

SELF-DETERMINATION IN SPACE LAW: A RETREAT TO BASIC HUMAN RIGHTS

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Abstract

Excluding the general humanitarian provisions found in the 1967 Outer Space Treaty, the 1968 Rescue and Return Agreement, and the 1979 Moon Agreement, Space Law is silent on the issue of human rights in general and self-determination in particular. Accordingly, supplemental or new agreements will be needed to codify the rights which passengers aboard spacecraft and settlers in settlements in outer space, on the moon and other celestial bodies will have.

It may be safely assumed that basic human rights will be guaranteed. However, self-determination will, it is submitted, not be considered a basic human right and will not be granted. Just as a commander of a civilian aircraft has authority over all persons and property aboard his/her aircraft, the commanders of spacecraft will have identical authority.

In order to guarantee the fundamental human rights of the inhabitants of settlements ultimately controlled by one individual, an internationally accepted Bill of Rights will have to be established. The cultural differences which exist today between different peoples will be magnified in the confines of outer space. It is the purpose of this paper to outline those rights keeping in mind the international composition of those settlements.

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The Corpus Juris Spatialis

The 1967 Outer Space Treaty¹ is the cornerstone of the international legal regime which has been established to regulate the activities of man in outer space. Included within its articles are very basic and general individual protections:

According to Article III, "States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding."

The category of "international law," unquestionably includes existing international human rights protections. Before discussing general international human rights, it is important to realize that existing international space law treaties include human rights protections peculiar to the exploration and exploitation of outer space.

To begin with, Article V of the Outer Space Treaty states, *inter alia*,

"In carrying on activities in outer space and on celestial bodies, the astronauts of one State Party shall render all possible assistance to the astronauts of other States Parties.

"States Parties to the Treaty shall immediately inform the other States Parties to the Treaty or the Secretary-General of the United Nations of any phenomena they

discover in outer space, including the moon and other celestial bodies, which could constitute a danger to the life or health of astronauts."

This general provision was, of course, expanded upon within the context of the 1968 Rescue and Return Agreement.¹

The Outer Space Treaty does not limit itself to mere polemics; it clearly identifies the parties responsible for the honoring of these provisions.

According to Article VI,

"State Parties to the Treaty shall bear international responsibility for national activities in outer space, including the moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty. When activities are carried on in outer space, including the moon and other celestial bodies, by an international organization, responsibility for compliance with this Treaty shall be borne by both the international organization and by the States Parties to the Treaty participating in such organization."

Moreover, according to Article VIII, "A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body."

Finally, Article IX states, in part, that, "In the exploration and use of outer space, including the moon and other celestial bodies, States Parties to the Treaty shall be

guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. ..."

Through these measures, the framers of international space law hoped to protect the lives of astronauts by recognizing the applicability of international law - including human rights - in outer space and by clearly designating the States which are responsible not only for them, but perhaps even more importantly to them.

The only specific regulation dealing with future settlements in outer space, including the moon and other celestial bodies, is found in Article 9 of the 1979 Moon Agreement:¹

"1. States Parties may establish manned and unmanned stations on the moon. A State Party establishing a station shall use only that area which is required for the needs of the station and shall immediately inform the Secretary-General of the United Nations of the location and purposes of that station. Subsequently, at annual intervals that State shall likewise inform the Secretary-General whether the station continues in use and whether its purposes have changed.

"2. Stations shall be installed in such a manner that they do not impede the free access to all areas of the moon of personnel, vehicles and equipment of other States Parties conducting activities on the moon in accordance with the provisions of this Agreement or of article I of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies."

From this provision, there is no doubt that States have the right to establish settlements on the moon

and, by inference, on other celestial bodies and in outer space.⁴ However, it is Article 10 which provides basic protections to the occupants of those stations:

"States Parties shall adopt all practicable measures to safeguard the life and health of persons on the moon. ..."

Until the adoption of that provision, the only guarantees offered to astronauts were the previously mentioned general provisions of the 1967 and the 1968 conventions. It is Article 10 of the Moon Agreement which guarantees them two human rights: life and health.

With the above exception, to date, States have been involved - for obvious reasons - only with generalities. No specific agreement exists guaranteeing the human rights of the occupants of space objects⁵ - be they ships, stations or settlements. For an examination of what can be expected in such future regulations we must examine existing human rights law.

International Human Rights

The 1948 Universal Declaration of Human Rights⁶ is the foundation on which human rights law is built. Yet, as a resolution of the United Nations General Assembly, it is non-binding. That said, some of its provisions do constitute general principles of international law and, as such, are binding in their own right.⁷

The Universal Declaration recognizes that all human beings have the following rights:

- 1) equality;
- 2) freedom from discrimination;
- 3) life, liberty and security;
- 4) freedom from slavery;
- 5) freedom from torture or cruel, inhuman or degrading treatment or punishment;
- 6) recognition as a person under the law;
- 7) due process;
- 8) presumption of innocence;

- 9) freedom from retroactive crimes or punishments;
- 10) freedom from personal attack and protection of privacy;
- 11) freedom of movement and residence within one's country and to exit and return to that country;
- 12) political asylum;
- 13) nationality;
- 14) marriage by free and full consent of intending spouses;
- 15) ownership of property;
- 16) freedom of thought, conscience and religion;
- 17) freedom of opinion and expression;
- 18) freedom of peaceful assembly and association;
- 19) participation in one's country's political process including genuine elections;
- 20) social security;
- 21) employment;
- 22) rest and leisure;
- 23) standard of living adequate for maintenance of personal and family health and well-being;
- 24) education;
- 25) participation in cultural life.

All of these rights are noble. However, they are not by any definition of the word, universal.

"The Axiology of the International Bill of Human Rights"⁸ is perhaps the most insightful article written on international human rights. In his conclusion, Professor Sinha writes:⁹

"The International [Human Rights] Covenants must provide a structure of international legal accountability on the part of States for the physical and spiritual protection of the human being living within their jurisdiction, and a precise specification of that protection for all the peoples of the world living in different civilizations where these States operate. These Covenants have come a long way in achieving both of these objectives. The achievements are especially remarkable when we remind

ourselves that we live in a society of States. However, the Covenants are in need of enhancing their axiological relevance by rewriting their specification of the protection sought for the human being.

"The areas of human existence which are of concern to these Covenants are: integrity of the person, personal relationships, social assertion, economic well-being, political assertion, and conflict resolution. A plurality of approaches exists in our multicivilizational world with respect to these matters, each civilization being possessed of its own value system governing these matters which has been produced by its own particular historicity. Although the Covenants cannot be condemned for being exclusively of Western values, they are predominantly so and they do not take an adequate account of other value systems. Nor do they contain sufficient awareness of some of the particular problems of human existence in non-Western societies, such as, for example, the ruinous system of dowry in India."

There are two clear examples in the Universal Declaration of rights which are clearly not universal but rather Western:

Article 16(2). Marriage shall be entered into only with the free and mutual consent of intending spouses.

Article 21(3). The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Clash of Cultures

We are involved here with a clash of cultures. There are a number of instances when two countries involved in a conflict, attempt to

negotiate a settlement but, because of a lack of basic understanding of the other State's culture, the negotiations become "a dialogue of the deaf."¹⁰

If this is true in bilateral negotiations, the problem is multiplied in multilateral negotiations. And, as any discussion on the writing of an international agreement guaranteeing human rights will be multilateral, a prerequisite for success will be a basic understanding and respect by the parties involved for each other's cultures.

Jus Cogens

Reviewing the above list of human rights contained in the Universal Declaration, it is clear that not all are honored by all cultures and political regimes.

That said, there are basic rules that must exist in any society be it Western or Oriental, democratic or totalitarian. Without them, society cannot exist. These rules, collectively referred to as *jus cogens*,¹¹ include prohibitions against:

- 1) genocide;
- 2) violating agreements - *pacta sunt servanda*;
- 3) slavery;
- 4) personal attack and protection of privacy;
- 5) murder;
- 6) causing the disappearance of individuals;
- 7) torture, cruel, inhuman or degrading treatment and punishment;
- 8) violation of due process;
- 9) enactment of retroactive crimes or punishments.

Those are the minimum requirements for *existence*. However, for a society to *advance* - for there to be quality of life - there are additional requirements:

- 1) education;
- 2) recognition as a person under the law;

- 3) freedom of thought, conscience and religion;
- 4) freedom of opinion and expression;
- 5) freedom of peaceful assembly and association;
- 6) right to social security;
- 7) right to employment;
- 8) right to rest and leisure;
- 9) right to a standard of living adequate for maintenance of personal and family health and well-being;
- 10) participation in cultural life.

Self-Determination

Freedom to participate in the country's political process including in genuine elections is also a prerequisite for an advanced society. However, that is one right that cannot be guaranteed to occupants of space vehicles or settlements.

There is no doubt that the Canada, Great Britain and the United States - to name but three - are all democratic nations guaranteeing basic human rights to their citizens and to persons residing within their borders. However, there is one "place" - even in those countries - where democracy is willingly thrown away in favor of a unique type of dictatorship: aircraft.

The commander of a civilian airplane is a dictator. True, on landing his actions will be reviewed by the relevant powers, however during the course of his aircraft's flight, he alone is responsible for all activities conducted and, therefore, has full power to make any and all decisions as he sees fit. While he may consult with his crew and passengers, he is under no obligation to do so.

Diederiks-Verschoor¹¹ identifies five basic powers and responsibilities of the aircraft commander:

"1. The responsibility for the perfect condition of the aircraft and

the welfare of the crew, the preparations for the flight and its successful completion. ...

"2. The right of the commander to issue strict order to crew and passengers. ...

"3. In addition, the commander has the authority to undertake all necessary measures to ensure the safe completion of the flight. ...

"4. The administrative duties of the commander include the registration of births and deaths on board an aircraft, the authority to perform marriages or to act as the competent authority for drawing up wills.

"5. The commander decides whether and in what way to render assistance in search and rescue operations in the event of an accident..."

There is a simple reason why one individual has been granted such overall power: security. Airplane travel is dangerous. Decisions need to be made by a person so trained and experienced. There can be no debate.

If this is true for air travel, there can be no question that it is true for space travel.

There should be no doubt of that basic truth. However, the question which needs to be asked is whether or not debate in the decision making process can be allowed in settlements established in outer space, on the moon or on other celestial bodies.

Conclusions

There will be a number of stages in the establishment of manned settlements in outer space and on celestial bodies. In the first stage, the occupants will be military personnel under strict command. However, as the population grows, societal demands will become stronger. It is true that man is a social animal and, regardless of location, man will always want not just mere existence but a quality of

life. For that, basic rights will have to be recognized and protected. However, danger will always exist. Accordingly, participation in society, i.e., self-determination, will have to remain severely limited. There will always be a need for a benevolent commander, however, when push comes to shove, in such a dangerous environment as space, there can ultimately be only one voice.

Footnotes

1. Treaty on Principles Governing the Activities of State 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. 6347, 610 U.N.T.S. 205 (effective Oct. 10, 1967).

2. Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, April 22, 1968, 19 U.S.T. 7570, T.I.A.S. 6599, 672 U.N.T.S. 119 (effective Dec. 3, 1968). See especially Articles 1 to 5.

3. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies. U.N. GAOR. 34th Sess. (1979). Supp. No. 20 (Doc. A/34/20) (effective July 11, 1984). Articles 2, 4, 8, 10, 12, 14, and 15 of the Agreement confirm the above mentioned provisions of the 1967 Outer Space Treaty and 1968 Rescue and Return Agreement.

4. See *id.*, at art. 1.

5. On the definition of "space object" see Hurwitz, B.A., *State Liability for Outer Space Activities in Accordance with the 1972 Convention on International Liability for Damage Caused by Space Objects* 23-26, 31 (11 Utrecht Studies in Air and Space Law, Dordrecht: Martinus Nijhoff, 1992).

6. U.N. Doc. A/811 (Dec. 10, 1948).

7. See Hurwitz, Bruce A., *The Labyrinth of International Telecommunications Law: Direct Broadcast Satellites*, 35 *Netherlands International Law Review* 149 (1988).

8. Sinha, Surya P., *The Axiology of the International Bill of Human Rights*, 1 *Pace Yearbook of International Law* 21 (1989).

9. *Id.*, at p. 58-59.

10. See Cohen, R., *Culture and Conflict in Egyptian-Israeli Relations: A Dialogue of the Deaf* (Bloomington: Indiana University Press, 1990).

11. See Rest. 3rd, *Restatement of the Foreign Relations Law of the United States* S. 702.

12. Diederiks-Verschoor, I.H.Ph., *An Introduction to Air Law* 22-23 (3d re. ed., Deventer: Kluwer, 1988).