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TO THE QUESTION OF NOVELTIES OF THE INTERNATIONAL AIR LAW

Abstract. The International Air Law is one of the branches of international law, representing set of the international legal principles and norms, governing the relations between the states for implementation of the international air traffics. A subject of the international air law is the relations between the states, which concern the legal regime of airspace and the international air traffics. Air traffics between the states are regulated on the basis of the conventional principles of the International Law, the principles and norms, which are contained in the multilateral and bilateral agreements, concluded between various states. The International Civil Aviation Organization (ICAO) is the main international organization, which is carrying out the activity in the sphere of regulation of air traffics. The basic principle of the International air law is the principle of sovereignty of the state over the airspace, located over all its overland and water territory. This principle is enshrined in the Convention on the international civil aviation of 1944 and determines the content of other principles of the International Air Law, also the character and the features of the legal relationship, using airspace in the international air traffics. There are the basic principles of the International Air Law: 1) principle of safety of the international civil aviation; 2) the principle of free flights in the international airspace.

Key words: international air law, branch of law, international legal principles, norms of international law, international air traffic, legal regime of airspace, principles of international law, multilateral agreements, bilateral agreements, International Civil Aviation Organization.

Air Law, one of the branches of law, directly or indirectly concerned with the civil aviation. Aviation in this context extends to both heavier-than-air and lighter-than-air aircraft. Air-cushion vehicles are not regarded as aircraft by the International Civil Aviation Organization (ICAO), but the practice of individual states in this regard is not yet settled. The earliest legislation in air law was 1784 decree of the Paris police, forbidding balloon flights without a special permit.

Large part of air law is either International Law or International Uniform Law (rules of national law, international uniform). International Air Law is need an international agreement or an amendment for the states-sides if the treaty.

A basic principle of International Air Law is complete and exclusive sovereignty over the airspace above its territory, including sea territory. At the turn of the 20-th century the view that airspace, like the high seas, should be free, was changed. But the principle of airspace sovereignty was unequivocally affirmed in the Paris Convention on the Regulation of Aerial Navigation (1919) and subsequently by various other multilateral treaties. The principle is restated in the Chicago Convention on International Civil Aviation (1944). Airspace is now generally accepted as an appurtenance of the subjacent territory and shares the latter's legal status. Thus, under the Geneva Convention on the High Seas (1958) as well as under international customary law, the freedom of the high seas applies to aerial navigation as well as to maritime navigation. Vertically, airspace ends where outer space begins [1, P.17].

It follows from the principle of airspace sovereignty that every state is entitled to regulate the entry of foreign aircraft into its territory and that persons within its territory are the subjects of the laws. States normally permit foreign private (i.e., nongovernmental and noncommercial) aircraft to visit or fly through their territory without too much difficulty. Such aircraft registered in states that are sides to the 1944 Chicago Convention.

Commercial air transport is divided into scheduled air services and nonscheduled flights. Charter flights fall mostly, but not invariably, into the latter category. Under the Chicago Convention, contracting

states agree to permit aircraft registered in the other contracting states and engaged in commercial nonscheduled flights to fly into their territory without prior diplomatic permission and, moreover, to pick up and discharge passengers, cargo and mail [2, P.29].

The privilege of operating commercial services through or into the foreign country was entered in 1944, during Chicago conference, split into five so-called freedoms of the air. The first is the privilege is flying across the country nonstop; the second is flying across with the stop for technical purposes only. These two freedoms are also known as transit rights. A large number of ICAO members are the sides of the 1944 International Air Services Transit Agreement, placing these rights on a multilateral basis. The third freedom of the air is known as traffic rights, referring to passengers, mail, or cargo carried on a commercial service. The fourth of the five freedoms is the privilege of bringing in and discharging traffic from the home state of the aircraft or airline; the fourth is picking up traffic for the home state of the aircraft or airline; the fifth is that of picking up traffic for or discharging traffic from third states in the territory of the state granting the privilege. The fifth freedom is the main bargaining point in the exchange of traffic rights among the states. Attempts have been made since 1944 to create other freedoms, but each new freedom usually represents in practice a new restriction [3, P.64].

Efforts to conclude a widely acceptable multilateral agreement on traffic rights were unsuccessful, and such rights have continued to be handled through bilateral international agreements. These agreements fix the routes to be served, the principles governing the capacity of the agreed services (frequency of the service multiplied by the carrying capacity of the aircraft used), and the procedures for the approval of fares and tariffs by the respective governments. Most agreements require that airlines operating the same routes consult among themselves before submitting their fares to the two governments and many agreements specify the International Air Transport Association (IATA), an association of airlines, as the organ for such consultations. The right to carry domestic traffic between the points within a state is normally reserved to that state's own airlines. A bilateral agreement signed at Bermuda in 1946 between the United Kingdom and the United States set a pattern that has generally been followed, although the formal Bermuda-type agreement is likely to be accompanied by confidential memorandum attaching various restrictions.

In private law the acceptance of this maxim for a long time posed little difficulty, and the Code Napoléon of 1804 adopted it almost verbatim; in more recent times, however, it is more than questionable whether such a principle can be accepted without qualification. Both the German Civil Code (1896) and the Swiss Civil Code (1907), adopted the functional approach, limiting the right of the owner to such a height and depth as the necessity for enjoyment of the land. In common-law countries the courts have arrived at a broadly similar position. In France, too, both the doctrine and the courts have refused to take the regulation literally. In one celebrated case, *Clément Bayard v. Coquerel* (1913), the Court of Compiègne, lending judicial authority for the first time to the theory of abuse of rights, awarded damages to a plaintiff, whose balloon had been destroyed by "spite structures", erected by the defendant on his own land and ordered the offending spikes to be taken down.

In the course of the 1920s it became clear in most countries, either through judicial decisions or express legislation that aircraft would be allowed to fly over the private properties of others in normal flight, in accordance with aeronautical regulations. This immunity applies only to the mere passage of the aircraft and does not extend to damage caused by its encroachments on the use or enjoyment of the land, such as excessively low flights [4, P.58].

In most countries airports may be privately, municipally, or nationally owned and operated, and the siting of an airport may be the subject to town and country planning or zoning regulations. Whether or not the establishment of an airport requires special permission, aircraft leaving or entering a country will normally be required to do so at an airport having customs and immigration facilities. Airports that are open to public use are generally subject to some form of licensing or control in order to ensure compliance with minimum safety standards. Members of ICAO, in order to comply with their obligations under the Chicago Convention, have to make the same conditions as they are open to national aircraft. Restrictions may also be imposed on the noise level of aircraft taking off or landing, as well as the general level of noise, vibration, smoke, and so forth that may result from the operation of airports. In order to secure safety of flight, restrictions may be imposed on the use of lands adjoining an airport, such as the height of buildings or the planting of trees. Practice varies as to whether such restrictions are regarded as true

measures of planning or zoning the private property for public use, which require the payment of compensation [5, P.222].

Some legal systems exempt the airport owner, operator, and users from liability for low flights over neighboring properties, noise, vibration, or other forms of disturbance, provided all necessary regulations and conditions. In the absence of such immunity, granted by law or obtained privately from adjacent landowners, the owners, operators and users of airports are basically liable, in much the same way as other occupiers of land, for any substantial impairment of the use or enjoyment of neighboring lands.

Among the most important points resolved in the 1919 Paris Convention were that aircraft should have a nationality, that they should have the nationality of the state, in which they were registered, and that no aircraft could be validly registered in more than one state. The 1944 Chicago Convention retained these principles. While both conventions preclude dual or multiple registration, the ICAO Council in 1967 recognized the possibility of joint registration of aircraft by the number of states, and even “international registration” [6, P.16].

Under the 1944 Chicago Convention an aircraft, in order to benefit from the privileges conferred by the convention, must comply with its terms. Many of these terms are further elaborated in annexes to the convention. According to the norm of Article 20 of the convention, “every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks”. In accordance with the norm of Article 31, “every aircraft engaged in international navigation shall be provided with a certificate of airworthiness issued or rendered valid by the State in which it is registered”. In 1960 a number of European countries signed, in Paris, a multilateral agreement, relating to Certificates of Airworthiness for Imported Aircraft, which is open to accession by other states, designed to facilitate mutual recognition of certificates of airworthiness for import and export purposes. Under Article 30(a) of the Chicago Convention, aircraft of each contracting state may carry out radio transmitting apparatus only in case of registered license [7, P.49].

As regards the operating personnel of the aircraft, the Chicago Convention provides that the pilot of every aircraft and the other members of the operating crew of every aircraft engaged in international navigation shall be provided with certificates of competency and licenses issued or rendered valid by the State of aircraft registration.

When an aircraft is almost registered in one contracting state or on the territory of other contracting states, radio transmitting apparatus may be used only by the members of the flight crew, who are provided with a special license for the purpose, issued by the appropriate authorities of the State, in which the aircraft was registered.

In addition, the convention prescribes that there shall be maintained in respect of every aircraft engaged in international navigation a journey log book in which shall be entered particulars of the aircraft, its crew and of each journey.

All of the above documents must be carried by “every aircraft of a contracting State, engaged in international navigation,” as well as the appropriate manifests if passengers and cargo are carried.

The fact that all of these rules concerning the aircraft and its crew are channeled through the state of registry can give rise to the problems, when an aircraft is leased or chartered for any length of time to operators of different nationalities (“interchange of aircraft”). These problems can sometimes be resolved by a temporary transfer either of de facto control or of registration of the aircraft to the state of the operator.

The provision and operation of ground and other air navigation facilities, as well as the establishment and enforcement of air navigation rules and air traffic control, are the responsibility of the territorial state. So is investigation of accidents, though among ICAO members, under the Chicago Convention the state of registry shall be given the opportunity to appoint observers to be present at the inquiry [5, P.227].

Among ICAO members, over the high seas the Rules of the Air established by ICAO. Enforcement rests primarily with the state of registry, which is also responsible for investigating accidents occurring over the high seas. A body known as Euro control, established in 1960 by the Brussels Convention Relating to Co-operation for the Safety of Air Navigation, represents an attempt at international cooperation in air-traffic control by the number of western European states.

Registration of aircraft for nationality and public law purposes is distinguished from registration for purposes of private law. Some legal systems treat aircraft simply as ordinary movable property. Others

require all sales and other transactions, relating to aircraft, such as mortgages, to be affected in writing and recorded in a public registry before they may be invoked against third sides. If aircraft is used as security for credit or loans, the system of recording of rights with international recognition of the rights recorded with obvious advantages. Convention on the International Recognition of Rights in Aircraft was concluded in Geneva in 1948. Few states accepted it at the beginning, but later, with the rising cost of modern aircraft, the interest in the convention was increased. Its wide acceptance will have the side effect of bringing about much greater uniformity in the rules of private law, governing the rights on aircraft.

Air Law, the branch of law, has directly or indirectly concerned with the civil aviation. Aviation in this context extends to both heavier-than-air and lighter-than-air aircraft. Air-cushion vehicles are not regarded as aircraft by the [International Civil Aviation Organization](#) (ICAO), but the practice of individual states in this field is not yet settled. The earliest legislation in Air Law was 1784 Decree of the Paris police, forbidding balloon flights without a special permit. In the beginning we wrote about this Decree.

Large part of Air Law is either International Law or International Uniform Law (rules of national law that have by agreement been made internationally uniform) [6, P.48].

Basic principle of International Air Law is: every state has complete and exclusivesovereignty over the airspace above its territory, including its territorial sea. At the turn of the 20th century the view that airspace, like the high seas, should be free was sometimes advanced. But the principle of airspace sovereignty was unequivocally affirmed in the Paris Convention on the Regulation of Aerial Navigation (1919) and subsequently by various other multilateral treaties. The principle is restated in the Chicago Convention on International Civil Aviation (1944). Airspace is now generally accepted as an appurtenance of the subjacent territory and shares the latter's legal status. Thus, under the Geneva Convention on the High Seas (1958) as well as under international customary law, the freedom of the high seas applies to aerial navigation as well as to maritime navigation. Vertically, airspace ends, where outer space begins.

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Commercial air transport is divided into scheduled air services and nonscheduled flights. Charter flights fall mostly, but not invariably, into the latter category. Under the Chicago Convention, contracting states agree to permit aircraft registered in the other contracting states and engaged in commercial nonscheduled flights into their territory without prior diplomatic permission [7, P.55].

For scheduled air services, the privilege of operating commercial services through or into the foreign country is 1944 Chicago conference, split into five so-called freedoms of the air. The first is the privilege of flying across a country nonstop; the second, of flying across with a stop for technical purposes only. These two freedoms are also known as transit rights. A large number of ICAO members are the sides of 1944 International Air Services Transit Agreement, placing these rights on a multilateral basis.

Efforts to conclude a widely acceptable multilateral agreement on traffic rights were unsuccessful, and such rights have continued to be handled through bilateral international agreements. These agreements fix the routes to be served, the principles governing the capacity of the agreed services (frequency of the service multiplied by the carrying capacity of the aircraft used), and the procedures for the approval of fares and tariffs by the respective governments. Most agreements require that airlines operating the same routes consult among themselves before submitting their fares to the two governments, concerned for approval, and many agreements specify the International Air Transport Association (IATA), an association of airlines, as the organ for such consultations. The right to carry domestic traffic between the points within a state is normally reserved to that state's own airlines. A bilateral agreement signed at Bermuda in 1946 between the United Kingdom and the United States set a pattern that has generally been followed, although the formal Bermuda-type agreement is likely to be accompanied by confidential memorandum[7, P.57].

In most countries airports may be privately, municipally, or nationally owned and operated, and the siting of an [airport](#) may be subject to town and country planning or zoning regulations. Whether or not the establishment of an airport requires special permission, [aircraft](#) leaving or entering a country will normally be required to do so at an airport having customs and immigration facilities. Airports are open to public use, some form of licensing or control in order to ensure [compliance](#) with minimum safety standards. Members of [ICAO](#), in order to comply with their obligations under the Chicago Convention, have to make certain such airports open to aircraft of all other ICAO members under the same conditions. Restrictions may also be imposed on the noise level of aircraft taking off or landing, as well as the general level of noise, vibration, smoke, and so forth that may result from the operation of airports. In order to secure safety of flight, restrictions may be imposed on the use of lands adjoining an airport, such as the height of buildings or the planting of trees. Practice varies as to whether such restrictions are regarded as true measures of planning or zoning or as takings of private property for public use, which require the payment of compensation.

Some legal systems exempt the airport owner, operator, and users from liability for low flights over neighboring properties, noise, vibration, or other forms of disturbance, provided that all the regulations and conditions laid down for the operation and use of the airport. In the absence of such immunity, granted by [law](#) or obtained privately from [adjacent](#) landowners, the owners, operators, and users of airports are basically liable, in much the same way as other occupiers of land, for any substantial impairment of the use or enjoyment of neighboring lands [7, P.59].

Registration of aircraft for nationality and public-law purposes is distinguished from the registration for purposes of private law. Some legal systems treat aircraft simply as ordinary movable property. Others require all sales and other transactions relating to aircraft, and recorded in a public registry before they may be [invoked](#) against third sides. If aircraft is used as security for credit or loans, the system of recording of rights with international recognition and advantages. Convention on the International Recognition of Rights in Aircraft was concluded in Geneva in 1948.

Although some systems of national [law](#) still adhere to the view that ships and aircraft are part of the territory of the state the nationality of which they possess, this is merely a crude [metaphor](#). In [International Law](#), a distinction has to be made between three types of state jurisdiction: territorial jurisdiction over national territory and all persons and things; quasi-territorial jurisdiction over national ships and aircraft and all persons and things; and personal jurisdiction over all other nationals and all persons under a state's protection, as well as their property. In case of conflict, territorial jurisdiction overrides quasi-territorial jurisdiction and personal jurisdiction, while quasi-territorial jurisdiction overrides personal jurisdiction.

In the conclusion we would like to note, that the State, conducting the investigation, should recognize the need for coordination between the investigator-in-charge (ИИ) and judicial authorities. Most of the evidence should remain confidential unless the judicial authorities determine "that their disclosure outweighs any adverse domestic and international impact or any future investigations". Evidence, gathered during the accident or incident investigation, could be utilized inappropriately for subsequent disciplinary, civil, administrative and criminal proceedings. If such information is distributed in the future, no longer be open disclosed to the investigators. Lack of access to such information would impede the investigation process and seriously affect flight safety. Hence, extreme caution is urged in using evidence, gathered for safety investigation purposes in liability or punitive judicial or administrative proceedings, lest the willingness involved in aviation accident be chilled from volunteering useful information.

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ХАЛЫҚАРАЛЫҚ ӘУЕ ҚҰҚЫҒЫ НОВЕЛЛАЛАРЫ ТУРАЛЫ

Аннотация. Халықаралық әуе құқығы халықаралық-құқықтық жиынтығын білдіретін, мемлекеттер арасындағы қатынастарды реттейтін халықаралық әуе қатынастарын жүзеге асыру мақсатында халықаралық құқықтың принциптері мен нормаларының саласының көшбасшы. Халықаралық әуе нысанасы әуе кеңістігін және халықаралық әуе қатынастарын құқықтық режиміне қатысты құқықтарының мемлекеттер арасындағы қарым-қатынастары болып табылады. Мемлекеттер арасындағы әуе қатынасы, көп жақты және екі жақты келісімдерде құрамындағы әр түрлі мемлекеттер арасында жасалған халықаралық құқықтың жалпыға бірдей танылған принциптерін қағидаттары мен нормалары негізінде реттеледі. Халықаралық азаматтық авиация ұйымы (ИКАО) негізгі халықаралық әуе қатынастарын реттеу саласындағы қызметті жүзеге асыратын ұйым болып табылады. Оның бүкіл құрлық және су аумағы үстіндегі әуе кеңістігіне халықаралық әуе құқықтар - мемлекеттің негізгі

принципі тәуелсіздік принципі үстінде орналасқан. Бұл принцип Халықаралық азаматтық авиация туралы Конвенцияның принциптерінің мәртебесі құқықтық қатынастардың сипаты мен мазмұнын айқындайды және 1944 жылы құрылып халықаралық әуе құқығын, сондай-ақ әуе кеңістігін пайдалану кезінде туындайтын басқа да ерекшеліктері халықаралық әуе қатынастарымен қамтамасыз етті. Негізгі қағидаттарына қойылатын халықаралық әуе құқықтарына мыналар жатады: 1) Халықаралық азаматтық авиация қауіпсіздігін қамтамасыз ету қағидаты; 2) халықаралық әуе кеңістігінде еркін ұшу қағидасы.

Түйін сөздері: халықаралық әуе құқығы, құқық саласы, халықаралық-құқықтық принциптер, халықаралық құқық нормалары, халықаралық әуе қатынастары, әуе кеңістігінің құқықтық режимі, халықаралық құқық принциптері, көп жақты келісімдер, екі жақты келісім, Халықаралық азаматтық авиация ұйымы.

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К ВОПРОСУ О НОВЕЛЛИХ МЕЖДУНАРОДНОГО ВОЗДУШНОГО ПРАВА

Аннотация. Международное воздушное право – это отрасль международного права, представляющая собой совокупность международно-правовых принципов и норм, регулирующих отношения между государствами в целях осуществления международных воздушных сообщений. Предметом международного воздушного права являются отношения между государствами, которые касаются правового режима воздушного пространства и международных воздушных сообщений. Воздушные сообщения между государствами регулируются на основе общепризнанных принципов международного права, принципов и норм, содержащихся в многосторонних и двусторонних соглашениях, заключенных между различными государствами. Международная организация гражданской авиации (ИКАО) является основной международной организацией, осуществляющей деятельность в сфере регулирования воздушных сообщений. Основным принципом Международного воздушного права - принцип суверенитета государства над воздушным пространством, расположенным над всей его сухопутной и водной территорией. Этот принцип закреплен в Конвенции о международной гражданской авиации 1944 г. и определяет содержание других принципов международного воздушного права, а также характер и особенности правоотношений, возникающих при использовании воздушного пространства в международных воздушных сообщениях. К основным принципам международного воздушного права относятся: 1) принцип обеспечения безопасности международной гражданской авиации; 2) принцип свободы полетов в международном воздушном пространстве.

Ключевые слова: международное воздушное право, отрасль права, международно-правовые принципы, нормы международного права, международное воздушное сообщение, правовой режим воздушного пространства, принципов международного права, многосторонние соглашения, двусторонние соглашения, Международная организация гражданской авиации.

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REFERENCES

- [1] Alekseev V. A. Space commonwealth. Chronicle of the international flights. - SPb.: Mechanical engineering; Edition 2, additional, 2018. 208 p. <https://doi.org/10.32014/2018.2518-1483.7> (in Russian).
- [2] Biryukov M.M. European Union, European Constitution and International Law. M.: Scientific book, 2018. 256 p. <http://doi.org/10.13165/VPA-14-13-2-03> (in Russian).
- [3] Bordunov V. D. International Air Law. M.: Aviabusiness, Scientific Book, 2018. 464 p. <http://dx.doi.org/10.1177/0741713604271851> (in Russian).
- [4] Bordunov V. D. International air law. M.: Aviabusiness, 2018. 845 p. <http://dx.doi.org/10.1016/j.anihpc.2017.10.004> (in Russian).
- [5] Valeev R.M. International and interstate protection of human rights. Textbook. Signature stamp of UMO Ministry of Defense of the Russian Federation. M.: Statute, 2018. 358 p. <https://doi.org/10.32014/2018.2518-1483.7> (in Russian).
- [6] Yeliseyev B.P. Air law. M.: Dashkov and Company, 2017. 436 p. <https://doi.org/10.32014/2018.2518-1483> (in Russian).
- [7] Ayupova Z.K., Kussainov D.U., Winston Nagan. To the question of pre-trial adjusting of the conflicts in the modern legal system of the Republic of Kazakhstan // Reports of the Academy of sciences of the Republic of Kazakhstan. 2018. Vol. 6. P.49-56. <https://doi.org/10.32014/2018.2518-1483.26> (in English).