

ПОВІТРЯНЕ, КОСМІЧНЕ, ЕКОЛОГІЧНЕ ПРАВО

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HISTORICAL ASPECTS AND OVERVIEW OF LEGAL UNDERSTANDING OF AIRSPACE SOVEREIGNTY CONCEPT

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Goal: define different ideas of the concept of "sovereignty in aviation space" and consider the stages of development of the concept of airspace sovereignty in the context of the airspace bordering the territory of the state. **Research methods:** documentary analysis and synthesis, comparative analysis, cognitive and analytical, as well as methods of systematization and generalizations. **Results:** the analysis of legal acts of international significance in the field of aviation law, which determined the modern understanding of the concept of sovereignty in airspace, was carried out. **Discussion:** deep analysis made it possible to determine that the official recognition of airspace sovereignty under international law gave all states the right to establish rules and exercise sovereign control of any power over their sovereign airspace.

Key words: international agreements; sovereignty; aviation history; supranationalism.

Statement of the problem and its relevance.

Studying the historical development of concepts to interpret the essence and legal nature of airspace sovereignty is necessary for understanding the principles of aviation regulation, protection of passenger rights, ensuring aviation safety, prosecution for aviation accidents, etc. On this basis, the historical aspects of development also determine the current and future trends in the development of this concept in aviation.

Analysis of research and publications on the problem. The first theory protected the freedom of the air above a certain altitude, and the airspace below that altitude is the 'territorial air' of the respective state (e.g. Nys) [1, p. 24]. This approach embodied both extremes at the same time: absolute

airspace sovereignty and absolute freedom of the air. The second theory followed the functionalist approach of limited sovereignty, according to which there was absolute sovereignty over the adjacent airspace depending on the type of aircraft or the use of the airspace by other states. So, for example, a state can claim sovereignty over adjacent airspace to prevent the passage of military aircraft, but not civilian ones (e.g. Balwin, Collard, Westake) [2, p. 270].

The purpose of the article is to define different ideas of the concept of "sovereignty in aviation space" and consider the stages of development of the concept of airspace sovereignty in the context of the airspace bordering the territory of the state.

Main material.

A. Early attempts to regulate the aviation sector

When we, as passengers, fly in an airplane from the porthole we do not see borders on the ground, nor do we see them in the sky. God created Earth for peaceful human use for the benefit of all. However, in order to ensure the safety and security, to establish certainty in borders and due to development of technical capabilities of the aviation industry, humanity has begun to establish rules, objective standards and principles, based on the peace-making nature.

The need to regulate the movement of vehicles and other flying objects in the air arose with their appearance and influence to the society and environment.

1. First regulatory acts regulating aircraft flights

The history of mankind's conquest of the air-space still causes numerous disputes, but the date of the beginning of the era of air navigation is not in doubt among most researchers. It is an undisputed fact that on June 5, 1783, in the city of Annona (France), the brothers Joseph and Etienne Montgolfier made a public launch of the flying device they invented, which they called a balloon. After some time, on September 19, 1783, a hot air balloon was launched over Versailles, named after the inventors 'Montgolfier', the first 'passengers' of which were a rooster, a duck and a sheep [1, p. 59]. And already on November 21, 1783, the balloon took off with passengers on board, who became representatives of the French aristocracy, Jean-Francois Pilatre de Rosier and the Marquis d'Arland, and made its famous flight lasting 20 minutes, which marked the opening of the era of air navigation [1, p. 61].

Thus, it is natural that the first regulatory acts regulating aircraft flights appeared in France. Exactly one year after the first flights, on April 23, 1784, the Paris police issued a decree that prohibited the use of balls heated by alcohol and other fire-hazardous substances. In addition, any flight had to be coordinated in the appropriate order [1, p. 82].

In 1786, a decree of Emperor Leopold II was issued, which provided for fines for aeronauts who violated the established order of flights, as well as the obligation to compensate for damages caused by balloons [1, p. 35].

A similar decree was issued in 1784 in the Russian empire by Empress Catherine II, which imposed a ban on balloon flights between March 1 and December 1 due to the danger of fires [2, p. 51]. By the way, this ban lasted until the beginning of the reign of Alexander the First, when, with the permission of the Emperor himself, foreigners began to show aeronautics [2, p. 175].

Studies in the field of public international civil aviation law regarding the development of the concept of sovereignty show, the sovereignty in aviation has a relatively strong military basis. Unfortunately, the beginning of the era of aviation was marked by the interest in the practical application of the achievements of technical progress in the military sphere, characteristic of all eras of our civilization.

Already in 1783, the military engineer Meunier submitted to the French Academy of Sciences the work 'On the use of the balloon for military purposes.' Attempts to use balloons in war were also made during the 19th century. The most famous of them is the attempt of the Austrians in 1849 during the siege of Venice to bombard the city. The attempt turned out to be unsuccessful, because the wind directed the bullets not at the besieged, but at the besiegers [3, p. 58].

In the following decades, aviation technology achieved 'new achievements' in the military sphere.

During the war of 1870–71, free-rising bullets were already widely used in France. During the period of time from the end of September 1870 to January 1871, 64 balloons flew out of besieged Paris, carrying 64 aeronauts, 91 passengers, 354 carrier pigeons and about three million letters in their baskets. Of these bullets, 56 more or less hit their target, two were lost at sea, one landed in Norway, and five were captured by German soldiers [4, p. 86].

This case was the impetus for the intensification of the collective efforts of representatives of various countries in the development of international legal norms related to the use of balloons during the war.

2. Diplomatic attempts to soften the severity of the use of aviation for military purposes

Undoubtedly, the first step in this direction is the Draft Declaration on the Laws and Customs of

Land War, developed as part of the Brussels Conference of 1874 [5, p. 21]. According to the provisions of Article 22 of the Project, ‘persons who are sent on balloons to transmit dispatches and in general to maintain communication between different parts of the army or territories’ [5, p. 24] should not be considered spies. Although, according to a number of lawyers, including A. Meyer, a representative of the German School of Air Law, such an article, based on a limited interpretation of ‘espionage’, was not formulated by the authors of the Project [6, p. 1445-1446].

Later, the Hague Conference of 1899 supplemented the Regulations on the Laws and Customs of Land War with a corresponding clause, which proposed the following: ‘the contracting states agree to prohibit, for a period of 5 years, the throwing of shells and explosive substances from aircraft or by other similar methods.’ [7, p. 205]. This rather ‘soft’ offered to limit the ‘combat use of balloons’ caused a number of disputes during the second Hague Conference in 1907 and was not enshrined in Art. 25 of the Declaration [6, p. 211].

Based on this fact, some aspects of German law seem interesting. Thus, according to a special government decree dated 03.05.1909, new norms were defined regarding both the general liability of the aircraft owner in accordance with § 276 of the German Code, and the liability for damage caused to a third party, in accordance with § 823 of the German Code. This resolution established following limits of liability of the aircraft owner: a) in case of death or maiming of several persons, the maximum amount of payments was 500,000 marks (however, no more than 200,000 marks for each victim); b) in the case of property damage, the maximum amount of compensation was 30,000 marks [6, p. 1450-1452].

Subsequently, a number of legislative acts in the aviation sphere appeared in various parts of Germany. Thus, in Prussia in the period from 1910 to 1913, several by-laws were adopted, in particular the order of the Prussian Ministry of the Interior and Public Works on prohibited zones, on permission for air traffic, on the inspection of aircraft and on the examination of aircraft pilots. In October 1911, a special order of the Ministry of the Interior was adopted in Bavaria on prohibited zones and

permission for air traffic. In Saxony, in 1913, the Law on Compulsory Expropriation of Land, necessary for the construction of ground structures that would provide air traffic, was adopted [2, p. 96].

B. Development of airspace sovereignty concept

Understanding of aviation regulation principles functioning must begin with exploring of historical development of the concepts to the interpretation of essence and legal nature of airspace. On this basis, the historical aspects of the development also determine the current and future trends in the development of this concept in aviation. So, we are talking about, firstly, the organization and regrouping of powers within the sovereign state, an example of which is the distribution of powers and jurisdiction in the Kingdom of the Netherlands; and secondly, the transfer of national jurisdiction and authority to supranational organizations, firstly in a regional context, also referred to as ‘supranationalism’ [8, p. 68].

However, let’s explore the essence of main concepts in aviation law, which provoked the diplomatic failure and determined the way of relations development. Three intermediate theories of airspace sovereignty arose before the First World War. In theory, the term ‘limited sovereignty’ is an oxymoron, since the very concept of sovereignty implies the full power of the state. Thus, the functionalist approach is more easily explained as absolute sovereignty over contiguous airspace with safe passage granted by a subordinate state to certain types of aircraft – a theory similar to the peaceful navigation of rivers that pass through sovereign territory. The third model combined both of the above-mentioned intermediate approaches. It provided for absolute sovereignty over the airspace above a state up to a certain altitude, and limited sovereignty over that altitude only to the extent necessary for the defense of the subject state. This approach was advocated by the Frenchman Paul Fauchill, a leading supporter of freedom of the air [5, p. 115]. Fauchill insisted on establishing an arbitrary boundary above the ground, above which there would be absolute freedom of the air. The limit he proposed was 330 meters, the height of the Eiffel Tower (300 meters) plus the maximum height of power transmission structures (30 meters). Thus, Fauchille (1901) and the Institut de Droit International (1911) held that -

in accordance with the principle of freedom of the seas - the global air is the common property of all humans [1, p. 156]. However, the notion that the high seas border the surface of sovereign territory, while airspace is above the surface of sovereign territory, must be reviewed. This, certainly, affects the security and safety interests of the countries which are under such airspace.

In 1910, various states met at the International Conference on Aeronautics, which was held to try to define airspace sovereignty in international law [9, p. 78]. The conference did not achieve its goals, although it highlighted different approaches to different 'air regimes'. Great Britain and its supporters at the conference believed that sovereignty over airspace extends *usque ad coelum* (the definition *usque ad coelum* ('up to the heavens') refers to the rule of law according to which the owner of the land owns the air space above it indefinitely upwards). and the state is not obliged to treat foreign and national aircraft on equal terms. This view is probably the result of the long struggle of Great Britain for supremacy over the seas. Since security issues were paramount to the British, the creation of new security risks through the free transit of foreign aircraft in British airspace did not encourage the British to support any air freedom approach [10, p. 217]. On the other hand, France advocated a limited sovereignty, according to which the state could only introduce certain rules that would protect its interests. France began to dominate the development of the art of flight at the time, and from its dominant role in aviation, the theory of freedom of the air probably contributed to the development. Although the 1910 conference ended without a firm agreement, there was general agreement that there is a certain limit airspace sovereignty adjacent to national territory [11, p. 146]. This debate over airspace sovereignty changed fundamentally with the outbreak of the First World War.

The development of concepts of airspace sovereignty in relation to airspace bordering state territory included three different ideas: airspace as private property, airspace as *res communes* (*Res Communes* refers to things used and enjoyed by everyone that can never be exclusively acquired as a whole) or *res nullius* (Conversely to *res communes*, in Roman law, *res nullius* refers to property that be-

longs to no one and which is not susceptible to private ownership) and airspace as state property. The first of these relates to concepts related to the private ownership of ultra-clean airspace by private property subjects in comparison to other private property owners and the state in which the property is located. Although today private air rights are secondary to issues of airspace sovereignty, such rights were a major issue in history before the advent of air transport.

The principle 'airspace as the property of the subjacent land owner' [11, p. 76] is based on the understanding of airspace as private property and includes: ownership is limited by the definition of navigable airspace, with navigable airspace defined by the state based on the nature of activities occurring on the land below.

Conception of airspace as *res communes*, namely, as common property belonging to all, arose from the inability of states to appropriate airspace and exclude other states from its use - a concept identical to the concept of seas as *res communes*.

The impossibility of reaching an agreement on the legal status of airspace and political collapse were main reasons of the failure in 1910.

Therefore, the first diplomatic conference to consider the regulation of flights met in Paris on May 10, 1910, and adjourned on June 29, 1910, without signing the convention. Those who attended the conference were divided between the concept of freedom in the air (similar to that of the sea) and the concept of national sovereignty that extends to international airspace [10, p. 189].

C. Further development of airspace sovereignty concepts after World War I

After the First World War, the custom of states declaring absolute sovereignty in airspace became an international norm. The application of this custom as international law corresponded to the 'pure theory of law', which postulated that the main norm of international law is international legal custom. 'In this context, the philosophy of air law [was based] on the concept of airspace sovereignty and will retain its credibility through this universally recognized concept' until something changes the international norm [11, p. 15-16]. After the First World War, there were several attempts by interna-

tional agreement to change this international norm through various legal regimes.

1. *The Paris Convention of 1919*

Convention Relating to the Regulation of Aerial Navigation - CINA (*Commission Internationale de navigation aérienne*) signed Paris in 1919 and upheld the principle of (national) sovereignty of the air [12, p. 23].

Hence, almost twenty years of debate over territorial airspace culminated in the official recognition under Article 1 of the treaty which stipulated 'each State has full and exclusive sovereignty over the airspace over its territory' [12, p. 1]. The use of the word 'recognize' means that international norms or customs, as evidence, arose before the Paris Convention, and that 'sovereignty over airspace was a customary principle of international law that existed separately from the Convention and did not arise through the Convention [13, p. 58]. This formal recognition of airspace sovereignty under international law gave all states the right to set rules and exercise sovereign control of any authority over its sovereign airspace.

'Freedom of the air' was rejected as something which does not correspond to the interests of states: military actions during the First World War showed its incompatibility with political, economic and military realities [13, p. 95].

Having decided on the main and fundamental issue - who disposes of the sovereign airspace, the states - participants of the Paris Convention of 1919 did not seek to make its provisions acceptable because they did not participate in its acceptance by the states. Thus, according to Art. 5 of the Convention, only the participants of the Convention had the right to fly over the territories of the contracting states, while other countries were not granted this right [13, p. 4-5].

Many stakeholders were also not satisfied with the provision of Art. 35, which ensured the dominance of the victorious countries in the First World War in the International Air Navigation Commission, created in accordance with the Paris Convention and subordinated to the League of Nations [14, p. 32]. The commission was entrusted with the functions of making changes to the technical rules contained in the eight annexes to the Convention. By a majority of votes, the commission could make

decisions on controversial issues of interpretation of technical rules. In fact, these decisions were imposed on other participants of the Convention, which was the main reason for the unpopularity of the Paris Convention of 1919 for many states. Therefore, it could not take effect for a long time.

Despite its shortcomings, the Paris Convention of 1919 played a huge role in the establishment and development of international air law as an independent branch of international law.

First, the Paris Convention of 1919 marked the beginning of the general recognition of the principle of full and exclusive sovereignty over airspace, although supporters of 'freedom of the air' continued to prove the advantages of freedom of air movement throughout the 20s and 40s. Evidence of the legal authority of the principle of sovereignty over airspace was its consolidation in the 20s by almost all national air codes.

Secondly, the Paris Convention of 1919 caused an avalanche of national air laws, in which a certain place was devoted to the regulation of international air connections and transportation, although the capabilities of aviation at that time were very modest - to fly far and not very fast [2, p. 68-69].

In the course of technical development and improvement of aviation, the states began to conclude the first bilateral agreements on international air transportation of passengers, cargo and mail in the 20s of the 20th century. It is noteworthy that in such agreements reference was made to the principle of sovereignty over airspace, the need to obtain a permit for international air transportation and to subject arriving foreign aircraft to the laws and regulations of the state that authorized the flight and transportation to its territory was recognized.

Thus, the Paris Convention of 1919 created young national air legislation and was the first bilateral agreements on air traffic in the 20s and 30s. XX century outlined the directions of legal regulation that continue to exist at the present time.

2. *Ibero-American and Havana Conventions*

Another attempt at international legal regulation of civil aviation was initiated in 1926 by Spain and was motivated by Spain's political ambitions and rivalry with the League of Nations and ICAN. In October 1926, Spain invited all Latin American countries to the 'Ibero-American Aviation Con-

gress', which met in Madrid on October 25-30, 1926, and adopted the Ibero-American Aeronautical Convention, commonly referred to as the Madrid Convention of 1926 [2, p. 12-14]. CIANA (Convencion Ibero-Americana de Navegacion Aerea) never entered into force and was only the result of the political position of Spain, which was trying to assert its leadership in Latin America.

Next attempt to codify air law on a regional basis was made by the Commercial Aviation Commission of the Pan American Union. The Convention was adopted at the Sixth Pan-American Conference in Havana on January 20, 1928 and was known as the Convention on Commercial Aviation - the Havana Convention of 1928 [5, p. 69]. It differs significantly from the Paris 1919 and Madrid 1926 conventions, which dealt with the technical and operational aspects of aviation and left the establishment of international routes and the granting of carriage rights to specific bilateral or multilateral negotiations. The Havana Convention interpreted the rights of carriage in the most liberal way and provided that an aircraft of a Contracting State should be allowed to disembark passengers and cargo at any airport - authorized as a port of entry - in any other Contracting State, and also to receive in respect of passengers and goods destined for any other Contracting State [2, p. 208]. The Convention is no longer in force, but its liberal attitude towards traffic rights still inspires advocates of 'open skies' and free competition for air transport services in a borderless world.

Conclusions. The 20th century was marked by the rapid development of the aviation industry, and, accordingly, international air law as a branch of international public law, the principles and norms of which regulate the legal status of airspace and the modes of its use for the purpose of navigation.

The need to regulate the movement of vehicles and other flying objects in the air arose with their appearance and influence to the society and environment.

The development of concepts of airspace sovereignty in relation to airspace bordering state territory included three different ideas: airspace as private property, airspace as *res communes* or *res nullius* and airspace as state property. The first of these relates to concepts related to the private ownership of

ultra-clean airspace by private property subjects in comparison to other private property owners and the state in which the property is located. Although today private air rights are secondary to issues of airspace sovereignty, such rights were a major issue in history before the advent of air transport.

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Hence, almost twenty years of debate over territorial airspace culminated in the official recognition under Article 1 of the Convention Relating to the Regulation of Aerial Navigation - CINA (*Commission Internationale de navigation aerienne*) signed Paris in 1919 and upheld the principle of (national) sovereignty of the air which stipulated 'each State has full and exclusive sovereignty over the airspace over its territory'. The use of the word 'recognize' means that international norms or customs, as evidence, arose before the Paris Convention, and that 'sovereignty over airspace was a customary principle of international law that existed separately from the Convention and did not arise through the Convention. This formal recognition of airspace sovereignty under international law gave all states the right to set rules and exercise sovereign control of any authority over its sovereign airspace.

Next attempts to codify air law on a regional basis were made by Spain and all Latin American countries in the form of the 'Ibero-American Aviation Congress' and the Commercial Aviation Commission of the Pan American Union.

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ІСТОРИЧНІ АСПЕКТИ ПРАВОРОЗУМІННЯ ПОНЯТТЯ СУВЕРЕНІТЕТУ В ПОВІТРЯНОМУ ПРОСТОРИ

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Мета: визначити різні поняття «суверенітету в авіаційному просторі» та розглянути етапи розвитку поняття суверенітету повітряного простору в контексті повітряного простору, що межує з територією держави. **Методи дослідження:** документальний аналіз і синтез, порівняльний аналіз, пізнавально-аналітичний, а також методи систематизації та узагальнень. **Результати:** проведено аналіз нормативно-правових актів міжнародного значення в галузі авіаційного права, які визначили сучасне розуміння поняття суверенітету в повітряному просторі. **Обговорення:** глибокий аналіз дозволив визначити, що офіційне визнання суверенітету повітряного простору згідно з міжнародним правом дало всім державам право встановлювати правила та здійснювати суверенний контроль будь-якої влади над своїм суверенним повітряним простором.

XX століття ознаменувалося бурхливим розвитком авіаційної промисловості, а відповідно і міжнародного повітряного права як галузі міжнародного публічного права, принципи і норми якої регулюють правовий статус повітряного простору та режими його використання з метою навігації.

Необхідність регулювання руху транспортних засобів та інших літаючих об'єктів у повітрі виникла з їх появою та впливом на суспільство і навколишнє середовище.

Розвиток концепцій суверенітету повітряного простору щодо повітряного простору, що межує з державною територією, включав три різні ідеї: повітряний простір як приватна власність, повітряний простір як *res communes* або *res nullius* і повітряний простір як державна власність. Перша з них стосується концепцій, пов'язаних із приватною власністю суб'єктів приватної власності на надзвичайно чистий повітряний простір у порівнянні з іншими власниками приватної власності та державою, у якій розташована власність. Хоча сьогодні приватні права на авіаперевезення є другорядними щодо питань суверенітету повітряного простору, такі права були головною проблемою в історії до появи повітряного транспорту.

Принцип «повітряний простір як власність підлеглого власника землі» базується на розумінні повітряного простору як приватної власності та включає: власність, обмежена визначенням навігаційного повітряного простору, причому навігаційний повітряний простір визначається державою на основі характеру діяльності, що відбувається на землі внизу.

Ключові слова: міжнародні угоди; суверенітет; історія авіації; наднаціоналізм.

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