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## Book Reviews

DeForest Billyou

Lucile Sheppard Keyes

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## BOOK REVIEWS

AIR LAW, by George A. Seabrooke. University of London Press, Ltd., 1964, pp. 323. 37s 6d

In the Foreword to this volume, the Chairman of the British European Airways states (p. 2):

This book has been commissioned by BEA for its many students and for all those, inside and outside the airline industry, to whom air law is an important or an interesting field. It is primarily a students' book, written for the information and interest of people who may have no earlier knowledge of law in general or of the particular complexities of air law.

The author, Lecturer in Law at Nottingham and District Technical College and Tutor in Law to BEA, has undertaken to "outline the law of air transport, and incidentally, though necessarily, to examine those aspects of general law which may be considered essential to a proper understanding of air law" (p. 9).

The volume is divided into nine chapters, commencing with two outlining English law and commercial law, followed by chapters on the English treatment of subjects such as torts, international air law, air transport, civil aviation, carriage by air, and insurance. While the volume does cite cases, and some texts, it lacks footnotes, references to secondary authorities, or texts of statutes or conventions, with the result that it will not be too useful in commencing research on a problem. But for its stated purpose, as an outline for students of a major air carrier of the United Kingdom (BEA has about 16,000 employees), it is an admirable volume. Nothing like it has been published elsewhere.

*DeForest Billyou\**

THE LAW OF THE AIR, by Arnold D. McNair (3d ed. by M. R. E. Kerr and A. H. M. Evans). Stevens & Sons, London, 1964, pp. xxxviii, 588. \$23.70

The enthusiasm for aviation that swept the United States following Lindbergh's solo transatlantic flight of 1927 led to the 1930 Air Law Institute at Northwestern University School of Law, Chicago, Illinois.<sup>1</sup> At that Institute, the speaker on the air law of England was Arnold D. McNair, Reader in Public International Law at the University of Cam-

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\* Member of the New York Bar. Author of *Air Law* (2d ed. 1964).

<sup>1</sup> See 1 J. Air L. & Com. 206-07, 334-36, 581-83 (1930); McNair, *The Beginnings and the Growth of Aeronautical Law*, 1 J. Air L. & Com. 383 (1930).

bridge (now President of the European Court of Human Rights). Other speakers addressed themselves to the development of international air law through the Commission Internationale de Navigation Aérienne (CINA)<sup>2</sup> and to air law in the United States.<sup>3</sup> The lectures on English air law presented at that Institute were later developed further and presented as the 1931 Tagore Law Lectures at the University of Calcutta; they were published in 1932 as McNair, *The Law of the Air* (the second edition was published in 1953).

That first edition was undoubtedly the most significant single volume on the broad subject of air law published in the English language. Its analysis of the subject received wide acceptance and placed its imprint on subsequent development in the field. That is evidenced by the fact that the outline of the eleven chapters of the first edition of thirty-two years of age is found virtually intact in the third. The third edition, largely the work of two members of the faculty of Cambridge University, carries forward the high standards of its predecessors "to state the aeronautical law of England" (p. 3).

It is clearer today than in 1930 that the air law of major nations of the world will proceed along divergent paths. The volume of cases and reported air law opinions of courts of the United Kingdom is but a small fraction of such cases and opinions in the United States. Chief among the factors contributing to this is the presence in the United States of the contingent fee system, with its incentive to negligence litigation. Also important is the existence in the United Kingdom of Section 40 of the Civil Aviation Act, 1949, referred to below.

The first edition of McNair included as appendices one statute of the United Kingdom (the Air Navigation Act, 1920) and two international Conventions (Paris, 1919, and Warsaw, 1929). The United States became a party to only the latter of those Conventions. Its statutes have covered only some of the ground covered by the Air Navigation Act, 1920, and it does not have a statute like Section 40 of the Civil Aviation Act, 1949. The later act, in effect, provides that neither trespass nor nuisance lies in regard to flight that is reasonable and conducted in compliance with law (p. 101; also pp. 1, 21). The disparity between the treaty and statutory air law of England and that of the United States continues to grow. The United Kingdom is today a party to five multilateral conventions (Warsaw, 1929; Chicago, 1944; International Air Services Transit, 1944; Geneva, 1949; and Guadalajara, 1961); the United States is a party to all of those except Guadalajara but has announced its withdrawal from Warsaw.<sup>4</sup>

Internal legislation in the two nations enlarges the disparity. While the United Kingdom is not a party to the Hague Protocol, 1955, it expects

<sup>2</sup> See 1 J. Air L. & Com. 206-07, 334-36, 581-83 (1930); Roper, *Recent Developments in International Aeronautical Law*, 1 J. Air L. & Com. 395 (1930).

<sup>3</sup> See 1 J. Air L. & Com. 206-07, 334-36, 581-83; cf. Logan, *The Present Status and the Development of Aviation Law*, 2 J. Air L. & Com. 510 (1931).

<sup>4</sup> Aviation Week & Space Technology, 22 Nov. 1965, p. 33. See the statement of Hon. Thomas C. Mann, Under Secretary of State for Economic Affairs, before the Senate Committee on Foreign Relations, 20 Aug. 1965; New York Times, 20 Oct. 1965, p. 1, col. 5.

to achieve much the same result by internal legislation (pp. 223-55); the United States is shunning that Protocol. Concepts of legal liability prevailing in the United Kingdom have not produced anything comparable to two statutes of the United States that play an ever-increasing role in aviation: the Death on the High Seas Act<sup>5</sup> and the Federal Tort Claims Act.<sup>6</sup>

Despite the fact that the British did so much in the pioneering and the development of commercial aviation,<sup>7</sup> in 1963 only one of its carriers ranked among the top ten commercial carriers of the world (ranked in order of revenue and passenger miles flown) as against six carriers of the United States in that group.<sup>8</sup> As a result, the resolution of the legal problems of United States carriers in terms of the environment of the United States is having an increasing influence on the development of air law.

For those with an interest in the development and present status of air law in the United Kingdom, and in the important nations that have been influenced by it, the third edition of McNair, *The Law of the Air*, is, like its predecessors, indispensable.

*DeForest Billyou\**

TRANSPORT INVESTMENT AND ECONOMIC DEVELOPMENT, edited by Gary Fromm. The Brookings Institution, Transport Research Program, Washington, D. C., 1965, pp. 314, x. \$6.75

As part of a United States Government-financed research program on the role of transportation in the economic and social development of the emerging nations of Africa, Asia, and Latin America, the Brookings Institution is sponsoring a series of graduate seminars at Harvard University on transport investment planning. The volume under review is a collection of essays based on the first such seminar, which was held during the spring semester of 1963, with the declared aims of "awakening . . . student interest in the topic and [providing] an introduction to the complexities of the subject" (p. vii).

Although very little in the book bears on the specific characteristics or problems of air transportation, at least some of the essays should be of interest to all who are concerned with any type of large-scale investment in transport facilities, whether or not in an emerging nation. The excellent essay on "Economic Evaluation of Transport Projects," by Hans A. Adler of the World Bank, is a succinct but definitive treatment of this central theme. Mitchell Harwitz of the State University of New York at Buffalo

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\* Member of the New York Bar. Author of *Air Law* (2d ed. 1964).

<sup>5</sup> 41 Stat. 537, 46 U.S.C. §§ 761-67 (1920).

<sup>6</sup> Ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.).

<sup>7</sup> See Pudney, *The Seven Skies* (1959); Higham, *Britain's Imperial Air Routes* (1960); Davies, *A History of World Airlines* (1964).

<sup>8</sup> See Billyou, *Air Law* 253 (2d ed. 1964).

has contributed an enlightening application of linear programming techniques to the problem of equalizing regional development. By setting forth a theoretical example of such a procedure, the author succeeds in bringing out its potential usefulness "to enforce evaluation of the overall effects of policies and to pin-point important areas of ignorance" (p. 159). A similar perspective is provided by the editor's two essays on general problems of investment decision and the "Design of the Transport Sector." Here the essential point is made that the evaluation of specific projects should be undertaken in the context of the economy as a whole and in the light of the planners' "horizon" goals. Two case studies—"Transportation in Soviet Development," by Holland Hunter of Haverford, and "The 'Railroad Decision' in Chile," by Robert T. Brown of the University of Chile and the Brookings Institution—emphasize the fact that there is no simple direct relationship between investment in the modernization of transport and the promotion of economic development.

Of particular interest to readers concerned with rate-making or price theory is the paper entitled "Pricing Transport Services" by James R. Nelson of Amherst, who quite appropriately advises that total returns from new investment should be expected to cover total costs. While recognizing the widespread incompatibility between this over-all requirement and marginal-cost pricing, the author perhaps tends to underplay the very great importance in this connection of various sorts of indivisibilities and common costs in the field of transportation. His "long-run" cost curve, which is unaffected by these factors, would be relevant to transport pricing only in a stationary environment, or in periods of steady, uniform demand expansion where investment "lumps" could be disregarded through averaging costs over the period for which prices are determined. If assumed horizontal, such a cost curve can of course be used to effect a surface reconciliation between total cost coverage and marginal-cost pricing. As Mr. Nelson notes, a similar reconciliation can be brought about (as in Hotelling's celebrated toll-bridge case) by resorting to a "tax to prevent overcrowding"—but this is quite obviously a thinly disguised method of setting prices by a species of value-of-service criterion, as is the reported current French practice of setting so-called "marginal-cost prices" for hydro-electric power by reference to the cost of supplying the same power from marginal steam plants. Because of the practical importance of irregular demand and indivisibilities, it is doubtful that the construction of a rational system of, say, air fares or railway rates will be helped by Mr. Nelson's assurance that "for a whole transportation network, cost discontinuities tend to cancel out" and that "What matters most is the *average* cost of an increment of new output spread over most or all of the transport system" (p. 222).

Also of special interest is the author's reaction to recent criticisms of marginal-cost pricing norms such as those based on the "theory of the second best," which, he suggests, may undermine the very "idea of optimum allocation" and "call for the destruction of economics" (p. 206).

In this reviewer's opinion, what is called for—and it was called for long before the “second best” was heard of—is the restatement of the economics of pricing norms on a much more pragmatic level. Thus, it is not on the basis of some utopian “maximization of welfare,” but by comparison with practical alternatives, that the use of market measures of costs and benefits, and the pricing principles derived therefrom, can be defended. The pricing criteria outlined in Mr. Nelson's lively and penetrating discussion can for the most part be fully justified in these more realistic terms.

*Lucile Sheppard Keyes*

SPACE LAW, by C. Wilfred Jenks. Stevens and Sons, London, 1965, pp. 476. 5£ 10s

COSMIC INTERNATIONAL LAW, by Modesto Seara Vázquez. Wayne State University Press, Detroit, 1965, pp. 293. \$9.95

WELTRAUMRECHT, by Ernst Fasan. Krausskopf-Flugwelt-Verlag, Mainz, 1965, pp. 234.

The magnitude of man's venture into space is reflected in the vast legal literature which has appeared in the last ten years in a new field of international law. Many authors, even today, contend that a treatise on space law is a premature work since it is destined to be outmoded by rapidly changing conditions and new agreements. However, a number of treatises have already appeared, most of which distinguish themselves by their notable systematization of a broad material and by their sincere effort to help in establishing the principles requisite to a future codification. The latest contributions to this branch of international law, one by a well-known English author and high international civil servant; another by a professor of international law at the National University in Mexico City, known from his first work, *Etudes de Droit Interplanétaire* (1959); and a third by an Austrian lawyer, are exemplary.

Notwithstanding the fact that all three works deal with the same subject matter, their approach to the subject and their substance differ in nature. Therefore, the opinions advanced by the authors on the various problems do not coincide. Dr. Jenks' book, *Space Law*, is based mostly on the authoritative opinion of the writer, and primarily on the Declaration of Legal Principles, unanimously adopted by the General Assembly of the United Nations on 13 December 1963, as well as on the other United Nations resolutions, the International Telecommunications Union regulations, and existing bilateral agreements. Professor Vázquez, in *Cosmic International Law*, sees his subject from the point of view of pure international law which, according to him, is “not law in its true sense, but should be called, rather, a codification of obligatory moral principles in international politics . . . .” Moreover, he adorns his work with substantial

materials which make it an extremely useful manual. Finally, one cannot but admire the technical knowledge possessed by Dr. Fasan and his grasp of the problems connected with space exploration, illustrated in *Weltraumrecht*.

One of the most important questions in space law today, due to its wide repercussions on the future of humanity, is the demilitarization of outer space. In more concrete terms, one poses the question whether the expression "peaceful uses" of outer space, already employed by a number of United Nations resolutions, means "non-military" or merely "non-aggressive" uses. Dr. Jenks, while reserving an interpretation of the term "peaceful," is in favor of a demilitarization of outer space through a general disarmament treaty. Professor Vázquez, although not himself an adherent to the doctrine of demilitarization of outer space, accepts, however, that the word "peaceful" regards "those activities that include the requisites more or less clearly called for by the resolutions of the General Assembly, among which is the non-military stipulation." Dr. Fasan objects to the reviewer's opinion that "peaceful" should mean non-military.<sup>1</sup> He contends, *inter alia*, that in such a case the right of self defense would be forbidden in space. We cannot see the force of this argument, since according to Article 51 of the United Nations Charter it is especially in extra-terrestrial space that the primary authority and responsibility of the Security Council of the United Nations to maintain and restore peace should be made effective. The role of the Security Council would be relatively simple, since the demilitarization of outer space, if accepted by all world States as signatories to an international agreement or a general disarmament treaty, would preclude the creation of situations of necessity justifying individual or collective defense.

Another interesting point of space law is the question of sources of this law and the legal value which should be attributed to the resolutions on space of the United Nations General Assembly. Dr. Jenks, who concedes that the sources of space law are identical with those of international law (since the latter applies also in space), proposes further the drafting of a Space Treaty "similar in general function to the Antarctic Treaty." With regard to the General Assembly Resolution of 13 December 1963, the so-called Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, the author, relying heavily on this Declaration, boldly considers it less than a treaty but "rather more than a statement of custom." Professor Vázquez is also of the opinion that no legal vacuum exists in space because international law, in general, is applicable. However, he favors an international treaty for the solution of specific problems in space, rather than a slow-moving custom formation in cosmic law. According to him, the resolutions of the General Assembly have a very restricted value, being mere recommendations lacking a legal power of enforcement. Thus, unfortunately,

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<sup>1</sup> See N. Poulantzas, *Imperium or Dominium Within the Framework of Space Law*, *Revue Hellénique de Droit International* 95 (1962).

the role of these resolutions in the formation of outer space custom is not recognized by the author.<sup>2</sup> Dr. Fasan, on the other hand, contends, without reason, that since it is expected that the future development of space law will be based on the United Nations resolutions, one may consider them as *leges latae*. He further attributes to them a quasi-legal character.

The demarcation between outer space and airspace or atmosphere, a question still actually of only theoretical value, has been a matter of great concern to space lawyers. A great many theories have been advanced in this direction. Dr. Jenks rightly states that in so far as no agreement on this matter exists, it will be necessary to consider it on the "basis of principle" and in regard to matters "immediately at issue." He further chooses, among all conflicting theories, the one treating troposphere and stratosphere as airspace. Professor Vázquez supports the old theory of John Cobb Cooper, which distinguishes three zones by analogy to international maritime law, *i.e.*, airspace, contiguous space, and supra-atmospheric or free space. Dr. Fasan espouses the Karman line theory extending atmosphere to eighty kilometers.

With regard to sovereignty over outer space and celestial bodies, Dr. Jenks draws a distinction between them, holding outer space not subject to appropriation on account of its nature, and celestial bodies not subject to national appropriation, under any form, on grounds of "international public policy." This "international public policy," he thinks, is expressed in Resolution 1721 of the General Assembly as well as in the Declaration of Legal Principles, which provides that "outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." The author suggests that the term "national appropriation" does not include appropriation by the United Nations acting on behalf of the whole community of nations. He considers that such an appropriation is permitted. Professor Vázquez states that outer space is not subject to sovereignty because it is not *res*. So far as celestial bodies are concerned, he adopts the view of their internationalization and of the creation of an international entity to exploit them, in which all nations will participate. Dr. Fasan adopts the opinion that celestial bodies are *res omnium communis*.

This comparative analysis of some of the most important points of the international law of outer space demonstrates the complexity of the material with which a space lawyer must work. Materials on this subject should be utilized only with care and conclusions drawn after intelligent deliberation. The quality of imagination, indispensable to the writer in this field, must be coupled with realistic assessments and an awareness of the responsibility involved in working with problems having world wide implications. The three authors whose works have been reviewed deserve

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<sup>2</sup> See N. Poulantzas, *Synopsis of Recent Developments in Extra-atmosphere Law and Some Relevant Theoretical Problems*, *Revue Hellénique de Droit International* 97 (1964).