LEGAL REGULATION OF SPACE ACTIVITIES: WHICH WAY WILL IT ADVANCE FURTHER?+

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Abstract

Public international law should continue to play a leading role in the regulation of space activities. However, another movement has manifested itself clearly alongside of that. This is the development of national legislation in the space field which has been called forth to a considerable degree by the commercial uses of space technology. The growth and diversification of special national and international rules in this area, pertaining to civil law relationships with "foreign elements," bear witness to the gradual formation of private international space law. Despite the great desirability of ensuring the unification of national laws governing space activities, such a unification cannot be ensured in practice by elaborating an artificial "transnational space law." The unification must be ensured by: (1) bringing national legislation into conformity with international law, (2) concluding new international agreements, including those of unificatory character, (3) giving due consideration to the interests of other states when elaborating and passing national legislation and (4) using the institution of international consultations for this purpose.

1. New Tendencies in the Legal Regulation of Space Activities

At the early stages of outer space exploration, states, or more precisely state's entities, were the only actors in outer space. The reason for this could be explained by the exceptionally high cost of space rocketry and technology, their close connection with defense, political and economic interests of states, as well as by the uncertainty of using commercially the achievements of outer space exploration. Hence, space law has been formed, primarily, as interstate law governing relations among states as sovereign entities in connection with their space activities.

It must be assumed that some of the above-mentioned factors, determining mainly the "state" character of national and international space activities, will remain important in the immediate future as well. This means that public international space law will continue to develop actively. Issues included in the agenda of the Legal Sub-Committee of the

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U.N. Committee on Peaceful Uses of Outer Space, revealing a number of complex, unresolved problems of international space law, bear witness to this tendency.

At the same time, in the recent years, another movement has clearly manifested itself in the development of legal regulation of space activities - the appearance of national legislation in the field of outer space. This national legislation is connected mainly with the growth of commercialization of space activities and the entry into the "space arena" of new actors: private organizations, firms, and companies. Such legislation has already been passed in the USA, the United Kingdom and Sweden. They are also under consideration in a number of other countries.[1]

The necessity of adopting national laws is dictated, of course, not only by the requirements of commercial uses of space rocketry and technology. The broad development and diversity of space activities in many countries must be accompanied by relevant national legal regulations which will affect many branches of domestic law, including those of constitutional, administrative, civil, criminal, and labor law as well as others.

The study of existing legal rules and the elaboration of new ones pertaining to personal property and personal non-property relations "with foreign elements" in them which have relevance to space activities, that is the sphere of legal regulation which traditionally comprises the subject of private international law, is of great interest.

The scientific and practical importance of these matters is explained by the evolution of space activities taking place before our eyes and is evident from the evolution of purely research tasks toward an ever widening economic use of space technology and the formation of an international market of space technology and services. At the same time, international cooperation which is developing on a broad scale in the field of exploration and use of outer space also requires an improvement of its juridical mechanism.

The rendering of "paid" services in launching spacecraft into orbit, the allocating of telephone and television communication channels via artificial earth satellites, the selling of data acquired by remote sensing of the earth, the conducting of works in the field of space processing, and other kinds of space activities are inevitably connected with the necessity of solving a number of private law issues so long as their conduct on an international basis takes place with the participation on one, or on both sides of natural or legal persons. This is so because the performance of such works requires the conclusion of civil contracts, the establishment of a procedure for settling disputes through courts or arbitration and also demands the solution of issues of property, insurance, copyright, and patent rights.

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1. Regretfully, there is no national law on space activities in the Soviet Union.

Many of these matters are being solved through choice of law rules or by reference to relevant rules of international agreements. This bears testimony to the fact that in spite of earlier expressed opinions on the inapplicability of private international law to space activities,[2] the latter already operates in an active manner in regulating such activities.

2. *International Private Space Law and "Space Law in a Broad Sense"*

The question arises as to what should be understood by "private international space law" and whether it is possible to say that such a body of law is already being formed.

Without undertaking the task of theoretically attempting to solve a debatable issue on the subject and system of private international law, but still considering the question raised, we proceed from the provisions universally recognized in the doctrine that international private law regulates property, and (related) personal non-property, relations with a "foreign element," arising not between states as sovereign entities, but between natural and legal persons.

If such relations arise in connection with space activities, they can be related, rather conditionally, to the sphere regulated by private international space law. At present, the degree of this conditionality is very high inasmuch as there has neither been a universally recognized definition of space activities nor a substantially large volume of national legislative rules adopted independently or by virtue of international treaties on unification specific to civil space law relations.

However, a clear tendency has become evident toward a quantitative growth of such special rules dictated primarily by requirements of the development of commercial space exploration. In particular, this has manifested itself in the field of space insurance in view of the exceptionally high risk associated with the operation of space technology and the specifics of relations between the insurer and the insured. Special solutions have been called for by matters relating to the protection of copyright and "neighbouring" rights when using Earth satellites for direct television broadcasting, as well as by the necessity of protecting patent rights on inventions resulting from direct activities in outer space. A complex set of specific legal issues arises in connection with the liability of manufacturers of space technology. A task has been set in the literature to elaborate international agreements unifying legal regulations governing space activities, in particular, as applied to the unification of contracts dealing with the launching of space objects.[3]

International agreements on outer space currently in force already have specific rules pertaining to private international law. For example,

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2. *See* Kolossov, *On the Problem of Private Commercial Activities in Outer Space*, 27 PROC. COLLOQ. L. OUTER SPACE 66 (1984).

3. Dann, *Future Role of Municipal Law in Regulating Space Related Activities* in SPACE LAW: VIEWS FOR THE FUTURE 132 (Zwaan & others ed. 1988).

the provision of article VIII of the Outer Space Treaty[4] states that "ownership of objects launched into outer space, including objects landed or constructed on a celestial body, and of their component parts, is not affected by their presence in outer space or on a celestial body or by their return to the earth." This rule is directed at the settlement of disputes concerning ownership of space objects and their component parts in the event of the presence of these objects and their component parts on a foreign territory or in spaces beyond the jurisdiction of a state. States and legal persons, as well asphysical persons, can be the owners.

With the development of production activities in outer space, what will be the situation in the not too distant future? Everything seems to indicate that not only matters of industrial and intellectual property, but also matters of labor law and liability for damage caused to spacemen in the course of production activities in outer space, will require special regulation.

The quantitative growth and diversification in national legislation of special rules and unified rules of international treaties pertaining to civil law relations with a "foreign element," brought about by constantly developing international regulations in the field of space activities will gradually lead to the formation of private international space law which will coexist with the private international law of the sea, private international air law, and so on.

We stress the tentative nature of this terminology inasmuch as the division of private international law, in the doctrine, into branches, subbranches, or special independent sections is far from being universally recognized. Thus, the subject matter and system of this law, as it has been mentioned above, remains to be the topic of scientific discussions.[5]

However, there is no doubt that a combined study of private international law pertaining to space activities of natural and legal persons is not only of cognitive significance but also of exceptional importance to the practice as well.

For the same reasons (scientific, educational, and practical), in connection with the combined study of legal regulations pertaining, for instance, to commercial activities in outer space, we may go beyond the limits of private international space law and include relevant rules of public international space law into the scope of these studies. In this context, we can speak of space law in broad terms, encompassing both international and national regulations. However, we must not forget that, in reality, the corresponding rules of this artificially construed space law "live" either in acts of national legislation or in international treaties and

4. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

5. *See* PROBLEMS OF CONTEMPORARY INTERNATIONAL PRIVATE LAW (M.M. Boguslavsky ed., Moscow 1988).

customs. In addition, this system does not form an organic unity, a single totality of rules.

Therefore, it is hardly possible to agree with the statements of a number of authors on the necessity to proceed from the unity of space law or on the possibility of creating an "integrated space legal system," including both international and national legal rules.[6]

In our view, the notion that the term space law "is purely a functional one used to describe the sum of all legal rules (whatever their source), which are applicable to space related activities"[7] is a more correct opinion.

3. "Transnational Space Law:" Is Its Creation Possible?

Let us discuss in greater detail Prof. H. DeSaussure's proposal regarding the elaboration of "transnational space law." He has discussed this proposal in a number of works and presented it in the greatest detail in the report at a previous colloquium on the Law of Outer Space.[8]

Prof. H. DeSaussure believes that the "new era" of the space age, which he relates, first, to commercialization and privatization of space activities, requires the development of a "unique and special law," a new *corpus juris*.[9]

It follows from the title of the report and the analysis of the possible sources of future space law given in it, that Prof. H. DeSaussure believes transnational law to be the basis for this new law. According to the definition of adherents to this concept such law includes "all the law - national, international or mixed - that applies to all actors that perform or have influence across state lines."[10] While recognizing the vagueness of the notion of transnational law, Prof. H. DeSaussure, nevertheless, thinks that it has "relevance in establishing an extraterrestrial regime."[11] As to the content of future transnational space law, he also attaches special significance to the use of an analogy to the present law of the sea, which he considers as an independent branch of law that "embraces segments of both

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6. *See* Dutheil de la Rochere, *Les sources du droit de l'espace, in* DROIT DE L'ESPACE 11 (1988); DeSaussure, *An Integrated Legal System for Space*, 6 J. SPACE L. 253 (1978).
7. Dann, *supra* note 3, at 125.
8. DeSaussure, *The Unification and Development of Transnational Space Law*, 31 PROC. COLLOQ. L. OUTER SPACE 253 (1989).
9. *Id.* at 253. It is interesting to note that at the same Colloquium on the Law of Outer Space another U.S. author presented a report which denied at all the need for space law. He writes: "There is simply no need for a unique 'space law'" and then: "each nation must rely solely on its own domestic law."*See* Dribin, *What Space Law Will Govern Accidents and Breaches of Contracts in Outer Space? Id.* at 166, 167.
10. DeSaussure, *supra* note 8, at 257.
11. *Id.* at 257.

public and private law and regulates commercial as well as governmental activities."[12]

At the same time, Prof. H. DeSaussure thinks that international law cannot play a leading role as a source of future "transnational space law." To substantiate this thesis, he refers to the premise that international law regulates only governmental functions of states which do not include commercial activities of governments and private persons. He also notes that international law is based on the principle of state sovereignty over the territory; he believes this to be inapplicable to outer space.[13] Finally, he stresses that in a number of countries, in particular the U.S.A. and the U.K., in the event of a conflict between rules of international and national law, the latter could prevail.[14]

Prof. H. DeSaussure proposes a mechanism for the elaboration of a new space law - a Space Law Commission of the U.N. General Assembly, set up in a fashion similar to the U.N. International Law Commission, from among the most well-known specialists, appointed on a personal basis which would ensure work "from a universal rather than a state centred viewpoint."[15] He thinks that the U.N. Committee on Peaceful Uses of Outer Space or an International Space Agency, proposed by a number of states, is unsuitable for this work.[16]

The report by Prof. H. DeSaussure raises issues of principal importance for the future regulation of space activities and contains a number of interesting and useful considerations and remarks.

In particular, one cannot disagree with the author's statement that "there must be some international or universal consistency in the enactment and application of national law."[17] He notes quite correctly that "[i]ndividualistic and unrestrained extension of domestic law into outer space will fragment the legal order. Instead of outer space unification, there will be disarray and confusion."[18] He stresses that "[s]tates must legislate for their national programs with due regard for the interests and programs of other states."[19] In this connection, Prof. H. DeSaussure makes an interesting proposition that, in order to consolidate international law and order in outer space, national laws should be applicable to outer space only "after international consultation and approval."[20]

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12. *Id.* at 255.
13. *Id.* at 257.
14. *Id.*
15. *Id.* at 258.
16. *Id.*
17. *Id.* at 257.
18. DeSaussure, *The Interaction of Domestic and International Law*, 30 PROC. COLLOQ. L. OUTER SPACE 295 (1989).
19. *Id.* (Emphasis added by original author, Prof. H. DeSaussure).
20. *Id.*

The crucial question is whether a unified or integrated legal system for space activities is possible. If so, what should it be and how can it be created. Although Prof. DeSaussure puts the time frame for the creation of this system beyond the end of the twentieth century,[21] the present state of legal development in the world provides no ground for optimism on that account.

In essence, it is a matter of unifying into a single body already existing legal rules (international and national) related to space activities, by giving them legally binding force for all actors in outer space. It is also a matter of elaborating a mechanism for the development, adoption, and enforcement of future rules governing any space activity which would be binding on national and international levels. This proposition, however attractive it might seem, raises a multitude of issues to which we have no answers at this time. The most important issue is what should be the mechanism for the elaboration and enforcement of the law, encompassing the totality of present and future national laws and international agreements.

The reference to the precedent of the law of the sea does not sound convincing. From the viewpoint of a majority of states, it is not considered to be transnational law. As in other similar fields of legal regulation (air, outer space, environment, etc.), it belongs to the corresponding branches of national and international law.

4. *How Is the Unification of National Legislation in the Field of Space Activities to Be Ensured?*

As mentioned earlier, from scientific, cognitive, and educational viewpoints, a combined comprehensive study of international and national legal rules, pertaining to a sphere of regulation or a region, seems to be useful and fruitful. In this sense, the notion of transnational law, at this time of the growing interdependence and integrity of the world, is worthy of further study. However, study is one thing, law-making and law-enforcement is another, when they relate simultaneously both to the domestic and international spheres. Who will have authority to act as a legislator, even if these rules are elaborated by the U.N. Space Law Commission as proposed by Prof. H. DeSaussure? How can universal acceptance and action of such rules be ensured?

By thinking in categories of today's state of legal development, it is more realistic to proceed from the assumption that the unification of national laws in the field of space activities must be ensured by: (1) bringing national legislation into full conformity with the international obligations of a state, (2) actively developing new international agreements, including those which would unify national legislative rules, (3) paying due regard to the interests of other states when elaborating and adopting

21. DeSaussure, *supra* note 8, at 253.

national legislation on outer space, and, (4) using for that purpose the procedure of international consultations.

At the same time, we presume that public international law must play, as it has before, the leading role in the regulation of space activities. We must not forget that agreements, unifying matters of international private law, be they uniform substantive law rules or conflict of law rules, are also concluded between states, that is to say, they also relate to public international law. In all areas, including the field of space activities, it is necessary to assert the primacy of international law over domestic legislation. This is becoming more and more the imperative of contemporary international life. If we do not succeed in obtaining the universal recognition of the primacy of international law over domestic law, where is the guarantee that transnational law in this respect will have a better destiny? If transnational law is understood as a simple sum of existing international law and national legal systems, what innovations will it bring to the unification of regulation of space activities?