Just Culture in Aviation: The Best of Two Worlds

ABSTRACT

Investigation into the causes of aviation accidents and incidents is of key importance for finding solutions that improve the safety of aviation and provide assurance to passengers for an uneventful flight. Nobody should be immune from the law. The use of these findings in determining whether criminally reproachable behaviour is involved forms part of the administration of justice; a function which is an integral part of any society that respects the rule of law. The issues related to this apparent conflict between these two worlds and approaches towards reconciling or at least balancing these activities form the basis for this paper. It introduces the notion of Just Culture, experiences with its application in Europe and the prospects and conditions for a more global application. The role and responsibilities of the International Civil Aviation Organization (ICAO) in this context are addressed, in particular as the possible facilitator for introducing Just Culture-based solutions in the different ICAO regions.

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INTRODUCTION

Accidents and Incidents happen. They form part of our daily lives and we accept their occurrence, even in air traffic management (ATM) and air transport, and we hope and expect that we can avoid by far most of them by our actions, professionalism and abiding by established rules and practices.

Ever since the investigation of aviation accidents was undertaken in a systematic manner with the specific aim of using the findings of each accident investigation for the prevention of other accidents, the problem of the use of these findings for purposes other than accident prevention has manifested.

Improving aviation safety depends to a large extent on the feedback of knowledge generated by a system of accident/incident data collection and analysis. Such a system serves the industry, as well as its regulators, by allowing it to adapt and improve on equipment and procedures. A high-quality output of the system very much depends on the existence of systematic record traceability and active participation and reporting from all the aviation stakeholders involved in safety areas. In the US and Europe, for example, well-developed accident prevention processes are in place, including mandatory and voluntary incident reporting systems and independent accident investigation.

From relatively early days, the ICAO which is responsible for setting international rules and recommendations for improving safety, has been confronted by the need to protect aviation safety interests from those parties that want access to investigation results and other safety data with the goal of what ICAO calls apportioning blame or liability. Therefore, ICAO rules, in the interest of an uncompromised safety investigation process, are often seen as advocating a protection against the interests of what is often referred to as “the administration of justice.”

In a safety-critical domain such as aviation, the legal consequences of (contributory) actions or behaviour that could result in serious personal harm, death or other damages are plentiful and very significant, both in the private law and, increasingly, in the criminal law domain. Criminal law forms an essential part for a sovereign State in the exercise of its responsibility for enforcing specific domain-related norms as well as for the prevention and sanctioning of unacceptable behaviour.
SAFETY VERSUS JUDICIAL

The administration of justice, in particular in the criminal law domain, constitutes one of the pillars of State sovereign functions; they are usually firmly imbedded at the constitutional level. Both the Convention on International Civil Aviation (hereafter referred to as the Chicago Convention) and the EUROCONTROL Convention explicitly confirm the complete and exclusive sovereignty of a State over its territorial airspace. That certainly includes the administration of justice. States are of course free to choose to delegate or pool certain sovereign functions, as is the case with the European Union membership, but criminal jurisdiction, with only a few exceptions, generally remains firmly imbedded at the State level.

There is a growing concern in recent years on the part of aviation professionals and aviation industry about the interpretation of flight safety and aviation accidents by the general public as well as the criminal judiciary. These concerns are associated with what is seen as the increasing emphasis on legal issues in aviation safety occurrences. This has led to growing fear of litigation and the threat of criminal sanctions against individuals and organisations that are seen as partly or fully responsible for an accident or incident in which they were involved.

We need to understand the complicated relationship between the administration of justice and the safety investigation. As in a classical drama, two antagonists are involved: one with the aim of preserving justice by investigating and prosecuting possible perpetrators and the other with the aim of enhancing aviation safety through independent investigation and reporting.

The issue of criminalisation of aviation accidents or incidents illustrates the delicate relationship between the propagation of aviation safety and the administration of justice in the aviation domain. These are two distinct worlds that seldom meet. One is by nature international, dynamic and very sensitive to safety; the other is by nature national, resistant to progressive change and very sensitive to the rule of law. It is no wonder that their interaction, or perhaps the lack of it, generates difficult and often passionate discussions.

Accidents and serious incidents very often occur as the result of a series of events that in an eerie and inevitable way lead to disastrous results. When mistakes are involved they can often be labelled as “honest” mistakes that would not qualify as criminal behaviour. Controllers and pilots are professionals who are ready to realise that nobody can claim criminal immunity in any civilised country. But it is equally true that a small, but highly visible, number of cases raise questions on the relevance and motives of some criminal prosecution and court cases.

And here lies the root of the issue: Who will determine whether a mistake was made by a qualified professional acting in a responsible manner or whether this was a clear case of gross negligence, wilful misconduct or criminal intent, to use just a few of many legal terms for criminally reproachable behaviour? That person cannot be a chief pilot or a control room
supervisor; such a call can only be made by a professional in the judiciary, a prosecutor and ultimately a court of law.

The key is what happens next: A qualified criminal investigator or prosecutor must assess whether, under the applicable criminal law, the actions leading to the accident/incident warrant further steps such as investigations and indictment. A number of high profile accidents and serious incidents did result in criminal investigations and proceedings and have raised strong concerns from the air traffic control and air transport community about the criminalisation of aviation. That is not all; events have shown that further complications could arise as a result of public and media pressures that generally accompany any crash or serious incident with the associated “search” for a guilty party.

The discussion on criminalisation of aviation incidents and accidents shows concerns on the perceived intrusion by the judiciary in the all-important effort in enhancing safety in aviation. It also shows a tendency to use “criminalisation” as the epitome of misdirected and unwarranted activities by the authorities and to argue that the safety domain should therefore be protected from any action by the prosecution.

The problem is that invoking real or alleged criminalisation of aviation incidents or accidents as a justification for fully protective legislative action does not really work. All the regional and global rules and standards related to the protection of safety data and investigative processes in aviation create an exception for the actions of a sovereign State in the exercise of the administration of justice. What is needed now is the establishment of equilibrium between two equally relevant goals: aviation safety and the administration of justice.

**JUST CULTURE**

Rather than trying to shut up the judiciary, focus has now shifted towards initiating a dialogue between the national authorities concerned. A better understanding of the consequences of a judicial inquiry must be the starting point. In most States, national criminal legislation provides prosecutors with a level of discretion as to how to apply those laws; a clearer appreciation of the associated safety consequences may actually influence the application of those laws.

This is where the Just Culture initiative, as developed for aviation by EUROCONTROL, enters the equation. Attempting to describe, let alone define, Just Culture is not simple, to put it mildly. The results may vary from one person, culture, legal system to another. The following description of Just Culture in the aviation domain has been accepted in Europe:

“A Culture where front line operators are not punished for actions, omissions or decisions taken by them that are commensurate with their experience and training, but where gross negligence, wilful violations and destructive acts are not tolerated.”
This description introduces the notion of gross negligence and wilful violations for qualifying criminally relevant behaviours that are not in accordance with internationally agreed definitions. And although the criteria to establish gross negligence or related legal concepts in common or civil law may be similar in most countries, their interpretation and application with respect to individual cases will ultimately lie in the hands of prosecutors and ultimately of a criminal court.

When the legal consequences of Just Culture were first discussed, the initial reaction was that most European States would need to significantly amend their laws in order to implement Just Culture in a non-punitive environment. Calls were made for changes to criminal laws and to regulate and fully protect access to information. The general feeling was that a Just Culture could not be implemented without these.

Subsequently, when the discussions became more mature, it dawned upon the participants that amending laws and principles that constitute the basis of sovereign judicial systems was, in most cases, not a realistic option. And equally important, it was not deemed essential. The issue was not necessarily the need for more legislative actions but rather the way in which those existing laws and regulations were implemented and enforced by the national judicial authorities.

Provisions which could result in a legal environment supporting a Just Culture, while taking a realistic view to the need to respect some fundamentals with regards to the administration of criminal justice, already exist. A number of relevant instruments dealing with accident investigation and incident reporting, supported in some cases by guidance material, are in place.

GLOBAL AND REGIONAL PROGRESS

Just Culture has been on the agenda for many years and it has become apparent that a key part of its successful implementation relies on a number of realistic deliverables that would stimulate further understanding and active and open coordination between the safety and judicial authorities.

In ICAO, the discussions and findings of the 36th Assembly, the Accident Investigation and Prevention Divisional meeting in 2008 and the recommendations of the ICAO High Level Safety Conference in March 2010 resulted in resolutions A37-2 and A37-3 of the 37th General Assembly on the sharing of safety information and the protection of safety data. Both resolutions, using the description of the Just Culture initiative, instructed the Council to strike a balance between the need for the protection of safety information and the need for the proper administration of justice. The Assembly furthermore noted the need to take into account the necessary interaction between safety and judicial authorities in the context of an open reporting culture. The ICAO Safety Information Protection Task Force (SIPTF) was, among other reasons, created as a result of these conclusions which to a great extent have inspired its findings and recommendations.
In Europe, the European Union (EU) has not only formally enacted Just Culture as part of EU law with the introduction of Performance Regulation (EU) No 691/2010, but it has also recently introduced elements of it in Regulation (EU) No 996/2010, governing air accident and incident investigation that also addresses the need to achieve a balance between the objectives of the judiciary to determine whether criminality was involved, and the need for the aviation industry to be able to run a real-time self-diagnostic system without unnecessary interference from Justice.

EU Regulation 996/2010 stipulates that its purpose is dual: to regulate both “the investigation and prevention of accidents and incidents”. It says: “An accident raises a number of different public interests such as the prevention of future accidents and the proper administration of justice. Those interests go beyond the individual interests of the parties involved and beyond the specific event. The right balance among all interests is necessary to guarantee the overall public interest.”

Although it may sound a little negative, the strength of the Just Culture Concept (or by any other name as long as it addresses the same processes) is the understanding that there is realistically no other way forward. Formal legislation fully protecting pilots or controllers or side-lining criminal prosecution is a dead-end street as demonstrated by all the existing national, regional and international legislation. Providing a reasonable expectation to, for example to a controller or a pilot, that the chances that he or she would ever be invited to be part of a preliminary criminal investigation, let alone prosecution, are very minimal, would provide a sound basis for continued incident reporting and even measured and balanced accident investigations.

Just Culture represents the fundamental recognition that both the aviation safety drive and the administration of justice would benefit from a carefully established equilibrium, moving away from criminalisation fears. It is based on the understanding that controllers and pilots can blunder and that the line between an “honest mistake” and intentional or reckless behaviour can only be drawn by a judiciary professional.

That is easier said than done, of course. But the time has come to seriously question the added value of endless and generally unsuccessful efforts at the international level to “protect” controllers and pilots against judiciary actions by creating standards, regulations and laws that are supposed to shield them against interference by justice. This is perhaps a good time to point out that this paper primarily focuses on the introduction and benefits of Just Culture at the State and International level and on the interaction between safety experts and the judiciary. At the (national) corporate level, in the interaction between management and staff of, for example airlines and air traffic service providers, Just Culture of course plays an equally important role in the acts of pilots and controllers and the application of company rules, contract and labour law.
A lot of progress has already been made in this domain through safety management and related practices and the new ICAO Annex 19 will certainly also play an important role in this area. It is important to note that these developments will also require the recognition and perhaps harmonisation of corporate Just Culture with the criminal law requirements and policies at the State level.

## DISCUSSION

The time has come to focus on the pursuance of the practical goals identified by the Just Culture activities. The first steps toward the proliferation of the model aviation prosecution policy concept have started and the first prosecutor expert courses have been held. The relevance of offering assistance and education to prosecutors and judges together with the introduction of and implementation of the model for an aviation prosecution policy in Europe and beyond is obvious. After the historic support by the full EUROCONTROL 39 State membership and the EU for these deliverables, the next step will be to submit them for global consideration at ICAO.

At the 37th General Assembly, resolutions A37-2 and A37-3 on the sharing of safety information and the protection of safety data added the instruction to the ICAO Council to strike a balance between the need for the protection of safety information and the need for the proper administration of justice; the Assembly furthermore noted the need to take into account the necessary interaction between safety and judicial authorities in the context of an open reporting culture.

As mentioned earlier, The ICAO SIPTF was tasked with analysing present ICAO rules and Standards and Recommended Practices (SARPs), National Legislation and considering enhanced communication and interaction mechanisms to improve the efficiency and credibility of data protection and occurrence reporting and the relations between safety activities and the national judiciary.

It may be expected that the SIPTF, which held its last meeting in January 2013, will come forward with realistic proposals for the enhancement of safety data protection that recognise and reconcile the existing national and international legislation and regulatory processes and their limitations. In addition to SIPTF recommendations regarding changes in positive law or ICAO SARPs, considerable progress could be made in advancing safety information protection with deliverables in the domains of training, support, education, and communication through innovative implementation tools and tactics, to balance the adequate protection of safety data with the proper administration of justice.

There is general recognition of the need to establish communication and training initiatives and advance arrangements between the aviation safety sector, regulators, law enforcement and the judiciary to avoid unnecessary interference and to build mutual trust.
and understanding. Furthermore, making high-level aviation expertise available to law enforcement and judiciary would facilitate the exercise of their appropriate investigative and judicial processes.

A number of States and groups of States in different ICAO regions are already organising training and communication between safety and judicial authorities addressing implementation tools and deliverables that would lead to a stable and successful basis for enhanced safety data protection and a balanced interaction between safety and the administration of justice. It is important to note that these recommendations address processes and activities that are expected to continue well beyond the active life of the SIPTF. Training, support, cooperation, communication and advanced arrangements form decisive conditions for an efficient and realistic safety data protection.

The time has come for ICAO to further build on the Just Culture principles and become the facilitator at the regional level to educate and encourage States to establish (joint) permanent frameworks to ensure a constructive and on-going dialogue with the judiciary, to inform them on the possibilities to establish a national aviation prosecution policy and to provide them at their request, with dedicated and impartial aviation expertise in the exercise of their functions.

ICAO should also establish and regularly update a repository of training and education activities related to the protection of safety data, the interaction with the judiciary and existing or new best practices and policies. It should provide coordination and support, as well as organise progress reporting and information on a regular basis to all Contracting States.

Just Culture is not the “magic wand” against injustice and misuse of judiciary processes. It has been introduced to protect as much as possible the mundane but ever so important ongoing processes of incident or occurrence reporting: literally thousands of daily events that feed into the well-established system of using the reports for the improvement of safety and the prevention of incidents and accidents. It represents an ongoing daily routine, certainly not as spectacular and awesome as the aftermath of an accident, but absolutely vital for the continued effort to improve safety by learning from mistakes and other relevant occurrences.

Just Culture requires understanding and appreciation of the different processes and commitments by both safety people and the judiciary. And let there be no mistake: Just Culture also implies that misuse of criminal processes or ignorance from the part of the judiciary is equally unacceptable! There is still a long way to go, both in Europe as well as at ICAO, but most of the signs are outright encouraging, as witnessed by the deliverables of the Just Culture Task Force and those expected from the SIPTF and reactions from third parties.

Finally, as good concepts often are in essence simple ones, I would submit that the summary of Just Culture, of reconciling safety and justice interests, can be reflected as follows: IT TAKES TWO TO TANGO!
References

Commission regulation (EU) No 691/2010 of 29 July 2010 laying down a performance scheme for air navigation services and network functions and amending Regulation (EC) No 2096/2005 laying down common requirements for the provision of air navigation services; OJ L 201, 03.08.2010.

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