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Space and the Law

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While technology is striving to make the conquest of Space a splendid reality, our sense of normative order has promoted extensive discussions as to the legal implications of our leap into the cosmos. So lively have the deliberations of lawyers become, they induce an eminent scholar, Myres S. McDougal, to observe wryly: "The conquest of Space has barely begun. Yet the law of Space, instead of lagging behind as some lawyers fear, is threatening to outfly the attraction of the Earth's gravity."

To be sure, "the law of Space" has yet to come. At present it is largely confined to theory and speculation motivated by a sense of urgency rarely demonstrated by international jurists. Why our venture into Space should fill distinguished lawyers with a feeling that the legal determination of the status of Space is so pressing a problem is indeed a question worth examining.

Since the launching of Sputnik I, the power struggle raging on the surface of our planet is threatening to expand into our cosmic environment on the heels of scientific progress. As out of date as it may sound, we are presented with the ominous prospect of Space becoming an arena for political conflicts filled with dangers of unprecedented dimensions. Comparably with the discovery of the lethal capabilities of nuclear energy, the conquest of Space may present mankind with the fateful choice between tremendous progress on one hand, and its obliteration from the face of Earth on the other. The romanticists among us might shudder at the idea of the Moon becoming an object of controversy between nations, but such a prospect is indeed conceivable, with possible consequences far removed from the realm of abstract discussion.

To forestall these dangers, voices have been raised demanding an early international agreement on the status of Space, barring its exploitation for warlike purposes. Whatever rights states may claim in Space, it is imperative that its use be restricted to peaceful aims. Surely we cannot afford to be merely legalistic in so vital a matter; whatever sovereignty is asserted in Space, it must be subjected to this qualification.

In spite of international agreement, does the law of nations in its present form provide us with answers relevant to Space? Some lawyers advance the proposition that the first Space law doctrine has already been laid down by the practice of states. They argue that the fact that no single state has protested against the orbiting of satellites over its territory constitutes tacit agreement to the principle that Space may not be made an object of national acquisition. The validity of such a deduction is indeed questionable. We cannot ignore the fact that the Sputniks and Explorers launched thus far are national enterprises undertaken under the IGY program, and states may interpret their tacit agreement as of a nature limited to activities under this program. Furthermore, though the origin of doctrines of international law is possible in this manner, it is far more profitable, in an area as important as Space, to have a positive and express agreement on the subject.

The lack of explicit law regarding Space suggests a turn to analogies. Two areas of international law readily lend themselves to analogy: namely, the law of the air and the

law of the sea. We should, however, bear in mind that analogies serve only as indications of possible legal solutions without, in themselves, determining the law.

The latest restatement of the status of the air is embodied in the Convention on International Civil Aviation of 1944 (the Chicago Convention). Article 1 of this Convention reads: ". . . every state has complete and exclusive sovereignty over the airspace above its territory." We have no definition of the term "airspace" or any indication as to where it ends and Space "proper" begins. By no measure of interpretation may we say that this article applies to Space as well. That the framers of the convention did not have Space in mind when using the term "airspace" is a fact attested to by the eminent historian of air law, John C. Cooper, who served as chairman of the committee that drafted this article. The consensus of opinion is that "airspace" is the area in which aircraft fly. We can hardly consider movement in Space as flying, nor is a spacecraft the equivalent of an aircraft. While it is commonly accepted that the Chicago convention does not apply to Space, it remains to be seen whether we can draw an analogy from the status of "airspace" for the purpose of determining the status of Space. Should Space above states be considered part and parcel of the national domain, then sovereignty would extend upwards indefinitely. The difficulties inherent in such a concept of the national domain are practically insurmountable. For one thing, the rotation of our planet places, at various times, different portions of Space over a given territory. For another, it would be impossible to determine borders in Space and decide when a violation of "national Space" occurs.

The status of the high seas offers a more workable analogy. The high seas, for example, are open to all nations with no single state legally entitled to proprietary rights beyond its territorial waters. This concept is steadily gaining ground in the deliberations concerning the status of Space. The secretary general of the United Nations voiced a popular opinion when advocating last May that outer Space be accorded the same status as that of the high seas and that nations renounce any claims to it. The National Council of the Federation of American Scientists expressed similar sentiments, saying that "it would be tragic if the challenging task of Space exploration were carried on in the competitive nationalistic pattern under which it has begun."

Those objecting to the concept of Space devoid of national control argue that security considerations necessitate that states have exclusive jurisdiction in Space above their territory. It is pointed out that Space may be used for military aims even during peace time for such purposes as reconnaissance and the monitoring of radio communications. We have noted the physical difficulties in exercising such jurisdiction. Furthermore, whether alleged security considerations outweigh the advantages to be derived from a free and internationally controlled Space is highly questionable. Should arguments in the name of national security be motive for the determination of the legal status of Space, why should we not apply it first to the high seas? It is submitted that the high seas infested with missile-firing vessels pose as real a threat to the territories of nations as Space. Admittedly, the status of the high seas was established long before the introduction of modern missiles and it would be difficult to reverse time-tested, customary law. All in all, the argument that free Space may become a menace to states only underscores the demand that its free status should exclude its use for military ends.

The destructive capability of today's weapons makes it imperative that Space be an area of peaceful activities. Freedom of Space must also be freedom from fear of an attack from Space or its abuse. Accordingly, any international agreement on the status of Space should include a pledge by all nations to this effect.

Professor Cooper, in an attempt to compromise the two extreme views of open and restricted Space, suggests the adoption of concepts of territorial sea and contiguous zones in determining the status of Space. These suggestions amount to a vertical division of Space whereby, above a certain height, it would be open to the vehicles of all nations. An intermediate zone would assume a status similar to that of the territorial waters with the right of "innocent passage" used freely.

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