

State Sovereignty Over the Airspace on the Perspective of International Air Law (A Study of the Delegation of Airspace Management of Batam and Natuna Island to Singapore)

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ABSTRACT

The issue of state sovereignty has been debated over thousands of years. International law recognizes the exclusive right of the airspace over the state's territorial area. Its followed by the obligation to provide air navigation services on their airspace. The responsibility may be delegated by mutual agreement. The agreement may be terminated at any time. This research examines the case of the delegation of Flight Information Region (FIR) management of Batam and Natuna Island to Singapore from 1946 until 2020. Normative legal research methods are used in this research to analyze the legal issues through international treaties, legal regulations, and other literature related to FIR management. In conclusion, the delegation of the responsibility to provide air navigation services does not derogate the state's sovereignty.

Keywords: *Airspace, Flight Information Region, International Air Law*

1. INTRODUCTION

According to the international law enforced today, the part of the air space found above a particular state's land and sea territory is to be seen as that state's air space. It comes from the Latin maxim "*cujus est solum, ejus est usque ad coelum*" means "He who owns the land owns up to the sky".[1] This maxim is connected with air rights. Since the early development of air law, States claimed and exercised territorial sovereignty in space above their surface. The claim was laid down in the Paris Convention 1919 and reaffirmed in the Chicago Convention 1944. Both conventions put the distinction between civil and state aircraft. It emphasizes the purpose of the conventions, which promote cooperation and arrangement of international air transport services.[2]

In light of this, the concept of state sovereignty is followed by the responsibility to provide air navigation services under Article 28 (a) of the Chicago Convention 1944. It covers the management of the air traffic control area divided into several sub-regions called Flight Information Region (FIR). Indonesia's airspace is divided into Jakarta FIR and Ujung Pandang FIR.

Since 1946, FIR over the Batam and Natuna Island has been under the control of Singapore FIR. This decision is based on the mandate given by the International Civil Aviation Organization (ICAO) and reaffirmed on the Asia and

Pacific Council Regional Air Navigation (ASPAC-RAN) I in 1973 at Honolulu. At the ASPAC-RAN III meeting in Bangkok, the Government of Indonesia presented a working paper to realign the FIR management. It is based on the change of territorial sovereignty under the United Nations Conventions of the Law of the Sea 1982 (UNCLOS). As the result, Indonesia and Singapore sign the Agreement between the Government of the Republic of Indonesia and the Government of Singapore on the realignment of the Boundary Between the Singapore Flight Information Region and the Jakarta Flight Information Region in 1995 (the 1955 Agreement). The 1955 Agreement provisions give Singapore the authority to manage the Batam and Natuna Island's FIR. This agreement is bound to be renewed every 5 years.

In 2009 Indonesia enacted the new Aviation Law. Article 458 demands that Indonesia has to manage the air navigation services over its airspace by themselves. This includes the Batam and Natuna Island's FIR. Since then, Indonesia has been trying to negotiate with Singapore to realign FIR management.

The purpose of this paper is to analyze the concept of state sovereignty over the airspace based on the perspective of international air law. There are debates that give the assumption that the management of the airspace is closely linked to the state's sovereignty.

The rest of the paper is organized as follows: section 2 introduces the theoretical framework used in this paper, which includes state's sovereignty over the airspace and the responsibility of the state; section 3 presents the analysis by applying the theoretical framework to the present case; lastly, section 4 will conclude the analysis and presents direction for future research.

2. THEORETICAL FRAMEWORK

2.1. State's Sovereignty over the Airspace

2.1.1. State sovereignty from time to time

In international law, sovereignty is an important element of the state and it reflects the international personality that has the quality of independent power. Generally, sovereignty is interpreted as the common feature of a state, representing the supremacy and independency to express and as tool to attain the objectives of the state.

Sovereignty perceived from an international, domestic perspective, or even from the legal or political aspect, typically describes the need to delimitate the state's sovereignty for the sake of the international community. Max Weber formulates the definition of a 'state' that includes 3 conventional elements, which is: territory, people, and sovereignty. In terms of international relations, state requires the existence of competing sovereignty, resulting in 'legal equality of sovereignty'. [3]

In the Middle Ages, the concept of sovereignty develops rapidly. Jean Bodin, in his book *Les six livres de la Republique* defines sovereignty as an absolute, perpetual, indivisible, inalienable and imprescriptible. [4] This theory is a product of time and circumstances. The book was written 4 years after the Saint Bartholomew's Day Massacre. Bodin was a '*politique*', a partisan who had the reputation of caring more for civil peace than doctrinal truth. Hence his book is a major work of political theory related to religion and politics. [5]

The definition of sovereignty changes over time. Joseph Gabriel Starke defines sovereignty as a residue from the power it has within the boundaries of international law. For Starke, sovereignty is more of a literary term than a legal definition that can be precisely defined. [6]

In regard to the definitions above, sovereignty must be interpreted in the context of the usage. Every interpretation of sovereignty changes from time to time and has been influenced by circumstances, beliefs, assumptions, or justifications. [7] As a word, sovereignty has linguistic difficulties as in other languages such as ambiguity and vagueness. It fits the classification of 'open texture' theory of Hart. [8]

Open texture is a legal language concept that was written by Hart. In his book *The Concept of Law* he argues that there is always an empty area in the law. This is associated with the natural state at the time of a solar eclipse called 'penumbra', a blurry and vague shadow around the sun. Hart analogizes an empty area in the law with a penumbra when the law has not regulated a definite event that is yet to come. [9]

2.1.2. Sovereignty over the Airspace

Chicago Convention 1944 is the legal basis of international civil aviation law. Article 1 reiterates a customary international law, which sets out the basic principle of a state's exclusive sovereignty over the airspace above its territory. In addition, Article 2 defines territory as the land areas and territorial water adjacent thereto under sovereignty, suzerainty, protection of mandate of such state. [10] Those principles are acknowledged and have been implemented internationally.

2.2. State responsibility

Traditionally, international responsibility is attributed to the state as a subject of international law. State responsibility is related to the breach of treaties of other international obligations. [11] In general, the state's responsibilities in international law are laid out in international conventions. Chicago Convention 1944 set out the responsibility of the states, including international standards and procedures to improve air navigation services. Safety is an important element in aviation and it is one of the principles of the Chicago Convention. [12] Annex 11 of the Chicago Convention 1944 gives a detailed description concerning the responsibility of the states to provide air traffic services on their FIR management.

3. ANALYSIS

Flight Information Region has become unseparated element of the air navigation system. According to international law, FIR is the manifestation of safety principle of air navigation services. FIR management delegation is based on the outcome of the RAN Meeting, where all the delegates from state parties come into an agreement about the management. Based on Annex 11 of the Chicago Convention 1944, the delegation of FIR management does not derogate state's sovereignty over its airspace. This part will be divided into 2, the first will examine the legal framework of FIR management and the second part will discuss the delegation of FIR management of Batam and Natuna Island to Singapore.

3.1. Legal Framework of Flight Information Region Management

The legal basis of FIR management is set out on Article 28 (a) of the Chicago Convention 1944. It gives the responsibility of every state to give air navigation services. ICAO Council establishes the International Standards and Recommended practices and formulates them into Annexes. All state parties are obliged to adopt the Annexes as part of the convention. Part 2.1.1 of Annex 11 specifically regulates air navigation management. The state's obligation to give air navigation services can be delegated to other state under certain conditions. It requires the mutual agreement of the states involved. Furthermore, Annex 11 explicitly clarifies that the delegation of the state's FIR management does not derogate the state's sovereignty. Indonesia ratified Chicago Convention 1944 on 27th April 1950. In 2009, Indonesia enacts a new aviation law namely Act Number 1/2009 to replace the previous Act Number 15/1992. Article 458 demands that Indonesia has to manage the air navigation services over its airspace by themselves at utmost in 2024.

3.2. The delegation of FIR management of Batam and Natuna Island to Singapore

3.2.1. The issue of Air Sovereignty

Chronologically, the delegation of FIR management of Batam and Natuna Island to Singapore starts in 1948. ICAO appoints the United Kingdom to manage the airspace of Batam and Natuna Island. At that time, Indonesia has declared independence, but the air space over Batam and Natuna Island is considered as the high seas. Hence, the ICAO's decision in 1948 does not infringe Indonesia's sovereignty because the archipelagic water regime on UNCLOS has not implemented.

The issue of air sovereignty grows exponentially since 2016, when Chappy Hakim, former Indonesian air force chief published an article *A strange anomaly in management of airspace*. The article was republished by The Straits Times. Chappy argues that Indonesia has to take over the FIR management over Batam and Natuna Island from Singapore because it is linked to Indonesia's sovereignty. Responding to Chappy's article, Barry Desker, Singapore's Diplomat published an article. Barry disputes the fundamental misconception about the international system of FIR management. According to Barry, Chappy's argumentation was an irony, since Indonesia received the delegation of FIR management of Christmas Island and Timor Leste. Ministry of Transportation of Indonesia, Ignatius Jonan affirms Barry's opinion, whereas Ignatius

indicates that Indonesia was not ready to take over the FIR management from Singapore, due to the limited resources. Assessing the case above, it can be said that sovereignty must be interpreted case-by-case. The limitation of the concept of sovereignty is important so that every concept has its own characteristic and must be separated from circumstances, beliefs, assumptions, or justifications. By taking the limitation into considerations, the concept of sovereignty will always change as time goes. The ambiguity of the word 'sovereignty' is a common problem of legal language, as described by Hart on his open texture concept. The misconception of sovereignty is usually preceded by a lack of understanding. The concept of absolute sovereignty can not be applied to modern international law. Theoretically, absolute sovereignty is possible. But in reality, sovereignty is always limited to a certain aspect.

According to international law, FIR is an airspace dimension which contains flight information services. The services mentioned covers flight information warnings, air traffic consultation, and air traffic control. Those matters are technical and not related to sovereignty. The insignificant correlation is also shown in Paris Convention 1919 and Chicago Convention 1944, where both conventions distinctly differentiate between civil and military aircraft.[13] Both conventions aim to develop international civil aviation in a safe and orderly manner.

The delegation of FIR management is also performed by other states, without the prejudice of invoking the state's sovereignty. For example, FIR on Christmas Island and Timor Leste are managed by Jakarta FIR. Moreover, Samoa, Tonga, Cook Island, Niue, Fiji, Nauru, and Solomon Island's FIR are delegated to other states. The delegation is closely linked to the issue of infrastructure, technology, human resources, and demography of each state.

3.2.1. Legal Aspect

FIR of Batam and Natuna Island is managed by Singapore since 1956. Indonesia tried to take over the FIR management by submitting *Working Paper Number 55* in 1993. However, Singapore proposed a counter paper and ICAO suggest the problem must be resolved bilaterally. Subsequently, Indonesia and Singapore agreed to realign the FIR management over Batam and Natuna Island by signing the 1995 Agreement. The provision of the 1995 Agreement requires ICAO's approval prior to entry into force. However, Malaysia gives an objection because the 1995 Agreement will change the right of access from West Malaysia to East Malaysia. Consequently, ICAO does not approve, resulting in *void ab initio*.

4. CONCLUSION

The legal basis of FIR management is outlined in Article 28 of Chicago Convention, followed by Annex 11 which clarifies that FIR delegation does not derogate state's sovereignty. The delegation of FIR management of Batam and Natuna Island has started before UNCLOS, and it does not invoke Indonesia's sovereignty. Furthermore, the 1995 Agreement can not be enforced since it does not fulfill the entry into force requirements.

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