

## SOME DEVELOPMENTS IN AIR LAW

### I Introduction : role of aviation

INTERNATIONAL CIVIL aviation has a major impact on contemporary world society. It shapes national economies. Trade is carried on by aircraft and air routes. A small country like Singapore has produced remarkable economic progress due to its formidable airline, viz., Singapore Airline. Tourism promoted by aviation helps economies of countries like Thailand, Spain, Singapore, Malaysia, Nepal and many other countries in Europe, Africa and Asia.

Aviation is an agent for change and progress, as pointed out by the Secretary General of ICAO, S.S. Sidhu.<sup>1</sup> On the role of modern aviation, he observed :

As you all know, civil aviation is one major field which is affected by the revolution in high technology. In a country like India which is a vast country with difficult terrain in certain areas, I think aviation has a special significance. This is all the more true when we are in a developing economy which has to progress rapidly.<sup>2</sup>

The seminar held in India in 1987 on aviation therefore reflects its important role in national and international life. As Anand observes:<sup>3</sup>

It is impossible to imagine life today without these fast and safe airplanes criss-crossing all States irrespective of their claims of sovereignty. In spite of all their divisions, the world has been united as never before.

The participation of many international lawyers in the above mentioned seminar merely reflects the growing interest that lawyers and jurists have begun to take in problems associated with aviation. In fact some time ago, the eminent jurist H. Lauterpacht had remarked that a solution to problems of international civil aviation was a matter of future. There were conflicts, he said, born out of factors involved between security and commerce of aviation.<sup>4</sup> In the field of air law, security has been an overriding goal in aviation relations. However since the space exploration began in 1957, and the increasing confidence being shared by nations in recent years, there

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1. See, "Aviation—An Agent of Change", inaugural speech by S.S. Sidhu, then Secretary, Civil Aviation, Government of India, in Anand, Khan, Sidhu, Bhatt (ed.), *Recent Developments in Civil Aviation in India 23-7* (1987).

2. *Id.* at 23.

3. R.P. Anand, *id.* at 143.

4. See, H. Lauterpacht (ed.), *International Law 529* (1963).

is greater emphasis on the economic and commercial benefits of aviation. Thus, we have moved far away from the time of U-2 incident of 1960 which resulted in the breakdown of an important summit conference between USA and USSR.

Jurists have therefore a new vision and perspective on the role of air law. Long ago, a very eminent scholar and jurist, Garner, gave a long discourse in India<sup>5</sup> in 1922 under the auspices of Tagore Law Lectures, containing some very perceptive analysis on the developments of air law.<sup>6</sup> Another jurist Hudson wrote a long article on aviation and international law in 1930.<sup>7</sup> Here in this paper, therefore, this writer wishes once again to bring to the attention of scholars and students of international law, the important current problems of air law which need our analysis and attention. Most of these issues are being dealt with by UN and its specialised agency, the ICAO. It is of general interest to recapitulate the Charter of ICAO, its objectives and important role in the development of air law. In this short survey, therefore, we shall attempt to lay down some of the global issues. These include issues connected with economic development, the Chicago Convention, regional developments, security aspects, bilateral agreements, impact of outer space on aviation and development of the space transport, some aviation policies of other leading countries, and perspectives on Indian air law mostly derived from international air law. Analysis of the above problems cannot obviously be extensive here. We hope many scholars in India will attempt to analyse these problems further and develop and explore air law so that our national policies on these subjects are guided by the scholarly contribution so much needed.

## II A systems approach to air law

Many scholars feel that the law of air though related to a daily need of man and society is somewhat complex. One reason that many scholars have not paid particular attention to air law in India is that it is so complex and technical. Indeed, it is a multi-dimensional discipline and involves inter-dependent factors like, (i) knowledge of aviation technology; (ii) economics; (iii) air space management; (iv) private air law; (v) public air law; (vi) law-making by ICAO; (vii) security and safety laws; (viii) liability aspects; (ix) air routes structure; (x) regulation of air services and bilateral air agreements; and (xi) a complete knowledge of licencing of pilots, airports and regulation of aircraft components. The outer space penetration has further complicated our understanding of air law because two regimes, one based on airspace sovereignty and the other on the freedoms of outer space, lie alongside without a boundary wall between them.

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5. See, J.W. Garner, *Recent Developments in International Law* (1925).

6. *Id.* at 141-81.

7. See, Manley O. Hudson, "Aviation and International Law", *American Journal of International Law*, vol. 24, p. 228 (1930).

Many scholars have therefore accorded and recommended a systems approach to air law problems. This approach advocates harmony between various units of the aviation system to find a solution to aviation policies. Let us recall what a systems approach is:

The key word is "system"—for air transportation is a system, and a very complex one at that. It is made up of many parts, or subordinate systems, each closely related to another, and each capable of creating a problem to the detriment of the other. Unless these many closely interrelated parts are made to work in harmony, one with the other, the imbalance of one part will upset the ability of the total system to fulfil its intended purpose.<sup>8</sup>

Many air accident enquiries conducted by honourable judges are helped by technical experts called assessors.

### III Chicago Convention of 1944 on air law

Nevertheless, whereas a systems approach is needed for analysing air law problems, framers of the Chicago Convention of 1944 have set forth the essential principles of international air law which have helped develop air law in keeping with global community expectations. This convention is a charter for world aviation. Let us briefly recall here some legal principles enshrined in this convention which have produced fantastic progress of global aviation and maintained harmonious world aviation order.

A historian chooses the important historical facts for analysis. As Carr says, a historian needs, "a long-term vision over the past and over the future."<sup>9</sup> He cautions that "the historian of the past can make an approach towards objectivity only as he approaches towards the understanding of the future."<sup>10</sup>

Looking towards the intervening years since the Chicago Convention was drafted, one feels that the events and history of modern aviation have been superbly guided by the long-term vision of framers of this convention. We would recommend that scholars write analytically on its various important provisions which provide the fabric of modern air law regime.<sup>10a</sup> As Justice Krishna Iyer says, combining history with new values, new policies, new perspectives, new conventions in super-aviation makes a contribution to legal futurology.<sup>11</sup> Much less is however written on the Chicago Convention than it deserves to be.

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8. See, Clifton F. Von Kann, "A System Approach to Air Transportation Planning", in *Aviation and the Transportation System* 230 (1966).

9. E.H. Carr, *What is History* 123 (1961).

10. *Ibid.*

10a. Some analysis is made in S. Bhatt, "The Chicago Convention on Civil Aviation", *Aviation Environment and World Order* 36-52 (1980).

11. Justice V.R. Krishna Iyer, *id.*, foreword.

May we then bring forth the following important legal principles of Chicago Convention which help us realise the goals of international civil aviation: The preamble states:

[T]he future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world....

It stresses cooperation, peace, safe and orderly manner in which international air services may be established.<sup>12</sup>

Article 1 represents the air sovereignty of states. It reads:

The contracting states recognise that every state has complete and exclusive sovereignty over the airspace above its territory.

It merely reflects the history of aviation law ever since such an article was incorporated in the Paris Convention on civil aviation in 1919. Today air sovereignty is modified by space exploration. Security and privacy enjoyed by states as a result of air sovereignty is being substituted by international co-operation.

Article 2 refers to definition of territory which includes land areas and territorial waters. Article 3 differentiates civil and military aircraft. The convention applies to civil aircraft though in practice the rules of air like the rules of road are followed both by civil and military aircraft. Article 4 prohibits misuse of aviation. While the Chicago Conference of 1944 could not agree to an international agreement for scheduled operations, it did provide in article 5 the rights for non-scheduled flights for non-traffic purposes without the necessity of obtaining prior permission and subject to the right of state overflown to require landing. Scheduled services are governed in article 6 by special written permission of states. Article 7 prohibits sabotage, *i.e.*, carriage of traffic by a foreign aircraft between two places in a country. Under article 8 pilotless aircraft are not permitted to fly, though this provision does not apply to spacecraft without pilots/astronauts. States can declare prohibited areas under article 9. Such areas are of reasonable extent and location "so as not to interfere unnecessarily with air navigation." Article 10 makes it necessary for foreign aircraft to land at customs airports.

One of the important articles which applies national laws to international civil aviation is article 11 dealing with applicability of air regulations. It states:

[S]ubject to the provisions of this Convention, the laws and regulations of a contracting state relating to admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its

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12. See, *Convention on International Civil Aviation 1* (ICAO Doc. 730/6) (1980).

territory, shall be applied to the aircraft of all contracting States without distinction as to nationality....

This regulation makes for uniformity and equality of air laws in states. It ensures that no discrimination is made based on nationality. Indeed, there is a worldwide practice to enforce equal treatment to all airlines and aircraft. Seldom does one come across any aspect of international law which is so uniform and applicable to all without distinction. Thus world aviation moves uniformly and customs, health and other laws are applied more or less in identical manner across national boundaries.

Yet another important part of international air law is contained in article 12 relating to the "rules of air", applicable to movement of aircraft and for management of airspace. This article provides:

[E]ach contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under the Convention.

Other significant laws of the Chicago Convention are, (i) article 13 for entry and clearance regulations; (ii) article 14 for prevention of spread of disease; (iii) article 15 for airport and similar charges which are once again uniform for all countries; and (iv) article 16 which provides for search of aircraft of other contracting states. Article 22 relates to facilitation formalities for passengers and cargo, while article 25 lays down that states will provide help to aircraft in distress.

Yet another provision of international interest is investigation of accidents provided in article 26. The state in which an accident occurs institutes an enquiry into the circumstances in accordance with its laws and procedure recommended by ICAO. The state of registry shall be enabled to appoint observers. The focus of enquiry is not to apportion blame or liability but to find the cause of accident and take steps for its prevention. It may be recalled here that there is no international convention to determine liability for aircraft accidents. A draft agreement for aerial collisions has been discussed by ICAO but there is no consensus. It is commonly agreed that states have a duty to provide services like air traffic control, and navigation facilities. They do not however have responsibility to pay for accident damages as these services provided are discretionary in nature. Most of the courts in USA have also held the above view.<sup>13</sup>

Some other provisions of the Chicago Convention are mostly technical in nature. For example, article 30 is on aircraft radio equipment, article 31 relates to certificates of airworthiness, article 35 makes restrictions on cargo.

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13. See generally, S. Bhatt, "Responsibility in International Air Law : Some Aspects of the Problems of Air Traffic", *IJIL*, vol. 8, pp. 113-21 (1968).

However, article 37 provides another important legal principle. It enables drafting of annexes to the Chicago Convention which is a noteworthy process of law-making. ICAO circulates to states new laws in the form of standards or recommended practices and these are adopted if agreed to by the majority of ICAO member states. As many as 18 annexes have been adopted so far and they are a part of the convention as per article 37. Any differences from standards are to be notified by states to ICAO under article 38.

Part II of the convention refers to ICAO, its objectives, organisation, powers and functions. As a specialised agency of UN, this organisation is rendering great service to the cause of world aviation. Its council comprising 33 members is the permanent executive body. The Assembly meets once in three years, and has a secretariat headed by a secretary-general.

Part III of the convention is on international air transport. It refers to subjects like airports and other navigation facilities, financing of navigation facilities, technical assistance, *etc.*

Thus we have had a glimpse of the structure of the Chicago Convention which provides a network for the functioning of civil aviation. Seldom has aviation been a source of conflict between states. The legal norms, procedures, and co-operative spirit guides the development of international air law. Let us therefore pay our tribute to those who drafted the Chicago Convention and to those who keep its spirit alive for the present and future needs of global aviation.

#### IV Air law and economic development

Air law is very intimately connected with modern economic development of states. Air transport is developed on factors like export and import of cargo, passenger movement, tourism promotion, and a host of other national activities. In this manner, air law looks to equality of opportunity between states. It helps facilitate competing interests between countries and ensures cooperation. Collection of statistics, forecasting on traffic development and other relevant factors call for application of a systems approach to international air law for creative process. Thus air law has to include a study of international organisations like ICAO and IATA. The former regulates world aviation as already described and the latter makes possible a plethora of tariff regulations and procedures which enable airlines to issue a single ticket transcending national boundaries. IATA is also a big clearing house for airlines.

Indeed for these reasons we may recall here the objectives of ICAO which include tremendous emphasis on the economics of air law. Article 44 of the Chicago Convention relating to the objectives of ICAO states, *inter alia*, that "the aims and objectives of this organisation are... to meet the needs of the peoples of the world for safer, regular, efficient and economical

air transport"; "prevent economic waste caused by unreasonable competition"; and "avoid discrimination between contracting States".

Therefore international air law is to be explored and applied to day to day problems of aviation relations and help plan future growth of aviation order in the world. We recommend some urgent topics for students and specialists in air law such as the study of air tariffs, trade in services, technical economic assistance to developing countries, economic planning of air routes and airports. Indeed, airport planning and expansion of airports has manifold aspects which can be integrated only by air lawyers with some technical knowledge. Planning involves long-term view of development of airports, aviation technology, land use, property rights around airports, environmental aspects involved such as flora, fauna and impact on airport surroundings and the like. ICAO has made a master planning manual for airports which needs our analysis. Indeed many distinguished scientists like Pierre Dansereau, an ecologist, were involved in the planning of the Montreal Airport. Many professors from the School of Environmental Sciences, Jawaharlal Nehru University along with eminent jurists of the university would perhaps integrate their knowledge for the planning of airports in India in accordance with the needs of present and future requirements in the country keeping in view land use eco-standards.

### V Airports in the world

It is worthwhile to provide here the number of airports in some countries to gauge the level of economic progress born out of airports. In the list given by ICAO<sup>14</sup> USA leads with 5540 civil airports. Some other countries have the following numbers: (i) Mexico 1073; (ii) Peru 277; (iii) Philippines 226; (iv) Canada 509; (v) Brazil 871; (vi) UK 136; (vii) France 274; and (viii) FRG 134. India has 176, Pakistan 26 and Bangladesh 15 airports.

Some of the important areas of economics of air transport where air lawyers need to develop their expertise are summarised in the report of ICAO.<sup>15</sup> These subjects include, (i) work on the fare and rate panel of ICAO; (ii) workshop on airport and route facility management; (iii) workshop on aviation forecasting and economic planning; (iv) workshop on international fares and rates; (v) workshop on statistics of air transport; (vi) issue of trade in services and participation of ICAO in UNCTAD; (vii) a data bank bilateral air transport agreement which provides a network of schedule air services in the world; and (viii) facilitation problems of passengers and cargo for which indeed ICAO called for a Diplomatic Conference in 1988 in Montreal.

In brief, air law is air transport law today. It is a means to modern progress. Air routes provide a life-line for economic interaction. Modern

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14. See, *Annual Report of the Council, 1986*, p. 40 (ICAO Doc. 9506).

15. *Id.*, ch. III, pp. 61-7.

aviation is a marvel of this civilisation representing a media for cooperation, travel and economic activity. Air law must conform to this new world role for global air transport.

#### VI 1986 ICAO Assembly Session and problems of air law

The 26th session of ICAO Assembly in 1986 had the following agenda items relating to air transport problems of global interest: (i) model clause in bilateral agreement; (ii) regulation of non-schedule air transport; (iii) guidance material on sixth freedom; (iv) unilateral measures affecting civil aviation; (v) IATA paper on trade in services; (vi) unilateral application of competition laws; (vii) air transport fares, rates; (viii) taxation in air transport industry; and (x) automation in airline industry.

The Assembly agreed to continue the study of the above problems with the help of expert groups in ICAO and by IATA. With regard to unilateral measures which threaten civil aviation, ICAO has appointed a committee to deal with this problem. The IATA paper on trade in services suggests that ICAO and IATA continue their present role and not involve GATT in trade in services. With regard to tariff enforcement, discussions revealed the need for coordination between the governments and airlines and improving enforcement standards. Working paper<sup>15a</sup> presented before the Assembly related to some more major air transport problems such as: (i) economic situation of airports and facilities; (ii) economic aspects of unlawful interference in civil aviation; (iii) civil aviation and human environment; (iv) economic situation of air carriers; and (v) economic and safety factors in aviation and their relationships. The IATA paper on taxation in air transport brought about problems of government taxation laws which impose a burden on the airline industry.

In the matter of work programmes of the Legal Committee, the Assembly has emphasised the following problems for study : (i) development of instrument for suppression of unlawful acts of violence at airports serving international aviation. For this purpose a diplomatic conference was held in ICAO in 1988 and the Montreal Convention of 1971 was amended to include suppression of airport violence; (ii) the United Nations Convention on the law of the sea-implication for the Chicago Convention and its annexes and other international air law conventions; (iii) liability of air traffic control agencies; (iv) study of instruments of the Warsaw Convention; and (v) preparation of a draft instrument on the interception of civil aircraft.<sup>16</sup>

The list of air transport and air law problems are then seen having a bearing on many aspects of the development of modern aviation. Students of international air law are thus required to have a wide perspective on these

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15a. No. 19.30.

16. *Id.* at 101. The working papers of the 26th Assembly Session and its deliberations are partly reflected in the *Annual Report*, *supra* note 14. However, reference may also be made to the proceedings of the ICAO Assembly for 1986.



issues and analyse them for promoting public order of air. Safety, security, economics, trade, tariff, facilitation, liability aspects, relationship with law of sea, environment, are some major parameters to develop air law further.

### VII Future trends in air law

From an overview of developments in world aviation and air transport, we can discern some major goals towards which world air law seems to be moving.

*First*, there is the widespread element of *international cooperation* fostered by ICAO and modern international aviation relations between states. Cooperation is global, regional and bilateral. This augurs well for the future growth of civil aviation.

*Second*, in view of the importance and growth of aviation the world over, *airspace management*, to which air law can be applied, is becoming a study of intense interest. Laws of air traffic control, planning of air routes and airports, laws of search and rescue of aviation are factors involved in airspace management. An integrated and systematic approach is needed to understand airspace management. ICAO has enabled a world-wide network of flight airspaces with management and control units with more or less uniform standards of air laws or laws of airspace management often called standards and recommended practices of ICAO. Facilitation of passengers, safe and orderly flow of air traffic are the major areas of interest in airspace management with emphasis on cooperation and coordination between states.

*Third*, because of *space exploration*, aerospace transport era is coming close, with consequent impact on aviation. Space shuttles are already being tested. Air law needs to be updated to face problems of aerospace transportation. Greater cooperation will be needed between states for this kind of travel. Moreover, rights for passage, safety and security standards and planning of facilitation of passengers and that of airports are issues for aerospace lawyers.

*Fourth*, aerospace transport has impact on global *ecology and environment*. Therefore, maintaining of ecological goals of civil aviation becomes necessary for the world order that is unfolding.<sup>17</sup>

*Fifth*, air law must address itself to aviation being a means of *mass transportation* and mass tourism. Therefore, facilitation, taxation and air tariffs for passengers, and cargo are world order issues. Further, a great degree of uniformity is needed in national laws to enable mass air transport operate across national boundaries without delay. Time factor for travel in air and on ground handling has assumed great importance. ICAO indeed held a diplomatic conference in 1988 on problems of facilitation. Information and reservation systems in aviation are being overhauled with

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17. In this context reference is made to S. Bhatt, "An Ecological Approach to Aerospace Law", *Annals of Air Law and Space Law*, vol. 4, pp. 385-96 (1979).

new computerised technology. Air law has to ensure equality of opportunity for airlines of the world as provided in the objectives of ICAO.

*Finally*, aviation has a major role in the *economic development* of states and peoples. It is in the context of international trade, economics and development that modern air law has a substantial contribution. No more is air law concerned merely with rights and liabilities. As an instrument of change and development, air law must be developed to respond to the worldwide economic role that aviation has today and in the 21st century.

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