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THE SOCIAL ENTERPRISES OF MANKIND

Jovan Đorđević is a great teacher, who has had a lasting influence on my work and my thinking. It was he who first introduced me to Yugoslav political and constitutional theory: to the self-management system based on the concept of social ownership. His ideas shaped my thinking on the emerging new concept of the Common Heritage of Mankind. The parallels between the two concepts indeed are striking, and may have to be explored further in the future.

Both concepts, social ownership and common heritage, are concepts of *non-ownership*. That is, resources or means of production which belong into either category, *cannot be appropriated* by anybody, whether State or individual or legal personality. They can be *utilized*, but not owned. This leads, inevitably to a new *economic theory*, based on the *utilization value* rather than the *exchange value* of things. Such a theory has recently been proposed by Orio Giarini, a Swiss-based economist.

Secondly, both concepts, social ownership and common heritage, presuppose a *system of management* in which all users share. It is this aspect that distinguishes a common heritage regime from a high-seas regime: for while the high seas are inappropriable like the common heritage, they lack a management regime, which, in an era of intense resource exploitation, lays them open to „the tragedy of the commons.” The same distinction applies to the concept of „the commons” and „social ownership” at the national level.

Thirdly, there must be *benefit-sharing*, both under a common-heritage and under a social-ownership regime; and benefit-sharing is to be understood in a broad sense, including sharing not only of financial revenues but of the benefits accruing from shared management, such as technology transfer.

So much for the striking analogies. The concept of the common heritage, at the international level, has two further attributes, which are less developed in the socialownership concept at the national level, although they may be implicit or simply taken for granted.

The common heritage of mankind is reserved for exclusively peaceful purposes: a statement with a *disarmament* implication, however vague; and it must be managed in such a way as to benefit not only present but also future generations: implying a concept of *conservation* and environmental policy.

The reservation exclusively for peaceful purposes, in the 1982 United Nations Convention on the Law of the Sea is flawed in two ways, and will require much further work of interpretation and development. In the first place, it applies only to „the Area” as defined (also very poorly) in Part XI of the Convention — not to „the resources” — nickel, cobalt, copper and manganese — which are primarily used for strategic purposes, once they have been removed from „the Area.” And this distinction is upheld even though both the Area and its resources are solemnly declared to be the common heritage of mankind. Secondly, it should be kept in mind that not only the Area and its resources, which are the common heritage of mankind, are reserved exclusively for peaceful purposes, but also the high seas (Article 88) which are subject to a different regime of high-seas freedoms, as well as scientific research (Article 240); and that „reservation for peaceful uses” is defined in Article 301 — if one can call this a definition, as refraining from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations” — which makes the concept practically meaningless.

In spite of these conceptual deficiencies, the Common Heritage of Mankind, just as the concept of Social Ownership, is here to stay. Both concepts are more modern, more in line with economic, as well as with environmental and disarmament requirements of our age than the classical Roman Law concept of property and absolute ownership.

With both „ownership” and the concurrent principle of „sovereignty” in state of transition and re-interpretation, and the boundaries between „national” and „international” getting blurred, one can indeed discern a process leading to the merger of social ownership and common heritage.

Extensive debates have taken place in recent years over the „ownership” of offshore hydrocarbon resources between the Government of Canada and the governments of the Provinces of Nova Scotia and Newfoundland. In some respects these debates echoed those of the 'forties, between the Federal Government of the United States and those of Texas, California, and Louisiana, which eventually were resolved by the Truman Declaration of 1945, placing offshore resources beyond three miles from shore under federal jurisdiction. The Canadian debate, coming some forty years later, however, is taking a different direction. The Canadian debates between the Federal Government and the Provinces focus on *benefit-sharing* and *shared management* (through joint federal/provincial commissions). They disregarded the issue of *ownership*, on which Federal Government and Provinces simply cannot agree. For all practical purposes, Canada thus is moving, empirically, towards a modern concept of *non-ownership*, *shared management*, and *benefit sharing*, with regard to resources in an area, the Exclusive Economic Zone, in which the Law of the Sea Convention grants to the coastal State *exclusive sovereign rights to explore and exploit such resources*, not *ownership*, in the classical sense, nor *sovereignty*, in the classical or territorial sense.

Thus one could begin to think in terms of a regime of *Common Heritage* in areas beyond the limits of national jurisdiction — such as the resources of „the Area,” of the moon, or of Antarctica — and of common heritage in areas under national jurisdiction: and here the concepts of common heritage and social ownership merge: become indistinguishable.

Such a regime would be the basis of a really new international economic order, which must also be a new national economic order.

In an essay, „The Social Property of Mankind,” written for *Pacem in Maribus* (1970), Đorđević dwells these analogies. As a corollary of the common-heritage concept, he postulates the establishment of „social enterprises of mankind,” just as the basic enterprises of self-management are a corollary of the concept of social ownership, and you could not have one without the other.

It should be noted that, at that early date, he thought of „enterprises,” not of an „Enterprise” as stipulated in the 1982 L.o.S. Convention.

„Direct management,” he wrote in 1970, „that is, utilization, use and conservation, plus all of the economic and legal consequences this would entail, cannot be entrusted to a single organizational mechanism which would be a monster international enterprise. The technology of work and other peculiarities of the seabed, its geographical position, and the problem of efficient management will demand in principle regional and similar enterprises for direct management. However, it is an inevitable consequence of the concept of social property that these enterprises cannot be national, by proxy, or mixed, meaning an organization of „interested” or territorially national States. They can only be enterprises of social property, and hence social enterprises of mankind.”

„The Enterprise” to be established under Part XI of the L.o.S. Convention, undoubtedly a concept born of the same philosophy that inspired Đorđević, has encountered tremendous pre-natal difficulties — almost from the moment of its conception.

The functions and the structure of the Enterprise, as formulated in Part XI and the painstakingly detailed pertinent Annexes III and IV, are in fact based on assumptions which, if they ever were valid, certainly are not valid today: namely (1) that seabed mining would be commercially developed by 1985, an assumption invalidated by the severe and protracted economic recession; (2) that seabed mining would be primarily the mining of manganese nodules, and assumption invalidated by recent scientific discoveries, especially the discovery of the polymetallic sulphides; and (3) that seabed mining would be carried out primarily if not exclusively in „the Area” beyond the limits of national jurisdiction; an assumption invalidated both by scientific and political circumstances: the sulphides discovered thus far are predominantly in areas under national jurisdiction; so is a considerable portion of the manganese nodules; and the boundaries of the EEZ and the continental shelf, as defined in the Convention are conveniently elastic, so that any major resource discovery will in fact be claimed by some coastal State, island State or archipelagic State.

The Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea, which just has completed, very successfully, its first session in Kingston, Jamaica, now faces the task of adjusting, by interpretation and development, the text of

the Convention to this changed economic and scientific reality: a great and challenging task, demanding creativity and innovation, no less than the drafting of the Convention itself.

And this is where Đorđević's idea of the Social Enterprises of Mankind may provide inspiration and guidance. A working paper, circulated informally during the first session of the Commissions, to be introduced formally at the beginning of the next, deals with this issue. Entitled JEFERAD (Joint Enterprise for Exploration, Research And Development), the paper points out that „activities in the Area,” due to the above mentioned changed circumstances, will not consist in commercial mining for the foreseeable future, but exclusively in exploration, research and development. If that is so, the Authority, and before it, the Commission, should concentrate on exploration, research and development, which would considerably streamline its task.

Resolution II on Preparatory Investment Protection (PIP) which was adopted together with the Convention — the paper points out — creates, for all practical purposes, an interim regime for exploration, research and development, for the *pioneer investors*, that is, the „private sector” of the „parallel system.” What is urgently needed now — if the „public sector” of the „parallel system” is not to fall hopelessly behind — is an instrument analogous to Resolution II, providing such an interim system for the Enterprise side. There is of course a difference: The „private sector” already exists; the Enterprise does not yet exist some entity will have to be established for the interim period. This, it is pointed out, could most effectively and most economically be achieved through *joint ventures* or *joint enterprises on exploration research and development*: with the Commission raising 50 percent of the required (very modest) funding while the remaining 50 percent would be provided by pioneer investors who would want to join, and their Governments. Such JEFERADs would be small and self-manageable. Their establishment would serve the interests of the industrialized States, as it would halve their investment cost, a vitally important advantage at this time of economic recession; it would serve the interests of developing countries, giving them a unique opportunity to participate in a high-technology management venture and to acquire technologies through *co-development* rather than through *transfer* (the latter being far more costly), and it would be the only efficient way to prepare for the early entry into effective operation of the Enterprise which, in the wake of this development, would most likely *decentralize* its future operations into *social enterprises of mankind*.

This may be called the classical style of development. It certainly can be, will of course depend on circumstances far transcending the scope of activities of the Preparatory Commission. „Establishing solidarity, cooperation and reciprocity is one of the conditions for the prevention of new divisions leading to new conflicts and to great catastrophies,” Djordjević wrote in 1970. „The social property of mankind and its management is not only an essential technical-economic question; it is also a moral-political problem of life importance for the world and for each one of us.”

РЕЗИМЕ

ДРУШТВЕНИ ПОДУХВАТИ ЧОВЕЧАНСТВА

У чланку „Друштвени подухвати човечанства” аутор се упушта у оригиналну анализу аналогија између концепта друштвене својине, разрађеног у југословенској уставној теорији и пракси, и концепта заједничке баштине човечанства, формулисаног у Новој конвенцији о праву мора од 1982.

Суштинске аналогије између ових концепата налази у неколико момента: прво, оба концепта су заснована на невластништву; друго, претпоставка функционисања и једног и другог концепта је одговарајући систем управљања у коме учествују сви корисници; и, треће, систем расподеле добити својствен је обама концептима.

Концепт заједничке баштине човечанства одликују, по мишљењу аутора, два додатна својства која су недовољно развијена у концепту друштвене својине на унутрашњем плану. У том смислу наводи да је, према изричитој одредби Конвенције, заједничка баштина човечанства резервисана искључиво у мирољубиве сврхе и да њено искоришћавање претпоставља обавезу очувања и заштите животне средине.

Примена овог концепта немогућа је без одговарајућег организационог механизма који Конвенција успоставља у лицу Власти, самосталне међународне организације која организује делатност и искоришћавање Зоне, тј. заједничке баштине човечанства. О идеји Предузећа, органа Власти који непосредно дела у циљу искоришћавања заједничке баштине човечанства, аутор препознаје филозофско полазиште које је инспирисало проф. Борђевића да формулише институт „друштвених предузећа човечанства” у есеју написаном за *Pacem in Maribus* (1970).

RÉSUMÉ

LES ENTREPRISES SOCIALES DE L'HUMANITÉ

Dans cet article l'auteur fait une analyse originale des analogies entre le concept de la propriété sociale, élaboré dans la théorie et la pratique constitutionnelles yougoslaves, et le concept de l'héritage commun de l'humanité, formulé dans la nouvelle Convention sur le droit de la mer de 1982.

L'auteur trouve les analogies essentielles entre ces deux concepts dans les points suivants: premièrement, les deux concepts sont fondés sur la non-propriété; deuxièmement, la supposition du fonctionnement de tous les deux concepts est un système de gestion adéquat, dans lequel tous les bénéficiaires participent; et, troisièmement, le système de la distribution de profit est propre aux deux concepts.

La notion de l'héritage commun de l'humanité a — d'après l'auteur — deux caractéristiques supplémentaires, qui ne sont pas tellement développées dans le concept de la propriété sociale au niveau interne. Dans ce sens, l'auteur mentionne que, d'après les règles explicites de la Convention, l'héritage commun de l'humanité est réservé exclusivement pour des buts pacifiques et que son utilisation suppose l'obligation de préserver et protéger les environs humains.

L'application de ce concept est impossible sans un mécanisme organisationnel adéquat, établi par la Convention sous forme de l'Autorité — une organisation internationale indépendante organisant l'activité et l'utilisation de la Zone, c'est-à-dire, de l'héritage commun de l'humanité. Dans l'idée d'Entreprise, en tant qu'un organe de l'Autorité, qui travaille directement sur l'utilisation de l'héritage commun de l'humanité, l'auteur reconnaît le point de départ philosophique, qui a inspiré prof. Djordjević à formuler l'institut d'„entreprise social de l'humanité” dans son essai écrit pour *„Pacem in Maribus”* (1970).