
MH370 Crisis: The Adequacy of the Malaysian Civil Aviation Act 1969

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ABSTRACT

It has been close to three months since world was shocked by the disappearance of Malaysian Airline's flight MH370. Criticisms continue to zero in on Malaysia as to the manner its authorities are handling the situation, mismanaging the search and holding back information. This study aims to analyse the conundrums of crisis management practiced by Malaysia and investigate whether the Malaysian Civil Aviation Act 1969 under the purview of Malaysian Civil Aviation Department is an adequate regulatory framework to exercise regulatory functions in respect of civil aviation with reference to the International Standards and Recommended Practices set by International Civil Aviation Organization including the establishment of standards and their enforcement in context of a plane crash and the subsequent search for wreckage.

KEYWORDS: *civil aviation act, crisis management, search and rescue, investigation of accident*

INTRODUCTION

Around the world, the aviation industry is divided into three parts which is public transport airlines, goods and cargo and lastly military bodies. On 8 March 2014, flight MH370 departed Kuala Lumpur at 12.41am and scheduled to land at Beijing International Airport at 6.30am local Beijing time. It vanishes from Malaysian civilian radar at 1.30 am, just before passing to Vietnamese air traffic control (CNN, 2014). The disappearance of flight MH370 highlighted many debates towards the adequacy of Malaysian laws in addressing the issues surrounding the disappearance of MH370.

As of to date, there exist the following list of civil aviation legislation, air navigation regulations, air navigation orders in force in Peninsular Malaysia and Sabah and Sarawak (East Malaysia); Civil Aviation Act 1969, Civil Aviation Regulations 1996, Carriage by Air Act 1974, Aviation Offences Act 1984, Air Navigation (General) Regulations 1955, Air Navigation (Radio) Regulations 1955, Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953, Carriage by Air (Non-International Carriage) (Colonies, Protectorates and Trust Territories) Order 1953.

This paper seeks to highlight the conundrums surrounding the legal and regulatory Civil Aviation Act 1969 and Civil Aviation Regulations 1996 with reference to International Standards and Recommended Practices (SARPS) set by International Civil Aviation Organization (ICAO). The first part of this paper will discuss the various definitions and literature on crisis management from various authors. The second part of this paper will focus on the international regime of civil aviation. The third part and the crux of this paper will focus on the situation in Malaysia.

The last part which concludes the paper suggests that despite the adherence by Malaysia to international policies and regulations, the practical implementation of the regime within various agencies and at the international level remain challenging. Such issues should be addressed immediately in order to prepare Malaysia for any situation in the future.

The official search and rescue documents pertaining to MH370 are confidential. Nevertheless, certain aspects of the government response to the search and rescue operations are revealed through an examination of material already in the public domain. The study is thus based on analysis of the Civil Aviation Act 1969 and Civil Aviation Regulations 1996 in comparison with SARPs, media briefings and Malaysian press reports. Such an approach yields some useful insights, although the absence of an insider perspective and other limitations must be acknowledged.

WHAT IS CRISIS MANAGEMENT?

Crisis management is a complex, highly inter-active process which necessitates a considerable degree of strategic thinking on the part of management before the onset of a crisis event (Sipika & Smith, 1993). According to Henderson the process of crisis management occurs in three phases, which is firstly the crisis of management, secondly the operational phase and lastly the crisis of legitimation. The demands of each phase will create a series of specific requirements for managerial action in order to prevent a crisis or limit its impact (Henderson, 2003).

The literature indicated that the subject of crisis management has developed since the 1970s. Authors are from a variety of areas within and outside the management sciences and adopt different approaches, presenting mainly qualitative data and often making use of case studies to illustrate good and bad practices ([Lagadec, 1993](#); [Levitt, 1997](#); [Pauchant & Mitroff, 1992](#)).

Crisis management analysts stress the necessity of establishing a task force, recognising potential areas of crisis, devising preventive measures and formulating coping policies for situations when these fail and actual crises take place. Guidelines related to a detailed action plan and the allocation of responsibilities should be recorded in a manual setting out the procedures for managing the crisis, with particular attention given to effective communications machinery (Bland, 1998; Gonzalez-Herrero & Pratt, 1998; ten Berg, 1990).

The literature also indicates that crisis management is the process by which an organization deals with a major event that threatens to harm the organization, its stakeholders, or the general public (Shivastava, 1888). Crisis management is said to be a situation-based management system that includes clear roles and responsibilities and process related organisational requirements company-wide (Shivastava, 1888). It is said that the response shall include action in the following areas: Crisis prevention, crisis assessment, crisis handling and crisis termination. The aim of crisis management is to be well prepared for crisis, ensure a rapid and adequate response to the crisis, maintaining clear lines of reporting and communication in the event of crisis and agreeing rules for crisis termination (James, 2010).

INTERNATIONAL SITUATION

The aviation industry is expanding rapidly around the world, as such international aviation safety remains an important issue to the world. Thus, ICAO plays a big role in setting policies and guidance to member countries in the aviation industry.

2.1 International Civil Aviation Organization (ICAO)

International Civil Aviation Organization is a United Nation specialised agency that created in 1944 upon signing of the Chicago Convention (ICAO, 2014). ICAO works with the Convention's 191 signatory states and global industry and aviation to develop SARPs which are then used by States when they develop their legally-binding national civil aviation regulations (ICAO, 2014). There are currently over 10,000 SARPS reflected in 19 Annexes to the Chicago Convention (ICAO, 2014).

The Chicago Convention is the convention on International Civil Aviation. It was introduced on 7 December 1944 by 52 States. Malaysia has become a member of ICAO in 1958 (MOT, 2010). Article 12 of the Chicago Convention states that each contracting states undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention.

2.2 ICAO Annexes

When accident happens involving an international civil aviation flight, there are two important ICAO Annexes that are significant to be discussed which are Annex 12 and 13.

2.3.1 Annex 12

Annex 12 of the Chicago Convention is a three-part *Search and Rescue Manual* dealing with Search and rescue organization, management and procedures, sets forth the provisions for the establishment, maintenance and operation of search and rescue services by ICAO Contracting States in their territories and over the high seas. Containing five chapters, the Annex details the organization and cooperative principles appropriate to effective SAR operations, outlines required necessary preparatory measures and sets forth proper operating procedures for SAR services in actual emergencies (ICAO, 2014).

One of the first aspects addressed in the organizational chapter is the requirement for States to provide SAR services within their territories and over those portions of the high seas or areas of undetermined sovereignty as determined in regional air navigation agreements and approved by the Council of ICAO. This chapter also deals with the establishment of mobile SAR units, the means of communication for these units and the designation of other elements of public or private services suitable for search and rescue activity. Provisions concerning equipment requirements of rescue units reflect the need to give adequate assistance at the scene of accidents, due regard being given to the number of passengers involved. Cooperation between the SAR services of neighbouring States is essential to the efficient conduct of SAR operations. This important aspect is covered in depth in Chapter 3, which requires ICAO Contracting States to publish and disseminate all information needed for the expeditious entry into their territories of rescue units of other States. It is also recommended that persons qualified in the conduct of aircraft accident investigation accompany rescue units in order to facilitate accident investigation (ICAO, 2014).

Chapter 4, which deals with preparatory measures, sets forth the requirements for collation and publication of information needed by SAR services. It specifies that detailed plans of operation

must be prepared for the conduct of SAR operations and indicates the necessary information for inclusion in the plans. Preparatory measures required to be undertaken by rescue units, training requirements and removal of aircraft wreckage are also covered.

Chapter 5 details three distinct phases categorize emergency situations. The first is the "Uncertainty Phase" which is commonly declared when radio contact has been lost with an aircraft and cannot be re-established or when an aircraft fails to arrive at its destination. During this phase the Rescue Coordination Centre (RCC) concerned may be activated. The RCC collects and evaluates reports and data pertaining to the subject aircraft. Depending on the situation, the uncertainty phase may develop into an "Alert Phase", at which time the RCC alerts appropriate SAR units and initiates further action. The "Distress Phase" is declared when there is reasonable certainty that an aircraft is in distress. In this phase, the RCC is responsible for taking action to assist the aircraft and to determine its location as rapidly as possible. In compliance with a predetermined set of procedures, the aircraft operator, State of Registry, air traffic services units concerned, adjacent RCCs and appropriate accident investigation authorities are informed; a plan for the conduct of the search and rescue operation is drawn up and its execution is coordinated. Procedures are detailed in Chapter 5 for SAR operations involving two or more RCCs, for authorities in the field and for terminating or suspending SAR operations. Other procedures deal with actions to be taken at the scene of an accident and by a pilot-in-command intercepting a distress transmission.

2.3.2 Annex 13

Annex 13 among others states the objective of the investigation of an accident or incident is prevention. It also provides the international requirements for the investigation of aircraft accidents and incidents. It also spells out which States may participate in an investigation, such as the States of Occurrence, Registry, Operator, Design and Manufacture. It also defines the rights and responsibilities of such States.

The ninth edition of Annex 13 consists of eight chapters, an appendix and four attachments. The first three chapters cover definitions, applicability and general information. Chapter 3 includes the protection of evidence and the responsibility of the State of Occurrence for the custody and removal of the aircraft. It also defines how that State must handle requests for participation in the investigation from other States. All States that may be involved in an investigation must be promptly notified of the occurrence.

Procedures for this notification process are contained in Chapter 4. The same chapter outlines the responsibilities for conducting an investigation depending on the location of the occurrence, eg. in the territory of an ICAO Contracting State, in the territory of a non-contracting State, or outside the territory of any ICAO State. Following the formal notification of the investigation to the appropriate authorities, Chapter 5 addresses the investigation process. Responsibility for an investigation belongs to the State in which the accident or incident occurred. That State usually conducts the investigation, but it may delegate all or part of the investigation to another State. If the occurrence takes place outside the territory of any State, the State of Registry has the responsibility to conduct the investigation.

States of Registry, Operator, Design and Manufacture who participate in an investigation are entitled to appoint an accredited representative to take part in the investigation. Advisers may also be appointed to assist accredited representatives. The State conducting the investigation may call on the best technical expertise available from any source to assist with the investigation. The investigation process includes the gathering, recording and analysis of all

relevant information; the determination of the causes; formulating appropriate safety recommendations and the completion of the final report.

Chapter 5 also includes provisions regarding: the investigator-in-charge, flight recorders, autopsy examinations, coordination with judicial authorities, informing aviation security authorities, disclosure of records, and re-opening of an investigation. States whose citizens have suffered fatalities in an accident are also entitled to appoint an expert to participate in the investigation. Chapter 6 contains the Standards and recommended practices dealing with the development and publication of the final report of an investigation. The recommended format for the final report is contained in an Appendix to the Annex. Computerized databases greatly facilitate the storing and analysing of information on accidents and incidents. The sharing of such safety information is regarded as vital to accident prevention. ICAO operates a computerized database known as the Accident/Incident Data Reporting (ADREP) system, which facilitates the exchange of safety information among Contracting States. Chapter 7 of Annex 13 addresses the reporting requirements of the ADREP system which is by means of Preliminary and Accident/Incident Data Reports.

Chapter 8 of Annex 13 deals with accident prevention measures. The provisions in this chapter cover incident reporting systems, both mandatory and voluntary, and the necessity for a non-punitive environment for the voluntary reporting of safety hazards. This chapter then addresses database systems and a means to analyse the safety data contained in such databases in order to determine any preventive actions required. Finally, it recommends that States promote the establishment of safety information sharing networks to facilitate the free exchange of information on actual and potential safety deficiencies. The processes outlined in this chapter form part of a safety management system aimed at reducing the number of accidents and serious incidents worldwide.

MALAYSIAN SITUATION

3.1 Department of Civil Aviation

Department of Civil Aviation (DCA) is a Malaysian government agency is tasked with regulating aviation activities in Malaysia (DCA, 2014). It was formed under the Ministry of Transport in 1969. Among others, the DCA is responsible for matters relating to the progressing development of aviation as part of the country's transportation system and the safety of it airways. The department also in charge in licensing more than 100 public and private airports, helicopters and landing areas, and register all pilots and non-military aircraft based within Malaysia. DCA's activities also include managing aviation system planning and development, provide administrative and technical support for community airport planning and development, administering an airport pavement maintenance program, providing small community aviation grants and conducting aviation and public education program.

DCA is divided into 9 sectors and divisions: Air Traffic Management Sector, Airworthiness Sector, Flight Operation sector, Airport Standard Division, Air Transport Division, Air Inspectorate Division, Aviation Security, Malaysia Aviation Academy Division and Management Services Division.

Air Traffic Management Sector is the sector responsible to make sure that DCA's standard and practice are in-line with ICAO SARPs.

3.2 Civil Aviation Act 1969

Section 23 of the Civil Aviation Act 1969 is the only section which states the brief procedure on assisting or saving life or cargo. Section 23 consists of three subsections. Unfortunately, Section 23 only briefly covers definitions, applicability and general information.

Subsection one define wreck and salvage as any services rendered in assisting or in saving life ... cargo or apparel of, an aircraft in, on or over the sea or any tidal water, or on or over the shores of the sea or any tidal water, shall be deemed to be salvage services in all cases in which they would have been salvage services if they had been rendered in relation to a vessel; and, where salvage services are rendered by an aircraft to any property or person, the owner of the aircraft shall be entitled to the same reward for those services as he would have been entitled to if the aircraft had been a vessel.

Subsection two further extends the definition of wreck and salvage as to include the foreign aircraft. Subsection three meanwhile covers the applicability of the law relating to merchant shipping.

With reference to the ICAO Annexes, it can be concluded that Civil Aviation Act 1969 appears to have a substantive legal inadequacy.

2.3 Civil Aviation Regulation 1996

Civil Aviation Regulation has come into force in 1st April 1996. Civil Aviation Regulations 1996 consist of 16 parts, 204 regulations and 16 schedules. Among others, the regulation set the law on registration and marking of aircraft, licensing of air services, air operator's certificate, airworthiness and equipment of aircraft, aircraft crew and licensing, operation of the aircraft, fatigue of crew, documents and records, control of air traffic, aerodromes, aeronautical lights and radio station, investigation of accidents, detention and sale of aircraft, aircraft mortgage and landing, parking and housing, passenger service and air navigation facilities.

Part 12 of the Civil Aviation Regulations 1996 spell out the procedures for the investigation of accidents. Part 12 consist of two chapters. Chapter 1 among others states the purpose of the investigation of an accident, procedures for notifications of the accidents, procedures for removal of damaged aircraft, powers and report of the inspector of air accidents, form and conduct of accidents. Meanwhile Chapter 2 covers the miscellaneous procedures for witness expenses, obstruction of investigation, compliance with summons and requisition, procedures relating to aircraft registered outside Malaysia, accident involving military aircraft, the duty to furnish information relating to incident and the report of accident to ICAO.

THE LEGAL CHALLENGES

As a signatory to the Chicago Convention, Malaysia is legally-binding to develop national civil aviation regulations that are uniformly equal with SARPs set by ICAO. Aeronautical Information Publication (AIP) Gen 1.7 published by Department of Civil Aviation Malaysia spell out the differences between Malaysia n standard from ICAO standards, recommended practices and procedures. Gen 1.7 states that Malaysian are adopting Annex 12 and 13 in full. Despite that fact, Malaysian Civil Aviation Regulations 1996 does not state anything on SAR standard as required by Annex 12.

Apart from this substantive legal inadequacy, DCA Malaysia also lack of a specific sector in charge for search and rescue. When MH370 crisis occurred, it can be seen that Malaysian authorities are handicapped in handling the situation. The Malaysian government has been criticise for mismanaging the search and holding back information.

Additionally, there was no co-ordinated or unified response from the government. Police chief Khalid Abu Bakar contradicted acting Transport Minister Hishammuddin Hussein over when and whether the officers had visited the pilots' homes (Zarina Banu, SCMP).. The confusion over when the satellite data link was disabled, for example, sparked frenzied speculation on TV news and wild conspiracy theories on social media (ZarinaBanu, SCMP). Other than that, during the investigation in northern corridor of Indian Ocean, there are two expert teams worked separately and it had caused the searching to stop and shift to southern part of Indian Ocean (The Malaysian Insider, 2014). Even though the rescue coordination centre has been established in MH370 crisis as required in Annex 12, nonetheless, the Malaysian government failed to verify and corroborate the facts

Regulations 128 under Part 12 of Malaysian Civil Aviation Regulations 1996 failed to cover major procedures pertinent to investigation of accidents. Firstly, it failed to define the existence of the state of Occurrence, state of Registry, state of operator, state of design and manufacture. Regulations 128 failed to spell out that the investigation belongs to the State in which the accident or incident occurred as required by Annex 13. Additionally, Annex 13 also provides that the states whose citizens have suffered fatalities in an accident are also entitled to appoint an expert to participate in the investigation.

Furthermore, Part 12 also failed to address on the protection of evidence and the responsibility of the State of Occurrence for the custody and removal of the aircraft. Thirdly, it failed to address the matter regarding the participation in investigation from other states.

In addition, Part 12 also failed to detail out the matter regarding flight recorders, autopsy examinations, coordination with judicial authorities, disclosure of records, and re-opening of an investigation.

To cope with the rapid change in aviation industry, ICAO develops a computerized database known as the Accident/Incident Data Reporting (ADREP) system, which facilitates the exchange of safety information among Contracting States. Unfortunately, Malaysia is far back behind all this technology. Last but not least, Chapter 8 of Annex 13 also further deals with accident prevention measures. The provisions in this chapter cover incident reporting systems, both mandatory and voluntary, and the necessity for a non-punitive environment for the voluntary reporting of safety hazards which Malaysian law lack of.

CONCLUSION

Malaysian government must look to the future and work hand-in-hand with the international aviation organization for the continued growth of the aviation industry in Malaysia. Whist new systems, tools and methods continue to enter the industry to make aviation safer, Malaysian aviation law must also follow suit the industry's changes in order to make the regulation and its regulators more avenue for compliances and safer practice. Hence, steps must be quickly taken to address the legal conundrums above, only then Malaysia are in the correct legal path in ensuring that the industry is safer and the probability of the loss of human life can purely be minimize if not total preventable.

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