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The Development and Present State of German Air Law

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THE DEVELOPMENT AND PRESENT STATE OF GERMAN AIR LAW[1]

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IN order to understand the development and present state of German Air Law, one must remember that Germany has lost two wars. Everyone knows the old rule that those who have lost a war, must pay for it. So Germany had to pay heavily and particularly in the field of Air Navigation.

Germany felt this all the more as it had contributed much to the development of Air Navigation before the wars. Only two names need be mentioned: *Otto Lilienthal* and *Count Zeppelin*. Otto Lilienthal was the first to succeed in gliding. His name therefore stands at the beginning not only of German flying history, but of the history of flight in general. Unfortunately he crashed during a test flight in 1896 at the age of 48.

Strenuous efforts of other explorers and pioneers followed these two men and German Air Navigation had just begun to flourish, when it was for the first time violently interrupted in its development by the Treaty of Versailles which in 1918 ended the first world war.

Certainly the wording of the treaty provided only that

> "The armed forces of Germany must not include any military or naval forces."

But indirectly Civil Aviation and Aircraft Manufacture was also impeded, particularly in the early years after the first world war.

Much harder were the consequences which Air Navigation in Germany had to bear after the second world war in view of the complete defeat and unconditional surrender with which Germany was obliged to comply.

The governments of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the Provisional Government of the French Republic assumed after the unconditional surrender supreme authority with respect to Germany, because at this

[1] Based on a lecture given at the Institute of International Air Law of the McGill University in Montreal, March 23, 1956.

time in the opinion of the Allies no central government of authority in Germany was capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers.[2]

A *Control Council* was established which possessed paramount authority throughout Germany on matters affecting Germany as a whole.[3] The Control Council, which exercised the rights of sovereignty in Germany for several years after the second world war and enacted its legislation in the form of Proclamations, Laws and Directives, decreed as far as Air Navigation is concerned the following:

Besides the complete abolition of all German Air Forces with all their institutions it prohibited:[4]

> "The production in Germany and the possession, maintenance or operation by Germans of any aircraft of any kind or any parts thereof."

It prohibited further:[5]

> The manufacture, import, export, transport and storage of
> a) "Aircrafts of all types, heavier or lighter than air; with or without means of propulsion, including kites, captive balloons, gliders and model aircraft and all auxiliary equipment including aircraft engines and component parts, accessories and spare parts, specifically designed for aircraft use."
>
> b) "Ground equipment for servicing, testing or aiding the operation of aircraft, such as catapults, winches and beacons; material for the rapid preparation of airfields, such as landing mats, special equipment used in conjunction with air photography; excluding however . . . any such equipment and materials for landing fields and air beacons that have a normal peacetime use and are not specifically designed for military use."

It declared illegal in Germany and therefore prohibited the preparation, possession or making use of plans or models of *airfields,* they being considered as military installations.[6]

Finally the Control Council[7] prohibited all *applied scientific research* as

1. Applied aerodynamics, aeronautical structural engineering and aircraft power plants,
2. Rocket propulsion, jet propulsion and gas turbines,
3. Electromagnetic infra-red and acoustic radiation which has as its purpose

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[2] cf. Declaration of June 5, 1945 regarding the defeat of Germany and the assumption of supreme authority with respect to Germany of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the Provisional Government of the French Republic.

[3] Control Council, Proclamation No. 1, 30th August 1945.

[4] Control Council, Proclamation No. 2, 20th September 1945, Section VIII, No. 30.

[5] Control Council, Law 43, 20th December 1946, Art. I alinea 1 in connection with Schedule A, Group V.

[6] Control Council, Law 23, 10th April 1946, Art. I, II.

[7] Control Council, Law 25, 29th April 1946, Art. II, Schedule A.

a. . . .

b. the determination of the position of aircraft.

c. the remote and the automatic control of aircraft.

Furthermore *"fundamental scientific research,* of a wholly or primarily military nature" was completely prohibited.[8] "Fundamental scientific research, which is not of a wholly or primarily military nature" was prohibited "insofar as it required for its conduct installations which on account of their size or their special or peculiar construction, would be valuable for any applied scientific research of a wholly or primarily military nature."

Scientific research not prohibited in this way could be conducted only "by a research establishment authorized by the appropriate Zone Commander"[9] and each authorized research establishment was obliged to sumbit to this Commander:

(a) Technical Reports every four months showing details of all its activities.

(b) Annual Reports in as non-technical language as possible covering all work done in the year.

(c) A complete statement of the plant, apparatus and equipment existing in the research establishment, as may be required by the Zone Commander.

(d) A complete statement of accounts upon the demand of the Zone Commander.

All research and technical personnel employed in a research establishment were to be registered in accordance with the regulations issued by the appropriate Zone Commander.[10]

A *Military Security Board* was created, on January 17, 1949 directly subordinate to the united Commanders in Chief of the Western Zone.[11] Its task was "that of ensuring that the development of general activity in Germany, the purpose of which is to repair her damages, and enable her to participate in international cooperation, is not deflected from its peaceful aims, by risking the rebirth of a war potential."

Further a *Civil Aviation Board* was established by the Statute of the High Allied Commission of 20th June 1949.[12]

The first changes and relief measures in the legislation of the Allies in Germany concerning Air Navigation took place in the years 1950 and 1951. Already in 1948 various Air Navigation Journals in neutral Countries[13] had expressed the view that it seemed impossible to exclude a State of 50 million inhabitants forever from air navigation, now a regular means of transport.

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[8] Law 25, Art. III.

[9] Law 25, Art. IV.

[10] Law 25, Art. V. VI.

[11] The Department of State Bulletin, Vol. XX, No. 502, February 13, 1949, p. 195-197.

[12] Dept. of State Bulletin, Vol. XXI, No. 523.

[13] Interavia 1948, No. 11, p. 605; Swiss Aero Revue, October 1948.

The results of the relief granted in 1950 and 1951 by the Law No. 24 of the Allied High Commission of March 30, 1950 and its Regulations and by the Law No. 61 of the Allied High Commission of July 19, 1951 amending Law No. 24 were the following:[14]

The general prohibition to build, use and possess aircraft, did not refer any longer to:

1) "Meteorological balloons;
2) balloons without power of propulsion and not equipped with or carrying equipment specially constructed or adapted for ground or air photography or observation, or for the delivery of explosives or missiles;
3) gliders without power of propulsion, weighing less than 400 kg when empty, and constructed or adapted to carry not more than two persons;
4) model aircraft not directly related to the development, manufacture or operation of aircraft or to experiments or research on aircraft."

The *Military Security Board* or the *Civil Aviation Board* could authorize:[15]

a) "The acquisition, construction operation of airports;

b) the manufacture, production, installation, import, export, transport, storage, possession, ownership and use of articles and products included in Group V of the Schedule of Law No. 24 (amended)[16] and the repair, maintenance and operation of aircraft;

c) the construction or modification of plant or equipment intended or adapted for producing such articles and products."

But no change took place in this time in reference to the Scientific Research in Air Navigation.

All limitations imposed in Western Germany in Air Navigation ceased only with the enactment of the *Treaties* of Paris of October 23, 1954 on May 5, 1955. By these treaties the *Occupation Statute*[17] promulgated on 12 May 1949 by the Military Governors and Commanders in Chief of the Western Zones was revoked and the Allied High Commission and the Offices of the Land Commissions in the Federal Republic were abolished.[18]

It is quite obvious that the long interruption of nearly ten years, in which any construction and operation of aircraft with power of

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[14] Schedule to Law No. 24 as amended by Law No. 61, Group V. Official Gazette of the High Allied Commission for Germany, No. 63, August 29, 1951, p. 1051.

[15] Regulation No. 9, under Law No. 24 as amended by Law No. 61, Art. 2. Official Gazette of the High Allied Commission for Germany, No. 63, August 29, 1951, p. 1091.

[16] Group V mentions: "aircraft heavier or lighter than air with or without means of propulsion"; "auxiliary equipment of aircraft, including aircraft engines and component parts, accessories and spare parts, specifically designed for aircraft uses"; "aviation ground equipment and installations as follows . . . ".

[17] cf. Official Gazette No. 1, September 23, 1949, p. 13 et seq.

[18] cf. the Proclamation of May 5, 1955; Official Gazette of the Allied High Commission for Germany No. 126, May 5, 1955, p. 3272.

propulsion and the scientific research in Air Navigation were forbidden, created a large gap for Germany in the development of Air Navigation, which even now is not yet filled.

Effects On Air Law Development

The same took place in *German Air Law. Before the end of the second world war* the following laws and orders were enacted:

1) The *Air Navigation Act* of August 1, 1922, republished in the wording of August 21, 1936 with amandments of Sept. 27, 1938 and Jan. 26, 1943.[19]
2) The Air Navigation Order of July 19, 1930, republished in the wording of August 21, 1936 with amendments of March 31, July 12, December 15, 1937, September 30, 1938.[20]
3) The *Air Customs Order* of May 5, 1941.[21]

Besides Germany ratified the following Conventions:

a) The *Warsaw Convention* of October 12, 1929 on September 30, 1933.[22]

A German Act to put this Convention into effect was promulgated on December 15, 1933.[23]

b) The *Convention relating to the Precautionary Arrest of Aircraft,* signed in Rome on 29th May, 1933. A German Act regarding the inadmissibility of the Precautionary Arrest of Aircraft was issued on March 17, 1935.[24]

Germany was also a member State of the *International Sanitary Convention for Aerial Navigation* of April 4, 1933[25] and enacted a German Order against the extension of infectious diseases by air travel on June 2, 1937.[26]

All these laws and orders enacted by Germany before the end of the second world war were never abrogated either by the Control Council or by Orders of the Occupying Forces or the Occupation Statute. Naturally some provisions were superseded, because the Air Navigation Administration built up before the war had ceased to exist. But all the other provisions remained intact. There was never any reason to abrogate this German Air Legislation as it did not contain any specific Nazi provisions.

But as long as any flying activity was forbidden to Germans, all the laws and orders enacted by Germany before the end of the second world war, actually existed only on paper because they were not applicable to the air traffic of foreign aircraft over Germany, licensed by the Civil Aviation Board and here they were in practice not always observed.

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[19] RGBl. 1936 I, p. 653; 1938 I, p. 1246; 1943 I, p. 69.
[20] RGBl. 1936 I, p. 659; 1937 I, p. 432; 1937 I, p. 815; 1938 I, p. 1327.
[21] Reichsministerialblatt 1941, p. 111.
[22] RGBl. 1933 II, p. 1039.
[23] RGBl. 1933 I, p. 1079.
[24] RGBl. 1935 I, p. 385.
[25] Shawcross, No. 1047 et seq.; RGBl. 1935 II, p. 815.
[26] RGBl. 1937 I, p. 611.

Similarly the right conferred by the present *Constitution of 1949*[27] to the Federal Government to exercise legislation in Air Navigation existed only on paper, as long as any flying activity was forbidden to Germans. In order to ensure the accomplishments of the basic purposes of the occupation, the *Occupation Statute* reserved to the occupation authorities all power in *Civil Aviation,* "including the right to request and verify information and statistics needed by the occupation authorities."

Naturally, under these circumstances no development of German Air Law could take place during the time, in which any flying activity was forbidden to Germans.

In the opinion of the *"International Civil Aviation Organization"* (ICAO) the Federal German Republic could not become a member of this organization as long as it had no sovereignty in Air Navigation. Even the *"Legal Committee"* of the ICAO did not think it appropriate to invite representatives of Western Germany to participate:

1) in the sessions at which it drafted the *Convention on the International Recognition of Rights,* signed in Geneva June 19, 1948[28] nor
2) in the sessions concerning the Revision of the international *Convention relating to the damage caused by aircraft to third parties on the surface,* signed in Rome on 29th May 1933, which led to the new Rome Convention of October 7, 1952.[29]

Finally Germany could not participate

3) in the sessions of the *"Legal Committee"* concerning the *Revision of the Warsaw Convention* of October 12, 1929, though Germany has signed and ratified this Convention.

This situation changed only at the moment when *Germany's* sovereignty in Air Navigation was restored. This time marks the resumption of German air legislation. Two laws and various orders have so far been enacted. The laws concerned the establishment:

1) Of the *"Federal Office for Air Navigation"* ("Luftfahrtbundesamt"), established on November 30, 1954, the functions of which consists essentially
   a) in the admission of aircraft except balloons and gliders, and of model aircraft,
   b) in the registration of aircraft,
   c) in cooperating in search and rescue measures.[30]
2) Of the *"Federal Office for Air Traffic Control"* (Bundesanstalt für Flugsicherung"), established on March 23, 1953, the functions of which consist in ensuring the safety of Air Traffic.[31]

The Orders and Regulations which amended partly the Air Navigation Order of 1930 were the following:

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[27] Bundesgesetzblatt (BGBl.) 1949, Part I, p. 1 et seq.
[28] 15 Journal of Air Law 1948, p. 348 et seq.
[29] 19 Jounral of Air Law 1952, p. 447.
[30] BGBl. 1954 I, p. 354; Zeitschrift für Luftrecht (ZLR) 1955, p. 130 et seq.
[31] BGBl. 1953 I, p. 70 et seq.; cf. ZLR 1953, p. 178, p. 363.

1) The *Sixth Order of* November 5, 1954, concerning the nationality and registration marks to be borne by aircraft.[32]
2) The *Seventh Order* of June 21, 1955, concerning the test regulations for flight crew members and other service personnel engaged in Air Navigation and for Air Instruction.[33] (By both orders the German law was adapted to the standards and recommendations in Annex 1 of the Convention on International Civil Aviation.)
3) The *Test Regulations for Foreign Aircraft* of August 19, 1953.[34]

The following further Orders were issued:

1) An Order of May 11, 1953 completing the *Customs Air Order* and giving customs facilities.[35]
2) An Order of January 6, 1954 concerning the *taking of photographs,* which requires permission from the authority concerned for taking photographs from aircraft.[36] It is questionable whether such an Order is necessary. In *Switzerland* the taking of photographs from aircraft is unlimited, provided that the photographs do not concern military constructions.[37]
3) An other Order of February 14, 1955 gives exemptions from the obligation of having *passports and visas* particularly for the crews of scheduled airlines.[38]
4) The Federal Ministry of Transport recognized further the *certificates* issued to German Airmen by member states of the ICAO.[39]
5) It is again possible that aircraft belonging to a person not residing in Germany may temporarily enter Germany in the course of a commercial or touristic flight exempt from custom duties, if the aircraft is covered by a *carnet,* issued under the guarantee of a club or association belonging to the Fédération Aéronautique Internationale in Paris.[40] The German member of the F.A.I. is the German Aero Club. This Club also issues the carnets (triptych) for German aircraft flying temporarily in foreign countries.
6) Finally
   a) a law concerning the *recognition of a mortgage* (Hypotheques) contractually created as security and for the payment of a debt
   b) and other Orders are in preparation.[41]

Western Germany participated again for the first time after the war in the *Diplomatic Conference for the Revision of the Warsaw*

[32] BGBl. 1954 I, p. 302 et seq.; ZLR 1955, p. 61 et seq.
[33] BGBl. 1955 I, p. 321 et seq.; ZLR 1955, p. 295.
[34] BGBl. 1953 I, p. 1033; ZLR 1954, p. 68.
[35] Bundesanzeiger 215 1953 No. 95, p. 1; ZLR 1953, p. 363.
[36] Nachrichten für Luftfahrer (NfL) Part B 1/54; ZLR 1954, p. 155.
[37] Amtliche Sammlung (AS) 1951, 118.
[38] BGBl. 1955 I, p. 77 et seq.; ZLR 1955, p. 217.
[39] Bundesanzeiger 1955 No. 90, p. 3; ZLR 1955, p. 224.
[40] ZLR 1955, p. 296.
[41] ZLR 1955, p. 298 et seq.

Convention at the Hague September 6-29, 1955,[42] convened by the ICAO and has been granted membership in ICAO.[43] The *Lufthansa* became a member of IATA again on June 29, 1955.[43a]

Naturally before Germany became a member of ICAO, flying into Germany after the war was not easy. On the contrary it was not only necessary that the Scheduled International Air Service should have special permission or authorization to operate over or enter a foreign territory as the Convention of Chicago requires, but everyone wishing to fly into the occupied territory of Germany needed a permit from the Allied Permit Office concerned. But this was true not only for those wishing to enter Germany by air but everyone, wishing to enter Germany either by railway, car or foot had to secure a permit. For a long time a permit for each Zone of Germany was needed and persons entering a Zone without the necessary permit could encounter trouble.

German Air Law Studies

The activities of the *German Institute of Air Law* and of the Journal published by it were also interrupted for a long time. The *German Institute of Air Law* was established in 1925 in Konigsberg by *Professor Schreiber.* After his early death in 1929 it came under the direction of his former Assistant *Professor Oppikofer.* The German Institute of Air Law must have had at this time a very good reputation. For as far as I remember, when in August 1929 the American Air Law Institute was established at the Northwestern University, in Chicago, the Journal of Air Law reported:

> "The Institute Organization is patterned after the Institute of of Luftrecht at Königsberg in Prussia, founded by the late Dr. Otto Schreiber."

The Institute was transferred in 1935 to Leipzig, where the University had offered a professorship to Professor Oppikofer. He was of Swiss nationality and returned to Switzerland in 1939.

The successor of Professor Oppikofer as Director of the Institute was the Chief of the Legal Department of the Air Ministry, *Professor Schleicher.* He took charge of the Institute, which was transferred to Berlin, for 1940 till 1943, on which date the Institute ceased to operate. Dr. Schleicher himself, a modest and typical conscientious official who would have never been regarded as being involved in the plot on the life of Hitler on July 20, 1944, was nevertheless a tragic victim of this day. He was arrested and condemned to death by the Volksgerichtshof evidently because his wife was related to one of the conspirators. His brother, a doctor in the army, came to Berlin to hand over to the President of the Court a petition for a pardon. At the moment of his arrival at the Court a bomb fell on the building and

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[42] ZLR 1956, p. 1 et seq.
[43] ZLR 1955, p. 293; ICAO-Bulletin June-August 1955, p. 23.
[43a] ZLB 1955, p. 287.

killed the President. Being a doctor, he was brought to the body to help if possible. He asked: "Who is the person lying on the ground?" The answer was that it was the President of the Court. "How strange," he said, "just when I had the intention of handing him a petition in favor of my brother in prison." The Minister of Justice who heard of this event, postponed the carrying out of the death sentence. Nevertheless Dr. Schleicher did not escape his fate.

This was one of the most deplorable human losses suffered by the German Science of Air Law. Besides this it suffered other human losses, and also heavy material losses. The whole library and the irreplaceable files of the Institute of Air Law were lost, though they had been stored outside Berlin; some were destroyed by bombs, others just disappeared.

I was asked in 1950 by the University of Cologne whether I would be prepared to give lectures in Air Law at the University and reconstruct the Institute, I was faced with a real vacuum. However, by a lucky chance it was possible to get many books again and I am particularly thankful to Mr. Roper, who was at this time Secretary General of the ICAO. He sent us many ICAO documents. Now we again have more than a thousand volumes. We were also able to continue the old "Archiv für Luftrecht" under the present name of "Zeitschrift für Luftrecht."

In addition we have in Germany a *"Scientific Society for Air Navigation"* which established a *"Legal Commission"* in 1926. The task of this "Legal Commission" is to discuss all air legal matters of general interest and particularly to take part in the preparation of international Conventions and Agreements, which are to be signed by Germany. Therefore the "Legal Commission" eagerly examined the proposals for the Revision of the Warsaw Convention and adopted different Resolutions, which were brought to the notice of the German Delegation at the Hague Conference. Various decisions of the Hague Conference correspond to the proposals of this German Legal Commission.

If we now turn our attention to some Problems of Air Law, I think it would be appropriate to deal briefly in the first instance with a general problem of Air Law which affects many countries. This problem concerns the *competences in air legislation and air administration* between a Federal Government and the Governments of the individual States, or in *Canada* between the legislative powers of the Parliament and of the legislatures of the provinces in regard to the regulation of Aeronautics.

When discussing this problem, one must pay attention to the fact that there is a difference between the question whether a State has *"de jure"* sovereignty over the Air Space above its territories, and the question how far a State is entitled *"de facto"* to exercise the rights deriving from this sovereignty.

In Germany there was never a controversy such as existed in the US between the School of States Rights and the National School as to whether sovereignty over the air space above the territory belongs *"de jure"* exclusively to the Federal Government or to the individual States.

In Germany it was never contested that "de jure" in a federal State the sovereignty of the Federal Government extends in the air space above the whole federal territory and that the sovereignty of the individual States extends in the air space above their territories. The Federal Government and the individual States have de jure "concurrent control" in the air space above their territories. This follows from the principle that the air space over a nation is an integral part of the nation's territory, and has so been by nature from the earliest days. The different areas of the earth are not to be considered as a plane surface, but can only be conceived three-dimensionally as mankind is also a three-dimensional being. Therefore the argument that the air space did not become part of a national territory until nations had the physical ability to fly in it and to control it, is, in my opinion, erroneous. The sovereignty of the States in the air space over their land and waters is a compulsory conseqence of the natural connection between the air space and the land and water territories below it, though this may have appeared to us as a reality only since air navigation began to develop.

This opinion is also shared by Professor Cooper in his excellent study

> "State sovereignty versus Federal sovereignty of navigable air space."[44]

and in his study

> "Roman law and the Maxim cujus solum in international Air Law."[45]

Quite another thing however is the question how far the Federal Government and the individual States are *"de facto"* entitled to exercise their sovereignty in the air space above their territories.

This is a question of the Constitution of the State concerned.

The solution of this question differs in Germany from that in the US, because there is a difference in the Constitution of the US and the Constitutions of Germany of August 11, 1919[46] and the present Constitution of May 23, 1949,[47] both of which are the basis for the national German Air Law.

In the *Constitution of the US* there is no special provision concerning Air Navigation. Nor was a constitutional amendment concerning Air Legislation and Air Administration, accepted by the Congress, as was suggested by the American Bar Association in 1921. By enacting

[44] cf. p. 37.
[45] cf. p. 43.
[46] RGBl. 1919, p. 1383 et seq.
[47] BGBl. 1949 I, p. 1 et seq.

the *"Air Commerce Act of 1926"* and the *"Civil Aeronautics Act of 1938"* the Congress therefore was obliged to rely on one of the clauses, laid down in the Constitution which seemed capable of being applied to Air Navigation, such as the Admiralty Clause, the Treaty Power, the War Power, the Postal Power, the Commerce Power. The Congress finally relied predominantly on the*"Commerce Power."*[47a]

In *Canada*[48] a similar question arose, as to whether the Parliament of the Dominion of Canada should alone legislate on the control and regulation of aeronautics or whether it is to be properly controlled by province laws with the Dominion's jurisdiction correspondingly limited. Here the Privy Council declared in 1932 that the Dominion has full national control of aeronautics in order to perform the obligations towards foreign countries arising under the treaties between the Empire and such foreign countries as well as on the ground that "aerial navigation" is a class of subject which has attained such dimensions as to affect the body politic of the Dominion. The Supreme Court later approved this declaration. "This means nothing more than that the Dominion, not the provinces, has legislative power to regulate the air space rights so as to authorize and regulate air navigation."[49]

The situation in *Germany* was quite different.[50] The Constitution of Weimar of August 11th, 1919, mentioned "Air Navigation" in Art. 7, Number 19 and declared that the Federal Government is entitled to legislate on railways, inland water navigation, and all traffic by power driven vehicles on land, water, and in the air. On this legal basis the German Diet (Reichstag) accepted the Air Navigation Act of August 10th, 1922.[51] However, the conferring of *legislation* in Aeronautics on the Federal Government did not also give to the Federal Government all power of *administration* in Air Navigation.

Before the Nazi Regime the Federal Government had no power in police affairs. These lay within the competence of the States. Therefore administration in Air Navigation was divided between the Federal Government and the States.

The organization of the Air Navigation Administration naturally changed fundamentally when the National Socialist Government came into power. A law of January 30th, 1934[52] conferred all rights of sovereignty on the Federal Government to which the States became subordinated.

[47a] cf. Willebrandt, Federal Control of Air Commerce, Journal of Air Law 1940, p. 204 et seq.; Hilbert, Jurisdiction in High Seas Criminal Cases, 18 Journal of Air Law, p. 427 et seq. 1951.

[48] Cooper, Roman Law and the Maxim "Cuis est solum" in International Air Law, p. 41; Willebrandt, Federal Control of Air Commerce, 11 Journal of Air Law, p. 206, 1940.

[49] cf. l.c. Cooper, p. 43.

[50] Lorenz, German Air Law, 11 Journal of Air Law, p. 111, 1940 et seq.; p. 218 et seq.

[51] cf. RGBl. 1922 I, p. 681 et seq., republished 1936, cf. p. 6 note 19 of this article.

[52] RGBl. 1934 I, p. 75.

An Air Ministry,[53] as a Reich Authority, comprising the whole administration of Air Navigation, including the Air Police (Air Supervision), was created, on which 14 Air Officers (Luftamter)[54] in the States were dependent.

Furthermore, the new authority had to protect the safety of flying by providing the air weather service and was charged with the air protection against air raids[55] and finally with the command of the air forces.

All this changed again with the end of the National Socialist Regime. Certainly everyone today is happy that the Nazi Regime ended, but in so far as legislation and administration of Air Navigation were centralized in the hands of the Federal Government, one must say that from the point of view of Air Navigation such a centralization seems to be useful, because the international character of Air Navigation does not leave much room in a Federal State for legislation and administration by the individual States in Aeronautics.

According to the *present Constitution of the German Federal Republic* of May 23rd, 1949, the States are no longer subordinated to the Federal Government as under the Nazi Regime. The *Federal Government* has competence only in matters which are delegated to it by the Constitution. Thus Art. 73 No. 6 of the Constitution provides:

> "The Federal Government has exclusive legislation in Air Navigation."

But on the other hand Art. 30 and 83 of the Constitution provide:

Art. 30: "The States are charged with the exercise of public powers and the performance of public functions insofar as the Constitution does not provide or admit other regulation."

Art. 83: "The States carry into effect the federal laws as their own affairs insofar as the Constitution does not provide or admit other regulation."

However, there is no general provision in the Constitution that the carrying into effect of Air Laws shall belong to the Federal Government. In this respect the Constitution foresees only that separate federal authorities, or bodies may be established by federal law, if needed.

Based on this provision of the Constitution the two—already mentioned—federal authorities, the "Federal Office for Air Navigation" and the "Federal Office for Air Traffic Control" have been established.

The national machinery for legislation and administration relating to Civil Aviation in Germany is therefore constructed as follows: The *Federal Minister for Transport* or the Department for Air Navigation in his Ministry has the following functions: Like the Ministries of Air in all countries, he has the general duty to organize, carry out, and

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[53] RGBl. 1933 I, p. 241.

[54] RGBl. 1934 I, p. 310 et seq.

[55] RGBl. 1935 I, p. 827, rectification p. 1092 in the wording RGBl. 1939 I, p. 1762 et seq.

encourage all measures which may be appropriate to develop civil aviation and to promote its safety and efficiency as well as all research concerning air navigation.

In detail the Department of Air Navigation in the Ministry of Transport has the *legislative function* to draft all laws and orders concerning civil aviation, if necessary in consultation with other Ministries concerned. The legislation itself is enacted by the Parliament.

Regarding the *administrative functions* of the Minister of Transport an agreement has been signed on July 8th, 1955 between the Federal Government and the Governments of the States, for the interval in which the competences in Air Administration between the Federal Government and the Governments of the States are not yet fixed by law, defining the powers in civil aviation administration between the Federal Government and the States.[56]

This agreement provides that, insofar as federal powers are not conferred upon the Federal Office for Air Navigation and the Federal Office for Air Traffic Control, the Federal Minister of Transport (Department Air Navigation) has in particular the following powers:

> The complete regulation of air traffic with foreign nations.
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> The imposing of prohibited areas.
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> The granting of permission for the landing of foreign aircraft outside airports and landing places.
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> The licensing and supervision of airlines which operate over more than one State in Germany.
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> The granting of permission for public competitions or displays in which aircraft take part if these public events extend over different States in Germany.
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> The decision whether aircraft must have radio installations.
>
> The granting of permission for flights of German aircraft in foreign States and the forwarding of applications for such flights to the foreign authorities.

If we now take a short look at the *Air Navigation Act of 1922* which is, as already said, still in force, insofar as it is not superseded, this Act differs in several respects from the Civil Aeronautics Act of 1938 of the US. First, the German Air Navigation Act does not give, as the Aeronautics Act of 1938 does, a summary of definitions at its beginning. In Germany the opinion prevails that it is better to let the Courts give definitions.

Naturally it is not true that there are no definitions at all in the Air Navigation Act, but where such definitions are given, they are placed in the paragraph concerned: thus § 8 gives a definition of the term "airman," and § 11 of the term "air navigation enterprise."

The term *"aircraft"* is defined neither in the German Air Navigation Act nor in the German Air Navigation Order. Both only give examples of what they consider to be an aircraft, but this enumeration is in no way limitative. As "aircraft" are considered planes, airships,

[56] NfL, Part B, 48/55; ZLR 1956, p. 135 et seq.

gliders, balloons (captive and free), parachutes, kites, models heavier than five kg.

On the other hand I believe that the definition of the term "aircraft" given in the "Civil Aeronautics Act 1938," Section 1, Number 4 for aircraft saying:

> "Aircraft means any contrivance now known or hereafter invented, used or designed for navigation or flight in the air."

is rather wide, for it covers what otherwise might be classed as projectiles as well as toys. But both cannot be regarded as aircraft in a legal sense. I think therefore that aircraft means only: Any machine which can derive support in the atmosphere from reactions of the air and secondly which is thought of by the public as aircraft. For this reason it seems impossible to consider rockets which do not need support in the atmosphere from reactions of the air as aircraft. Likewise all regulations for aircraft and the air space cannot be applied without a special agreement to the outer space and to spacecraft.

As opposed to the US Civil Aeronautics Act of 1938 the *German Air Navigation Act* contains not only provisions of public law but also of private law. It has three parts.

Part I deals with public law and provides under the title "Air Traffic" rules regarding

> the necessary admissions of aircraft,
> the licensing of air crew,
> the permission to give instruction to pilots,
> the permission to establish and operate airports and enterprises which by way of trade carry persons or property by aircraft ("Luftfahrtunternehmen") and the permission to hold competitions or displays in which aircraft take part ("Luftfahrtveranstaltungen").

Part I deals further with traffic regulations, expropriation and some general rules empowering the government to issue statutes covering certain problems and rules for the decision of the administrative authority.

Part II deals with liability, *Part III* with penalties.

As far as *private law* is concerned, it may be of interest to note that the principles of the *Warsaw Convention* were introduced into the German Air Navigation Act in the middle of the War (1943) in connection with a regulation concerning the liability of the Air Forces.[57]

But the German legislator amended some provisions of the Warsaw Convention, and one must say that these amandments are to be considered as improvements of the Warsaw Convention.

> 1. First the operator is considered to be also liable for those objects which the passenger takes charge of himself (Art. 29 a), while the Warsaw Convention does not regulate the material conditions of liability of the carrier with respect to these objects and only limits the liability of the carrier to the sum of 5,000 P.Fr.

[57] cf. RGBl. 1943 I, p. 69.

2. The rules of liability of the Warsaw Convention are declared applicable to gratuitous transportation, but the carrier is entitled in these cases to exclude his liability. (Art. 29 a, 29 f).

3. The provision of Art. 20 II of the Convention that the carrier is not liable in the carriage of goods and baggage if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft or in navigation, is cancelled in the German Law of 1943. The Hague Conference passed the same resolution.

4. Finally a very important provision was added (Art. 24 g), saying that all air navigation enterprises are obliged to insure the passengers against accidents. In this way every passenger using a German airline is insured by the very act of purchasing a flight ticket. In my opinion this is a very good provision because it excludes any controversy on the question of fault in case of an accident.

I know that in other countries and particularly in the US the carriers do not wish this compulsory insurance. They say that such an insurance which does not exist for any transportation on land is a discrimination against Air Navigation, because air navigation is now not less safe than the other means of communication, and that furthermore the compulsory insurance would raise premiums and thus prices of tickets. But both arguments are erroneous. Certainly air navigation now is no more dangerous than travelling by railway, bus, or ship. But if an accident takes place, this accident generally differs from accidents on land and sea insofar as in many cases all the persons carried are killed and it is thus rather difficult to determine the fault. In all these cases the advantages of insurance are evident as the insurance sums are paid without any fault being proved.

Because of the fact that all indemnity that is paid on the basis of the passenger's insurance is to be deducted from the amount of liability for damage to be paid by the carrier, the premiums of insurance cannot be much higher than if there existed only an insurance for liability. These premiums are indeed only so little higher that they have no effect on the ticket prices.

As an observer of the International Law Association (ILA) I proposed at the Assembly of the ICAO in Geneva in 1948 to introduce the compulsory insurance of passengers in a revised Warsaw Convention, but I failed. Only Switzerland and Italy supported me. Neither the Legal Committee nor the ICAO were subsequently prepared to propose an international agreement concerning the compulsory insurance of passengers.

The Hague Conference recommended that ICAO study this question.[58]

Finally, I should like to deal briefly with a question, peculiar to *criminal air law*. This question concerns the problems of jurisdiction with respect to criminal acts committed on board aircraft in flight.

[58] cf. The Hague Conference, Document No. 97; ICAO—The Hague Conference, SR/21.

Besides the general interest of this question, it sems to me to be worthy of a short discussion because in the US a court came to a decision to which a German court according to German penal law could not have come. I mean the decision of the District Court, Eastern District of New York of March 7th, 1950 in the well known case of United States versus Cordova and Santano.[59] In this case, in which an affray began between the passengers Cordova and Santano on an American owned plane carrying 60 passengers on the route San Juan - Puerto Rico - New York on August 1948, Cordova and Santano had brought on board several bottles of rum and continued to drink in the plane. They had already had a convival toasting with rum on land with well-meaning friends and relatives.

When the pilot who had take his coat off because of the heat, went to stop the fight, he was attacked by Cordova and bitten on the shoulder, drawing blood. Cordova also struck the stewardess. He was locked up for the remainder of the trip and later indicted. The Court decided, it had jurisdiction to hear the case and found the defendant guilty of assult and battery, but granted a motion for arrest of judgment of conviction on the ground that there is no federal jurisdiction to punish those acts.

The Court found that assult and battery are only punishable by a United States Court, when committed within the admiralty and maritime jurisdiction of the United States and that the act defining the admiralty and maritime jurisdiction confined itself to crimes

> "committed *upon* the high seas or any other water within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State,
>
> *or* when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State *on board any vessel* belonging in whole or in part to the United States or any citizen thereof or to any corporation created by or under the laws of United States or of any State, Territory, or District thereof."

The Court decided that

1. an "airplane" was not a "vessel" and held
2. that *"upon* the high seas" could not be extended to mean *"over* the high seas." The acts complained of did not therefore in the opinion of the Court meet one of the two tests required for making operative the Statute condemning striking, wounding, beating, and simple assult within the admiralty and maritime jurisdiction of the US.

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[59] cf. United States Aviation Reports 1950, p. 1 et seq.; Hilbert, Jurisdiction in High Seas Criminal Cases, Journal of Air Law 1951, p. 427 et seq.; 1952, p. 25 et seq.; A. H. Meyer, Jurisdiction over Crimes committed in Aircraft while flying over the High Seas, Journal of Air Law 1951, p. 115 et seq.; Knauth, Crime in the High Air—A Footnote to History, 1951; ZLR 1952, p. 84 et seq.

Such a decision could not have been reached in *Germany* as § 5 of the German Penal Code has provided since 1940 that

> "German criminal law shall apply to acts committed on a German ship or a German aircraft regardless of the law of the place of commission."

Similar provisions are issued in Great Britain, Italy, Poland, and China.

The gap in American law is now filled. The President of the United States signed a new law on July 12, 1952, amending the United States Code by the addition of a new provision which assures jurisdiction in the Federal Courts to deal in future with certain common law crimes of violence, committed on board American aircraft in *flight over* the high seas or *over* waters within the admiralty and maritime jurisdiction of the United States.[60]

It is therefore no longer possible that a passenger in an American plane over the high seas can bite the pilot in the shoulder without risking punishment.

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[60] 19 Journal of Air Law, p. 354 et seq. (1952).