
CHARTING THE LEGAL TRAJECTORY: “A COMPREHENSIVE HISTORICAL ANALYSIS OF THE EVOLUTION OF AVIATION LAW”

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ABSTRACT

This paper explores the historical development and evolution of aviation law worldwide, tracing its origin from the early days of the air balloon to commercial flights which are the complex instruments of international and domestic regulations. The history of aviation law is rooted in the earliest flight and the subsequent development of the need for regulatory structures to regulate the airspace and the country's sovereignty, safety, and commercial activity.

Aviation law is a specialized branch of law that governs air travel and mainly delves into a wide range of issues, including air traffic rights, safety and security, economic regulations governing airlines, and the operation and management of airports. It is also part of international law that governs civil aviation and includes international institutions excluding military aircraft.

The foundation of aviation law evolved through the introduction of the Paris Convention of 1919, which delves into the state's sovereignty over airspace. It also established the International Commission for Air Navigation (ICAN) for the betterment and development of international aviation law on the global stage and later many such conventions were conducted for the proper management, analyses of policies on aviation law for the commercializing the area of the medium of transport to the world.

This paper also examines the contemporary legal challenges, including technological advances, privatization, and environmental considerations, highlighting how innovation necessitates the adaptation of legal frameworks.

Keywords: Aviation law, history, legal developments.

1. INTRODUCTION:

Air law has been defined as the “last born of juridical notions.”¹ The maxim “Cuius est solum, eius est usque ad coelum” (who owns the land, owns even to the skies) has provoked legal discussion ever since 1919² in both municipal law and international law. The Paris Convention of 1919 was the first significant international agreement that addressed the legal aspects of aviation, establishing the principle of national sovereignty over airspace and laying down a foundation for future aviation law. However, it was the Chicago Convention of 1944 that truly embarked on the revolution in regulating international aviation, resulting in the creation of the International Civil Aviation Organization (ICAO), it not only established the key principles governing civil aviation but also initiated a process of standardization and cooperation among nations, which remains at the core of aviation law at present.

In particular, the expansion of commercial air transport after World War II gave rise to a new need for more extensive and internationally harmonized legislation. The Tokyo Convention of 1963 on offenses and offenses and certain other acts committed on board aircraft, and the Montreal Convention of 1999 which regulated the rules related to liability of air carriers. These conventions were reflective of the effort by the global community to manage and mitigate the risks associated with aviation, hijacking, terrorism, and other unlawful acts that may have impact on the aviation industry, besides ensuring a fair compensation and liability order for the air carriers.

This paper traces the historical evolution of aviation law, identifying key legal developments and the challenges that continue to shape its future.

2. EARLY HISTORY OF AVIATION LAW:

2.1 Pre-20th Century Developments

The origin of aviation law before 1919 was an ordinance prohibiting balloon flights³ without special permits⁴ This was one year after the first aircraft, a hot-air balloon constructed by the Montgolfier Brothers, had left the ground. In the same year as the Paris ordinance, the City

¹ Le Golf, Marcel, *The Present State of Air Law*, The Hague (Nijhoff 1950) 24.

² Sand, Peter H. “An Historical Survey of International Air Law Before the Second World war”

³ Shawcross and Beaumont, on *Air Law*, London (2nd ed. Butterworth 1951), 3; some authors date this ordinance back to 1724, which appears to be a mistake: see Le Goff, Marcel, *Manuel de droit aérien*, Paris (2nd ed. Dalloz, 1954), 49; Hamilton, Eduardo, *Manual de derecho aéreo*, Santiago de Chile (1950), 29.

⁴ Ibid see note 2

Council of Ypres in Belgium, promulgated a similar enactment concerning balloon flights, as did the Council of Namur in 1785, and the Senate of Hamburg in 1786⁵

2.2 The Paris Convention (1919)

The first major international treaty, the Paris Convention of 1919, established that states have complete sovereignty over their airspace. It also led to the creation of the International Commission for Air Navigation (ICAN).

The legal body concerned with aviation originated during the early 20th century time when immediate, aggressive development of aviation was riding on the success of the first powered flight by the Wright brothers in 1903. As aircraft became progressively more capable of crossing national boundaries, it became increasingly obvious that there existed a need for a legal framework concerning the use of airspace and regulation of international flights. Before World War I, little control existed concerning flight, mainly because aviation was still in its infancy.⁶

2.3 World War II and the Chicago Convention (1944)

World War II gave an incredible fillip to aviation technology and underlined the strategic relevance of flying. This rapid growth of civil aviation called representatives from 52 countries to get together in 1944 and draft the Convention on International Civil Aviation, popularly known as the Chicago Convention. The Chicago Convention is considered a milestone in the history of aviation law, as it gave birth to a specialized agency of the United Nations, ICAO- International Civil Aviation Organization to coordinate and regulate international air travel.

3. SOURCES OF AVIATION LAW:⁷

Aviation law derived from various legal instruments, including:

1. **Multilateral Conventions** – e.g., **Chicago Convention (1944), Montreal Convention (1999).**
2. **Bilateral Agreements** – e.g., Air Service Agreements between states.
3. **National Legislation** – e.g., **U.S. Federal Aviation Regulations (FAR).**
4. **Contracts Between States and Airlines** – Covering traffic rights and economic

⁵ <https://www.canlii.org/en/commentary/doc/1960CanLIIDocs44> (last visited on 29th August 2024)

⁶ <https://aircraftmaintenancestands.com/blog/a-brief-history-of-flight/> (last visited on 24th August 2024)

⁷ Prof Dr. I. H. Ph. Diederiks- Verschoor, An Introduction to Air Law 03 – 08 (7th ed. 2001)

regulations.

5. **General Principles of International Law** – Influencing state sovereignty and jurisdiction.

Multilateral conventions are the primary source of ⁸aviation law. These are the documents that framed and regulated aviation law in the global context. The Chicago Convention of 1944, Tokyo Convention of 1963, Hague Convention of 1970, and Montreal Convention of 1999 are some of the instruments that set out international standards for safety security, and liability in aviation. These are the ones that are signed and entered into by the states and bind the countries that are signatories to it and can be viewed as a basis of modern international aviation law.

Every state adopts aviation-related legislation and regulations with which to manage its airspace and regulate airport functions, and the activities of airlines and other related industry operators. These national regulations often emanate from international conventions but are drafted in terms indicative of the particular legal, economic, and political situations of each nation. For example, in the United States, the Federal Aviation Administration (FAA)⁹ takes up the mantle for regulating civil aviation, while the European Union Aviation Safety Agency¹⁰ performs a similar function within the European Union.

In addition to multilateral conventions, the principles of bilateral and domestic agreements between countries, for example, air carriage agreements, are also of great importance in regulating concrete aspects of air transportation, route rights, freedoms of traffic, and market access. These agreements thus provide provisions that reflect the economic and strategic needs of the contracting parties.

ICAO Standards and Recommended Practices (SARPs): In virtue of being a Specialized agency of United Nations, ICAO¹¹ has the responsibility of establishing international standards and recommended practices in the field of aviation. Although these SARPs are of policies, most of the states have implemented them and they offer standardized measures on sundry facets of civil aviation such as safety, management, control of air traffic, and airports among others.

4. **KEY PRINCIPLES OF AVIATION LAW**

4.1 **Sovereignty over Airspace**

⁸ ibid

⁹ <https://www.faa.gov/>

¹⁰ <https://www.easa.europa.eu/en>

¹¹ <https://www.icao.int/about-icao/Pages/default.aspx>

The concepts of freedom and sovereignty have been crucial aspects in the development of aviation law for ages. As in the evolution of technology happened, it enabled the aircraft to cross national borders. The states were challenged with the question of who had sovereignty over the airspace and which and what liberties should be afforded to the foreign aircraft flying over a state's territory. These issues were important in the determination of the principles of aviation law which was essential in the determination of rights of nations as well as guidance on the use of the airspace.

During the Franco-German war of 1870, balloons were utilized, and the first Hague Conference of 1899 imposed a five-year ban on using balloons in military operations. However, this ban was not extended by the Second Hague Conference which we will discuss in the later stages. Several competing multilateral treaty were established in the wake of war, including the¹² Paris Convention of 1919, Ibero- American Convention (1926)¹³, and the Havana Convention (1928)

The earliest and fundamental rule of airspace, therefore, is the principle of sovereignty according to which a state has exclusive control over the air space above its territory, or billing and cooing, as the case may be is a principle that was developed about the Paris Convention of 1919. This convention was the first in the series of steps taken internationally to control air navigation along with being the first official attempt to look at the legal aspect of flying. The Paris Convention also prepared the legally binding acknowledgment of the principle in Article 1¹⁴ stating clearly that “every state has complete and exclusive sovereignty over the airspace above its territory” and this was an epoch-making advancement since this gave the basis for the modern idea of airspace rights and becoming one of the principal guidelines of aviation law.

4.2.FREEDOMS OF AIR:

The “Freedoms of the Air” is an elementary principle in aviation law that addresses the accessibility of aircraft to use foreign airspace, take off or land in another nation, and overfly a foreign country's territory. They provide the legal framework for commercial international aviation since they permit airlines to fly people and commodities across borders subject to national sovereignty interests¹⁵. These rights, regulated through multilateral and bilateral treaties, pertain to paramount significance to the global aviation market. The freedom of the air

¹² Yaya kareng, International Aviation / Airspace Law an overview,

¹³ The Ibreo- American Convention, ICAO history

¹⁴ Article 1 of the Paris convention

¹⁵ Mendes de Leon, Pablo. *Introduction to Air Law*. Kluwer Law International, 2017.

emerged in the middle of the twentieth century, and they have changed over time to meet the existing situation and the demand for international air travel. Let us see a comprehensive analysis of the Freedoms of the Air, the laws from which they were derived together with the implications of these freedoms to the states and airlines, and the impact of these freedoms on the international aviation industry.

The Freedoms of the Air are principles that stem from The International Civil Aviation, also known as the Chicago Convention of 1944. This was the first legal treaty that set out the rules governing international civil aviation; this convention aimed at expressing a new need for cooperation between the states owing to the further opening of air travel for civil use. As it has been stipulated in the previous Paris Convention of 1919, the Chicago Convention also restated that every state has jurisdiction¹⁶

However, to promote international civil aviation the Chicago convention has also incorporated a set of commercial rights now called Freedoms of the Air which govern the flying of civil aircraft over countries. Originally intended the Five Freedoms of the Air promote the protection of sovereignty with equal opportunity and efficiency in airline transportation. These freedoms were later formalized through two key international agreements: the first being the International Air Services Transit Agreement (IASTA) and the second being the International Air Transport Agreement. (IATA)¹⁷

The Five Freedoms of the Air:

“There are five different freedoms of the air. The first two are technical freedoms followed by three commercial freedoms:

- i. The first freedom: The right of aircraft from State A to overfly State B without landing
- ii. The Second Freedom: The right of aircraft from State A to land in State B for technical reasons
- iii. The Third Freedom: The right of aircraft from State A to accept the paying traffic from State A and put it down in State B.
- iv. The Fourth Freedom: The right of aircraft from State A to take paying traffic

¹⁶ Article 1 of Chicago Convention

¹⁷ Shawcross, William, and Maurice McNair. *Shawcross and Beaumont: Air Law*. LexisNexis, 2011.

from State B to State C “¹⁸

The First Freedom and the Second Freedom are known as the “technical freedoms” as they cover both the organisational part of the operation, they enable the plane to cross the foreign territory’s airspace or perform technical stop but do not actively conduct sales. These two freedoms were enshrined in the IASTA that has been acceded to by many states thereby offering a general legal regime for the overflight and refueling rights which are vital in most international long-haul flights.

The Third Freedom and the Fourth Freedom enable the business airlines’ organization to engage in all business activities through the transfer of passengers and merchandise from one’s country to another foreign country. It is such freedom that promotes the business travel and tourism industry and on which most of the bi-lateral and multi-lateral ASAs are based. The Fifth Freedom goes even further in which a commercial operation is granted to take passengers from one country right to another but one of the doors must be on the airline’s home country. Still, it is worth to mention that the Fifth Freedom rights are defined as being less favorable or more controversial since they mean the fact that the foreign airline companies compete with domestic ones in third countries.

Beyond the Five Freedoms: The holdings feature more operating rights than the overall flights.

When the chances to fly on an international level appeared, more freedoms were created to provide improved conditions in the commercial aviation field. The other freedoms mentioned above may not be very much defined and very much respected internationally like the five freedoms mentioned earlier but they are covered in some instances under bi or multinational treaty provisions. For instance, the Sixth Freedom allows an airline to take passengers or goods from one overseas country directly through the latter’s home country. This freedom is often utilized by the airlines in certain countries that already have rather well-evolved hub-and-spoke networks as this way the carriers can develop traffic towards their home country’s airport operational hub.

Seventh Freedom refers to the right of an airline to carry passengers or freight between two nations of the world and bear no territorial connection with the two nations involved. this freedom applies most to; liberal air transport policies however, this freedom is closely associated with controversies in the sense that it directly challenges national air carriers. The

¹⁸ Ibid, see note 14.

eighth Freedom is known as Cabotage or consecutive cabotage this enable an airline to transport passengers or goods in foreign country as the part of journey originating from and/or culminating in the airline's own country. The last of them is the ninth freedom more specifically known as 'standalone cabotage' which is the right of an airline to operate solely domestic services in another country.¹⁹

The first and the second freedoms are recognized through the multilateral treaties such as the IASTA but the rest of the freedoms are negotiated in the bilateral air services agreements (ASAs) between two states. These are the set of protocols that determine how and by what terms airlines may fly between two given nations, the many ways in which traffic rights are partitioned, and the number of flights that can be conducted on stipulated routes. Third, Fourth, and Fifth Freedoms are the most popular for negotiation in the traffic rights of ASAs; that is, the building blocks of most international aviation conventions.²⁰

In some areas, multi-lateral measures have been undertaken to open up the structures for the provision of air transport services and extend the Aerial Freedoms. Another is the Single European Sky offer by the European Union where it can be argued that Seventh, Eighth, and Ninth Freedoms are allowed for airlines of the member states within the union. Likewise, the ASEAN countries signed an open sky policy that has advanced the liberalization of traffic rights in the member countries²¹.

4.3. The Role of Open Skies Agreement:

Over time, the policy of open skies has been significant in advancing liberalization of the international aviation transport as well as the extension of the utility of the Freedoms of the Air within the last few decades. The open skies agreement, which is usually signed between two or more countries, seeks to remove most of the restrictions on services that measure the ability of an airline to choose its routes, frequencies, and capacities. It unlocks Fifth Freedom rights which make more competitive service opportunities across several markets for the airlines.²² The United States has championed open skies agreements and has had such agreements with more than 100 countries since the beginning of the 1990's. With the help of these agreements,

¹⁹ Milde, Michael. *International Air Law and ICAO*. Eleven International Publishing, 2012.

²⁰ Ibid see note 20.

²¹ Measuring the impact of ASEAN Open Skies on international air traffic movements from and to Southeast Asian Cities <https://www.sciencedirect.com/science/article/abs/pii/S0967070X21001761> (last visited: 10th Sep 2024)

²² Haanappel, Peter P. C., "The Transformation of Sovereignty in the Air," 20 *Air & Space L.* 311 (1995).

competition has been encouraged, airfares have been brought down and trade plus tourism has been encouraged internationally²³. For instance, the recently signed US-European Union Open Skies Agreement in 2007 has generated one of the biggest and the most open liberalized airline transport markets which gives the US airlines the rights to operate anywhere in the EU as the EU airlines in the US²⁴.

5. MAJOR INTERNATIONAL CONVENTIONS:

5.1 Convention Relating to the Regulation of Aerial Navigation (Paris Convention), 1919; On 13th October 1919, the first convention relating to the regulation of aviation was signed. This Paris Convention had twenty-six signatories from different state around the world. Here the members agreed to recognize the state sovereignty of the space above the territory to the state to which it belongs.²⁵

5.2 Havana Convention, 1928: here the member adopted the crucial resolution for the formation of an inter-American Commercial Aviation Commission to be followed by the Governing Board of the Pan- American Union to resolve the concerns regarding the aviation.²⁶

5.3 Chicago Convention, 1944: this convention is very landmark in the field of the law of aviation as the proper procedure and importance for the commercial aviation sector was given by the states. Totally 53 states were the signatories to this convention.

5.4 Montreal Convention, 1999: This convention was the first to provide the liabilities of air carriers and passengers. This convention was the multilateral treaty later adopted by the ICAO member states.

5.5 Warsaw Convention: There was a significant amendment in the Montreal convention for providing compensation to air passengers.

²³ Abeyratne, Ruwantissa, "Open Skies and the Future of Air Transport," 66 J. Air L. & Com. 1409 (2001)

²⁴ Ruwantissa Abeyrante, US/ EU Open Skies Agreement- some issues, journal of air law and commerce, volume 72 and issue 1

²⁵ Paul Fitzgerald, bilateral Air Service Agreementss and Sixth Freedom: Uncomfortable Bedfellows, Autumn 2023.

²⁶ Milde Michael, International Air Law and ICAO, 1st ed., Kluwer Law International, 2008.

6. International Civil Aviation Organization (ICAO):

The ICAO is a United Nations-affiliated agency that oversees the Civil Aviation sector and sets up the rules for the safety, security, and efficiency of international aviation. It was founded in 1944 by the Convention on International Civil Aviation commonly referred to as the 'Chicago Convention' and is the principal organization responsible for regulating international civil aviation. This task is important according to the organization's mandate to help facilitate the smooth running of aviation across borders and encourage cooperation among its member countries.

What are the Functions?

Standardization, auditing, coordination, and capacity building can also be highlighted as the primary activities of ICAO. Functions as elucidated try to foster a safe and secured air transport system in the international air space so that all the members of the organization are governed by regulations.

Establishing International Standards and Recommended Practices (SARPs): In fact, one of the main functions of ICAO is setting up Standards and Recommended Practices (SARPs) which are the technical and operating standards of International Civil Aviation. These standards apply to a variety of aviation-related activities such as air navigation, safety management, aircraft operation, traffic control, airport operation, and environmental concerns. SARPs are developed by ICAO's civil aviation authorities and are established in ICAO's council and posted in the Annexes to the Chicago convention. Member states are not required by law to incorporate all the SARPs, though they are required to ensure that they are compliant with them or submit a report²⁷.

Auditing and Monitoring Safety and Security: To make sure that its standards are implemented worldwide, there are two programs which include the Universal Safety Oversight Audit Programme (USOAP) and the Universal Security Audit Programme (USAP). These programmes evaluate the degree of commitment of member states to the SARPs in aviation safety and security. The observation and assessment of a country's capacity to ensure order in its aviation file is assessed during a typical ICAO audit, during which licenses are issued or

²⁷ Article 38 of Chicago Convention

modified if the country is unable to rid its framework of potential or actual inefficiencies.²⁸

ICAO must ensure that civil aviation remains safe and secure globally. The development and implementation of SARPs help protect passengers, crew, and cargo from safety hazards, including technical failures and human error. In response to evolving threats, such as terrorism, ICAO also formulates security measures to safeguard against unlawful interference in civil aviation, including hijacking and sabotage.²⁹

Since environmental issues have received increased importance, ICAO has a stake in sustainable aviation. ICAO has approached this by implementing CORSIA designed to create a decrease in the impacts of aviation on international air travel. This organization is further working hand in hand with member states to develop and implement policies on mitigating these same contributions to climate change, noise pollution, and other aspects of environmental challenges.³⁰

The supreme function of ICAO is to maintain cooperation from all its 193 member states to establish that international civil aviation shall be developed in a safe, orderly, and sustainable manner. It ensures this through diplomatic relations, best practice exchange, and venues for negotiation and cooperation among member states about aviation matters. ICAO serves as a forum for the formulation of global policies in the complex field of aviation and dispute settlement.

7. CONCLUSION:

It has developed roughly in tandem with the growth of the aviation industry. Aviation law has emerged as an essential field of international law that would regulate safety, security, economic concerns, and environmental impacts. This trajectory, from the early days of the Paris Convention of 1919, which recognized the importance of national sovereignty over airspace, all the way through to the Chicago Convention of 1944 that finally came up with the International Civil Aviation Organization, ICAO, and established the basic framework for aviation law today, has been conditioned by a need for harmony and international cooperation. Several agreements have also been reached, such as Freedoms of the Air and the Open Skies

²⁸ Mendes de Leon, Pablo, "The Chicago Convention and Modern International Air Transport," 52 Colum. J. Transnat'l L. 405 (2014)

²⁹ Havel, Brian F., and Gabriel S. Sanchez, *The Principles and Practice of International Aviation Law* (2014).

³⁰ ICAO, *Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA)*, available at <https://www.icao.int>.

Agreements, which in turn have permitted international air transport to flourish while balancing state sovereignty with the freedom of international travel.

Open Skies Agreements have liberalized international air transport, holding considerable potential for more competition and lower fares. However, small and less developed states face greater difficulty competing in an increasingly liberalized air transport market. Hence, the avenue to ensure equitable participation is in ICAO promoting capacity-building programs, especially for developing countries to improve their aviation infrastructural strength and capacities in regulation. The benefits of promoting fair competition would also be supplemented by overall safety and sustainability in global aviation.

The rise of private airlines and low-cost carriers has introduced new challenges in regulatory compliance and competition laws. Aviation's future depends on its ability to adapt to emerging challenges, and this ability would make air travel remain safe, secure, and sustainable. International cooperation towards stronger legal frameworks and innovation will shape the future of a thriving aviation industry in a complex global environment. Any development in aviation law should, therefore, balance the sovereignty of states with the openness of air travel to global community mobility, seeing that the sky remains open, safe, and accessible to future generations.

The legal trajectory of aviation law determines the importance of international collaboration, technological adaptation, and regulatory innovation to ensure that air travel remains safe, secure, and sustainable for future generations.