

# CONSTITUTIONALITY OF INDIA'S ANTI HIJACK POLICY

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## Introduction

As images of hijacked aircrafts crashing into the iconic World Trade Centre flashed across news channels, on 11th September 2001, Governments across the world were eager to decide a course of action that would help them prevent such threats from materializing and combating them, if they arose again. To counter the growing threat of global terrorism, the aggressive *War on Terror* led by the United States of America in the aftermath of the 9/11 attacks brought about a paradigm shift in the way the world and the aviation sector specifically perceived and chose to combat emerging threats, especially hijacked civil aircrafts, which might be used as weapons of mass destruction. In India, the Cabinet Committee on Security (CCS) in 2005 also adopted the 'no negotiation' policy as a course of action in the event of the hijacking of aircrafts. This paper questions the constitutionality of this policy and its consonance with general principles of international law.

Unlawful seizure of an aircraft, or hijacking as it is more commonly known has been a long standing threat to security of passengers in civil aviation. It was in the late 60's and early 70's when the number of hijacking increased significantly, that the request was made, to have a specific convention to address this issue. This process began in September 1968, when the sixteenth assembly of the ICAO, requested the Council of ICAO to initiate a study on measures to cope with the problem of hijacking of aircraft, at the earliest possible date.<sup>1</sup>

## The Concept Of Hijacking

The problem of hijacking is more than 80 years old. The motives behind hijackings transformed with time over the decades. The first recorded hijacking occurred 1930 in Peru. Byron Rickards was approached by armed revolutionaries, who demanded his aircraft. Initially Rickards refused, however when the revolutionaries' uprising was successful and he was allowed to go, he was ordered to fly one of the members of the revolutionaries to Lima, Peru. Although this was not a hijacking in the meaning of the term as it is understood today, it is argued that this was the first hijacking as it led to an unauthorized use of an aircraft.<sup>2</sup> Between 1930 and 1967, there were a total of thirty five hijackings,

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twenty three in Europe and twelve in America. The idea behind these hijackings was mainly a search of political asylum, or petty insurance frauds etc.

In the 1960s, the number of hijackings grew at an alarming rate. There were a total of 364 hijacking across the world between 1968 and 1973 according to the U.S. Department of Transportation (DOT). The majority of hijackings in this period were for one of the following three reasons: (1) Political Asylum, (2) Release of Prisoners, and (3) financial gain.<sup>3</sup> By the late 60's, early 70's the world had started to fly in modern jets which could carry more people, and go longer distances, therefore leaving more at the disposal of the hijackers. This led to the states taking action against the hijackers and wanted the ICAO to take up this issue with the legal subcommittee. Meanwhile, states made sure that baggage checks were performed, and check in baggage and passengers were screened before they were let into the aircraft. This was the beginning of airports as we know them today.

The 1980s till 2001 was the time when the aviation industry transformed dramatically. Several devastating attacks on aircrafts leading to high number of casualties, worse hijacking scenarios with the perpetrators making demands on governments and engaging in negotiations led to a lot of significant changes to the field of aviation. Aircrafts were shot down as states believed them to be spy aircrafts. The Soviet Union shot down flight KAL 007 as the aircraft entered Soviet territory en route Korea from the United States. After these incidents, mainly in the 80s the aviation industry made some radical changes, which led to a relatively quiet 90's without many incidents of hijackings, leading to a false sense of security for the passengers and the industry.

The most prominent hijacking in the 90's was the infamous Kandahar hijack, in which an Indian Airlines aircraft, IC-814 was hijacked as it left for Kathmandu from Delhi. The hijacked aircraft was refuelled at Lahore, and then parked at Kandahar for a week. This episode ended only after the release of 3 dangerous terrorists.

#### **Post 9-11: Aircrafts As Weapons Of Mass Destruction**

As the Al-Qaeda trained hijackers, crashed aircrafts into the World Trade Centre, New York, it brought to the fore the new threat that hijackings had become. Hijackers, could use aircrafts as missiles, to crash into the most strategic military or financial institutions in a state, leading to killing of thousands of people, as was demonstrated on 9/11.<sup>4</sup>

This led to a change in the policy of states towards hijacked aircrafts. On January 5, 2003 a mentally disturbed person, flying a light aircraft, overflew the town centre of Frankfurt (Germany) and threatened to crash the plane on the Central European Bank building if he was not allowed to make a phone call to the US. General alarm was raised, buildings were evacuated, and one police helicopter and two Air Force fighters took off to track the aircraft. After 30 minutes, the man was allowed to make the phone call, and it was clear that the

threat was neither serious nor dangerous. He landed the aircraft and surrendered without violence.<sup>5</sup> Concerned, by what the German Government believed could have been a catastrophe, the German Government enacted the 2005 Air Security Act. Many other countries passed legislations which allowed them to act in case such an attack where aircrafts were used as missiles was to occur in their territory.

### **India's Anti Hijack Policy**

Indian Government adopted its Anti Hijack Policy in 2005, when it was approved by the Cabinet Committee on Security. The policy among other things states:<sup>6</sup>

- No foreign hijacked aircraft will be allowed to land in India
- Any hijacked Indian aircraft, will be forced to land in India, and once a hijacked aircraft has landed in India, all efforts shall be made to stop it from taking off again.
- In case of any suspicious activity<sup>7</sup> by the aircraft, the ATS Watch Supervisory Officer, shall inform the Joint Control and Analysis Centre (JCAC), manned by IAF officials.
- In case the aircraft does not pay heed to the communication with the ground controller, it shall be branded as '*rogue*' aircraft, and in case it aligns itself to a strategic target like Rashtrapati Bhawan, or the Parliament,<sup>8</sup> the aircraft shall be branded '*threat*'. Once an aircraft is declared a threat, the CCS can take a decision to shoot down the aircraft.

The CCS is the apex body for handling such decisions, however in case of emergency, the PM, Minister of Defence or under extreme circumstances an IAF official (not below the rank of Assistant Chief of Air Staff) can take this decision.

9-11, therefore not only exposed fundamental human errors in security procedure but they also brought to the new *modus operandi* of terrorists wherein aircrafts were used as guided missiles. Around the world, strategists and policy makers looked in disbelief at the apparent ease with which aircrafts brought down the WTC, and with that the warm sense of security and belief that the skies were now secure. The anxiety of the state, over combating such attacks in the future, led to this policy, which although very strict in the literal terms, is dissonant with the Chicago Convention, which India has ratified, and the Indian Constitution as well.

### **The Use Of Force Against Aircrafts Being Used As Weapons Of Mass Destruction**

#### ***a. International Perspective***

The shooting down of the Korean Airlines flight KAL 007 in 1983, led to the ICAO taking up discussions on attacks against civil aircrafts more seriously which culminated in the adoption of Article 3bis of the Chicago Convention in

1984. This amendment entered into force in May, 1998 when it was ratified by the required two-thirds majority of ICAO's member states (102 ratifications). In the preamble to this protocol, states expressed their desire to re-affirm the principles of non-use of weapons against civil aircrafts in flight. The new addition to the convention reads as follows:

*Article 3bis*

(a) *The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.*<sup>9</sup>

India is not yet a state party to Article 3bis of the Chicago Convention, and does not need to recognise the principle of non usage of force as laid down under it. However, long before the adoption of Article 3bis, abundant state practice had developed regarding the treatment of intrusions of civil aircraft.<sup>10</sup> In the *Corfu Chanel*<sup>11</sup> case, the International Court of Justice (ICJ) emphasized the principle of 'elementary considerations of humanity' which is a general principle of international law. This principle has repeatedly been invoked to denounce the disproportionate use of force against intruding civil aircrafts.<sup>12</sup> In the *Corfu Chanel case*,<sup>13</sup> Albania planted mines in the sea and failed to notify the British warships about the impending danger of those mines. British warships suffered damages due to these mines. The court affirmed that Albania had the responsibility of informing the British warships about the threat posed. The court stated:

*...such obligations are based...on certain general and well recognized principles of international law namely: elementary considerations of humanity, even more exacting in peace than in war, the principle of the freedom of maritime communication; and every State's obligation not to allow its territory to be used for acts contrary to the rights of other States.*<sup>14</sup>

In the context of aviation law, the same principle would not allow states to attack aircrafts, as attacking an aircraft and killing civilians would be against the elementary considerations of humanity. Based on state practice prior to 1984, a number of commentators who were involved with the drafting of Article 3bis were of the view that paragraph (a) is 'not a new rule of law', but the recognition of the 'existence of a prior rule binding on all parties and prohibiting the use of weapons against civil aircrafts in flight',<sup>15</sup> it is declaratory of the principle of general international law, which 'had its independent existence separate from the written (codified) text of Article 3bis(a)'.<sup>16</sup> This is also evident from the text of paragraph (a) of Article 3bis, where the words 'recognize' and 'every state' were deliberately chosen to indicate that the effect of the provisions is not limited to contracting states.<sup>17</sup>

### *b. Domestic Perspective*

Indian Law draws its character and strength from the Constitution of India. The Constitution of India grants upon all citizens the fundamental rights, which are part of the basic structure of the constitution.<sup>18</sup> These fundamental rights are guaranteed, and any violation of these by the state can be challenged in the Supreme Court of India.<sup>19</sup>

India's Anti Hijack Policy, leaves many unanswered questions. Do the people who are onboard the aircraft which is hijacked, involuntarily lose their right to life as enshrined under this article? Is a policy passed by the CCS, fall under the definition of 'procedure established by law' under the definition of Article 21? The text of Article 21 reads as follows:

*"Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law."<sup>20</sup>*

The most important part under this article is procedure established by law. Article 21 has been given an expanded view in order to protect the citizens from any possibility of a violation of the right to life. Therefore, it is important to notice the interpretation of 'procedure established by law' and the character of the term 'law'.

This issue first came into light, in the *Gopalan Case*.<sup>21</sup> In this case the court stated "the expression 'procedure established by law' introduces into India the American concept of procedural due process which enables the Courts to see whether the law fulfils the requisite elements of a reasonable procedure."<sup>22</sup>

The Supreme Court ruled by majority that the word 'law' in Art. 21 could not be read as meaning rules of natural justice. These rules were vague and indefinite and the Constitution could not be read as laying down a vague standard. Nowhere in the Constitution is the word 'law' used in the sense of abstract law or natural justice. The word 'law' was used in the sense of *lex* (state-made law) and not *jus*. The expression 'procedure established by law' would therefore mean the procedure as laid down in an enacted law.<sup>23</sup>

The decision to shoot down a hijacked aircraft which is a 'threat' is of either the Prime Minister or Minister of Defence or an IAF official (not under the rank of Assistant Chief of Air Staff). It has been made clear by a long line of precedents,<sup>24</sup> that to take away the right to life or personal liberty, the order must be coming from a just, fair and reasonable law. Although the word 'law' does include within its ambit 'ordinance',<sup>25</sup> 'rules made by the Supreme Court',<sup>26</sup> 'rules made for the governance of the tribal areas',<sup>27</sup> 'rules made by a House of the State Legislature'<sup>28</sup> and 'regulations made under a previously passed act',<sup>29</sup> two questions still remain. The first question is whether a 'policy' passed by the Cabinet Committee on Security falls under the definition of law under Article 21? The second question and the more pertinent one is that even if the policy is Law as enshrined under Art. 21, is it just, fair and reasonable?

A policy and an ordinance are different and that is the issue of contention here. An ordinance is issued by the President and is an executive decision, and therefore it is subject to the same levels of justice, fairness and reasonableness, and hence it has the status of law. However, this policy although passed by the Cabinet Committee on Security, had not been issued officially by the President, and nor has the Parliament been involved in this decision making in any way.

Before the second question is answered, one needs to take into consideration some other aspects of unlawful seizure of aircrafts. The policy states that in case of a threat, the Prime Minister would be the authority to order the shooting down an aircraft. If the PM is not available, then it would be the decision of Minister of Defence. In case both of them are not available, then an official of the Indian Air Force, not below the rank of Assistant Chief of Air Staff can order the shooting down of the aircraft. However, this policy does not take into account the nature of the threat in case such an event does happen. An aircraft-related threat would not take more than 10 – 15 minutes to materialise,<sup>30</sup> and a decision taken within such time will not conform to the standards of justice, fairness and reasonableness, as are required of a 'law' which would violate the fundamental right to life of a lot of people. The Supreme Court of India has reiterated again and again as has been previously shown, that a law which can take away the right to life of the people has to be just, fair and reasonable.

The order to shoot down a hijacked civil aircraft in flight would lead to the violation of the right to life of not only the people on board, but also of those people on whom the debris of the aircraft would fall. As the aircraft is approaching a strategic place in the middle of the city, such an aircraft would fall onto the city as debris, thereby causing more casualties. Keeping in mind the little time in the hands of the decision maker, the order would definitely not be just, fair and reasonable. There is no justification for allowing such an order which would violate the human rights of a large number of people, both in air and on land. With such a policy, the government implies that all the people who fly in India, let go of their fundamental right to life in the airport, as in case of an emergency, the people can be deprived of this right by a procedure which is firstly not established by law and secondly is not just, fair and reasonable. The 'right to life and personal liberty' of passengers of a hijacked civil aircraft cannot be relegated into oblivion in the interest of national security. The government has a responsibility of protecting its citizens at all times, not violate it in the name of national security.

According to elaborate procedures that have been adopted for shooting down a commercial plane, it has to be first ascertained without doubt that the hijacked aircraft will hit a strategic target. Experts<sup>31</sup> in the field of aviation maintain the stance that it is virtually impossible to assess from there whether the prerequisites of this policy are met. The information which the PM, Minister of Defence or IAF need for the decision to order the shooting down of a plane does

not come from the direct danger zone on board the plane. That is only indirect information which the pilot has received from the cabin crew, who is possibly under the command of terrorists. Apart from this, the situation on board can change within seconds, something which ground control probably cannot be informed of fast enough due to the long channels of communication. The possible motivation of a hijacker and the objectives of a hijacking remain speculative till the very end. The policy stipulates that such an order to shoot down the aircraft would be taken only after it is absolutely sure that the aircraft is going to attack a strategic target. The experts although believe that there can never be absolute surety about the objective of the hijackers, therefore implying that such a decision to shoot down an aircraft would be taken only on the belief of such an impending threat, when there might be none.

With the right to life, the biological and physical existence of every human being is protected against encroachments by the state from the point in time of its coming into being until the human being's death, independently of the individual's circumstances of life and of his or her physical state and state of mind. Every human life as such has the same value, including non citizens of India, who also have a right to life till they are in the territory of India.<sup>32</sup> Although it constitutes an ultimate value within the order of the Constitution, this right is nevertheless subject to the constitutional requirement as laid down in the latter half of the text of Article 21. The fundamental right to life can therefore be encroached upon on the basis of a 'procedure established by law'. The precondition for this is that it has to conform to the standard of 'just fair and reasonable'. It must be adopted in accordance with the legislative competences, it must leave the essence of the fundamental right unaffected pursuant to Article 21, and it may also not contradict the fundamental decisions of the constitution in any other respect.

The right to life has been expanded to include to 'living with dignity'.<sup>33</sup> The Supreme Court of India in the *Francis Coralie*<sup>34</sup> held that the expression 'life' in Article 21 does not connote merely physical or animal existence but embraces something more. "We think that the right to life includes the right to live with human dignity and all that goes along with it..." In the *P. Rathinam Case*<sup>35</sup> the court said "The right to live with human dignity and the same does not connote continued drudgery. It takes within its fold some of the fine graces of civilization which makes life worth living and that the expanded concept of life would mean the tradition, culture, and heritage of the person concerned."

In view of this relation between the right to life and human dignity, the state is prohibited, on the one hand, from encroaching upon the fundamental right to life by measures of its own, thereby violating human dignity. On the other hand, the state is also obliged to protect every human life. This duty of protection demands of the state and its bodies to shield and to promote the life of every individual, which means above all to also protect it from unlawful attacks, and interference, by third parties.

Taking as a starting point the idea that it is part of human nature to exercise self-determination in freedom and to freely develop themselves, and that the individual can claim, in principle, to be recognised in society as a member with equal rights and with a value of his or her own, the obligation to respect and protect human dignity precludes making a human being a mere object or being treated thus. What is thus absolutely prohibited is treatment of any human being by public authority. The policy calls into question his or her status as a legal entity by its lack of respect of the value and dignity which is due to every human being.

The state which in such a situation resorts to the measure provided by this policy treats them as mere objects of its rescue operation for the protection of others. The desperation and inescapability which characterise the situation of the people on board the aircraft who are affected as victims also exist vis-à-vis those who order and execute the shooting down of the aircraft. Due to the circumstances, which cannot be controlled by them in any way, the crew and the passengers of the plane cannot escape this state action but are helpless and defenceless in the face of it with the consequence that they are shot down in a targeted manner together with the aircraft and as result of this will be killed with near certainty. Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being.

### **Conclusion**

Growing threat posed by non state actors led to states taking up new measures in the war against terror. State policies need to be potent enough to effectively counter this growing threat. However looking at this policy from the paradigm of human security, the policy has a number of loopholes. The government in a bid to secure strategic locations has failed in not being able to strike equilibrium between the apprehension to public security and the basic human rights of the passengers.

India has always taken pride in being a champion of human rights, with an independent judiciary ensuring the same. To have a policy, neither having the character of law nor conforming to the parallel principles of 'justice, fairness and reasonableness', violating the right to life of its citizens is unreasonable.

Every citizen has an inherent right to life which he or she can be deprived of only through 'procedure established by law'. Although the term law has been given an expanded definition by the court, such an order to shoot down an aircraft based on an apprehension<sup>36</sup> of threat to public security can hardly fall into that definition.

The fundamental question through this paper remains whether killing of innocent people is always forbidden, even when the state needs protection



against dangers to its strategic establishments. The answer is a yes, as the state is primarily responsible for the life of all its citizens and cannot take away that right.

### Endnotes

1. Sami Shubber, 'Aircraft Hijacking Under the Hague Convention 1970—A New Regime?' (1973) 22 Int'l & Comp. L.Q. 688; also see Res A16-37, para.3.
2. Air Piracy is defined under 49 U.S.C. 1472(i) as any seizure or exercise of control, by force or violence, or threat of force or violence. 'Hijacking' is a modern term for air piracy.
3. Jeffrey. C. Price and Jeffrey S. Forrest, *Practical Aviation Security*, (Butterworth—Heinemann Publication, 2007) 49.
4. 2977 people were killed in the attacks on the World Trade Centre.
5. Miguel Beltran de Felipe & Jose Maria Rodriguez de Santiago, 'Shooting Down Hijacked Airplanes? Sorry, We're Humanists. A Comment on the German Constitutional Court Decision of 2.15.2006, Regarding the Luftsicherheitsgesetz (2005 Air Security Act)', <http://law.bepress.com/expresso/eps/1983>, 2007.
6. Sanjan Jain, Gautam Sen(ed.), *Conceptualizing Security for India in the 21<sup>st</sup> Century*, (Atlantic Publishers and Developers, 2007) 59.
7. An aircraft shall be deemed to be a suspicious aircraft, when it stops listening to the ATC instructions and after repeated orders, does not respond or comply with the instructions issued.
8. A list of strategic targets has been prepared by the Bureau of Civil Aviation for the same purpose. <http://www.india-defence.com/reports-216>, last visited 29th September 2010.
9. ICAO Doc. 9436, *Protocol* relating to an Amendment to the Convention on International Civil Aviation (Article 3bis), signed at Montreal on 10 May 1984. This amendment came into force after ratification by the required 102 states on 1 October 1998. It has 140 parties as on 12 October 2010 (<<http://www.icao.int/icao/en/leb/3bis.pdf>>).
10. Dr. Jiefang Huang, *Aviation Safety through the Rule of Law—ICAO's Mechanisms and Practice*, (Kluwer Law International, 2009) 89.
11. *Corfu Channel Case (UK v. Albania)* (Merits) [1949] ICJ Rep 4.
12. ICAO Doc. 9436 (n. 10).
13. *Corfu Channel* (n. 12).
14. *Ibid.* at 22.

15. M.Milde, 'Interception of Civil Aircraft vs. Misuse of Civil Aviation (Background of amendment 27 to annex 2), AASL XI (1986), 105, 125.
16. Milde (n. 16) at 113.
17. In the original drafting, the term 'undertakes to refrain' was used. It was subsequently replaced by the term 'recognize that every State must refrain'. <http://www.india-defence.com/reports-216>, last visited 29th September 2010.
18. *Kesavananda Bharti v. Union of India* AIR 1973 SC 1461.
19. Constitution of India 1950 art 32.
20. Constitution of India 1950 art 21.
21. *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.
22. *Ibid.*
23. M.P. Jain, *Indian Constitutional Law*, (Lexis Nexis Butterworths Wadhwa Nagpur, 2010) 1179-1180.
24. *Maneka Gandhi v. Union of India* 1978 1 SCC 248; *A.K. Roy v. Union of India*, AIR 1982 SC 710: (1982) 1 SCC 271; *In re Sant Ram*, AIR 1960 SC 932, 935: (1960) 3 SCR 499; *State of Nagaland v. Ratan Singh*, AIR 1967 SC 212, 223: (1966) 3 SCR 830; AIR 1959 SC 395, 410-11: 1959 Supp (1) SCR 806; *Govind v. State of Madhya Pradesh*, AIR 1975 SC 1378, 1385.
25. *A.K. Roy v. Union of India*, AIR 1982 SC 710: (1982) 1 SCC 271.
26. Constitution of India 1950 art 145; *In re Sant Ram*, AIR 1960 SC 932, 935: (1960) 3 SCR 499.
27. *State of Nagaland v. Ratan Singh*, AIR 1967 SC 212, 223: (1966) 3 SCR 830.
28. AIR 1959 SC 395, 410-11: 1959 Supp (1) SCR 806.
29. *Govind v. State of Madhya Pradesh*, AIR 1975 SC 1378, 1385.
30. This draws from the 9-11 attacks. All the aircrafts crashed into their targets within 15 minutes.
31. The Cockpit Association; Independent Flight Attendant Organization.
32. *Louis de Raedt v. Union of India*, (1991) 3 SCC 554: AIR 1991 SC 1886; *National Human Rights Commission v. State of Arunachal Pradesh*, AIR 1996 SC 1234: 1996 SCR 88.
33. *Francis Coralie v. Delhi* AIR 1981 SC 746; *State of Kerala Scheduled Tribes Case*, (2009) 8 SCC 46, 95; *P. Rathinam v. Union of India*, (1994) 3 SCC 394.
34. *Francis Coralie v. Delhi*, AIR 1981 SC 746 at 753.
35. *P. Rathinam v. Union of India*, (1994) 3 SCC 794.

36. The word apprehension is used keeping in mind the explanation given earlier, where the author puts forward that the situation on a aircraft can change very quickly. Ground Control can never be a hundred percent sure of a situation on board an aircraft, therefore that applies to the decision makers as well.