

Law of Crimes, Terrorism vis-à-vis Aviation



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Every organized society has its own quota of transgressive acts and correlated to these its own socially regulated forms of sanction, deterrence and punishment.

NEED FOR AVIATION SECURITY

- Susceptibility to inherent risks of flight, the use of force, and, more dangerously, terrorist acts.
- Accidents in civil aviation raise much more public anxiety.
- The vital role of civil aviation also makes it an attractive target for terrorists.
- Impact of Globalization, Privatization and Liberalization
- Increase in international trade and tourism

Torts and Crimes

- Law is always couched in negative language
- It imposes harsh consequences for breach of duty.
- Will not give any incentives for performing duties.
- Law does not do any thing on its own in the field of civil wrongs.
- State has a duty to protect the 'law and order'

Duty of state

- Except in cognizable offences, the crime has to be complained and reported.
- Law takes its own course
- But somebody has to initiate the course
- Hands of the law are long, true, too long, it takes years to reach, or it will certainly reach at any point of time.

Administration of justice

- One of the main sovereign functions is the administration of justice.
- Justice should be rendered in time.
- Disputes arise out of breaches of duty
- Peace depends upon the justice.
- Justice is an essential prerequisite for development and day to day life of people.

Understanding the “ offence ”

- What is a **Crime**?
Defining the Crime.
- Who can commit a **Offence**?
Human being, Corporation.
- When an act becomes an offence?
Guilty Mind (*mensrea*),
Wrongful act or omission (*actus rea*)
Consequences : Harm or injury to the body, property or reputation.
- Difference between a civil wrong and crime

- **Who is important Crime or Criminal?**

Paradigm shift from Crime to the Criminal

- How to look into the Guilty Mind of a person?
- Intention, Fraudulent Intention, Dishonest Intention.
- Motives are they relevant ?
- Knowledge or Knowingly, Voluntarily.
- Strict Liability : Socio-Economic Offences
- NDPS ACT, ESSENTIAL COMMODITIES ACT, POTA.

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- Guilty Act : *Actus reus*: act / omission.
- Causation: Intervening Causes.
- Legal Requirement of an 'Offence'
mensrea + actus reus = offence.
- **Punishment:**
- **Why do we punish ?**
Theories of punishment.
- What is the importance of **Punishment**?
Nullum poena sine lege.
- **Kinds of Punishments:** Sec 53 of IPC: Death, Imprisonment- Rigorous and simple, solitary confinement, Fine.
- Reforming the penal clauses with New Punishments (Community service, Restitution, restorative justice programs – compensation to the victim).
- Customs Act, Excise, **Confiscation**, Income Tax Act, **Forfeiture of Property, Imprisonment, Fine**.

- **Stages of commission of crime:** Intention, preparation, attempt, accomplishment.
- **Who has to prove the Offence?**
Burden of proof: Prosecution.
Dowry death and Rape cases: Shift of the burden.
- **What is the Standard of Proof?**
Standard of proof: Proof beyond reasonable doubt. (Mallimath Committee report) High standard of proof.
- How the Criminal Law **evolved and developed?**
Primitive stage...Formation of State.....Prosecution.....*parens patriae* jurisdiction.
- How the Code came into existence?
Uniform law in the country, applicable to all....First Law Commission of India...Lord Macaulay.
- What is the **Scheme of the IPC** ?
- Procedure to formulate the code: Codification and Consolidation.
- Sec 5: special law and local laws.
- General principles.....Common intention, Criminal Conspiracy, Abetment, General Exceptions.
- Specific Offences: Offences against Human Body, Offences against Property etc.,

Classification of offences

- General law and special law
- Cognizable and non cognizable
- Bailable and Non Bailable
- Compoundable and non compoundable

Criminal Justice System



- ***Due process model*** and ***Crime Control Model*** CJS.
- Inquisitorial and adversarial.
- Presumption of innocence
- Fair trial....Free legal aid.....open court.....right to go for appeal.

Key Players of the Criminal Justice Process

- Police
 - Prosecutors
 - Judges
 - Jail authorities
- (Forensic Experts)

Pilot's conduct liability

- Pilot error in aviation accidents make him liable,
- mechanical problems with the aircraft or its component parts may contribute to the accident or the severity of the injuries suffered, makes the manufacturer of the aircraft (or the manufacturer of a component part) liable or both may share the legal blame for a crash -- and for any deaths or injuries caused by the accident -- under a legal theory known as "strict liability"

Maker's Product Liability

- The doctrine of "strict product liability" was created to make it easier to sue manufacturers in product defect cases by switching the focus to the safety of the product, rather than the conduct of the person using the product (in this context the aircraft and its components).
- The judges who created these laws have said that manufacturers in a high-risk industry must design, manufacture and warn in accordance with the foreseeable risks of using their product.

Strict – product liability

- Unlike cases against an airplane pilot or carrier, a strict liability claim against a manufacturer does not require proof that negligence caused the accident.
- In almost all states, a victim can hold a manufacturer or seller "strictly liable" if it is shown that a defect in the product was a cause of the injuries.

Unreasonably dangerous

- A manufacturer may be held strictly liable for a defective product if the product is "unreasonably dangerous" for use by an ordinary consumer.

Risk-benefit analysis

- The "risk-benefit" analysis test requires the jury to decide if the risk associated with the design of the product outweighs the benefits of the design.
- In an aviation strict liability claim, the jury will decide whether there is an alternative, mechanically feasible design for the product that could have been implemented by the manufacturer at the time it was sold.
- The focus is on the "state-of-the-art" at the

Essentials to product liability

- To establish strict liability in a product liability lawsuit, the injured person (the "plaintiff") must show that:
- The product was defective when it left the manufacturer or distributor's (the "defendant") control;
- The product was used in the intended manner or a reasonably foreseeable manner;
- The product caused plaintiff's injury.
- Strict liability can arise as a result of a defect

Design defect

- A design defect is one in which a whole product line or every product from a particular model is dangerously deficient.
- This is where courts apply the "unreasonably dangerous" test or a combination of the consumer expectations and "risk-benefit" test to determine if the design is defective.

Manufacturing defect

- If the manufacturer fails to produce the product correctly, a manufacturing defect may exist.
- This means that if the finished product is substandard in comparison with identical products in that product line, the manufacturer may be held liable for causing the anomaly and failing to catch the defect before the product was sold to a consumer.
- Manufacturing defects include the use of

Failure-to-Warn

- If manufacturers fail to provide adequate warnings or instructions for use, they can be held strictly liable for failure to warn. There are two types of warnings:
- **General instructions** that accompany the product. A good way to look at this is that the instructions are a part of the product. If the instructions are ambiguous or insufficient, the product cannot be used safely (i.e. operating limits and weight limits).
- **Specific warnings of a danger** that the manufacturer knew or should have known

- Hijacking means illegally seize (an aircraft, ship, or vehicle) while in transit and force it to go to a different destination or use it for one's own purposes.
- ICAO was adopted by UN six months after the hijacking of a Trans World Airlines aircraft to Beirut in June 1985 with its attendant hostage-taking, murder, and destruction, the tragic bombing, on June 23, 1985, of an Air India jet over the North Atlantic with the loss of 329 lives, and the related explosion of a terrorist bomb at Narita Airport in Japan.
- President George Bush's publication entitled Task Force on Combatting Terrorism, which appeared in 1986, thus: "The unlawful use or threat of violence against persons or property to further political or social objectives. It is usually intended to intimidate or coerce a government, individuals, or groups or to modify their behaviour or policies."

The three ICAO-developed conventions on aviation security are

- Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963) ;
- Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970) ;‘
- Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 1971).

Some incidents

- (i) June 14, 1985: Seizure of Trans World Airlines Boeing 727 during a flight from Athens and diversion to Beirut. Persons on board held hostage against the release of 700 Shi'ite Moslems in Israel. One passenger, a United States national, was murdered. Flight crew and a number of passengers held hostage until June 30, 1985. Alleged participant in incident arrested in Federal Republic of Germany and United States sought extradition of that person. Meanwhile, two citizens of Federal Republic of Germany taken hostage in Lebanon. Nevertheless, FRG decided to try suspected offender. Aircraft returned to owner.
- (2) June 23, 1985: During a scheduled flight from Montreal to Bombay via London, an Air India Boeing 747 crashed into the Atlantic Ocean about 100 kilometres southwest of the Irish coast; all 329 passengers and crew perished. A court investigation in India concluded that the crash occurred due to the explosion of a bomb. No suspected offender brought to justice.
- (3) April 2, 1986: A bomb exploded on board a Trans World Airlines Boeing 727 en route from Rome to Athens causing the death of four passengers and injuring nine others. In spite of loss of pressurization and damaged fuselage, the pilot managed to land the aircraft at Athens Airport.

- (4) April 17, 1986: Attempt to place an explosive device upon an El Al Israel Airlines Boeing 747 at Heathrow Airport. The device was discovered in the hand baggage of a pregnant passenger who intended to board the flight for Tel Aviv. The woman proved to be an unwitting accomplice. The perpetrator was subsequently arrested and tried in London. He was convicted and sentenced to forty-five years' imprisonment.

ICAO Guidelines

- Each ICAO contracting state is required to establish an organization, develop plans, and implement procedures, which together provide a standardized level of security for the operation of international flights in normal operating conditions and which are capable of rapid expansion.
- Each contracting state is to establish a national civil aviation security program and ensure that the objective of that program is to protect the safety, regularity, and efficiency of international civil aviation by providing, through regulations, practices, and procedures, safeguards against acts of unlawful interference.
- Each contracting state is obliged to ensure the establishment of an airport security program, adequate to the needs of international traffic, for each airport.

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- the Montreal Protocol, and the Montreal Convention of 1991 continue to rank among the most widely accepted international Conventions and the fact that this trend demonstrates that each State recognizes the importance of aviation security,
- One of the major shortcomings of the Tokyo Convention was that it failed to declare the act of hijacking to be a crime under International Law. This was because of the agreement during drafting of the convention that no attempt should be made to define penal offences. Clearly this has political undertones at play.
- In December 1970, The Hague Convention was signed wherein State Parties would get jurisdiction over the hijacker and it would thus become difficult for the hijacker to escape the process of law
- The Montreal Convention for the Suppression of Unlawful Acts, Against the Safety of Civil Aviation, 1971 was signed wherein parties were now not only responsible for terrorist acts aboard aircrafts but were also required to provide for deterrent punishment for the crime of hijacking. A protocol supplementary to the Montreal Convention stipulated that severe penalties for unlawful international acts of violence against persons at an airport serving international civil aviation which causes or is likely to cause serious death or injury or death or destruction or serious damage to the facilities or disruption of the service at such airports

1. Convention on Offences and Certain Other Acts Committed On Board Aircraft (Aircraft Convention)

Tokyo Convention

- Applies to acts affecting “in-flight” safety;
- Authorizes the aircraft commander to impose reasonable measures, including restraint, on any person he or she has **reason to believe** has committed or is about to commit such an act, where necessary to protect the safety of the aircraft; and
- Requires contracting States to take custody of offenders and to return control of the aircraft to the lawful commander.
- Requires parties to assist each other in connection with criminal proceedings brought under the Convention.

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Civil Aviation Convention)

Montreal Convention

- Makes it an offence for any person **unlawfully and intentionally to perform an act of violence** against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft; **to place an explosive device on an aircraft**; to **attempt** such acts; or to be an **accomplice(?)** of a person who performs or **attempts** to perform such acts;
- Requires parties to the Convention to make offences punishable by "severe penalties"; and
- Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution.

4. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including diplomatic Agents (Diplomatic agents Convention)

- Defines an "**internationally protected person**" as a Head of State, Minister for Foreign Affairs, representative or official of a State or international organization who is entitled to special protection in a foreign State, and **his/her family**; and
- Requires parties to criminalize and make punishable "by appropriate penalties which take into account their grave nature" **the intentional murder, kidnapping or other attack upon the person or liberty of an internationally protected person**, a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an attack; and an act "constituting participation as an accomplice".

5. International Convention against the Taking of Hostages (Hostages Convention)

- Provides that "any person **who seizes or detains and threatens to kill, to injure, or to continue to detain** another person in order **to compel a third party**, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention.

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6. Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention)

- Criminalizes **the unlawful possession, use, transfer or theft of nuclear material** and threats to use nuclear material to cause death, serious injury or substantial property damage.
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Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Maritime Convention)

- Establishes a legal regime applicable to acts against international maritime navigation that is similar to the regimes established for international aviation; and
- Makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships.

Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

- Criminalizes the use of a ship as a device to further an act of terrorism;
- Criminalizes the transport on board a ship various materials knowing that they are intended to be used to cause, or in a threat to cause, death or serious injury or damage to further an act of terrorism;
- Criminalizes the transporting on board a ship of persons who have committed an act of terrorism; and

International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention)

- Creates a regime of **universal jurisdiction** over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or **with intent to** cause extensive destruction of the public place.

International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention)

- Requires parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, through **groups claiming to have charitable, social or cultural goals or which also engage in illicit activities such as drug trafficking or gun running;**
- Commits States to hold those who finance terrorism criminally, civilly or administratively liable for such acts; and
- Provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other States on a case-by-case basis. **Bank secrecy is no longer adequate justification for refusing to cooperate**

Counter – Terrorism Committee (CTC):

- In 2001, following the September 11 terrorist attacks against the US , the Security Council established a Counter Terrorism Committee also comprising all members of the Security Council by resolution 1373. This obliges Member States to take a number of measures to prevent terrorist activities and to criminalize various forms of terrorist actions, as well as to take measures that assist and promote cooperation among countries including adherence to international counter-terrorism instruments. Member States are required to report regularly to the Counter Terrorism Committee on the measures they have taken to implement resolution 1373.

- 1540 Committee: - it says that all states should refrain from supporting by any means non-state actors from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems.
- 1566 Working Group: - by the establishment of this Working group Security Council called on Member States to take action against groups and organizations engaged in terrorist activities that were not subject to the 1267 Committee's review. The Working Group made up of all Council members to recommend practical measures against such individuals and groups as well as to explore the possibility to setting up a compensation fund for victims of terrorism.

LOCKERBIE INCIDENT

- The facts involved the attempt of the United States to bring to justice 2 Libyan nationals who had allegedly put a bomb aboard Pan Am flight 103 that exploded over Lockerbie, Scotland.
- The Montreal Convention required Libya either to prosecute or extradite those committing an offence that destroys civil aircraft (Aut dedere aut judicare).
- Libya contended that it was prosecuting the alleged perpetrators under its domestic law. It relied on Article 14 of the Convention which provided that any dispute over the interpretation and application of the Convention that cannot be settled by negotiation should be submitted to arbitration.
- The United States and the United Kingdom were insisting that Libya promptly surrender the suspects for trial to British authorities, disclose all it knew about the crime and pay appropriate compensation.

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- It appeared that Libya had complied with the Convention and the United States had not. However, the Americans were convinced that the Libyan Government was involved in the criminal act, and would not accept its willingness to prosecute the suspects. The United States was able to persuade the UN Security Council to intervene, and the Security Council issued a couple of resolutions which concerned with the persistence of acts of international terrorism and second requesting Libya to cooperate during the process.
- The ICJ examined American behaviour in light of these two resolutions and found that under Article 25 of the UN Charter, both Libya and the United States were obligated to carry out the decisions of the Security Council. The Court found that these obligations —prevail over their obligations under any other international agreement, including the Montreal Convention, thus the relief requested by Libya was denied.

IC 814 INCIDENT

- The Indian Airlines flight, IC-814, carrying 178 passengers was hijacked on 24th December 1999 after it took off from Kathmandu. The aircraft landed at three different places (Amritsar, Lahore and Dubai) before it flew to Kandahar. No counter-hijacking action was taken while the aircraft was still in Indian airspace. In fact the pilot of the craft deliberately delayed the departure of IC-814 from the Amritsar airport and waited for more than half hour to give the Indian agencies a chance to mount a takeover.

- The then foreign minister personally took the terrorist to Kandahar. The three were Maulana Masood Azhar, Mushtaq Ahmed Zargar and Ahmed Omar Saeed Sheikh. After his release Maulana Azhar set up Jaish-e-Mohammad in early 2000 which is accused of the deadly attacks on Indian targets, including one on the parliament in Delhi in December 2001. Mushtaq Ahmed Zargar after his release renewed the activity of Al-Umar Mujahideen in Muzaffarabad, close to the LOC, in recruiting and training of young Muslims to the independence war in Indian occupied Kashmir. Zargar while in custody revealed his enormous hatred for Non-Muslims especially Jews, Hindus and Christians and once famously said "If you want to end these terror strikes in the world then either accept Islam or wipe out Islam".
- The last of the freed terrorist who was once a LSE attendee, Sheikh Omar Saeed was later arrested by Pakistani police on February 12, 2002, in Lahore for his involvement in the Pearl kidnapping and sentenced to death.

Indian Obligation

- India, the 1970 Hague Convention is relevant for it formed the backdrop for the passing of the **Anti-Hijacking Act enacted in 1982**.
- At the domestic level, various legislative and administrative reforms were brought in to curb the menace of increasing terrorist attacks including regulation on foreign exchange management, drugs and psychotropic substances, money laundering etc. The Unlawful Activities (Prevention) Act, 1967 was enacted to prevent secessionist tendencies and any unlawful activity prejudicial to the sovereignty or territorial integrity of India.

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- Another forward legislation in line with the SAARC mandate was the —SAARC Convention (Suppression of Terrorism) Act, 1993 which mirrored the provisions of the convention as a part of national legal regime.
- Very recently, in May 2013, India was one of the very active participants of the —*INTERPOL Capacity Building Programme on Counter-Terrorism*” in Asia held in Mumbai which stressed on the vitality of —community based policing approach as a cornerstone of regional cooperation to counteract terrorism.
- India is on the verge of having its own centralized intelligence in the form of National Counter Terrorism Centre with separate planning and execution wings independent of the Intelligence Bureau specifically to focus on the anti-terror agenda.

Recent developments

- In August 2005, India revealed its new anti-hijacking policy. The policy came into force after the cabinet committee on security (CCS) approved it. The main points of the policy are as follows
- Any attempt to hijack will be considered an 'act of aggression' against the country and will prompt a response fit for an aggressor.
- Hijackers, if captured, will be sentenced to death.
- Hijackers will be engaged in negotiations only to bring the incident to an end, to comfort passengers and to prevent loss of lives.
- The plane will be shot down if it is deemed to become a missile leading for strategic targets.
- The plane will be escorted by armed fighter aircraft(s) and will be forced to land.
- A grounded plane will not be allowed to take off under any circumstance.

The list of strategic targets is prepared by the Bureau of Civil Aviation in India.

- The decision to shoot down a plane is taken by CCS. However, due to the shortage of time, whoever – the prime minister, the Defence Minister or the home minister can be reached first will take the call.
- In situations in which an aircraft becomes a threat while taking off – which gives very little reaction time – a decision on shooting it down may be taken by an **Indian Air Force officer** not below the rank of Assistant Chief of Air Staff (Operations).
- This policy, which lays down basic principles to deal with such situations, was made more stringent recently when the cabinet approved amendments of section 4 of the 1982 Act.
- **The act provides for life imprisonment and a fine for hijacking, to also include the death penalty.**
- The new policy permits the shooting down of a "hostile plane if there is conclusive evidence that it is likely to be used as a missile to blow up strategic establishments".

The new policy permits....

- the shooting down of a "hostile plane if there is conclusive evidence that it is likely to be used as a missile to blow up strategic establishments", to avoid humiliating situations like the release of militants, the new policy categorically rules out negotiations with hijackers except for the purpose of bringing an end to the crisis, to ensure comfort of the hostages and to prevent the loss of lives.
- The Bureau of Civil Aviation Security has also put in place an aviation security manual that lists out a three-stage classification process for shooting down a hijacked aircraft.
- The Indian Government decided in 2011 to amend the anti-hijacking law to award death punishment to hijackers, and also to arm itself with powers to shoot down a passenger plane if its hijackers intended to use it as a missile, as was done by the 9/11 hijackers in the US in 2001.

- The new provision constitutes a competent authority to authorize the Indian Air Force (IAF) to intercept to force to land and/ or shoot down any hijacked or hostile aircraft, particularly if it is believed that the aircraft would be used as a missile to hit a vital installation.

The Aircraft Act (1934)

- is regarded as the basic constitutional law of aviation in India.
- The Aircraft Rules (1937) contain rules that apply to the operation and use of aircraft as well as rules of the air relating to the public order of air space.76 Part XI (Rules 78 through 92) deals with airports (management aspects), but here again airport security does not seem to feature into the drafters' agenda.
- International Airports Authority Act (1971); National Airports Authority Act (1985); and Airports Authority of India Act (1994)

Anti-Hijacking Act (1982)

- defines the act of hijacking “as seizing or exercising control of an aircraft, unlawfully, by force or threat of force or by any other way of intimidation on board an aircraft in flight”.
- The term “**aircraft in flight**” has also been defined as starting from the moment external doors of the aircraft are closed following by embarkation till the moment they are opened again for disembarkation.
- The Act covers any aircraft which is not a military aircraft or one used by customs or police and the nation in which the aircraft is registered is not relevant.

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- The punishment for hijacking is "imprisonment for life" along with a fine and there is no power with the judge to reduce the sentence below that and this raises question of constitutionality of this provision for Section 301 of the Indian Penal Code, which did not leave any power with the judge as to the quantum of punishment was declared as unconstitutional by the Supreme court.

Suppression of Unlawful Acts against Safety of Civil Aviation Act (1982)

- Similar to the previous two Indian laws under discussion, this law was given weight by the Indian law makers so as to give effect to the Montréal Convention, 1971, in India