

## Initial Reactions to the Anti-Terrorism Act published by gazette on 17<sup>th</sup> March 2023

### Introduction

For a country no longer in the throes of war, Sri Lanka ought to have been rolling back on the overbroad and dangerous laws that have been repeatedly abused to the detriment of its citizens and causing marginalization of groups and communities. The proposed Anti-Terrorism Act (ATA) published on 17<sup>th</sup> March 2023 is the latest attempt by governments of Sri Lanka to respond to domestic<sup>1</sup> and international pressure<sup>2</sup> that for over the last 40 years the Prevention of Terrorism Act of 1979 (PTA) has wreaked havoc in the lives of Sri Lankans particularly minority communities.

### No justification for the wide powers in the ATA

With the ATA, this government has demonstrated a commitment to retaining broad and excessive executive powers to be used against legitimate and peaceful activities of civil society, human rights defenders, journalists, minorities and others, or suppress political dissent. As is usual in Sri Lanka, the proposed ATA is not accompanied by a paper setting out the context that justifies its provisions. The preamble to the ATA reminds us that Sri Lanka has experienced terrorism, loss as a consequence and states that national development was retarded due to terrorism, that Sri Lanka is committed to international human rights standards and that Sri Lanka is committed to protecting other sovereign nations. None of these objectives appear to be meaningfully addressed by the provisions that follow.

Whilst having a broad range of criminal laws at its disposal for dealing with almost all of the offences the ATA describes, the ATA is really a declaration of power by the executive to citizens who are challenging government policies.

### An ATA geared and in time for public protests

The ATA is being proposed at a time Sri Lanka is facing serious economic crisis and its citizenry being left in the dark over the several government policies that are being bulldozed through. The government policies to date have really failed to address real needs of the poor and even middle class, citizen protests are a daily occurrence – and the ATA shows all the signs of being crafted to deal with protestors. Citizen protestors have been cast as ‘terrorists’ to stabilize elite rule and protect elite benefit to continue during the economic crisis. **What has been presented is a Counter Democracy Act.**

This proposed ATA presents a scheme of law that, *inter alia*

1. Creates a broad range of offences as terrorism and related to terrorism,
2. Maintains and expands extraordinary arrest and detention powers
3. Makes provision of a range of investigation powers for the police
4. Attempts to bestow on the Attorney General power to compel admissions of guilt
5. Create a scheme of broad powers for the President to declare proscribed organizations, make restriction orders, declare curfews, declare places as prohibited places (similar to high security zones), introduce rehabilitation programs.

---

<sup>1</sup> Several publications, the island-wide campaigns against the Counter Terrorism Bill of 2018 and later calling for the repeal of the PTA, numerous media articles and public programs

<sup>2</sup> In the form of a commitment made to the UN Human Rights Council, call for a moratorium of the PTA by seven UN Special procedure mandate holders, country reports and letters by UN Special rapporteurs on torture, on counter terrorism and human rights, international human rights agencies, part of the human rights reforms that formed part of the conditions for preferential trade agreements with the European Union and a resolution adopted on Sri Lanka by the European Parliament.

A brief look at the provisions of the proposed ATA demonstrates that **the ATA is worse than the PTA in many ways**. The much objected to ‘confessions clause’ in the PTA has been removed and some judicial oversight over some arrests has been introduced. However, to compensate for introducing judicial oversight over arrests the power of detention orders has been wildly expanded and overwhelmingly negates the judicial oversight introduced.

### **1. Expands definition of what is a terrorist offence.**

A law which removes ordinary safeguards within the justice system must be precise about the circumstances in and the offences to which it can be applied. This will reduce chances of it being abused and used in ways that are unjust. This is why the definition of terrorism must be clear and precise.

The proposed section 3(2) of the ATA defines broadly 13 kinds of acts as acts of terrorism and includes causing serious damage to any place of public use, obstruction of essential services, committing theft on private property and being a member of an unlawful assembly for the commission of other broadly defined terrorist acts,

The definition as given gives license for the state to treat as terrorism instances such as

- Citizens protesting against state such as in the cases of Rathupaswala and state involvement in water pollution, Rambukkana state action impacting fuel distribution, Meethotamulla state decision to dump garbage in their neighbourhood, impact of development projects by state action such as urban evictions, eviction and forceful use of plantation lands, projects such as Hambantota industrial development zones and citizens protesting demanding release of lands occupied by the military.
- Trade union strikes
- Mass civic protests and civil disobedience actions (like the anti coup protests of 2018 and GGG of 2022)
- Critique deemed harmful to national interest (arrests and prosecutions like that of Tissainayagam (allegedly inciting communal hatred and collecting money for his publication), Azath Sally (whose criticisms of the BBS were allegedly incitements to racial disharmony)
- Human rights activists (like arrest and detention of Ruki Fernando and Fr. Praveen when they were visiting families of the disappeared)

The Section 3(2) definition completely fails international human rights standards. The definition consists of a long list of offences Many of these offences ought to be offences under the ordinary criminal law and they cannot be reframed as ‘terrorist offences’ which essentially mean there is a broad threat to the country.

### **The definition in the ATA fails the UN guidelines**

The UN Special Rapporteur on Counter Terrorism and Human Rights has recommended that attempts to define terrorism must have the following components:

- a. Defined offences (described as ‘trigger offences’ found in 10 of the anti-terrorism conventions in force) **AND**
- b. Part 1 intention - to cause death, serious bodily injury, or taking hostages **AND**
- c. Part 2 intention - purpose of invoking a state of terror/intimidating a population/compel a government or international organization to do or refrain from

doing an act. Both parts of the intention must be present to ensure that the offence reaches the threshold of defining terrorism.

**The ATA fails to, as international norms require, NARROWLY DEFINE acts which constitute an offence.** Without reference to the 10 anti-terrorism conventions refers to as a long list of acts as attracting the definition of terrorism. The ATA fails to insist that

- only acts committed with the intention of causing death, serious bodily injury, or taking hostage AND
- there is intention to invoke a state of terror or intimidating a population or compelling a government.

More offences vague and overbroad offences have been included.

- Section 10 creates an offence where “*Any person who (a) 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*” and (b) intends directly or indirectly to encourage or induce the public to commit, prepare or instigate the offence of terrorism; or 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. When the offence of terrorism is very wide and includes ordinary offences, then creating an offence where someone publishes something that may be ‘interpreted’ as encouragement to commit/prepare/instigate ‘terrorism’ means anything can be caught up in it – it all depends on the interpretation.
- Proposed Section 11 states that distributing, circulating, giving, selling, lending, offers for sale, provides a service that enables others to access, transmits electronically, or keeps in possession “terrorist publications” is an offence. Again, given the wide definition of ‘terrorism’ what amounts to ‘terrorist publication’ will have very wide meaning.
- Proposed Section 12 states giving or receiving instruction or training in “terrorism” is an offence. Given how broad the definition of terrorism is even giving instructions or receiving on how to protest, where to assemble and march, what slogans to display may all potentially amount to acts of terrorism. The proposed punishment is a maximum of 15 years rigorous imprisonment - and fine not exceeding 1 million.
- Section 16 states that it is an offence to willfully fail to or neglect to comply with a direction issued under this Act or willfully hinder the implementation of a lawful order or directive or obstruct enforcement of the provisions of this act. This section may be read together with Section 61 gives a list of directions a Senior Superintendent of Police is empowered to make by this Act, which includes the following: (a) not to enter any specified area or premises; (b) to leave a specified area or premises; (c) not to leave a specified area or premises and to remain within such area or premises; (d) not to travel on any road; (e) not to transport anything or to provide transport to anybody; (f) to suspend the operation of a specified public transport system; (g) to remove a particular object, vehicle, vessel or aircraft from any location; (h) to require that a vehicle, vessel, ship or aircraft to remain in its present position; (i) not to sail a vessel or ship into a

specified area until further notice is issued; (j) not to fly an aircraft out of, or into a specified air space; (k) not to congregate at any particular location; (l) not to hold a particular meeting, rally or procession; and (m) **not to engage in any specified activity**.

The range offences created under the ATA are extensive, completely unwarranted and will do much harm. It is not consistent with international standards as the wording fundamentally introduces a very low threshold for acts identified as terrorism and fails to limit extraordinary powers to genuine terrorism. It dangerously widens the definition of terrorism to potentially include entirely legitimate speech, journalism, and democratic political actions. By design it is highly susceptible to abuse. The definition empowers the state to term as 'terrorism' acts of dissent and civil disobedience and lawfully permits disproportionate and excessive responses by state officials.

## **2. Extraordinary arrest and detention powers are continued**

Sri Lanka should not have laws that permit arrest by armed forces or the coast guard for a broad range of acts deemed to 'terrorism'. Sri Lanka also should not continue to empower the executive to restrict physical liberty for extended periods of time without full judicial review in the name of "detention orders". Detention orders (DO) is an extraordinary power. The ordinary criminal law system with all its protections is the best possible scheme to respond to offences, particularly the broad range of act that the ATA seeks to call 'terrorism'. There is no justification whatsoever to have detention without judicial review.

In the proposed ATA, Section 28 states that a suspect ought to be produced before a Magistrate within 48 hours of arrest. However, if there is a DO, the Magistrate shall make order to give effect to DO. Magistrate's discretion to discharge is curtailed by Section 28(2)(b)(iii) which states that discharge (release) of the suspect, is possible only if the officer in charge of the relevant police station so requests on any ground that the Magistrate is satisfied.

Section 31 of the proposed ATA states that DOs can be made by a Deputy Inspector General of Police. Previously only Minister of Defence. This means that the proposed law instead of curtailing potential abuse of the law proposes to expand the potential for abuse. The reasons set out in the law for when a DO can be made, are reasons that can be applied by a judicial officer. By increasing the number of persons who can issue DOs, the state has completely failed to recognize the multitude of human rights violations that were perpetrated under the PTA where only one individual was empowered to issue DOs.

Section 31(6) provides for creation of 'approved places of detention' which are essentially detention sites under the supervision of the police and not under the judicial or prisons system. Detention sites have a history related to torture in Sri Lanka. It is contrary to the basic principles of criminal law that are aimed to prevent torture – what is the reason for a suspect to be in the custody of the investigators? Once transferred to the remand system which is under judicial supervision there is a separation of interests that theoretically keeps the suspect safe. Nothing prevents the continuation of investigations. Section 38 sets out maximum period of detention as 12 months. Section 41 allows the police to make a case for the suspect to be removed from remand and placed back in detention! This entire scheme is extraordinary and there is nothing justifying the requirement of such a scheme.

**3. Creates a situation whereby the AG can compel persons that they do not want to prosecute into admitting guilt**

Section 71 of the proposed ATA states that the Attorney General may suspend and defer the institution of criminal proceedings against such person alleged to have committed an offence under this Act, for a period not exceeding twenty years. The AG is empowered to obtain the sanction of the High Court to impose one or more of the following conditions for such suspension/deferment: Publicly express remorse and apology, provide reparation to victims, participate in rehabilitation, publicly undertake to refrain from committing an offence, engage in community or social service, refrain from committing an offence or breach of peace. This type of provision essential places undue pressure on persons to admit guilt in the hopes of not having to be detained for a long period or go through a long legal process under the terror law.

**4. Continued power of the executive to declare organizations as ‘proscribed organizations’, ‘Restriction orders’, Curfew orders, Prohibited places**

**Proscription orders by the President are provided for by Section 82 of the proposed ATA.** Where the President has reasonable grounds to believe that any organization is engaged in any act amounting to an offence under this Act, or is acting in an unlawful manner prejudicial to the national security of Sri Lanka or any other country, the President can by order published in the Gazette declare an organization or movement as proscribed. Proscription orders contain prohibitions such as prohibiting any person being a member of such organization; prohibiting such organization recruiting members to such organization; prohibiting any person acting in furtherance of the objectives of such organization; prohibition on conducting meetings, activities and programmes by such organization; prohibition on the use or mobilization of bank accounts and other financial depositories of such organization; prohibition to entering into contracts; prohibition on raising of funds and receiving grants and bequests; prohibition to transferring funds and assets of the organization; prohibition for lobbying and canvassing on behalf of such organization; or prohibiting any person by publication of any material in furtherance of the objects of such organization. Section 82(7)(a) states that a Proscription Order made under this section may be initially issued for a period of one year. It may also be extended by year each time.

**Restriction orders are provided for by Section 83 of the proposed ATA.** The President is empowered to apply to the High Court to obtain a restriction order. A Restriction Order made under subsection (1) may include restrictions on - (a) the movement outside the place of residence; (b) travelling overseas; (c) travelling within Sri Lanka; (d) travelling outside the normal route between the place of residence and place of employment; (e) the communication or association, or both, with particular persons as shall be specified in the Order; or (f) engaging in certain specified activities that may facilitate the commission of an offence under this Act.

It is notable that the office of the President being used to exert pressure on the judiciary in this provision. There is no need for President to be applying for these order if an offence has been committed – the matter should be before court as instituted by the police and any restriction orders such as travelling overseas and within SL as required could be made by a judge. It is also notable that persons so restrained if challenging the order must apply to the Court of Appeal, the geographically more distant court. This makes it so much more difficult for a person to pursue justice.

By Order published in the Gazette the **President is empowered to order curfews.**

By Section 85. (1) of the proposed ATA **the President is empowered to declared places as Prohibited Places.** The clause states that the President may, on a recommendation made by the Inspector General of Police or the Commander, respectively of, Army, Navy or Air Force or the Director General of Coast Guard, from time to time, by Order published in the Gazette, stipulate any public place or any other location to be a prohibited place. Prohibitions include prohibitions on the entry, prohibitions on taking photographs, video recording and making sketches. There is no time limitation which means that the prohibition can be permeant. This clause appears to be an attempt to circumvent the current procedure of the police having to go to court to obtain orders restraining persons from particular places by demonstrating to court that such orders are necessary to prevent a breach of peace. The power given here is similar to the war time practice of designating 'high security zones'.

Section 100. (1) of the proposed ATA states that **the President may make regulations to implement rehabilitation programmes** for the persons in respect of whom the Attorney General has recommended suspension and deferment of criminal proceedings under section 71, or the Attorney General has withdrawn indictments under section 77. This clause is an attempt to legitimize a practice that the government has previously engaged in and continues by attempts to bring various rehabilitation focused laws to legitimize, whereby persons in detention are compelled to accept 'rehabilitation' to fast track release. This scheme in effect permits restraint and/or punishment in situations where the Attorney General is not prosecuting a suspect. Given the high susceptibility for abuse of this law and the broad definition of terrorism it is very likely that persons who have been arrested without cause are compelled to consent to rehabilitation to secure their freedom.

5. **Fails to introduce compensation for arbitrary arrest, detentions and other harms** that may be caused by orders / directions made in terms of this Act on the lives of innocent citizens. This results in the use of the ATA against citizens as an effective punishment.

Ermiza Tegal LLB (London), LLM (Law, Governance and Development)(London)  
Attorney at Law  
24<sup>th</sup> March 2023