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1. DROIT AÉRIEN (Jan.-Feb.-Mar.) 1931.

(a) *La Souveraineté des Etats sur l'Espace Aérien.*[1] Amedeo Giannini, pp. 1-10.

Sovereignty of states over the airspace was much discussed by jurists before the world war under various theories which fell into the following groups:

1. Freedom of the air without restriction (Wheaton, Bluntschli, Pradier-Fodéré, Stephan, Nys, etc.). This theory is justified by the very nature of the air, an element common to all and one which cannot be confined within the frontiers of a state.

2. Freedom of the air, taking into consideration the right of preservation of states. This theory, supported by Meili, in 1908, has some small number of adherents (Stranz).

3. Freedom of the air, except in that which concerns territorial airspace necessary for the defense of states (Despagnet, Fauchille, Rolland, Bonnefoy, Mérignac, Oppenheim, Ferber, Meyer, van Fels, etc.). Under this theory the influence of the analogy to territorial waters is evident. A number of authors take as criterion for the extent of territorial airspace the range of guns or the maximum height to which aircraft can fly at present, namely from 300 to 1500 meters.

4. Another theory more directly influenced by maritime law recognizes sovereignty up to a certain height, considering the airspace in that zone as belonging to the land, (von Holtsendorff, Rivier, Pietri, Hilty, von Bar, von Listz, etc.). Under this doctrine the height of the zone varies from 50 meters to an indeterminate altitude defined by the range actually reached by guns or by air navigation.

5. Other authors, (Westlake, Corsi, Gruenvald, Meurer, A. Meyer, Catellani, etc.), affirm the sovereignty of states, excepting the innocent passage of aircraft, certain ones considering this passage as a servitude.

6. Finally a group of jurists (von Ullmann, Gollard, Gemma, Baldwin, Lycklama à Nijeholt, Scialoja, joined by von Listz and Gruenvald who reconsidered their previous opinions) declared in favor of full and complete sovereignty of states over the airspace.

Scialoja stated that the analogy to territorial waters is false as also the analogy to the right of a property owner to enjoy his private property to the extreme limits, and he added that to deny absolutely sovereignty over the airspace was akin to denying territorial sovereignty.

Agreement among the jurists was no more possible than agreement among the legal organizations which studied the problem.

Mr. Giannini then describes briefly the endorsements before the war of certain of the above theories by the Institute of International Law, the Diplomatic Conference of 1910 in Paris, the Congress of Verona, the Inter-

1. This report was delivered in Italian by Mr. Giannini at the 5th International Congress on Air Navigation at the Hague and is included in the Proceedings of the 5th Congress published by Martinus Nijhoff, The Hague.

national Juridical Committee for Air Navigation and the International Law Association, which varied from freedom of the air to sovereignty. He then proceeds to examine actual law on the subject, mentioning the tendency toward absolute sovereignty immediately before the war as shown by the forbidden zones in Great Britain, denial of flight over its territory by France, and the Franco-German agreement of 1913.

After the war, during which absolute sovereignty prevailed, the Convention of Paris for the Regulation of Air Navigation reaffirmed in Article 1 the principle of entire and exclusive sovereignty over the airspace above the territory and the territorial waters of a state participating in the Convention. The same principle prevails in the Spanish-American and Pan-American Conventions, and in numerous bilateral agreements. It is likewise found in a number of national laws (Great Britain, Italy, Chile, Brazil, Spain, United States, Hungary, Czechoslovakia, etc.). Other nations tend toward the principle of freedom in varying degrees (Germany, Austria, Bulgaria, Jugoslavia, Switzerland, Denmark, Saare), while still others (France, Denmark, Estonia, Finland, Switzerland, Norway, Portugal, Soviet Republics, etc.) have not directly codified the principle of sovereignty, but appear to be guided by it in practice.

Since the writing of the principle of sovereignty into laws after the war, the theorists have been mute, with a few exceptions including Henry-Coüannier who advocates the principle of freedom (Eléments Créateurs du Droit Aérien, pages 144-145) as well as Roper (La Convention de Paris, etc., Paris, 1930), without alleging the motives for their opinions. However, the point of view is completely modified. Formerly, when internationalists believed it impossible to control the airspace, the theory of freedom of traffic predominated. Pittard (Dominum Coeli, in *Zeit. für das gesamte Luftrecht*, 1926, Part I, pages 13 *et seq.*) believes the principle of sovereignty is pure fiction, but he advocates freedom with protection for interests of the land, and the safeguarding of aircraft against the unlawful acts of the inhabitants of the land.

De Visscher, who, in "Le Droit International de Communications", (Gand-Paris, 1923) did not take a definite stand, published a study in 1926 in *Zeit. für das gesamte Luftrecht* (Vol. II, Part I, pages 4 *et seq.*) which Mr. Giannini considers the most important work to date on this subject since the war. In it de Visscher advocates the general rule of free air traffic, under a declaration of authority, but he tempers this proposition by recognizing certain just demands of states. Sperl (Revue de Droit International Public, XVIII, pages 473 *et seq.*) wishes to conciliate the theory of free air traffic with *plenitudo potestatis* of states over the air. Cheney Hyde (International Law, I, page 331) presents a view similar to that of de Visscher. Others could be included in the list to show the different tendencies, but partisans of the principle of sovereignty, modified by the right of innocent passage, are the more numerous.

As to the international legal organizations, the Institute of International Law in 1927 eliminated from its project its preceding formula of freedom which had also been accepted in 1911 by the International Juridical Committee for Air Navigation. On the other hand, in 1916, the Pan-American Aeronautic Federation declared in favor of the principle of sovereignty at Santiago, Chile. Finally, a recent official pronouncement was made at the

first conference for the codification of international law at The Hague in March, 1930, when the Commission charged with the study of the problem of teritorial waters reaffirmed the extension of sovereignty of states over the airspace above their territorial waters.

The author then proceeds to examine the views of Henry-Coüannier who severely condemns the principle of sovereignty, claiming that it vitiates the whole Convention of Paris. Mr. Giannini finds that no advocate of any of the above-mentioned theories pushes his theory to the limit. Each one in reality proposes modifications in the endeavor to reconcile with his own opinion the double demand of air navigation and security of states. The different theories lead to the same conclusions: under one extreme theory the air is free, but each state may limit this freedom within its territory for military, fiscal, hygienic and other purposes, while under the other extreme theory the state has sovereignty over the airspace, but it may not prevent innocent flight. Thus air traffic for innocent ends is assured under both theories.

The author considers the intermediate theories unfortunuate, which on one hand follow the analogy to maritime law or on the other hand the analogy to private property. He believes that the analogy to territorial waters cannot be carried into the territorial airspace because the atmosphere does not perform the function of a deterrent as does the territorial water. Also aircraft is the more dangerous the farther it is removed from the land, contrary to a ship. He believes that private property does not offer a proper analogy because property does not extend *usque ad sidera* but only as far as it is practically usable. He quotes Scialoja as follows: "In the definition of all private property, utility is a criterion upon which all depends although the public right is not limited by the concept of utilization. I would even say that as much as private right is limited by, public right is free of all consideration of utilization."

The ownership of the airspace by states becomes each day more and more necessary a protection to liberty and security of life. Absolute freedom of the airspace cannot be admitted, and freedom would have to be modified by so many restrictions as to make it illusory. Everything leads, according to Mr. Giannini, toward making the column of air situated above the territory of a state an integral part of the territory, both land and air being subject to a single regime of sovereignty.

But it is objected that innocent air traffic is necessary upon land, sea and in the air. Freedom of air navigation is not inconsistent with sovereignty any more than is freedom of passage upon the sea and territorial waters. He concludes, therefore, that the principle of sovereignty upon which the Convention of Paris is based is not open to criticism, but claims that the defects of the Convention are due to the applications drawn from this principle. He proceeds to analyze the Convention as to non-participation by some of the non-belligerent and allied states, regulations and gurantees for participating states, consent of states to be crossed (Article 15, last paragraph) international air routes, and the effect upon the strong as well as the weaker states. The revision of the Convention by the protocol of June 15, 1929, remedied certain difficulties, and similar situations were considered by the Congress of experts which was held at Geneva in July, 1930.

In conclusion Mr. Giannini believes that the principle of sovereignty of states over the airspace must be maintained, at the same time permitting innocent passage through the airspace, and he advocates preserving the principle in the last paragraph of Article 15 of the Convention of Paris as adopted by the protocol of June 15, 1929.

(b) *La Circulation Aérienné au-dessus des Mers non Territoriales. La Création et la Condition Juridique des Iles Flottantes ou Aéroports Flottantes en Haute Mer.* Joseph Hild, pp. 11-25.[2]

In the very near future we may foresee an organization of international air lines over the oceans similar to international railroads. Besides the great difficulty of management in fogs and the fire-proofing of machines, the only remaining obstacles are refuelling and landing on the water in case of breakdown or damage.

Regardless of refuelling experiments in the air, practical results in refuelling can only be accomplished at a determined place, either on land or upon the sea. Landing upon the water in spite of winds and tides will become increasingly possible by the construction of floating islands. Plans for "seadromes" were exhibited in 1920 at Paris by Henri Defrasse and received the medal of honor for architecture and the National Prize at the 1928 Salon.

The first floating island was announced in January (1930) by the technical journal *"Bâtiment et Travaux Publics"*, stating that the first artificial floating island would soon be placed between New York and Bermuda, and another one later on the European route. It predicted the possibility of an autonomous city on the sea or a little floating republic which would have the advantage of being able to move about and change climate at will. The technical details were printed in the journal, but omitted by Mr. Hild

What law would be applicable to the various acts which may accompany aerial navigation over the high seas?

The Code of the Air mentions the problem only in article 23 which states that aircraft finding itself over the high sea or a territory not belonging to any state, is subject to the legislation of the country from which the aircraft takes its nationality. But the application of the law of the flag of the aircraft over the sea cannot control cases of collisions between aircraft of different nationalities, or between foreign aircraft on floating islands, or between aircraft and ships on these islands or on the high seas. Nor can the law of the flag control the regulation of secondary damages due to collisions or the determination of conditions for rendering assistance between aircraft or between aircraft and ships, damages from articles thrown overboard, etc. What law will determine police regulation on super-oceanic airways and seadromes? What will be the legal status of the seadromes?

The two concepts which dominate these problems are that of sovereignty of the state and legal status of the high sea.

The doctrine of freedom of the high sea is briefly discussed by the author historically, with comment as to the theories that the sea is *res*

2. This report was presented at the 9th Congress of the International Juridical Committee for Aviation held at Budapest, September 29th to October 2, 1930. For translation of resolutions on this subject passed at the same Congress see 2 JOUR. AIR LAW, 48.

communis, a heritage common to all peoples, or *res nullius,* over which each state exercises authority as to its nationals and ships flying its flag. The author quotes F. Despagnet (*Traité de Droit International Public,* page 432) on the principle of freedom of the sea and the inability to submit the sea to the right of property. He refers to the proceedings of the Institute of International Law, The Hague, 1927 (*Revue de Droit International Public,* 1927, page 318) wherein Francis Rey maintained that if the bottom and sub-bottom of the high sea are capable of appropriation, so that a state first occupying them may claim title to lay cables, construct tunnels, establish beds for fish, oysters, sponges, and pearls, it is none the less possible to occupy the surface of the sea. If an artificial floating island should be constructed, the surface of the sea would not be occupied, but the island itself.

As to the freedom of the high sea, on the side of *res nullius* is Sir Thomas Barclay, while that of *res communis* is defended by Lapradelle, Niemeyer, Politis, Sir Cecil Hurst and Lord Phillimore, the latter recognizing that all states have equal rights of usage on the high sea and that no state may invade those rights.

As to sovereignty, the concept is more and more considered not as absolute but as related to the mutual interdependence of states. Fauchille is quoted (*Traité de Droit International Public,* 1922, Part I, page 431) as saying that a sovereign state is the sole master of its acts, but it is not free to do everything which may be possible.

The territorial waters along the coasts of a state are subject to the right of sovereignty of the state, but there is a difference in the extent of the territorial waters whether considered from the point of view of fisheries, customs, or police. The standard varies according to the range of cannon, the right of pursuit, or a distance fixed by law.

The status of international straits has also given rise to numerous discussions. The author devotes a page to the Convention of Lausanne of July 23, 1923, concerning the straits of Turkey, which establishes absolute freedom of passage for the ships and also for aircraft of all nations in and over these straits in time of war as well as in peace.

Mr. Hild analyzes the Convention for the Regulation of Air Navigation of October 13, 1919, regarding flight over the high sea or over international straits by explaining the absence of specific mention of the subject on the theory that sovereignty of states extends only to the airspace over their territory, their colonies, and territorial waters. He believes that over the high sea and international straits the air should be free as a means of communication useful to all humanity, with no state establishing a private right with respect thereto.

Cooperation of states analogous to that which resulted in the international conventions of radio-telegraphy of 1906 and 1912; of uniform rules for boarding ships, Brussels, 1910; of safety at sea, 1914; could create regulations for floating islands, international refuelling stations, repair, salvage, tolls, signals, police and security for superoceanic navigation. The author suggests the forming of a permanent commission by the family of nations, or the extension of the powers of the Commission appointed under the Convention of Paris of October 13, 1919, (CINA) to carry out such regulations.

"It is desirable that the nations enter into an agreement to determine the location of artificial islands before marking out air routes," was the resolution submitted with the report. This was in view of preventing the danger of a veritable string of floating islands which might interfere with navigation upon the high sea, but of encouraging proper floating stations for aiding oceanic air lines.

(c) *Crimes et Délits à Bord des Aéronefs en Droit International.* K. Volkmann, pp. 28-35.

What law governs crimes and misdemeanors committed in a foreign country or by a foreigner on board aircraft above the territory of a state?

Under international penal law all breaches of law come under the jurisdiction of the state in the territory of which they are committed, even by a foreigner. The competence of a state to prosecute and judge crimes or misdemeanors committed in its airspace depends in the first place on whether the airspace forms a part of the territory of the state.

In the early stages of international air law the doctrine of freedom of the air prevailed. If this doctrine is followed, crimes and misdemeanors committed above a state should be judged as if committed in territory without ownership or upon the high sea. But since the war the preponderance of legislation has embraced the principle of sovereignty.

The Convention of Paris established freedom of innocent passage, as did other conventions, and rules were formulated for regulating flights by foreigners over the participating states, since police provisions of national laws extended to foreign aircraft in the airspace.

The fact that the penal competence of a state as to its airspace has not been established is due to the rules of maritime law which have influenced air law. There has been an effort to compare aircraft above a foreign state with ships in foreign ports, but the legal status of ships in foreign ports has not yet been definitely determined. According to a widespread opinion in the doctrine of international law, ships are considered "floating territory" of their state. This theory has some advantages for ships on the high sea, where acts are judged by the law of the flag of the ship. But this is not because the ship is part of the territory of the state; it is because the flag is the most convenient bond when a ship is on the high sea. The thesis that a ship on the high sea is subject to the laws of its flag is fundamentally pure fiction, for, if a ship is truly a floating territory, it would be illogical to deny this status in foreign ports.

The practice of states with regard to breaches of law committed on board foreign ships within the ports of a state is varied. As early as 1806 an opinion of the Counseil d'Etat declared that France was not interested in acts on board a foreign ship when the acts did not touch the security of the state or the interests of its inhabitants. The Anglo-American practice is otherwise. England submits to British laws all crimes and misdemeanors committed on board foreign ships in British ports, but the English courts may refrain from intervention, if British interests are not concerned. The United States took a similar stand in 1855, according to an opinion by Secretary of State Marcy in a communication to Mr. Clay.

These differences regarding ships in foreign ports have made certain repercussions in the law of aviation.

In general all crimes and misdemeanors against the security of the state flown over and its police laws are punished by the subjacent state, but it does not concern itself with acts against the internal discipline of the aircraft. An aircraft is thus chiefly subject to the law of its flag. The author quotes the provisions proposed by M. De Lapradelle and accepted at the conference of the International Juridical Committee for Aviation at Budapest in 1930.[3]

A new conception is found in article 5 of the project of the German Penal Code which says: "The penal laws of the Reich are in force for all acts committed in the interior of the country. Acts committed on board a German ship or aircraft are subject to the laws of the Reich, even if the ship or aircraft is not at the time of the act within the territory of the state." The submission to German law of crimes and misdemeanors committed in foreign territory is evidently based upon the theory that aircraft are "floating elements of the state." If this supposition is not justified, or is at least strongly contested, aircraft above a foreign state come under the competence of the penal jurisdiction of the state flown over by the aircraft. This state may renounce its right of pursuit, for example, when the act committed does not concern it. In general a state would confine its criminal jurisdiction to its own territory but, using the flag as a tie, it would proceed in exceptional cases of crimes committed abroad, and under these circumstances would apply not only its own laws but also those of the country in question.

Those who consider ships and aircraft as floating territory of the state may object, but they cannot deny that when foreign ships and aircraft commit breaches against the security or interests of the state the jurisdiction of the latter state prevails. In such circumstances they are not treated as foreign territory. It is not logical that a ship or aircraft be considered sometimes as territory of the state of the flag and at other times as foreign territory.

The above considerations might serve to abandon entirely the comparison between ships and aircraft and to associate the legal concept of aircraft with that of automobiles in international law. If in a Swiss aircraft flying over French territory or landed at a French airport a Swiss passenger steals the watch of another passenger or strikes him a blow, there is primarily no difference between the same acts committed in an autobus transporting passengers from Geneva to Grenoble. The theft or blow would have been committed on foreign soil, namely that of France. But aircraft are distinguished from automobiles because the former have a nationality as do ships. Nationality gives ships a special position from the point of view of international law, and enables them to enjoy certain privileges such as the right to fish in the territorial waters of their state, coasting-trade, and exemption from toils. For aircraft, likewise, nationality is a standard for participation in international navigation. Moreover there have been associated rights and duties of private aircraft with those of ships of commerce, and of military aircraft with those of warships. Consequently, it would be hazardous to treat aircraft as "floating automobiles". It would be better to apply special rules developed in international maritime law.

3. For translation of the text of these proposals see 2 JOUR. OF AIR LAW, 48.

Ships of commerce in foreign ports constitute the best basis of comparison. It is then only necessary to discuss whether the legal status of aircraft over foreign territory should be associated with the French or British practice concerning foreign ships in ports. The English practice has the advantage of being more logical and precise. It therefore follows that a crime or misdemeanor committed on board an aircraft over foreign territory is committed in the foreign state. If that state announces that its interests are not concerned, it renounces the rights resulting from its sovereignty, and the law of the law of the flag may enter the case and undertake legal pursuit.

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2. ARCHIV FÜR LUFTRECHT (April) 1931.

This new German air law journal contains a short introduction by the editor, followed by two leading articles of considerable length, a shorter article, the resolutions of the International Law Association at its recent conference in New York, four important German cases arising in connection with aircraft (a translation of which appears in this issue of the JOURNAL OF AIR LAW) as well as some book reviews and a summary of the laws and treaties of Egypt, Argentina, Australia, Belgium, Brazil, Bulgaria, Chile, China, Cuba, Denmark and Danzig, dealing with the problems arising out of aviation. The editor Dr. Hans Oppikofer, head of the Königsberg *Institut für Luftrecht,* has made an auspicious beginning of a new law journal devoted to air law. It would seem from the contents of the journal that he intends to confine his journal to the law of aviation and leave radio law to the *Archiv für Funkrecht.*

(a) *Zur Frage der Untersuchung von Luftfahrtunfällen.* Dr. Adalbert von Unruh, pp. 6-21.

The author divides his article into ten parts. In the first part he discusses investigations of aircraft mishaps from the viewpoint of crime detection. In the second part, the general safety policy of such investigations is considered. He then shortly discusses the duty of the local authorities to report mishaps. The nations are divided into two groups in regard to the discretion reposed in the body which actually investigates—many nations leaving the method almost exclusively to the discretion of the local investigators, while others prescribe the procedure with considerable minuteness. In part five, he divides the investigation into its two competent elements—namely, the finding of the facts, and the deductions to be made from these facts. In part six, the investigations are divided into investigations by the police, by commissioners and by local authorities. In part seven, the advantages and disadvantages of these various methods of investigation are set forth and discussed. Part eight, discusses the particular difficulties which arise in connection with police investigations in federated states—due to the fact that the police is generally a local body while the investigating body should be one constituted by the federal government. The hiatus which exists between the investigation itself and the practical use of it is made the subject of the ninth part. Finally, the author discusses the publicity which is accorded to the investigation in the various nations

and states that only England and the Netherlands seem to favor such publicity and then only under particular circumstances.

(b) *Das Luftrecht der Vereinigten Staten von America in Jahre 1930,* Dr. Herman v. Mangoldt, pp. 22-40.

The author divides his article into three parts, namely, (1) Statutes, (2) Cases, and (3) Literature. He divides the statutes into federal and state and discusses the main trends in both. In obtaining his material the author undoubtedly has drawn heavily on the 1930 U. S. Aviation Reports though he does not confine himself by any means to this source of information. Thus, in discussing the case of *McBoyle* v. *U. S.* he notes that the opinion by the Circuit Court of Appeals was reversed by the United States Supreme Court. The third part discusses numerous law review articles and a few books which made their appearance during the year 1930. The author concludes that the year 1930 did not result in revolutionary changes in the law but that progress was noticeable and that there are a number of definite points of departure which presage further development.

(c) *Luftrechtliche Arbeiten innerhalb des Internationalen Luftverkehrbandes* (I. A. T. A.) Dr. Jur. Hermann Doering, pp. 41-43.

This short article, as its title clearly shows, discusses the work done by the I. A. T. A.

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