

THE LAW AND GROWTH OF CIVIL AVIATION

By

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It is an honour to come to Istanbul University to address the Institute of International Law and Affairs. It is also challenging, for in my remarks I have been asked to discuss the role of law and the growth of civil aviation.

Let me begin by telling you something about the International Air Transport Association which is the direct successor of the International Air Traffic Association, a pioneer organization started in 1919 to promote cooperation in the field of international aviation. The initials of both Associations spell IATA.

Today's IATA comprises 104 member airlines flying approximately 90 per cent of the world's international air traffic under the flags of 84 nations. It is essentially a trade association dealing with almost every aspect of international airline cooperation, and this, of course, includes cooperation in the legal field. But, in addition, governments have given IATA the task of negotiating passenger fares and rates. This activity is handled through the IATA traffic conference machinery and I shall discuss it in more detail later. But first may I tell you IATA's three main aims as stated in its Articles of Association. They are :

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To promote safe, regular and economical air transport for the benefit of the peoples of the world, to foster air commerce and to study the problems connected therewith;

To provide means for collaboration among the air transport enterprises engaged directly or indirectly in international air transport service;

To cooperate with the International Civil Aviation Organization and other international organizations.

From this definition of intention you can see why "cooperation" is the most important word in the IATA vocabulary.

And in no field is this international cooperation more essential than the field of international law.

It has been common to refer to air law as the "last born of juridical notions"¹. In one sense of the term "air law", this is probably true. Although rights in air space were discussed by legal thinkers even in Roman times, it was not until this century that the great technological developments in aviation began to prompt lawyers to look for legal solutions to the social problems posed by powered or heavier-than-air flight.

But another thought may be expressed by the observation that air law is the last born of juridical notions. In some quarters it has become almost a truism to say that air law follows rather than guides the social changes wrought by the rapid pace of technological developments in aviation. To a limited extent, this proposition is historically demonstrable. For example, when the Frenchman, Blériot, crossed the English Channel in 1909, he did so without any thought of the legality of his entry into English territory. It was only subsequently, in 1910, that the French Government, fearing the possibility of a disagreeable incident, called a nineteen-State diplomatic conference on the International Regulation of Air Navigation². And even the 1910 Conference was indecisive. It was

1) **Le Goff, Marcel**, *The Present State of Air Law*, The Hague (Nijhoff 1950) 24.

2) *Conférence Internationale de Navigation Aérienne, Procès-Verbaux*, Paris (imprimerie Nationale 1910); **Cooper J. C.**, *The International Air Navigation Conference in Paris 1910*, 19 *J. Air L. and Com.* 12 (1952).

not until after the War and the attendant developments in the technology of flight that a conclusive international convention on principles regulating air navigation came into being in 1919. It took another great period or radical technological change in aviation, during the Second World War, to stress the inadequacies of the 1919 Convention and to give impetus to the Chicago Conference on International Civil Aviation which took place in the winter of 1944.

Those who offer this thesis — that air law lags behind other developments in civil aviation — also try to find support in the history of domestic regulation of air transportation and in efforts to find common uniform rules to govern the private international legal aspects of air transportation, such as liability and traffic documentation. For example, they point out that the first regular air transport service in the United States began as early as 1914 — yet, it was not until over two decades had passed, in 1938, that the United States Congress established the Civil Aeronautics Board for the economic regulation of air transportation services. Again, they would point out that scheduled international air transportation was attempted between Italy and Austria-Hungary as early as 1918. Yet, it was not until 1929, after great strides had been made in developing international air transportation, that the Warsaw Convention unifying liability rules and establishing common rules for traffic documentation was ready for signature.

But I think it is easy to overwork this thesis which would relegate air law to a passive or secondary function. And I would not agree with all of the historical examples which are offered. For instance, I believe that the Warsaw Convention of 1929 which is still the basic unifying agreement for air carrier liability and traffic documentation, is evidence of the strong influence which forward-thinking lawyers can have on civil aviation. I believe that the term law itself implies adaptability, flexibility, and change, as the great Dean of Harvard Law School, Roscoe Pound, once demonstrated by isolating at least twelve historically different understandings of law. It was he who concluded after this well known study: "I am content to think of law as a social institution to satisfy social wants — the claims and demands and expectations involved in the existence of civilized society — by giving effect to as much as we may with the least sacrifice, so far as such wants may be satisfied or

such claims given effect by an ordering of human conduct through politically organized society"³.

There are many examples today of law in the active portrayal which Pound described. We have only to think of the developments in labour-management law, in workman's compensation, in the right to work laws, the laws governing other basic civil rights, in the new laws which permit commercial arbitration on an ever-increasing scale, in the replacement of positivistic international law by a system involving objective standards of state responsibility — this could go on quite a while. But my point is, that in many fields, law, as a social institution, is playing a dynamic and active role. I think that air law is developing in the same direction. But, if this process is to continue, there must be an awareness on the part of lawyers and on the part of Governments of the creative force which air law represents.

I think that understanding air law's present role in the growth of civil aviation requires an appreciation of three factors — the present structure of what I would call the "aviation community"; the role of the lawyer in that community; and an understanding of the problems which may admit of legal solution.

I have mentioned the "Aviation community". I believe this expression best describes the forces and disciplines which make it possible for the public to enjoy air transportation today. In the past it was fashionable to talk about airlines, manufacturers, governmental regulatory bodies, air commerce and international aviation organizations as if each of these endeavours comprised an end within itself. This is no longer possible, for at least three reasons: technology, financial involvements and the fact that we have crossed the threshold into an era of mass travel by air. By 1975, world scheduled airline passenger traffic will triple that of 1965, and by 1980, will be four times as great. This means that in 1975 there will be 580 million airline passengers, and 770 million in 1980, compared with 236 million this past year (which, incidentally, saw the greatest yearly percentage increase in civil air transportation ever recorded). To handle this traffic, the airlines will have a fleet

3) Pound, R., *An Introduction to the Philosophy of Law* (Yale 1922, 1954), 47.

of some 7,600 aircraft in 1975 and 8,500 in 1980, compared with last year's total of under 6,000. And many of these new aircraft will be twice or three times as large as those which fly today. Furthermore, the ratio between jet, turboprop and piston powered aircraft will have changed completely.

The challenges posed by mass travel by air require the most comprehensive coordination and cooperation of all of the techniques and disciplines affecting aviation. It is this coordination and cooperation of scientists, engineers, business men and government representatives which constitutes the aviation community of which I speak.

It is because of the cooperative nature of this community that the lawyer's role is so important. Each discipline in this community brings with it its own problems and its own solution to those problems. Some of these problems and some of these solutions may be overlapping. But no one discipline has the ability or expertise to foresee and define all of the problems and all of the solutions. This, in itself, requires cooperation and coordination. It is in anticipating and isolating problems and solutions common to the aviation community that the lawyer can play a role. In this process, air law cannot be passive; but, rather, it will be an active and dynamic social institution meeting the social changes which will be brought by mass air transportation.

Many of the community-wide problem areas where air law will find its place in the continuing growth of civil aviation can already be identified. A number of these relate directly to the introduction of the very high capacity sub-sonic and super-sonic aircraft which will be carrying passengers in the very near future. For example, I would mention the high cost of these new aircraft and the necessity that they enjoy maximum utilization. It may be necessary for airlines and governments to work out ways by which these aircraft can be jointly acquired, registered under the national laws and economically employed. Already lawyers from many international airlines are discussing various forms of cooperative agreements in IATA's Legal Committee which will make this possible. And recently, the Council of the International Civil Aviation Organization (ICAO) has adopted the recommendations of the ICAO Legal Committee under which aircraft owned by international

operating agencies may have the nationality of more than one state, thus easing the way to joint airline acquisition of aircraft.

Another challenge confronting the aviation community is possible public disturbance due to jet noise and sonic boom. This is truly a community-wide problem, common to the airlines, manufacturers, governments and inter-governmental organizations. Lawyers on IATA's Legal Committee, in cooperation with technical representatives from the airlines and manufacturers, actively keep abreast of all suggested governmental solutions. They also maintain a watching brief on suggested inter-governmental solutions, such as may arise from the efforts of ICAO. I believe it is a measure of the degree of cooperation and understanding within the aviation community that we have not seen premature and unresponsive restrictions of laws on noise and sonic boom from any quarter.

Another area in which lawyers are actively participating in the aviation community is in the development of new forms of traffic documentation. The guidelines for the passenger ticket and baggage check and air waybill which are used at present by airlines around the world were established by international agreement in 1929, long before the era of mass transportation by air. 1929 was also long before the practical use of computers and containerization of cargo. Airlines will use these new techniques in order to meet the demands of mass air transportation and ways must be found to modernize and simplify traffic documentation to accommodate them. Here, lawyers are already cooperating with traffic experts under the auspices of IATA and I am confident that timely solutions will be found.

Finally, I should mention what has been termed the "quasi-judicial private law system" which IATA Traffic Conferences provide⁴. One of the continuing challenges to the international aviation community is the development of uniform rates, fares and charges for air services amongst the various states. Without this uniformity, the economic characteristics of air transportation might tempt airlines and other interested parties to resort to many practices, perhaps restrictive practices, to maintain competitive advan-

4) **McGoldrick**, Regulation of Service Competition in International Air Travel, 8 Harv. Int. L. J. 78 (1967).

tages or simply to survive. The result would be chaos and a diminution in the nature and quality of air services to which the whole world is becoming accustomed.

IATA is involved in this activity because States have not achieved agreement on multilateral inter-governmental machinery for regulating the rates, fares and charges offered by their international scheduled air carriers. The last major effort to reach such an agreement was the Chicago Conference in 1944, where, in the end, the Conferences decided to leave these matters for resolution by individual governments, with the resultant development of a multitude of inter-governmental bilateral air transport agreements. And this is where IATA comes into the picture. For in the majority of these agreements, reference is made directly or indirectly to IATA as the machinery through which rates, fares and charges are to be negotiated by carriers. The number of these agreements is impressive : at the beginning of last year there were 1,248 bilateral air transport agreements in existence between over 100 nations and of this number, no less than 872 refer to IATA as the machinery for fare and rate negotiation.

At this point, I should like to take a little of your time to discuss the rate-making function which Governments have delegated to IATA through its Traffic Conference machinery. Incidentally, you may be aware that last July seven European governments signed a convention under which they agreed to — and here I quote, “endeavour to determine the tariff by mutual agreement” should carriers fail to agree at IATA Traffic Conferences”.

The primary function of the Traffic Conferences is to establish fares, rates, charges and rules and regulations for scheduled international air services in the form of resolutions which are subject to approval by interested governments. The Traffic Conferences have no authority in respect to the commercial rights granted by one country to another. They have no business in respect to determining routes, capacity, types of equipment, or pooling agreements. Nor is it the Conferences' concern which carrier is designated by a government to operate any of the routes.

5) International Agreement on Procedure for the Establishment of Tariffs for Scheduled Air Services, opened for signature on 10th July 1967.

Every active member of IATA has a right to vote in the Traffic Conference for the area in which it carries out operations. All Conference agreements must be reached by unanimous vote. Thus, every airline, regardless of size, has veto power in the Conference of which it is a member. After a Conference has been concluded, rate agreements are submitted to the carriers' respective Governments for their approval. Once approved, the airlines publish the detailed tariffs to be offered to the public. If the rate agreement is disapproved by any of the interested governments, for all practical purposes, it becomes null and void.

For more than 20 years, IATA members have carried out a difficult and delicate task through the Traffic Conferences which often appears impossible. Indeed there are areas of the world where, for many years, it was not possible to obtain airline agreements and, for this reason, what may be termed an "open rate" situation existed. Only through patient, long-drawn-out negotiations is it possible to find universally acceptable solutions always taking into account government interest and final acceptance. Thus, it is in the vacuum of direct multilateral governmental control that IATA Conference play their role in international air transportation under the Chicago Convention and the network of bilateral agreements.

In this perspective, the uniform rules of conduct to which airline representatives unanimously agree at IATA's Traffic Conferences may be seen as an essential ingredient in the developing private international air law. These IATA agreements — called Traffic Conference Resolutions — are maintained in force by the self-discipline of all of IATA's active Members who come from over eighty different states. This reflects a remarkable degree of understanding and cooperation and is a vital aspect of the aviation community about which I have been speaking.

It would be possible for me to go on at length about the many problems and challenges facing the aviation community which may admit of legal solutions. But that is not the purpose of my talk. Rather, I hope that I have been able to show that the nature of air law and the nature of civil aviation are both experiencing radical changes, and that for air law these changes predestine greater involvement and commitment as a social force.

I mentioned earlier the need for awareness on the part of lawyers and governmental representatives of the new role of law in civil aviation. I think it is implicit in my remarks that this awareness must be coupled with interest and a willingness to act if the problems and challenges of the aviation community are to be solved. It is not enough to assume that a few lawyers meeting at international conferences can devise all the necessary solutions and implement them. We may hope that these conferences will be able to isolate community-wide problems and to suggest their resolution.

By demanding both technical and commercial standardization in every corner of the earth, civil aviation is spearheading the move towards universality. But coincidentally it is posing one of the most exciting questions of our time in that by its very reach and speed the industry is challenging the concept of "national state".

We are now faced with the fascinating prospect that aviation, in its role as a common denominator of geographical difference, will force a direct confrontation between national systems of law and national constitutional traditions.

It is with this in mind that the IATA Legal Committee has already established a long-range planning committee to study and forecast future matters of legal interest to civil aviation. But, in most cases, the real work will have to be done by the lawyers in each state who are mindful of the needs of the entire aviation community. In this sense, the new air law of which I have spoken may be seen as an invitation to lawyers to exercise their creativity within the great social experience which the growth of civil aviation represents.

That there is an exciting future ahead for civil aviation is beyond question. But that future will rely heavily on understanding in the field of international legal cooperation. We are on the threshold of an unprecedented exercise in the art of statesmanship.

In conclusion may I thank you for the opportunity I have had here today to talk to you briefly about some aspects of the work of IATA, particularly on the legal side of international civil aviation.
