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Proposed Anti-Terrorism Act 2023: A Non-Functioning Legislation?

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Abstract

Proposed Anti-terrorism Act 2023 of Sri Lanka may contain procedures which are arbitrary when come to application in the short term; but, in the long-term, given the "over-structured" and "circumambulatory" nature of the offences, the proposed legislation may cause a structural collapse when come to apply it to combat global terrorism, especially if Sri Lanka is to follow the 'definition based terrorism approach' which has a "human rights bias" – an approach which the countries like UK has not followed.

Keywords: *Anti-terrorism Act, Human rights, Constitutional law, Criminal law, Police powers*

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Introduction

Contrariwise, if it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic. – Mathematician Charles Dodgson (AKA Lewis Carroll)

As the crescendo of criticisms on the proposed Anti-Terrorism Act (ATA) recedes, the Sri Lankan government's decision to suspend the enactment of the law and call for a parliamentary select committee is a sublime tribute that political defiance has ever paid to reason. Encrusted by the obsolescence, enervated by ineffective enforcement and burdened by international pressure, the government's decision to formulate a new ATA became commendable. Yet, the formulation of the new ATA became very controversial. The proposed ATA[1] has now become a cauldron of contradiction – to dub in Charles Dodgson's logic. The draft law triggered criticisms in extreme divergent angles that it has now become difficult to formulate a coherent philosophy on the matter; and this is certainly not ideal for Sri Lanka which is in desperate need of a workable ATA in its effort to combat global terrorism.

Writer wishes to point out that issues concerning global terrorism – more particularly, matters concerning global maritime terrorism – need to be addressed in the proposed ATA much more effectively, especially from the universal jurisdictional point of view. At the time of writing, the Government is reconsidering the proposed ATA. During this period, many have aired their views, especially, the Bar Association of Sri Lanka (BASL),[2] International Commission of Jurists (ICJ),[3]

1See<https://www.academia.edu/103322753/ANTI_TERRORISM_Bill_2023_Sri_Lanka_Government_Gazette_> viewed on 14 June 2023.

2 See<https://basl.lk/media-statement-of-the-bar-association-of-sri-lanka-regarding-the-anti-terrorism-bill/> viewed on 14 June 2023.

3 See<https://www.icj.org/sri-lanka-proposed-anti-terror-bill-set-to-introduce-death-penalty-and-break-existing-human-rights-violations-record/> viewed on 14 June 2023.

Centre for Policy Alternatives (CPA)[4] and many others; and the public is grateful to have received such diverse and in-depth views on the proposed ATA. It is the writer's view that, whilst ATA being law that is weaker than that of the UK's Anti-Terrorism Act 2000[5] (hereinafter referred to as UK's ATA 2000) compared to its substantive offences; the proposed ATA may be an abusive weapon as far its enforcement orders are concerned, such as the Miscellaneous Orders contained in Part X. The writer took this view in an article titled, 'Proposed Anti-Terrorism Bill: Real tiger, paper tiger or mixed bag' published in the Sunday Island Paper dated 23/04/2023.[6]

The Objective of the write-up

There is a far greater concern which prompted the writer to do this write-up. Is the proposed ATA a non-functional legislation given the convoluted and spiral nature of the main offences like those mentioned in clauses 6, 7, 8, 9, 10, 11, 12 etc. which are built on clause 3? The laws comparable to that of the UK's Anti-Terrorism Act 2000 (as amended) seem to be more practical, and do not follow the proposed ATA approach in the drafting of the main offences.

The structure of this write-up is that; first, writer will begin with an outline of the proposed ATA; Second, the main argument of why the proposed ATA has become a non-functional legislation given the convoluted and spiral nature of the offences like those mentioned in clauses 6, 7, 8, 9, 10, 11, 12 etc. which are built on clause 3 is discussed. Thirdly, the writer will address various schools of thinking on anti-terrorism law, like that of the requirement of a definition on terrorism, universal jurisdiction required to address international terrorism etc.

4 See< https://www.cpalanka.org/cpa-statement-on-the-anti-terrorism-bill-2023/>viewed on 14 June 2023.

5 See < https://www.legislation.gov.uk/ukpga/2000/11/contents > viewed on 14 June 2023.

6 See< https://island.lk/proposed-anti-terrorism-bill-real-tiger-paper-tiger-or-mixed-bag/ > viewed on 14 June 2023.

The writer will reach the conclusion that in the long-term, given the "over-structured" and nature of the offences, the proposed ATA may cause a structural collapse. This is mainly the result of Sri Lanka following a 'definition-based terrorism approach' which has a "human rights bias" – an approach which the UK/USA laws have not followed.

Outline of Structure of the proposed ATA 2023

There are two primary provisions in the proposed ATA – clauses 2 and 3. Clause 2 enunciates the jurisdiction and clause 3 deals with the offence of terrorism. This is the archetypal structure of an ATA law in many countries, and draftsmen followed the universal structure. Clause 2 becomes the international jurisdiction base for the implementation of the proposed ATA.

Clause 3 contains the 'offence of terrorism' that becomes the foundation on which other offences and provisions are built; that means, clause 3 is the mother provision, and the rest of the offences are the offspring of Clause 3 – which is characteristic of any ATA in the world including the UK. The clause 2 – the provision on jurisdiction – becomes the foundation for enforcement powers mentioned in the Part X of proposed ATA. Whilst the enforcement powers in the Miscellaneous Part – that comprises of Proscription Orders, Prohibition Orders, Restriction Orders etc., which is less judicially accountable – are wide and arbitrary when applied within Sri Lanka; conversely, its overall reach and enforcement of such Orders in the context of global terrorism is 'fragile' given the limitations in clause 2.

Both clauses 2 and 3 are the foundational structure of the proposed ATA, and the enforcement provisions contained in the rest of the ATA, including Part X forms the superstructure. Since this article is based on a review of clause 3, I will, notwithstanding its length,

reproduce it in full;

3. (1) Any person, who commits any act or illegal omission specified in subsection (2), with the intention of–

(a) intimidating public or section of the public;

(b) wrongfully or unlawfully compelling the Government of Sri Lanka, or any other Government, or an international organization, to do or to abstain from doing any act;

(c) unlawfully preventing any such government from functioning;

(d) violating territorial integrity or infringement of sovereignty of Sri Lanka or any other sovereign country; or

(e) propagating war or advocate national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, commits the offence of terrorism.

(2) An act or an illegal omission referred to in subsection (1) shall be –

(a) murder;

(b) grievous hurt;

(c) hostage taking;

(d) abduction or kidnapping;

(e) causing serious damage to any place of public use, a State or governmental facility, any public or private transportation system or any infrastructure facility or environment;

(f) causing serious obstruction or damage to or interference with essential services or supplies or with any critical infrastructure or logistic facility associated with any essential service or supply;

(g) committing the offence of robbery, extortion or theft, in respect of State or private property;

(h) causing serious risk to the health and safety of the public or a section thereof;

(i) causing serious obstruction or damage to, or interference with, any electronic or automated or computerized system or network or cyber environment of domains assigned to, or websites registered with such domains assigned to Sri Lanka;

(j) causing the destruction of, or serious damage to, religious or cultural property;

(k) causing serious obstruction or damage to, or interference with any electronic analog, digital or other wire-linked or wireless transmission system including signal transmission and any other frequency-based transmission system;

(l) being a member of an unlawful assembly for the commission of any act or illegal omission set out in paragraphs (a) to (k); or (m) without lawful authority, importing, exporting, manufacturing, collecting, obtaining, supplying, trafficking, possessing or using firearms, offensive weapons, ammunition, explosives, or any article or thing used or intended to be used in the manufacture of explosives, or combustible or corrosive substances or any biological, chemical, electric, electronic or nuclear weapon, other nuclear explosive device, nuclear material or radioactive substance or radiation emitting device.

However, if clause 3 is structurally deficient, then the whole law collapses.

Is the Proposed ATA a Non-Functional Legislation?

The proposed ATA seems to have placed a high legal threshold for the prosecution, so much so that, it is very difficult to bring home a conviction under clause 3 or other offences built on clause 3. The offences like those mentioned in clauses 6, 7, 8, 9, 10, 11, 12 etc., are built on clause 3, which necessitates the proof of the offence of terrorism (clause 3) as a 'condition antecedent', or a 'condition subsequent'. This places far greater onus and a stress on the prosecution to prove an array of ingredients in an offence built upon the mother offence, namely clause 3, as a 'condition antecedent', or a 'condition subsequent'. And this 'network or the reticulum of ingredients in these offences will make the whole scheme of offences unworkable when come to the application in a court of law.

These cascaded offences based a 'network or the reticulum of ingredients' should be carefully reconsidered before introducing the same into the legislative text. It is common to have offences built upon offences in the criminal law. For instance, robbery is one example of an offence built on a structure and a superstructure respectively on either theft or extortion as per section 379 of the Penal Code.

Another example is clause 10.

> 10 (1) Any person-
>
> (a) who publishes or causes to be published a statement, or speaks any word or words, or makes signs or visible representations which is likely to be understood by some or all of the members of the public as a direct or indirect encouragement or inducement for them to commit, prepare or instigate the ***offence of terrorism (clause 3)***; and

(b) such person-

(i) intends directly or indirectly to encourage or induce the public to commit, prepare or instigate the ***offence of terrorism (clause 3)***; or

(ii) is reckless as to whether the public is directly or indirectly encouraged or induced by the statement to commit, prepare or instigate the ***offence of terrorism (clause 3)***, commits an offence under this Act.

(2) …

(3) For the purposes of subsection (1), a "statement" includes every statement–

(a) which glorifies the ***commission of the offence of terrorism*** (***(clause 3)***or preparation for the **offence of terrorism**; and

(b) from which the public may reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances. (*Emphasis and interpolations are mine*)

It is observed that clause 10 brings clause 3 into the offence of the former.

Whether such multilayered approach should be introduced to the Sri Lankan legal structure remains dogmatic given the fact that the UK law on terrorism does not follow such a strong inclination - at least not to the extent of Sri Lanka's proposed law. While there is always room for abuse when comes to procedural due process involving the implementation of the proposed ATA resulting from Part X,

the substantive offences built upon the clause 3 will axiomatically make the proposed ATA unworkable for the prosecution in the long term – or even when come to framing charges against a suspect.

Let us take section 15 from the UK's ATA;

15 Fund-raising.

(1) A person commits an offence if he—

(a) invites another to provide money or other property, and

(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the ***purposes of terrorism***.

(2) A person commits an offence if he—

(a) receives money or other property, and

(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the ***purposes of terrorism***.

(3) A person commits an offence if h

(a) provides money or other property, and

(b) knows or has reasonable cause to suspect that it will or may be used for the ***purposes of terrorism***.

(4) In this section a reference to the provision of money or other property is a reference to its being given, lent or otherwise made available, whether or not for consideration. (*emphasis mine)*

It seems that the term *'purposes of terrorism'* mentioned in the UK Act in many provisions is much wider than our proposed ATA term – *the offence of terrorism.*

The appearance of injecting rationality and coherence into the proposed ATA's structure built on cascaded criminal offences will make the prosecution labour for a conviction: and the inflections/ deflections to other offences within an offence will make the prosecution trial more tedious; and this is compounded by the fact that such offences have a limited sovereign jurisdictional application.[7]

As the offences are added and layered on top of the 'mother offence of terrorism' (clause 3) in response to the *ad hoc* concern to prevent any abuse in application, any semblance of rationality or coherence required for a successful prosecution has been made to disappear. What is needed at this point is not to rush this proposed legislation; but rather, to reflect deeply on the criminal jurisprudence and its associated schools of thinking and reframe a coherent criminal law ideology based on other countries like the UK.

Human Rights Oversight Bodies and the Anti-Terrorism Laws in the UK/USA

There is a far greater concern when one compares the policies of the UK and USA when comes to legislating on the issue of combating of global crime.[8] A careful analysis will show that none of these legislations in UK/USA carry direct and overbearing provisions that bring such legislations within the human rights oversight

7 Supra note 6.

8 See generally, Joyner, Christopher C. "The United Nations and terrorism: rethinking legal tensions between national security, human rights, and civil liberties." International Studies Perspectives 5.3 (2004): 240-257.

bodies,[9] although such checks and balances are given in, no small measure, by the involvement of the judiciary – or for that matter by their human rights regulatory bodies.

There is a reason. The war on terrorism declared by a State party never originates by directing on a clear target, and the war on terror is not over until the State party declares it to be over. And the targeted group is not clearly identified until the State party declares as such, based on its own evidence, and the use of force is also to the extent of the what the State party considers it to be necessary to destroy the so called target.[10] Given the supervening subjectivity on the global war on terror, the offences on terrorism is kept broad, purposefully; and the UK/USA laws do not carry direct and overbearing provisions that bring such legislations within the human rights oversight bodies.

The writer is aware and appreciative of the human rights groups of the world that pursue the 'schools of thinking' that a definition of terrorism is a 'pre-condition' for the purposes of drafting the offence on terrorism.[11] This school of thinking inherently has a 'human rights bias', rather than "pro-state prosecutorial bias".[12] So far what seems to have prevailed, given the complexity of the global terror networks, is to have broadly drafted offences in anti-terrorism laws of the UK/USA. If such be the case, should Sri Lanka follow the 'definition-based terrorism approach' which has a human rights bias, or should Sri Lanka follow a practical

9 See generally, Jaeger, Paul T., et al. "The USA PATRIOT Act, the Foreign Intelligence Surveillance Act, and information policy research in libraries: Issues, impacts, and questions for libraries and researchers." The Library Quarterly 74.2 (2004): 99-121.
10 See generally, Saul, Ben. "Defining terrorism." The Oxford handbook of terrorism. 2006.
11 See generally, Greene A. Defining terrorism: one size fits all?. International & comparative law Quarterly. 2017 Apr;66(2):411-40.
12 See generally, "The Definition of 'Terrorism' in UK Law. Justice's Submission to the Review by Lord Carlile of Berriew QC," March 2006.

approach taken by the UK/USA?[13] This is a matter that should be carefully deliberated by the policy makers and criminal law practitioners. As I observed earlier, the proposed ATA follows a cascaded offences based a 'network or the reticulum of ingredients' which makes it very difficult for the prosecution to bring home a conviction; which means that the legal convulsions within the structures, superstructure, and infrastructures of the offences in the draft ATA can be understood to mean a seriously unworkable legal set-up for the prosecution.

Take this example. Assume that a terror group takes a LNG carrier and her crew as hostage in the outer-harbour of Colombo Port, where the sabotaging of this carrier would cause enormous destruction comparable to an explosion of a nuclear bomb. The hostage situation goes on for a minimum of 10 days in the outer-harbor. Fortunately, in the early hours of the hostage crisis Sri Lanka arrests a suspect in Colombo Port connected to the hostage crisis. It is not preferable to bring in a human rights oversight body[14] to question the welfare of the suspect taken to custody in the first few days, since the hostage crisis is ongoing and the arrested suspect may be needed for hostage negotiation and other counter-terrorism measures.

This example reflects the complexity of fighting against global terrorism, and institutionalizing human rights oversight bodies alongside counter-terrorism operations may not be the most advisable thing to do, especially when the UK/USA laws on human rights institutions do not penetrate so deep into such legislation.[15] If so, why should Sri Lanka overbearingly subordinate her anti-

13 See generally, Fenwick, Helen. "The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?" The Modern Law Review, vol. 65, no. 5, 2002, pp. 724–62.
14 Clauses 2 and 34 as examples in the proposed ATA.
15 See generally, Gearty, Conor. "11 September 2001, Counter-Terrorism, and the Human Rights Act." Journal of Law and Society, vol. 32, no. 1, 2005, pp. 18–33.

terrorism laws to the mandate of the human rights oversight bodies "within the text" – I repeat, "within the text" – of the proposed ATA, when UK/USA laws have not been so progressive in this regard? If one is to be so human rights' conscious when come to dealing with global terror suspects, then such a policy should be carefully deliberated in the parliament.

Defining Terrorism

There is a trend towards following the definitions and approaches of the international conventions which are supposed to combat global terrorism. In this regard, BASL too has issued its erudite observations on the proposed ATA by an assembly of top legal luminaries,[16] and the writer graciously appreciates the forward-looking nature of the contents of this report. The report recommends the application of the definition contained in Convention on the Suppression of Terrorist Financing Act No. 25 of 2005 on the 'terrorism' to the proposed ATA.

The writer wishes to point out that, whilst some Conventions like the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation[17] carry a broad explanation for what is meant by maritime terrorism, other conventions may or may not carry meaningful and a workable definition on terrorism.[18] The legislature should be mindful not to import definitions of some of the international conventions, although Sri Lanka is a party. Such definitions on terrorism are mostly politically compromised definitions in the negotiation stages on what is meant by terrorism in specific contexts to which the respective international convention

16 Supra note 2.

17 UN General Assembly, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March 1988, No. 29004, available at: https://www.refworld.org/docid/3ae6b3664.html [accessed 14 June 2023].

18 See generally, Kraska, James. "Effective implementation of the 2005 convention for the suppression of unlawful acts against the safety of maritime navigation." Naval War College Review 70, no. 1 (2017): 10-23.

refers to. In any event, such definitions may not be legal definitions, and may just be political or socio-economic definitions, which are not capable of having "judicially manageable standards".[19]

For instance, conventions like Convention on the Suppression of Terrorist Financing[20] purports to contain a definition in Article 2 which is unlikely of a workable legal definition in all contexts, which in fact refers to acts of terrorism in a particular context– that is terrorist financing; and in any event makes no sense given the list of treaties Article 2 refers to in order to make semblance of a definition. And it is questionable whether such a non-legal definition on terrorist financing can be imported to the proposed ATA outright when the proposed ATA deals with all kinds of terrorism, including terrorist financing.

It is in this regard that it is much safer to follow the legal standards maintained by the UK laws, where such countries follow no overbearing definition on terrorism, even after being a party to such Conventions. Such nations understand that their international obligations are best met by adopting their own legal standards and approaches which are inherently better than a vague text, and a better and a more meaningful international compliance can be achieved within the framework of such international conventions when such nations follow their own legal standards.

The Need for Universal Jurisdiction

Last, by no means least, it must be said that it is preferable to discard the approach of our proposed ATA being territorial or extra-territorial in its international application. Although the UK

19 See generally, Hodgson, Jacqueline S., and Victor Tadros. "The Impossibility of Defining Terrorism." New Criminal Law Review: An International and Interdisciplinary Journal, vol. 16, no. 3, 2013, pp. 494–526.

20 UN General Assembly, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349, available at: https://www.refworld.org/docid/3dda0b867.html [accessed 14 June 2023]

law seemingly assumes to be extra-territorial in its application, it seems to carry "universal jurisdiction". For instance, a religious fundamentalist group commits an act of terrorism in Sri Lanka. Such an act can be prosecuted pursuant to section 1 read with other provisions in the ATA 2000 of the UK. The entire commission of the said act of terror has taken place in Sri Lanka, which is a foreign State, and it is irrelevant whether such religious fundamentalist group is a proscribed organisation or not in Sri Lanka or in the UK, and the ingredients and the characterization of the offence of terrorism is purely based on the UK law, and it is irrelevant what Sri Lanka law is with regard to the act. The UK law seems to attract universal jurisdiction, rather than any other form of jurisdictional reach, and the proposed ATA must clearly have a provision which grants such universal jurisdiction.

Take this example. Chechniyan rebels in Russia[21] attacks a cinema and kills innocent civilians - an incident similar to The Moscow theatre hostage crisis (In the past similar incident happened, and is known as the 2002 Nord-Ost siege).[22] Assume that one terrorist ends up in Sri Lanka. Sri Lanka should have universal jurisdiction to prosecute such a terrorist irrespective of Sri Lanka's political affiliation. It is in Sri Lanka's best political interests that an anti-terrorism law with universal jurisdiction is formulated, and in line with the ATA of the UK. However, whether Sri Lanka prosecutes such international criminal or not is the country's policy decision – and the laws should not be crippled in advance to limit Sri Lanka's sovereign reach.

21 See Kramer, Mark. "Guerrilla Warfare, Counterinsurgency and Terrorism in the North Caucasus: The Military Dimension of the Russian-Chechen Conflict." *Europe-Asia Studies*, vol. 57, no. 2, 2005, pp. 209–90.

22 See Snetkov, Aglaya. "The Image of the Terrorist Threat in the Official Russian Press: The Moscow Theatre Crisis (2002) and the Beslan Hostage Crisis (2004)." Europe-Asia Studies, vol. 59, no. 8, 2007, pp. 1349–65.

Overly Broad Nature of Offences Relating to Terrorism

The writer is aware the popular criticism on the overly broad nature of offences relating to terrorism.[23] However, a close inspection of the applicability of the offences built on clause 3 does not create such abuse in the long term, and given the multilayered structure of the proposed ATA for the offences that I explained, it is very unlikely such an abuse may take place in a final conviction from a court of law – in fact, the inevitable observation is that the offences are very restrictive in application. However, the abusive nature of the proposed ATA is mainly in part X of the Act, which in the short-term, can lead to arbitrary arrests.

Conclusion

It may be true that in the short term abusive procedure can be used as a weapon of suppression – or at least the possibility exists given the dehumanised nature of the law enforcement bodies; but, in the long-term, given the "over-structured" and "circumambulatory "nature of the offences I explained earlier, the proposed ATA may cause a structural collapse when come to applying the law to combat global terrorism, especially if Sri Lanka is to follow the 'definition based terrorism approach' which has a "human rights bias" – an approach which the UK/USA laws have not followed, or is weary about, to say the least.

23 See generally, Greene, Alan. "The Quest for a Satisfactory Definition of Terrorism: R v Gul." The Modern Law Review, vol. 77, no. 5, 2014, pp. 780–93.,.