

Bridging the gap – are we fighting windmills?

Following the aftermath of the tragic accidents in Milano linate (2001) and Ueberlingen (2002), Eurocontrol created an Action Group of Aviation Safety (AGAS). One of these subgroups was the Just Culture Task Force. The Just Culture Task Force brought together a large variety of key actors in aviation inside and outside Europe. One of the deliverables was to create a combined training for ATCOs, Pilots and members of the Judiciary.

Since 2012 Eurocontrol, the European Cockpit Association and IFATCA co-organise three-day education courses. Every year two courses of three days are organised to bring together professionals (Air traffic controllers and pilots) and member of the judiciary (judges, prosecuting judges and prosecutors). Over 200 persons have participated so far. Despite these efforts to bridge the gap between aviation safety (ultimately the passengers' safety) and the judiciary the Just Culture concept is challenged as the recent Swiss Federal Court decision shows.

Following the Swiss Federal Court verdict of an air traffic controller for an incident where nobody was hurt and no material damage was done, a conflict materialized between the duty of the judiciary and the needs of a safety-relevant reporting system in complex systems. Through this, aviation is subjected to a stress test. In view of the EU regulations on safety-related reporting and the prevention of aircraft accidents, the judicial and aviation authorities are called upon to push ahead with regulations for increased coordination. A contribution to this implementation could be provided by the joint training for aviation experts and judicial authorities provided by Eurocontrol and the international umbrella organization of air traffic controllers IFATCA.

These courses aim to present tools such as the Just Culture concept, education and exchange of views between the aviation sector and the members of the judiciary. In organization with high level of safety or high-risk industries, decades of upholding safety has become the *raison d'être*. Nowadays aviation has achieved a very high level of safety and accidents are very rare. In fact, so rare that the aviation sector cannot improve other than learning from incidents or events, where the outcome is not as was expected. In order to continue to learn and improve the aviation sector, which by the way is not free of risk, aviation has chosen to regulate the access to safety data and safety information. This has produced various instruments such as reporter protection, safety data and safety information protection in the international regulations and recommendations.

In modern safety management, a systems approach has been nurtured in recent years in incident investigations. The focus is no longer on the "failure of the individual", but on understanding the complex system interactions and suggests improvements. As a result, safety management is dependent on knowledge of the situation and constant dialogue with the operators in the system, in this case the controllers. This approach is called the *systems view*. It sees the error or problems that we perceive superficially as a symptom and not as a cause. As symptoms, they point to deeper and complex deficiencies in the system. These can have to do with priorities, communication, resources, development, politics and much more. For people who are part of this system, such conditions are rarely as obvious as they appear to external observers after an accident or a more serious incident; they are simply part of the daily work from the point of view of perception. Linking the symptoms to a potential accident seems almost impossible before the accident.

It is therefore of the utmost importance in a complex system that is not completely transparent for the individual to know as many such symptoms as possible. However, this information only becomes freely accessible if, in return, nobody is punished for reporting it, especially if the observation is related to a work error of one's own.

On the other hand, there is the judiciary, which must legally evaluate the event in a serious case. That is our claim in a constitutional state. In general, lawyers can only orient themselves on written guidelines, but do not necessarily know the working methods, the decision-making processes or the so-called "best practice".

In theory, this could lead to the punishment of a "good decision" in the interest of safety, but which was not compliant with the rules, or to pilots and controllers failing to report work errors for fear of legal consequences. Punishing people for "honest mistakes" in a disciplinary or judicial way does not increase the security of the system. Sanctions do not preclude similar incidents from happening again. On the contrary, they tend to lead to an increased risk: we are thus cementing the false belief that the system itself is safe and that after an incident with the "sorting out of the rotten apples" this state is also reached again. As soon as we punish some individuals within the system, well-documented adverse effects occur. The most problematic factor is fear. Participants stop reporting any safety-related problems they encounter because they fear that the rapporteur will be resorted to, that he will be punished. Systems in which there is no open communication on safety aspects are vulnerable and risky systems. They are not adaptive and cannot improve.

The tension between the need to learn from safety-related observations and the government's obligation to punish negligent behaviour has been recognised by the international authorities and implementation provisions have been enshrined in various air transport laws. The implementation of this EU regulation is a difficult undertaking for the countries concerned, as the actors concerned do not usually operate in the same environment. The aviation industry is international, dynamic and very security-conscious, the judiciary is national, designed for stability and very legally conscious. These two worlds rarely meet. And when they meet, this leads to a correspondingly committed exchange. In 2008, Eurocontrol established a "Just Culture" Task Force to promote dialogue between these different worlds. This has made it possible to establish contacts and bring the various actors together at one table. One of the initiatives from this Task Force is a training course jointly organised by Eurocontrol and IFATCA (International Federation of Air Traffic Controller Associations) and the European cockpit association (ECA), which trains representatives of national criminal investigation authorities and aviation experts (active air traffic controllers and pilots) over three days. The aim of this joint training is to promote understanding of the various interests involved and to form a network of European criminal investigation experts who can provide operational expertise to the criminal investigation authorities at their request. In addition, opportunities have also arisen for the various nation states to implement the EU requirements in a pragmatic manner. The limits and possibilities of criminal investigations become apparent and court rulings reveal how accidents or serious incidents are viewed from a legal point of view. Initial experience has shown that national legal systems react very differently to a security incident. In the Netherlands, for example, an aviation prosecutor with national competence was appointed in 2007 and, together with an aviation police corps, declared the sole point of contact for all aviation incidents. This public prosecutor can decide when, where and how to initiate prosecution. In other countries, e.g. Italy, the investigating authorities must act in the case of known possible violations of the law and can restrict the activities of the accident investigation authorities. For the Italian criminal

investigation authorities, this course has been included in the voluntary training offer for investigating magistrates and prosecutors.

The need to bridge the gap between the judiciary and the aviation world has become apparent during these courses. Most of the participating members of the judiciary have never heard of the concept of just culture and on the other hand most of the participating experts of aviation world have never been faced with the legal proceedings and analytical process determining if an act in a working environment leading to an unwanted outcome is negligent or gross negligent. To bring these two worlds together in order to bridge the gap and foster understanding of the different needs is a sensible way to contribute to the safety of the travelling public. Understanding the various national legal frameworks helps as well to show the limitations to the current just culture notion from an aviation perspective and gives avenues to propose to the legislators to change the legal framework where necessary. This is not an easy task like the cases in front of court in Switzerland demonstrate. Penal code, aviation law and various ordonnances need to be adapted to become compliant with the aviation requirements as outlined in the international legal law.

Over 200 persons, of which 90 from the judiciary have participated to this course and have debated, exchanged views and learned around the difficult topic of justice and aviation safety. As these two worlds can sometimes be seen as antagonistic, the fact to bring together representatives of both worlds is assisting in fostering understanding of the respective needs, rights and duties. To bridge the gap is a valuable contribution to aviation safety while respecting the needs of justice. The existence of these initiative has permitted to highlight as well some of the weaknesses of the current transposition of the international aviation standards and regulations into the various national laws and permits the dialogue between the world of justice and the one of aviation. This allowing for changes at the national level.

The current court cases in Switzerland have allowed Just Culture to be debated in public, with an understanding of the just culture concept and the acceptance that the Swiss legal framework has to change in order to be compliant with the ICAO and EU regulations on the one hand and to continue the improvement of aviation safety. A few years ago, such a debate would not have been possible as the notion and the importance of the just culture would have been unknown to most of the public and the administration of justice. This as such is an achievement and bridging the gap has to continue restlessly.

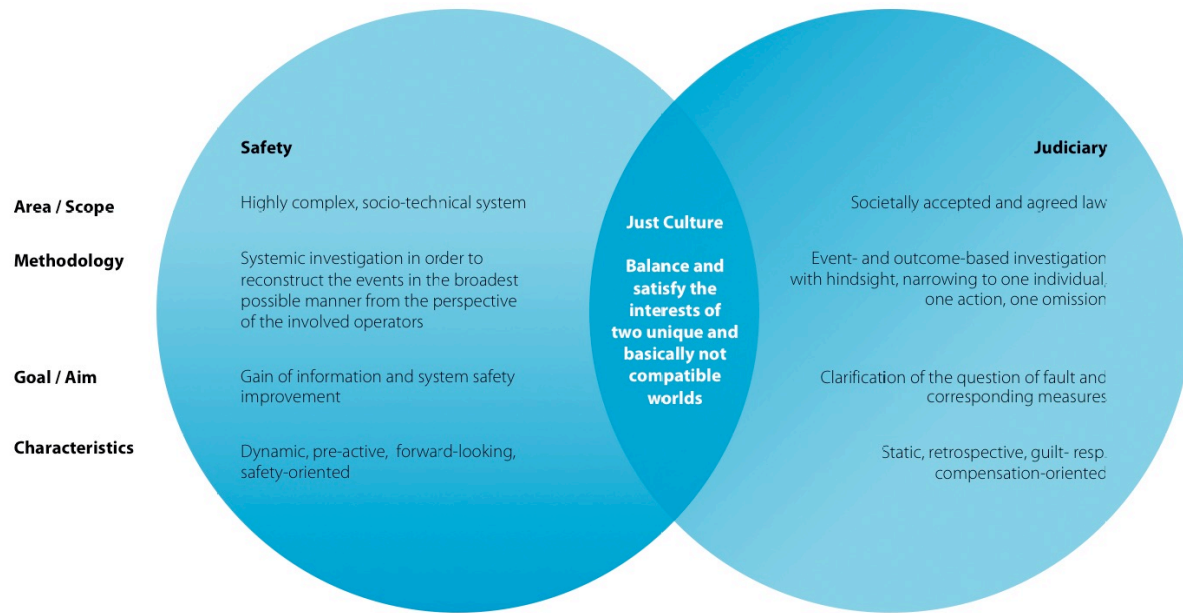


Figure 1 the two worlds meet in the prosecutor expert courses
© Swiss ATCA