



Just culture versus criminalization - moving forward

by Jerónimo Coelho dos Santos

Amongst the various areas of practice in which I have acted as a lawyer, aviation is the one where I believe professionals have a higher and more consistent concern with safety, which they consider an essential element for the proper performance of their activity. In fact, aviation organisations themselves are subject to legal criteria pertaining its structure, management and resources order to support operational safety aviation.

These preliminary observations may help to understand the astonishment and even rejection of aviation professionals regarding the criminalisation of what they refer to as 'honest mistakes'. This individual and collective behaviour of aviation professionals should not be mistaken with the pursuit of a 'status of impunity'. Actually, aviation professionals accept and claim that unsafe acts resulting from gross negligence or intentional actions should be punished because the aviation industry cannot tolerate practices that seriously violate safety standards.

Aviation professionals have for a long time claimed that the law should clearly distinguish between a non-punishable level of activity in the form of 'error', from another level where unsafe acts should be punishable.

By not punishing the negligent acts of aviation professionals (the so-called 'honest mistakes') aviation safety is strengthened through the reinforcement of a positive culture based on an environment of trust, free reporting of safety occurrences, analysis and dissemination of 'lessons learned' for the benefit of safety.

Some professionals and others working in aviation take the view that the usual model of justice in which an offender is punished in order to avoid relapse (deterrence) and in order to show others that they must use due diligence to avoid suffering the consequences of their actions (general deterrence) is not appropriate to their industry.

They say that the proliferation of criminal investigations into the actions of aviation professionals reduces reports of occurrences and, therefore, lessens the chances of preventing future repetition of similar unsafe situations.

What matters is to work out how to achieve both safety and the rule of law at the same time. The problem can be considered in an interrogative manner:

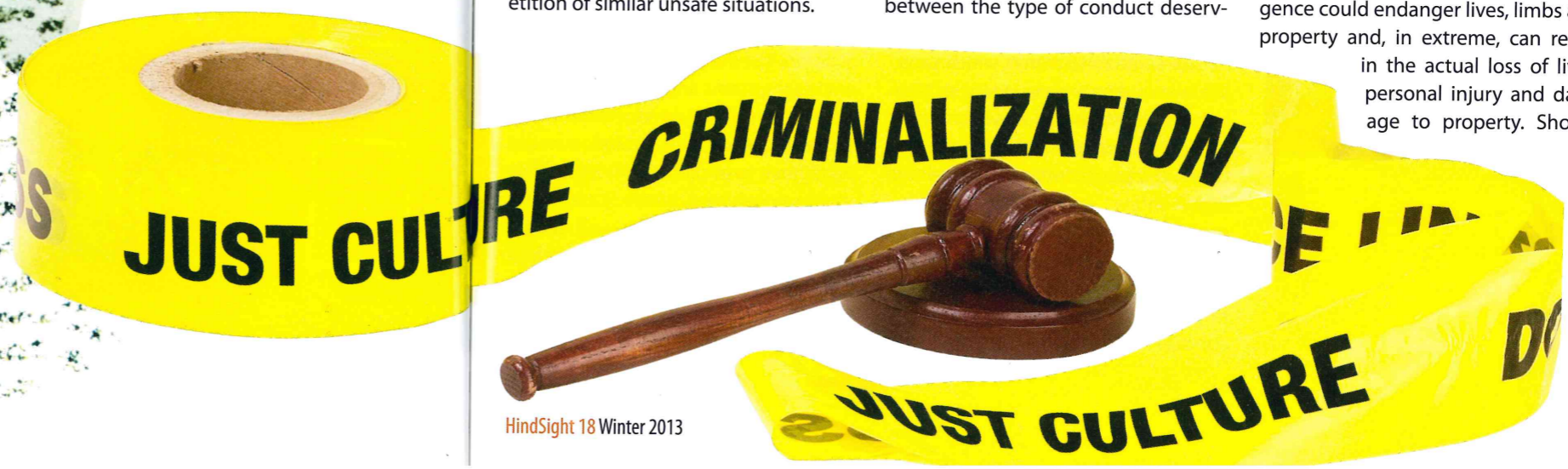
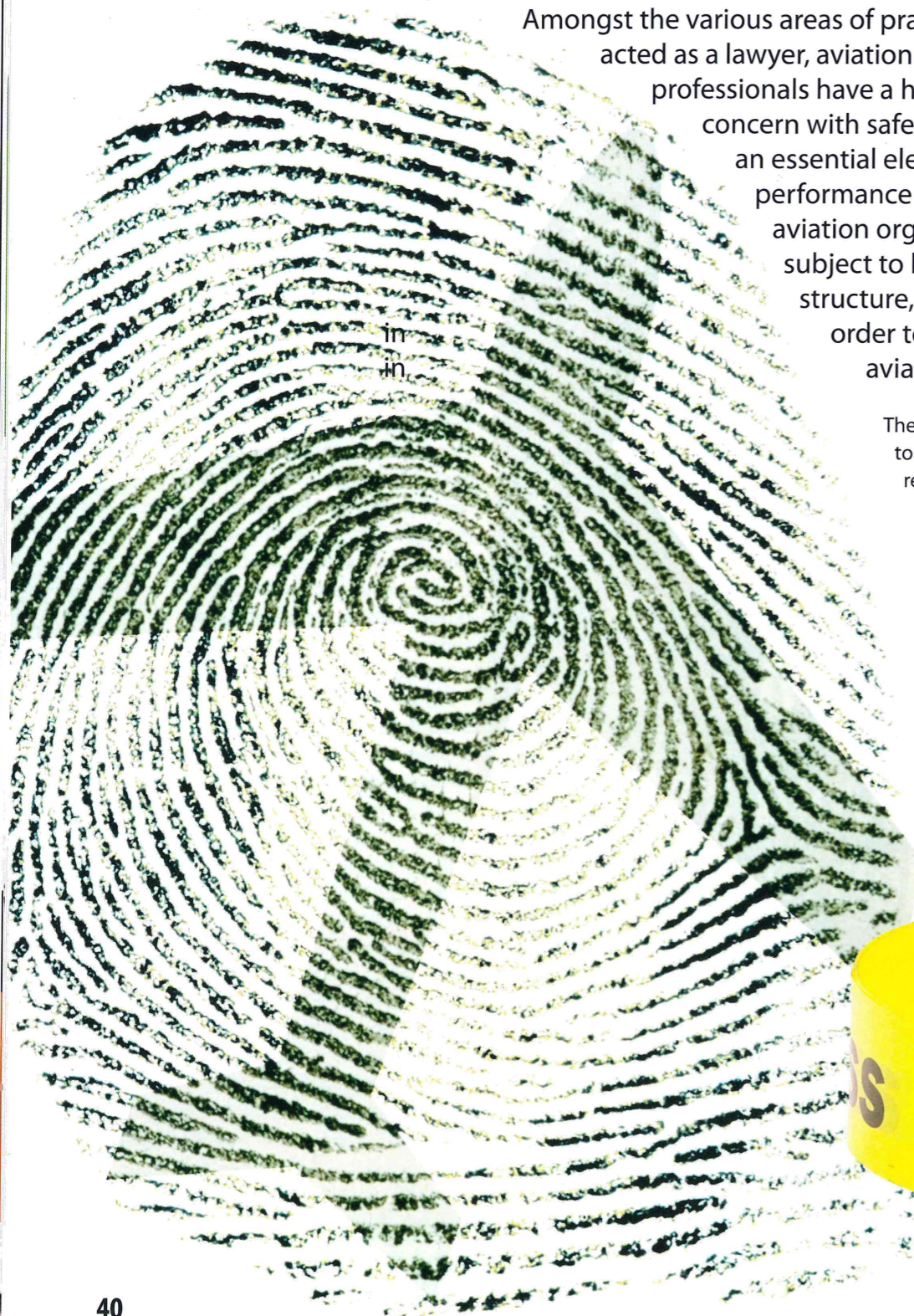
1. Could the Law accept that conduct which violates professional due diligence should not be punished?
2. If the answer is affirmative, where should the line between punishable and non-punishable acts be drawn?
3. Once this problem is solved, how should the line be defined? By law rules or through law enforcement?
4. Regardless of how the question is solved, who draws the line, i.e. who qualifies a specific conduct occurred as punishable or not punishable?
5. All these questions raise the most relevant issue – is it possible and desirable to establish a common legal framework at international level?

Let's look at each of the points.

1 Criminal laws define intentional conduct by describing it. Additionally, some conduct of this type is also punished when the person acted with negligence. And within the latter, the law distinguishes between punishable and non-punishable conduct depending on the degree of negligence. If the law in all fields of human behaviour already drew lines between the type of conduct deserving

and not deserving of punishment, nothing would prevent us from making the same distinction regarding the aviation professionals' breach of their duty of care.

2 This brings us to the second question: where to draw the line between punishable and non-punishable behavior. This is one of the most difficult questions to answer because violation of due diligence could endanger lives, limbs and property and, in extreme, can result in the actual loss of lives, personal injury and damage to property. Should



Just culture versus criminalization – moving forward (cont'd)

the answer to the question, 'where to draw the line' take into account the effects of the person's conduct or exclusively its context? It is possible to address the 'draw the line' issue at two levels in a criminal justice policy:

■ **When the legislator is concerned with which outcomes are punishable.** The law could opt just to punish conducts that lead to injuries or damages, or the latter and harmless conducts that create danger to people or property. In some legal systems criminal law still punishes the creation of abstract danger (theoretical, not actual danger). In such cases the professional is punished without actually endangering people or property because the law selects the 'safety of aviation' itself as the value to be protected. It can be said that the law criminalises the conduct that creates the danger of endangering lives and property in the course of aviation.

■ **When the legislator is concerned with which conducts are punishable.** In this case, the criminal law determines whether or not to take legal action according with the culpability of the person. Some crimes depend on the intention to inflict harm or cause damage whereas some others could be the effect of the breach of a duty of care or through the disregard of the rights or the safety of third parties, i.e. acting with negligence. Regarding negligence, it is still necessary to distinguish gross negligence from negligence. The solutions and legal concepts differ between States but some sort of definition of different degrees of culpability of conduct is always present.

The challenge for policymakers is, thus, to find the balance in achieving both public interests at stake: to ensure aviation safety and to punish those who commit a crime. One answer seems clear from the perspective of aviation professionals: punishment for the creation of danger without serious consequence should not occur. The creation of hazards to air navigation without endangering life, limb or property, severely compromises aviation safety yet, on the other hand only marginally satisfies the collective interest of punishing professionals who have failed their duty of care.

Decriminalisation can not be an adequate solution to crimes which cause actual dangerous consequences. Nevertheless, before action which leads to this is taken, the right balance between the public interests concerned, flight safety and criminal liability, should be determined by the context of the professional conduct rather than its outcome. In other words, we must decide whether to punish any conduct that violates due diligence

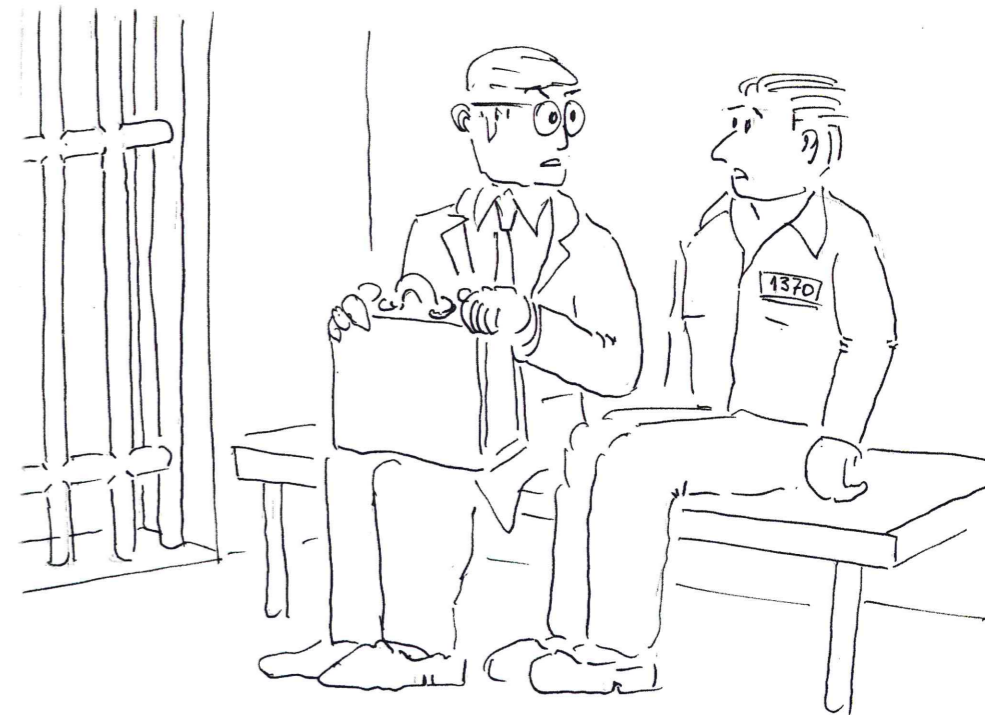
or whether all such violations must be punished, choosing, for example, not to punish those who acted negligently and punish those who acted with gross negligence and/or intentionally.

In my opinion, the issue can be addressed at three levels, that of the individual State, at a regional level or globally. At the individual level, action can be immediately taken at State level to promote the change of national criminal law in accordance with the most appropriate solution for the protection of individuals against danger and harm, with regard to civil air navigation and air transport development and reliability, which will not prejudice the increase of operational safety. Specifically, States should enact criminal provisions for aviation professionals, a more limited list of offences than apply generally so that they are at least excluded from prosecution for crimes of theoretical (abstract) danger whilst still being liable to prosecution when causing actual (concrete) danger and death/serious injury or major damage as a result of gross negligence or intentional disregard of the rights or the safety of others. A more comprehensive approach, regional or global, involves international organisations to compromise States to adjust their criminal law to common principles that safeguard the growth and safety of international civil aviation. This path would be the best way to enhance a positive and safe environment in international civil aviation, but the cultural roots of different legal systems and different levels of political and social development in the globe mean that such a solution would be difficult to implement. Nonetheless, at a regional level, where States share a common legal system and similar levels of political and social development, the acceptance of an obligation to harmonise criminal law may be less difficult to achieve.

3 Law enforcement has, by definition, to observe the law. Within the range that the law permits, measures can be taken to limit the inquiries into the actions of aviation professionals with a view to their prosecution. For example, the use of instructions to the prosecutors, instructions which may have a greater or lesser extent according to the legal system involved. There will be more freedom to give instructions under common law legal systems and less under civil law systems. This process can at least create a more stable legal environment in each State but will not guarantee harmonisation internationally so the lack of confidence of aviation professionals and agents in the justice system at that level remains. So, the solution that best brings certainty and confidence in the system is the stipulation of criteria in the law and not by giving instructions to the judiciary.

4 In a particular situation, who will decide whether conduct is punishable or non punishable. In general, States give investigative power to the police and the decision on whether to charge people with an offence to Prosecutors. Assessing the conduct of aviation professionals when there is evidence that the conduct is punishable or when the outcome legally requires opening an investigation (e.g., if there are deaths) are powers that belong to police and to law officers.

Whilst the mere beginning of a criminal investigation may bring uncertainty and, consequently, have a negative effect on the just culture environment, it is also true that the decriminalisation of crimes of danger (at least crimes of abstract danger), and the strict punishment of gross negligence and intentional misconduct are scenarios



Just for laughs, let's consider basing your defence on that "mumbo jumbo" aviation law you spoke of...

that provide a high level of certainty for aviation professionals.

The grey area is the distinction between negligence and gross negligence, but most conducts do not offer doubts on whether the negligence is simple or gross. On the other hand, the concepts of negligence and gross negligence are not identical in all States and it is this difference which brings us to the last of the questions.

5 The difficulties of establishing an international legal framework are at two levels: the differences between criminal laws and the disparity in the application of criminal law. A standardisation implemented through international law requiring States to accept an external definition of what conduct should be criminalised is not accepted by States.

Instead, a process leading to the adoption of a Convention – under the auspices of ICAO – which sets up the principles governing the prosecution of the conduct of aviation professionals,

aimed at harmonizing national criminal laws would be difficult but in my view achievable.

Such a solution can also be developed at the regional level, but whilst the geographic restriction of the solution would be a breakthrough, it would also be insufficient given the eminently comprehensive nature of international commercial air transport and of air navigation services.

In conclusion, the adoption of an international Convention whose main guidelines are the decriminalisation of danger and the exclusion of simple negligent acts of aviation professionals from liability to prosecution, would be, in my opinion, the best solution to increase just culture, aviation safety and justice. **5**



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