

National Space Sovereignty Dogs World Legal Circles

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How high is up?

How far upward does national sovereignty extend?

Where does air space end and outer space begin?

These are but some of the many complex questions which promise to demand the increasing attention of international lawyers in the days ahead.

The questions, however, are not new ones.

Although the much-publicized U-2 plane incident has probably served to dramatize the issue, the problem of a legal regime of space is one which legal circles have been discussing for some time.

U.S. Violation Seen

In fact, the one clear legal question involved in the U-2 flight—the alleged United States violation of Soviet air space—already appears to be obsolescent. Legal consensus regarding the question seems unanimous.

"Without exception," says a professor at the Harvard Law School, "we would say the United States violated international law in flying the U-2 over the Soviet Union."

If the matter were referred to an international tribunal, comments Roger Fisher, lecturer on law, "we would get an adverse decision."

Professor Fisher explains that legal precedent for such a decision lies in a long series of mutually tolerated acts and implicit agreements among nations which by now have hardened into customary law.

As far back as the Paris convention of 1919, states in the international community were arriving at the conclusion that every power has complete and exclusive sovereignty over the air space above its territory.

"One legal writer even asserted

that such sovereignty reaches "to an unlimited height."

The Convention on International Civil Aviation, signed at Chicago in 1944—which many consider the "basic text" of the legal status of air space—made little if any change in the stipulations of the Paris convention.

In fact, annexes to both conventions, as Professor Fisher points out, defined aircraft as "machines which can derive support in the atmosphere from reactions of the air."

Coming in an era when Sputniks, satellites, and other man-made spacecraft were but wild dreams of scientists, the Chicago convention made no effort to distinguish between air space and outer space. Indeed, there was no need to.

Present-day rereading of the Chicago convention, therefore, assumes that air space—in the absence of a clear definition—designates those parts of the atmosphere where the gaseous air is sufficiently dense to support airplanes and balloons.

It further assumes national air sovereignty to be limited to those areas.

First Sputnik Launched

It was, of course, the electrifying launching of the first sputnik on Oct. 4, 1957, that shocked international lawyers into a serious study of the distinction between air space and outer space.

Previously, however, developments on the international scene had given them some direction for their deliberations.

In 1956, the United States, followed shortly by the Soviet Union, announced programs of planned satellite flights in conjunction with the International Geophysical Year.

Neither nation, however, Professor Fisher comments, felt it necessary to ask formal permission of other countries in order to place the proposed satellites

into orbit—orbits which would pass over the territory of these other countries.

And no country recorded objections to these planned flights.

"If, on the first flight, someone had protested," says Professor Fisher, "that would have been one question."

In the absence of any protest, says the professor, "one can say that there is worldwide recognition that it is not a violation of law to send scientific satellites up in the air."

A well-known expert on international air law, Prof. John C. Cooper of McGill University, Montreal, has put the matter succinctly. In an address delivered in November, 1957, he declared:

"International conduct since the satellite flights were first announced is consistent with no theory other than the acceptance of the principle that 'outer space' is not part of the territory of any state and may be used by all states as freely as the high seas are now used for surface shipping."

The task for international law for some time has been to define the boundary between territorial air space and universal outer space. The urgency of the task, of course, has been heightened by the recent launching of the United States' Midas early warning satellite and continued testing of other military satellites.

Where to Draw Line?

But how and where to draw the line?

Legal thinking has offered several proposals.

Some legal writers have suggested basing an arbitrary horizontal boundary on a supposed physical constant, such as "the point where the earth's gravitational effect ceases."

Others have sought to determine the height at which there ceases to be enough air to support aircraft.

Still others have talked in terms of the actual physical control which any nation can exert over space. In other words, the top limit of air space would be the greatest height at which any national can effectively control space due to its scientific and technological progress.

The difficulty of dividing space into fixed boundaries, Professor Fisher says, has forced many legalists to turn from the question of physical boundaries to that of activities.

The approach itself runs into the necessity of delicate judgments. For it would require lawyers to distinguish "peaceful" or "scientific" satellite ventures from "military" ones.

Complexity Increases

The assumption is that the former would be legal. On the other hand, as Professor Fisher puts it, "no matter how high up it is, a satellite using your territory for military purposes would be deemed in violation of international law."

The complexity of the scientific-military criterion is immeasurably increased by what some writers have termed "the extraordinary interdependence of scientific, military, commercial, and other objectives that may be advanced by the same activities in space."

These writers are apprehensive lest prohibitions against military space activities also hamper activities of more constructive aim.

The whole discussion of a possible legal regime of space is so complex, Professor Fisher says, that "the real question may be whether we know enough about the situation to be able to make any durable decision."

"Will we, instead, stir up needless rules?"

Specific Issues Kept

"The big question," he goes on, "is not what the law ought to be but how that law ought to be developed—not how high is up but how you decide how high is up."

Law has always developed best by practice, Professor Fisher continues. It is therefore to the specific issues which may come up that we must turn for a definitive law of outer space.

In the meantime, Professor Fisher says, "the vague line works better than a clear line." By keeping the legalities of space purposely vague, the international community may best succeed in imposing a law of self-limitation on its members.