The Common Heritage of Mankind: A Doctrine of the Wealth of the Commons

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Res communis and res nullius are the two legal maxims of great significance in the legal fields related to seas, space and many natural resources. The roman philosophy for determining the rights over the public property and their ownership is mostly considered as origin of these concepts. While *res communis* is something which is owned or being used commonly by all, like seas, underground water, and many other natural resources, *res nullius* means something which belongs to no-one. The *res communis* is a positive concept establishing a common ownership one the other hand re nullius negates all sort of ownerships to commodities and resources available to all as an ownerless property and is usually free to be owned. The "common heritage of mankind" (CHM), sometimes also called the common heritage of humankind or humanity is a more contemporary concept as compared to *res nullius* and *res communis* and is used broadly in the legal framework related to Sea.

The philosophy behind CHM is that few elements belong to all making it imperative that they should be exploited by all with due reservations and for the welfare of the mankind as whole. In the context of the sea it represents the notion that certain global commons or elements regarded as beneficial to humanity as a whole should not be unilaterally exploited by individual states or their nationals, nor by corporations or other entities, but rather should be exploited under some sort of international arrangement or regime for the benefit of mankind as a whole.

The actual origin of the concept of CHM is debatable but the concept came to limelight and assumed prominence after the speech of Arvid Pardo, the Maltese ambassador to the United Nations, delivered at the United Nations General Assembly in November 1967, calling for the deep seabed beyond national jurisdiction and the resources contained therein to be declared the common heritage of mankind. In his prophetic speech, he urged delegates to consider the resources of the oceans beyond national jurisdiction as "the common heritage of mankind". His quest to protect the oceans from arbitrary appropriation and his call for a regime to efficiently administer their resources created the necessary momentum and provided "the unique opportunity to lay solid foundations for a peaceful and increasingly prosperous future for all peoples". It was his efforts and dedication that UNCLOS, "the Constitution for the Oceans", the most far-reaching treaty ever negotiated under United Nations auspices, was adopted in 1982 and has since then fostered the maintenance of peace and security. Dr. Arvid Pardo gave rebirth to the lost philosophy of *Res communis* and this time called it "Common Heritage to Mankind Principle" which was incorporated in the modern law of the sea enshrined in the United Nations Convention on the Law of the Sea (UNCLOS) and Pardo was fondly called "the Father of the Law of the Sea Conference". The writer and environmentalist Elisabeth Mann Borgese also considered CHM an ethical concept central to a new world order, based on new forms of cooperation, economic theory and philosophy.

The "Common Heritage of Mankind": The Concept

The ethical core of CHM is the responsibility of humans to care for and protect the environment, of which we are a part, for present and future generations. It is an ethical and general concept of international law establishing some localities as free, belonging to all humanity and so that their resources are available for everyone's use and benefit. The traditional ambit of the concept is to achieve a sustainable development of common spaces and along

with their resources, but the concept may not be limited to its ambit only. The CHM is an intricate concept with controversial peripheries including the issues of scope, content and status but the most debatable aspect being the CHM's relationship to other legal concepts. The mining of seabed resources, modern environmental treaty regimes and many other exploitative practices primarily by the developed States sometimes raise doubts about its enduring significance but the same escalating global ecological degradation also ensures the continued relevance of the common heritage concept as it is the only answer to the question to all environmental concerns, despite the difficulties surrounding its acceptance by States, the evidences of applicability of CHM can be found in natural and cultural heritage, marine living resources, Antarctica and global ecological systems such as the atmosphere or climate system.

There have been debates on whether this concept is a legal one or merely a political or moral idea. Further, there have been disputes as to whether it connotes communal ownership or merely joint management of global commons that are held to be CHM. Initially, the concept was associated solely with the law of the sea, but it has since been expanded to other domains, such as outer space and the Moon, Antarctica, human rights, human genomes, and plant genetic resources.

The "Common Heritage of Mankind": The Core of Modern Legal Expansions

A Preliminary Draft of a World Constitution, 1948 provided that the Earth and its resources were to be the common property of mankind, managed for the good of all. Concern about the use of nuclear technology and resources, for military and peaceful purposes, also led to an early proposal that nuclear resources be collectively owned and managed, and not owned by any one state. The CHM was the core in the U.N. Outer Space Treaty of 1967, which governs state exploration and use of outer space, the moon, and other celestial bodies. CHM, however, achieved prominence in the context of the evolving law of the sea. The World Peace through Law Conference, 1967 referred to the high seas as "the common heritage of mankind" and stated that the seabed should be subject to U.N. jurisdiction and control.

Revolutionizing the Law of the Sea

In 1960s due to extraction of oil, tin, fisheries and almost everything the sea was being exploited by the States to the extent that the tranquillity of the sea bed was also disturbed by the exertions of man striving to own everything that sea had to offer. Concern about the impact of new technologies upon the oceans, militarization and expanding state claims to ownership of parts of the oceans, e.g., continental shelf and exclusive economic zones, together with growing economic disparity and associated harm to long-term human security, prompted Arvid Pardo to develop the idea that all ocean space, i.e., surface of the sea, water column, seabed and its subsoil, and living resources, should be declared the CHM, irrespective of existing claims to national jurisdiction.

The intention was to replace the outdated legal concept of "freedom of the high seas" developed by the Dutch jurist Hugo Grotius (1583–1645), proclaiming ocean areas as international commons. Contradictory to the concept of Free-sea of Grotius the concept of the CHM claimed, ocean space and its resources would be a common that could not be owned by states beyond a certain limit. The common sea and its resources would be open to the international community of states along with few limitations of international administration and management for the common good of all humanity. On the other hand, the ocean space and resources existed within national jurisdiction, states would regulate and manage on behalf of all mankind, not solely for the benefit of national interests.

The approach was a saviour of the oceans and rejected both laissez-faire freedom and unfettered state sovereignty. It included efforts to simplify ocean jurisdiction by establishing one single line of demarcation between national

and international ocean space through the Draft Ocean Space Treaty of 1971 and prevent gradually expanding claims to national jurisdiction.

The CHM was originally intended as a concept that would revolutionize the law of the sea by applying to all ocean space and resources but was later confined to the limited seabed space beyond national jurisdiction as Pardo recognized that the wide applicability would generate rejection from the powerful states who were attempting to extend their sovereign claims to more ocean space and resources. Pardo focused on the legal status of the much more limited entity of the "seabed" so that the CHM is feasible and acceptable by more and it could gain an important foothold within the U.N. system.

The Pardo's proposal led to a number of important developments, including the U.N. General Assembly Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Subsoil Thereof, Beyond the Limits of National Jurisdiction in the year, 1970. This declaration set out the legal principles needed to implement the notion that the seabed and its resources are the CHM, and it helped create consensus for the negotiation of a new law of the sea convention: UNCLOS-III, the U.N. Convention on the Law of the Sea, 1982.

However, the outcome was a very limited application of CHM than intended by its advocates but undeniably the principle got sanctity internationally, which was a good start. the UNCLOS III restricted the application of CHM to a few rocks, e.g., mineral resources such as manganese nodules, sitting on the bottom of the deep seabed.

Part XI of UNCLOS III deals with the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction and calls it the "Area". As per Article 136 only the "Area" and its resources are the "common heritage of mankind." The Area and its resources cannot be claimed, appropriated, or owned by any state or person as per Article 137. All rights to resources belong to mankind as a whole, and Article 140 makes the International Seabed Authority the acting authority on mankind's behalf. The International Seabed Authority must ensure the equitable sharing of financial and other benefits arising from activities in the Area, taking into particular account the needs and interests of developing states and others. The authority also promotes research, transfer of technology to developing states and protection of the marine environment's ecological balance as per the duties allocated under Articles 143, 144 and145.

Part XI provisions create an international administration and management regime for only a small part of the international commons i.e. the "Area" and its resources and does not replace the freedom of the high seas; resulting into a limited revolution of the law of the sea and the intended overhauling of the law could not be achieved.

Despite this serious limitation, the use of CHM was revolutionary enough as corroborated by the US refusal to adhere to UNCLOS-III. Developing nations on the other hand, often see the principle as a means of protecting critical resources from exploitation by developed nations and their corporations.

Appreciatively, it was only the indefatigable effort of Pardo that commercial use of the Area and its resources has not occurred till now giving us a hope that we would have something left in our oceans to inherit for our generation to come.

Few aspects of CHM also appeared in the Outer Space Treaty, 1967 but it was not until 1979 that a clear statement appeared in the Moon Treaty, a treaty to govern exploration and exploitation of the moon's resources. Still the conflicting jurisdictions over separate elements and resources persist despite the indisputable unity of ecological systems and wide impact on all if it gets disturbed.

In an ecological and generational context as per Weiss 1989; Taylor 1998, it is possible to argue that the Earth itself is a global commons shared by each generation and that CHM should "extend to all natural and cultural resources, wherever located, that are internationally important for the well-being of future generations."

Conclusion:

There are five core components of the common heritage of mankind concept:

1.There can be no private or public appropriation, i.e. no one legally owns common heritage spaces;

2.Representatives from all nations must manage resources contained in such a territorial or conceptual area on behalf of all, because commons area is considered to belong to everyone;

3.All nations must actively share with each other the benefits acquired from exploitation of the resources from the common heritage region;

4.There can be no weaponry or military installations established in territorial commons areas.

5.The common space should be preserved for the benefit of future generations.

Codified or non-codified, incorporated in law or not incorporated in any law, the principle of the Common Heritage of mankind continues to be one of the principle which is the need of the time and hopefully the world community realises this before its too late to recover.