasing consumption and production and on the assumption that the continuous development thereof can satisfy the needs of an ever-increasing world population. The major weakness of this model is that the Earth’s resources are limited. While citizens of developed states already use the natural resources very intensively in order to ensure their own well-being and quality of life, citizens of developing countries also aspire to reach such level of well-being. This effort, however, will result in

¹⁰ Decision No. 28/2017. (X. 25.) AB, Reasoning [38].

¹¹ See in detail at www.parlament.hu/web/ncsd/national-council-for-sustainable-development.

¹² *Intergenerational Solidarity and the Needs of Future Generations*, Report of the Secretary General, A/68/100, 2013.

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an unsustainable situation already in the short-term, by 2050 according to certain pessimistic forecasts. According to Principle 8 of the 1992 Rio Declaration,

“To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.”

Therefore, it can be said that due consideration of the interests of future generations and responsible management of the Earth’s resources require changing the ethical and legal approach, as well as revisiting the basic economic approach. A key element may be decoupling,¹³ that is, separating the economic concept of growth from natural growth in terms of consumption. Although statistical growth is virtually unlimited, at least in theory, the Earth’s limited resources constitute an absolute limit to physical growth.

Implementation of decoupling is by no means impossible. Decoupling would be supported, e.g. by making public administration eco-friendly, by the obligatory recycling of raw materials in the construction of infrastructure or obligatory consideration of calculations regarding the efficiency of certain investments and proper accounting of their efficiency. However, the issue in this respect is how to obtain stakeholders’ joint support. Market players will refrain from adopting a different market practice as long as they consider its introduction to be a competitive disadvantage, as otherwise they would threaten their own market position.

According to this approach, we should not consider ecological services as being externalities when establishing product value.¹⁴ Furthermore, discounting is also essential in today’s economic approach. By recognizing future damage at a smaller current value, discounting creates a link between ecological damage certainly arising in the distant future and a financial advantage that may certainly be realized in the immediate future.¹⁵ This approach itself, however, also prefers current economic advantage to mid-term and long-term damage.

Meanwhile, a great deal of work is being done today to advance greener, more sustainable economics.¹⁶ Green economics takes into account also ecological services and assigns a value to them, thereby considering them in the analysis of economic processes. Although

13 *Indicators to measure decoupling of environmental pressure from economic growth. The OECD Environment Programme, Executive Summary*, pp. 1-3, at www.oecd.org/environment/indicators-modelling-outlooks/1933638.pdf.

14 See in general: *The Economics of Ecosystems and Biodiversity. TEEB Report for Business*, at www.teebweb.org/wp-content/uploads/Study%20and%20Reports/Reports/Business%20and%20Enterprise/TEEB%20for%20Business%20Report/TEEB%20for%20Business.pdf.

15 Cedric Philibert, *Discounting the Future*, Internet Encyclopaedia of Ecological Economics, 2003.

16 Cameron Allen & Stuart Clouth (eds.), *A Guidebook to the Green Economy*, UN Division for Sustainable Development, 2012.

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this approach may continue to be pushed to the background by mainstream economic studies today, it is also clear that reform ideas which would be suitable for achieving a more sustainable development and a responsible management of environmental resources against the unconditional achievement of short-term economic advantages, also exist in the field of economics.

4 LESSONS FOR INTERGENERATIONAL EQUITY AND ENVIRONMENTAL LAW IN VOL. 7 OF THE HUNGARIAN YEARBOOK

The thematic chapter of this year's Hungarian Yearbook of International Law and European Law is dedicated to the role of legal sciences and jurisprudence in responding to climate change and environmental challenges. In the 2019 volume seven articles deal with the question of the protection of the environment and the interests of future generations.

Ludwig Krämer examines EU Directive 2001/42 on the assessment of the effects of certain plans and programs on the environment based on the case-law of the CJEU and highlights a number of legal questions which were not yet discussed by the CJEU. *Marie-Claire Cordonier Segger* introduces sustainable development in foreign investment law and policy related to renewable energy and climate change mitigation and adaptation.

Based on Article P of the Fundamental Law of Hungary – which underlines that national resources shall be protected, maintained and preserved for future generations by the state and everyone – the Constitutional Court of Hungary has a solid case-law concerning the protection of the environment and the interests of future generations. *Gyula Bándi* provides us with an overview of the recent decisions of the Constitutional Court, including the principle of non-derogation (non-regression), firstly recognized in Decision No. 28/1994. (V. 20.) AB. *Marcel Szabó* demonstrates how the precautionary principle became a constitutional cornerstone in the Hungarian constitutional practice and dialogue. In the field of environmental policy, the principle of 'think globally – act locally' has special relevance. *László Fodor* analyzes how Hungarian municipalities deal with environmental issues within their powers (including, among others, the question of air protection, waste management, or the protection of the built environment).

Gábor Baranyai evaluates the resilience assessment of European water law from the perspective of the management of hydrological variability and, last but not least, *Ágnes Váradi* tries to define the role of the Aarhus Convention as part of national, and international and EU law at the same time.

On behalf of the editors, I wish you a good read and hope you enjoy the current thematic chapter and our other 'traditional' chapters (Developments in international law; Developments in EU law; Hungarian state practice; Case notes; Conference reports; Book reviews).

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I also hope to welcome you among the authors of the next volume of the Hungarian Yearbook of International Law and European Law. For more information (including current and past volumes, call for papers and submission guidelines, current news *etc.*) please do not forget to check our brand new homepage at www.hungarianyearbook.com, launched in October 2019.