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Criminalising Terrorism: An Overview of Malaysia's Anti-Terrorism Laws

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Abstract

Terrorism is not a 21st century phenomenon and has its roots in early resistance and political movements. It is becoming a serious area of concern today due to the increase in terrorism related incidents in nations around the world. As a result, most nations including Malaysia have enacted many new legislations to counter these activities by criminalising them. The main argument for criminalising terrorism is that terrorism seriously undermines fundamental human rights, jeopardises the State's peaceful politics as well as threatens international peace and security. Malaysia's anti-terrorism Acts were enacted to counter threats from regional aggressors, third rate army, terrorist groups and even religious cults. However, these Acts have raised a lot of concern among stakeholders. Thus, this doctrinal research analyses all the anti-terrorism laws to identify whether they strike a balance between protecting national security and the principles of Rule of Law as well as basic human rights.

Keywords: Terrorism, Terrorism Acts, National Security, Human Rights, Criminal Law Procedures.

Introduction

Terrorism is a global phenomenon that consists of criminal activities with devastating outcomes and has become a major concern around the world. Almost every single day, major newspapers around the world broadcast news on terrorism attacks. The word 'terror' is correlated with 'terrorism' where 'terror' is defined as an intense fear of physical

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injury or death while ‘terrorism’ is the unlawful use or threat of violence especially against the state or the public as a politically motivated means of attack or coercion (Merriam – Webster Dictionary of Law, n.d.). Generally, in layman’s terms, terrorism is defined as the unlawful use of force or violence against person or property in order to coerce or to intimidate a government or the civilian population in furtherance of political or social objectives (Farlex-The Free Dictionary, n.d.). In essence, terrorism is a generic term which describes the method of causing harm based on certain motivations or ideologies which fuel such actions where the use of threat or force is to advance a political, religious or ideological cause. A terrorist is usually an individual who has radical or extreme views and extremism is a precursor to terrorism (Martin, 2013).

Today, terrorism has become one of the most controversial issues in the world. In this modern era, the term terrorism has significantly transformed after the September 11, 2001 incident (Shor, 2011) which involved the case of the hijacked airplanes by terrorists which crashed into the World Trade Centre in the United States of America leading to the invasion of Iraq. The whole world was shocked and most governments around the world decided to enact new laws and enhance the existing laws to combat terrorism. As a result, it has now become highly associated with Islam by the media. Malaysia has become embroiled in this issue because there are reports indicating a number of Malaysians have been recruited for the al-Qaeda (Hussin, 2017), Daesh (Bernama, 2017) and ISIS (Muhamad, 2016). These groups or organisations are generally accepted to be terrorist groups by the nations around the world. Islamic extremism and militancy have been recognised as a threat to national security in Malaysia since the 1970’s (Muhamad, 2016). In Malaysia, a few incidents involving terrorism have taken place. In 2013, there was an attack on Lahad Datu in Sabah by the militant group headed by Sultan Jamalul Kiram III which resulted in the death of fifty-six militants, six innocent civilians and ten members of the Malaysian Security Force. Besides, there were also four cross border kidnapping for ransom in Sabah in 2014 (Dhanapal & Sabaruddin, 2016). On 27 June 2016, there was an attack by the Islamic State (IS) terrorist group by using improvised explosive device (IED) at Movida Bar and Lounge in IOI Boulevard, Bandar Puchong Jaya that resulted in injury to eight innocent customers and severe injury to one innocent customer (Gunaratna, 2016). Even though there are counter terrorism legislations in Malaysia, yet terrorist incidents are still occurring and ongoing (Gunaratna, 2016).

Malaysia, at that point of time had several preventive laws that could be used should an act of terrorism occur and this included the notorious Internal Security Act 1960 (ISA). Since the past few decades, Malaysia has placed great concern on terrorist threats in particular the threats posed by the self-claimed Islamic State (IS) or Daesh (Hamidi, 2016). As noted by many nations, the volume and diversity of foreign fighters who have flocked to Syria and Iraq have already produced a new generation of terrorists, many with the skills, experience and international connections. The IS threat had spread its roots to Malaysia and such threats have made it imperative for Malaysia to quickly enact preventive laws that deal specifically with terrorism (Hamidi, 2016).

Although States and societies are all alert about the word terrorism, there are differences in opinion about the laws to be enacted to curb terrorism. For example, the United States of America has the Patriots Act 2001 and the United Kingdom has the Terrorism Act 2016. On the other hand, Malaysia has quite a number of anti-terrorism

laws such as the Anti-Money Laundering, Anti-Terrorism Financing and Proceed of Unlawful Activities Act (AMLATFPUAA) 2001; the Security Offences (Special Measures) Act (SOSMA) 2012; the Prevention of Terrorism Act (POTA) 2015; the Special Measures Against Terrorism in Foreign Countries Act (SMATA) 2015, the National Security Council Act (NSCA) 2016 and the Prevention of Crime (Amendment) Act (POCA) 2017. The enactment of these laws which were done consecutively over a short period of time has raised a number of issues. Firstly, the issues related to criminalising terrorism and secondly, the extent of compatibility of these laws with the principles of Rule of Law as well as basic human rights. This paper will analyze these counter terrorism laws to show how the act of terrorism has been criminalised and at the same time identify if these laws have struck a balance between protecting the security of a State and the fundamental rights of a person as upheld under principles of Rule of Law and basic human rights.

1. Definitions of Terrorism

Although there are numerous definitions of terrorism, there is no single comprehensive definition since it encompasses a range of activities that are designed to intimidate and instil fear. However, one well-known definition of terrorism is in the Federal Bureau of Investigation's Policy and Counterterrorism Guidelines (2000) where both domestic and international terrorism are succinctly defined as:

...the unlawful use, or threatened use, of force or violence by a group or individual based and operating entirely within the United States or its territories without foreign direction committed against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives while international terrorism involves violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or any state, or that would be a criminal violation if committed within the jurisdiction of the United States or any state.

Regardless of how terrorism is defined, its ability to terrorise has always been a critical issue and of serious concern as it has always challenged the stability of societies and the peace of mind of everyone not specific to locales or regions where the terrorists strike. In order to deal with the growing domestic and international threats of terrorism, governments all around the world have to take drastic measures by implementing tighter anti-terrorism laws to combat terrorism more efficiently.

Historically, the term terrorism originated in the late 18th century during the French Revolution (Silver-Grondin, 2010) but became popularised during President Ronald Reagan's tenure during the years of 1981 to 1989 and specifically after the 1983 bombings on Beirut barracks and then in September 2001 in New York and Washington DC as well as in Bali in October 2002. There are five types of terrorism which include state sponsored terrorism, dissent terrorism, political ideologist terrorism, religious terrorism and criminal terrorism (Grothaus, 2011). As terrorism constitutes numerous actions and approaches of political violence, it is therefore constituted as a political term. Anti-terrorism laws refer to the types of laws that are being developed and implemented for the purpose of reducing the threats of terrorist activities by developing and implementing strict punishments for the offenders (Chang, 2011).

2. Crime Versus Terrorism

With regards to criminal law procedures, it must be borne in mind that terrorism in comparison to criminal act is not the same thing and can be distinguished according to their basic components and criteria. The intricate difference between terrorists and criminals is best explained by Goldstein (2007) where according to him:

...the terrorist is often well trained and state-supported. He or she has a specific goal in mind, often more symbolic than opportunistic. On the other hand, it is a fair statement to claim that the “ordinary” criminal is one who seeks opportunistic targets, has little backing, is selfish, lacks discipline and may be deterred relatively easily.

Since in general, terrorists are assumed to be well trained as opposed to regular criminals, the propensity for violence and level of destruction can be much greater. Terrorists are more likely to believe in their cause, so much, that they are even willing to die for it (Chang, 2011). This is different from the mainstream violence where the criminal perpetrators run for cover when hunted down by the police while the terrorists confront the police boldly without fear for life. Criminals tend to hide after they commit a crime, but terrorists often like to take credit and bask in the media’s propaganda. Another factor to consider is the span of attacks of regular criminals and terrorists. Most criminals operate within the proximity of their hide out while most terrorists operate within entire countries and many of them operate internationally with hideouts and safe houses in many geographic regions (White, 2006).

3. Criminalising Terrorism

It must be noted that there are two different perspectives in criminalising terrorism. Saul (2008) claims that the main argument for criminalising terrorism is that terrorism seriously undermines fundamental human rights, jeopardises a State’s peaceful politics and threatens international peace and security. This statement is also supported by Nasution and Hum (2017) who state that terrorism is an extreme human rights infringement which diminishes the State and harmonious political activities as well as terrorise international peace and security. However, according to Motto (2016), instead of simply trying to bring as many terrorists to justice on the basis of mere suspicion of terrorist activity, greater emphasis needs to be given to serving justice while also respecting principles of Rule of Law and basic human rights as well as criminal law procedures in general.

In regards to countering terrorism, Bhoumik (2004) identified two models in his study of national counter terrorism strategy. These two models are ‘criminal justice’ and ‘intelligence’ models. Terrorism is regarded as a crime according to the ‘criminal justice’ model. This model explains that a suspect is captured and prosecuted only after the suspect commits a terrorist act. This is based on the fact that a crime definitely has an act also known as *actus reus* where a prosecution takes place only after a crime is committed. Under the ‘intelligence’ model, counter terrorism strategy emphasises on intelligence and prevention to prevent an act of terrorism from occurring. This is on par with the prevention method which requires lesser evidence than normal crime and it acts on a different wavelength as compared to criminal law. Therefore, under this ‘intelligence’

model, terrorism is not considered as a criminal activity but more towards a threat to national security. The second model allows for provisions in anti-terrorism laws to contravene procedures used to address criminal acts which violate basic human rights.

The analysis of the second model clearly shows that Motto's (2016) call for a balance in the anti-terrorism laws enacted is commendable. This is because life and personal liberty are the most precious of all entitlements of human rights. In Article 3 of the Universal Declaration of Human Rights (UDHR) 1948, it is clearly stated that "everyone has the right to life, liberty and security of person". In the classic version of Rule of Law formulated by Dicey, three main principles were identified and they are; a person can only be punished after a fair trial, the law is to treat everyone equally and the rights of individuals are to be protected by law (Sharom, 2013). All human beings have the right to be treated with dignity and respect. Such dignity and respect are afforded to people through the enjoyment of all human rights and are protected through the Rule of Law (United Nations and the Rule of Law, n.d.). Respect for principles of Rule of Law and basic human rights must be the basis of the global fight against terrorism. This requires the development of national counter-terrorism strategies that seek to prevent acts of terrorism, prosecute those responsible for such criminal acts and promote as well as protect principles of Rule of Law and basic human rights.

Thus, it is a fundamental obligation of governments to uphold individual basic human rights by taking positive measures to protect them against the threat of terrorist acts and bringing the perpetrators of such acts to justice. However, in the due process, the measures to counter terrorism by the government authorities have often posed serious challenges to the principles of Rule of Law and basic human rights (OHCHR, 2008). It is conceded that under terrorism law, authorities can arrest an individual based on mere suspicion. Hence, it contravenes the fundamental principles of criminal liability, *actus reus* and *mens rea*, a set of facts that must be proven to convict a person suspected of a crime in addition to contravening the principles of Rule of Law and basic human rights.

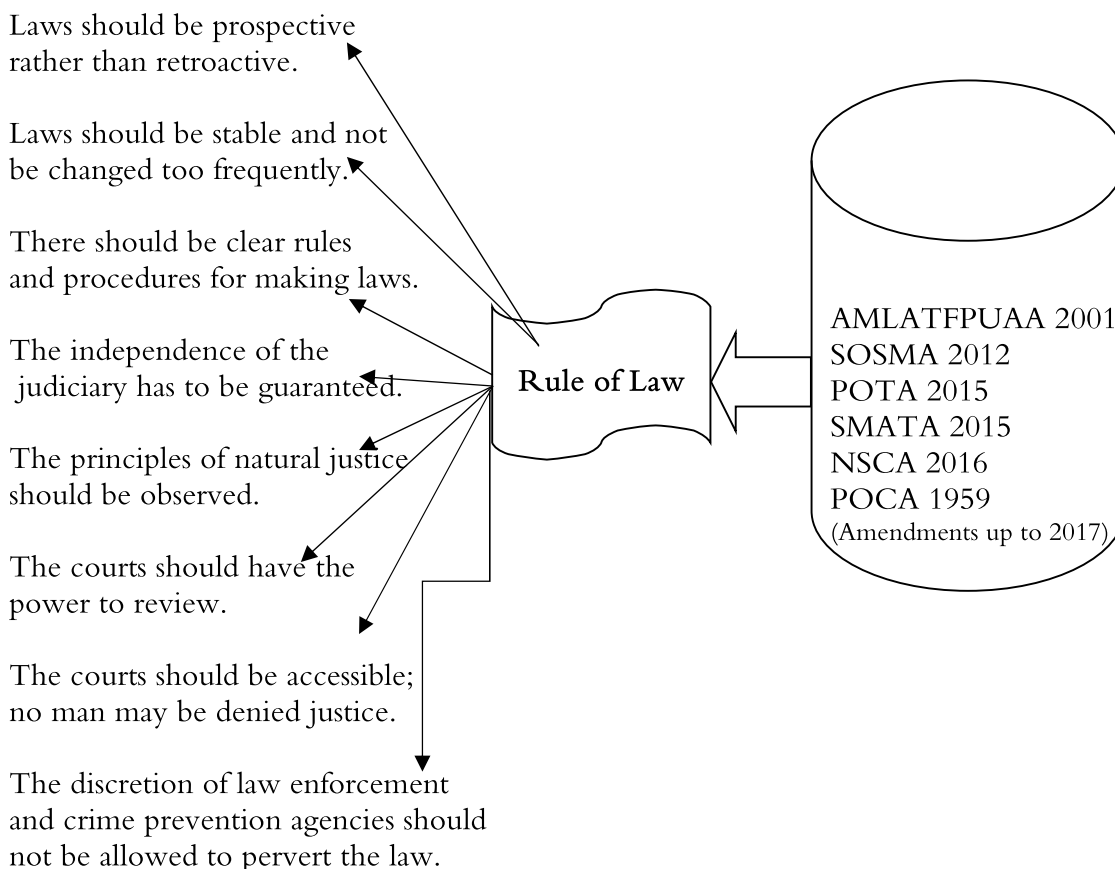
In sum, it can be concluded that terrorism requires a unique approach compared to the traditional criminal law. Firstly, terrorism needs proactive means to diffuse future threats. Secondly, traditional criminal law procedure is a time-consuming process that takes years to resolve. Thirdly, the catastrophic nature of terrorist attacks makes finding evidence difficult, as much of it is destroyed or made inaccessible by the destructive nature of the terrorist event itself. Finally, the criminal justice approach to terrorism does not account for terrorist organization's hierarchy (Majoran, 2015). Those convicted in terrorism cases do not represent all of those responsible and often do not include higher terrorist authorities. Moreover, it is evident that responding to terrorism with traditional criminal justice techniques is not effective in dealing with the threat. Instead, it is clear that a national security approach is required (Majoran, 2015).

4. Anti-Terrorism Legislations in Malaysia

This section gives a brief preview of the anti-terrorism laws currently in place in Malaysia. It provides details as to the date of enactment, the purpose as well as the reaction of stakeholders inclusive of those who view the enactments as a positive move in the right direction to criminalise terrorism activities as well as comments of those who view it as agents of government abuse to silent political dissent. This section also analyses the key

provisions of the legislations using Joseph Raz's list of principles found under the Rule of Law to show how in the attempt to criminalise terrorism, the legislature has violated the principles of Rule of Law and basic human rights. The analysis is done using the conceptual framework shown in Figure 1.

Figure 1. Conceptual Framework
(Dhanapal & Sabaruddin, 2015)



Before comparing the Malaysia's anti-terrorism laws to identify whether the provisions uphold the principles of Rule of Law, it is crucial to analyse when and why these Acts were enacted. For ease of understanding, the analysis is presented in Table 1 where key sections of the Acts which infringe the eight principles of Joseph Raz's Rule of Law are highlighted. The eight principles indicated in Figure 1 are labeled as Principle (P) 1 to 8. The Acts are identified in their abbreviated forms; AMLATFPUAA 2001, SOSMA 2012, POTA 2015, SMATA 2015, NSCA 2016 and POCA 1959 as amended up to 2017.

As stated, before analysing the key sections of the Acts, it is crucial to understand when these Acts were enacted and the purpose of the enactments. Anti-Money Laundering Act (AMLA) 2001 was enacted as law on 5 July 2001 and came into force on 15 January 2002. Subsequently, the Act was amended and became AAMLATFA 2001 in March 2007. Currently the Act is known as Anti-Money Laundering, Anti-Terrorism Financing and

Proceeds of Unlawful Activities Act (AMLATFPUAA) 2001 which came into effect in December 2013. Khoo (2014) claims that the various amendments have increased the reporting requirements and compliance responsibilities. The purpose of the Act is to cover the offence of money laundering and terrorism financing where it includes measures to be taken to counter these offences. This Act provides wide ranging investigating powers inclusive of permitting law enforcement agencies and the public prosecutor to freeze, seize and forfeit properties that are involved or suspected to be involved in money laundering and terrorism financing offences. On the other hand, Security Offences (Special Measures) Act (SOSMA) 2012 was passed by the Parliament and given the royal assent on 18 June 2012. The Act was passed to replace the infamous ISA 1960 but which at the same time gives recognition to the serious risks in regards to internal security and public order from threats like terrorism, sabotage and espionage (Yussof, n.d.). However, from the point the Act was still a bill, the constitutionality of this bill was questioned on two grounds; firstly, the condition precedent for the passing of this Act under Article 149(1) of the Federal Constitution and secondly, the contradictory treatment imposed on an accused for the same offence under this Act with that under the Penal Code. The first is seen as ultra vires of the Federal Constitution and the second, as a violation of the fundamental rights of equality under Article 8(1) of the Federal Constitution (Thomas, 2012). Despite the promise made by the government that the new Act would take into consideration fundamental rights and freedoms by reducing the tension between national security and personal freedoms, in essence, this Act reveals that there are serious violations of an individual's due process rights (Spiegel, 2012).

Prevention of Terrorism Act (POTA) 2015 obtained royal assent on 28 May 2015 and came into force officially on 1 September 2015. POTA 2015 is an Act that provides for "the prevention of the commission or support of terrorist acts involving listed terrorist organisations in a foreign country or any part of a foreign country and for the control of persons engaged in such acts and for related matters". One rationale for the enactment of the Act is that terrorist actions have occurred and further action is threatened "by a substantial body of persons both inside and outside Malaysia, which is prejudicial to the security of Malaysia or to any part of the country" and the Parliament considers it necessary to stop and prevent such actions (Ananth, 2015). Specifically, the main purpose for the enactment of POTA is to combat the ever-growing terrorism threats particularly the emergence of IS in the Middle East. When POTA was enacted as federal law, people from different walks of life conveyed different views on it where the Steering Committee of Bersih 2.0 said that "the introduction of POTA was another travesty of the parliamentary process" (Malaysiakini, 2015) while others claimed that it "will lead to a swift prevention of terror recruitment or attacks in the country" (Zolkepli & Hamidi, 2015). Being a preventive tool, it can be seen as a proactive piece of legislation to circumvent terrorism-related activities. However, this Act has raised a number of criticisms starting with a claim that it is a duplication of the infamous ISA 1960. Another concern raised is the definition of 'terrorist act' in the Act is very wide and can be interpreted to include many innocent actions (Hansard House of Representatives, 2015). It is also further criticised that the Act makes reference to the definition in the Penal Code in Section 130B(2) which is contradictory because the Penal Code defines terrorist acts as "threat made with the intention of advancing a political, religious or ideological cause" while

Section 4(3) of POTA asserts that “no person shall be arrested and detained under this section solely for his political believe or political activity”. This limitation has been cited as a positive element in the Act but Thiru (2015) has denounced it as a shameless revival of the ISA. According to Soon (2015), these are major areas of concern. Ashri (2015) quotes Datuk Seri Najib Razak’s claim that the Prevention of Terrorism Board (POTB) under the Act is a ‘credible body’ that ensures only those involved in terrorism are detained but members of the opposition feel that this is not so as the POTB is elected by the King on the advice of the Prime Minister.

In addition, the Special Measures against Terrorism in Foreign Countries Act (SMATA) 2015 is an Act that was enacted and came into effect on 1 September 2015. It was enacted to “provide measures to deal with persons who have taken part in committing or supporting terrorist acts involving listed terrorist organisations in a foreign country or in any part of a foreign country” (SMATA, 2015). According to the former Deputy Prime Minister, Datuk Seri Dr Ahmad Zahid Hamidi, Malaysia’s legal and regulatory framework in fighting terrorism has gained the world’s confidence (cited in Dhanapal & Sabaruddin 2015). He went on to add that the Act is consistent with the spirit of United Nation Security Council Resolution (UNSCR) 2178 particularly in monitoring the activities of foreign terrorist fighters and to deal with the threats they pose. Section 3 of the Act has extra-territorial application where it states that the special measures will have effect on “any person, whatever his nationality or citizenship within Malaysia as well as outside the country”. In connection with terrorist acts committed abroad, section 4 states that the special measures will apply to “any person who travels to Malaysia or who travels to a foreign country from or through Malaysia to engage in committing or supporting terrorist acts involving a listed terrorist organisation”. A strong argument in justifying the enactment of this Act is said to be related to Malaysia’s serious concern on those who intend to join Daesh, including foreigners who are using Malaysia as a transit point before joining and serving the Daesh in Iraq and Syria.

The National Security Council Act (NSCA) 2016 is the first Act in Malaysia to be passed without royal assent on the basis of Article 66 (4A) of the Federal Constitution. The Act was enacted to strengthen the existing National Security Council to make it more efficient as an effective coordinating body to streamline policies and the country’s security strategies, a move which, according to the former Prime Minister Najib Razak, is a necessary step (Parameswaran, 2015). The National Security Council (NSC) is the government’s central authority for considering matters concerning national security. Inarguably, the NSCA 2016 is one of the most debated and controversial laws that the Parliament has ever enacted. This is because it is widely seen as invading or usurping the power of the King to declare emergency as this Act enables the Prime Minister to declare emergency. Introduced by the Minister in the Prime Minister Department, Datuk Seri Shahidan Kassim in 2015, the NSCA 2016 has its roots in the Emergency Ordinance 1931 and Emergency Act 1939. To put it in a blunt way, the NSC had lost its power over national security and only has administrative power to oversee the nation’s welfare and does not have the power to impede national security threat when the Ordinance and Emergency Act were repealed. The essence of NSCA 2016 in general is to give power to the NSC to take control of the national security and prevent any subversive incidents from taking place. The power that is vested on the council is quite amass in the sense it has the

power to declare a place to be vacant and use civilian resources during the time of emergency. It was contended by Thiru (2016) that “the NSC can direct and control vital instrumentalities of government’. This statement has its roots in several provisions in the Act that clearly stipulate how the NSC members can exercise their power under the prescribed law. In addition to that, the amendment to Article 66 (4A) of the Federal Constitution was to make this Bill as an Act. Article 66 (4A) touches on the point of granting automatic assent to any legislation if the King does not give his assent within 30 days upon the legislation being presented before him (Azizan, 2016).

The Prevention of Crime Act (POCA) 1959 was initially enacted to control and prevent organised crime by targeting “criminals, members of secret societies, terrorists and other undesirable persons” in Malaysia. Subsequently, POCA was amended to cover terrorism as an offence. POCA is an old law but has been revamped numerous times. In 2017, POCA was amended yet again and now it takes away the right of the accused to be heard before the inquiry officer. The wide powers of authority in the application of POCA is seen in the case of Siti Aishah, a former student of Usuluddin (Islamic Studies) at University Malaya who was initially arrested under SOSMA for allegedly being in possession of 12 books on terrorism. She was then charged under Section 130JB(1)(a) of the Penal Code and claimed trial in which later, the High Court found no prima facie case and acquitted her (*PP v Siti Noor Aishah bt Atam [2017] 7 MLJ 461*). Eventually, prior to her acquittal, she was arrested under POCA 1959 and was sentenced to house arrest with an electronic surveillance device (EMD) attached. This case shows that the authority has vast powers to continue to arrest a person without a concrete reason under POCA 1959 and even worse after the Court has decided that the accused is not guilty, he/she can still be detained. Having understood the background of the Acts, the next part is a discussion on the provisions of all these Acts in reference to the 8 principles of the Rule of Law as indicated in Figure 1. Table 1 shows the findings from the analysis.

Table 1. Analysis of Malaysia's Anti-Terrorism Laws according to Joseph Raz's Principles of Rule of Law

NO	ACTS	DETAILS OF ENACTMENT	PURPOSE/OBJECTIVE	KEY SECTIONS
1	AMLATFPUAA 2001	<ul style="list-style-type: none"> • Anti-Money Laundering Act (AML) 2001– law on 5 July 2001 and came into force on 15 January 2002. • Subsequently amended and became AAMLATFPUA A 2001 and implemented March 2007. 	To cover the offence of money laundering and terrorism financing where it includes measures to be taken to counter these offences.	<p>Principle 1 S 2 (1)</p> <p>Principle 2 Amended in 2017 and 2013</p> <p>Principle 3 ‘abet’ – definition, S 69, S 86A and Second Schedule ‘conspiracy’ – S 69, S 86A, S 130L and Second Schedule ‘terrorist property’ – definition</p>

		<ul style="list-style-type: none"> Currently known as Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act (AMLATFPUA A) 2001 which came into effect in December 2013. 		<p>Principle 4 N/A</p> <p>Principle 5 S 5(1), S 24, S 30, S 31, S 32, S 77, S 87(1)</p> <p>Principle 6 S 77</p> <p>Principle 7 N/A</p> <p>Principle 8 S 30, S 31, S 66 B</p>
2	SOSMA 2012	<ul style="list-style-type: none"> Security Offences (Special Measures) Act (SOSMA) 2012 was passed by the Parliament and given the royal assent on 18 June 2012 	Gives recognition to the serious risks in regards to internal security and public order from threats like terrorism, sabotage, espionage.	<p>Principle 1 N/A</p> <p>Principle 2 S 4 (11) – Subsection (5)</p> <p>Principle 3 N/A</p> <p>Principle 4 S 11 (4)</p> <p>Principle 5 S 4, S 8, S 9, S 31</p> <p>Principle 6 N/A</p> <p>Principle 7 S 5 (2) (B) (C) (D), S 5 (3), S 24(4)</p> <p>Principle 8 S 6 (3), S 6 (4), S 31</p>
3	POTA 2015	<ul style="list-style-type: none"> Obtained royal assent on 28 May 2015 and came into force officially on 1 September 2015. 	Provides for “the prevention of the commission or support of terrorist acts involving listed terrorist organizations in a foreign country or any part of a foreign country and for the control of persons engaged in such acts and for related matters”.	<p>Principle 1 N/A</p> <p>Principle 2 N/A</p> <p>Principle 3 N/A</p> <p>Principle 4 N/A</p> <p>Principle 5 Section 4 (3), Section 30, Section 32,</p> <p>Principle 6 Section 19 (1) and (2)</p> <p>Principle 7 N/A</p> <p>Principle 8</p>

				Section 33, Section 34 (1)
4	SMATA 2015	<ul style="list-style-type: none"> Enacted and came into effect on 1 September 2015. 	To “provide measures to deal with persons who have taken part in committing or supporting terrorist acts involving listed terrorist organizations in a foreign country or in any part of a foreign country”	Principle 1 N/A Principle 2 N/A Principle 3 N/A Principle 4 N/A Principle 5 Section 5. (1), Section 6 (1) (a) (b) Principle 6 N/A Principle 7 N/A Principle 8 Section 10
5	NSCA 2016	<ul style="list-style-type: none"> The first Act in Malaysia to be passed without royal assent, on the basis of Article 66 (4A) of the Federal Constitution. National Security Council Act 2016 (NSCA) came into force on the 1st of August 2016 	Enacted to strengthen the existing National Security Council to make it more efficient and an effective coordinating body to streamline policies and the country’s security strategies	Principle 1 N/A Principle 2 N/A Principle 3 N/A Principle 4 N/A Principle 5 Section 24 (1), (a) (b) (c), Section 25, Section 26 (1) (2), Section 27 (1) (a) (b) (A) (B) (C), Section 28 (a) (b), Section 29, Section 30(1) Principle 6 Section 38 Principle 7 N/A Principle 8 Section 5 (a) (b), Section 18(1),
6	POCA 1959 (including amendments up to 2017)	<ul style="list-style-type: none"> Enacted and came into effect in 1959. Subsequently amended numerous times (1960, 1966, 	<ul style="list-style-type: none"> Enacted to control and prevent organized crime by targeting “criminals, members of secret societies, terrorists and other undesirable persons” 	Principle 1 Section 1(2) Principle 2 Act has been amended numerous times; 1960, 1966, 1976, 2014, 2015 and 2017.

		1976, 2014 and 2015) with the latest was in 2017.	<p>in Malaysia.</p> <ul style="list-style-type: none"> • Subsequently POCA was amended to cover terrorism as an offence. • In 2017, POCA was amended yet again and now it takes away the right of the accused to be heard before the inquiry officer. 	<p>Principle 3 There are some unclear Rules and procedures as a result amendment have been made e.g. Section 9(1)</p> <p>Principle 4 N/A</p> <p>Principle 5 POCA (Amendment) 2017 - Section 3 (1), Section 4, Section 5, Section 7</p> <p>Principle 6 15A (1), Section 19A (2)</p> <p>Principle 7 POCA (Amendment) 2017 - Section 3 (2)</p> <p>Principle 8 Section 22, 23(1) (2) (b)</p>
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Principle 1 states that the law should be prospective rather than retroactive. In layman's terms, this means that the law enacted must only be applied to cases that occur after its enactment. An analysis of all the six Acts clearly indicates that they uphold Principle 1 for it is stated that the Acts only take effect on a date to be appointed by the Prime Minister by notification in the Gazette, except for AMLATFPUAA 2001 and POCA (Amendment) 2017. Section 2(1) of AMLATFPUAA 2001 stipulates that "This Act shall apply to any serious offence, foreign serious offence or unlawful activity whether committed before or after the commencement date". This clearly indicates that the Act contravenes Principle 1 of the Rule of Law. Further, section 1(2) of POCA 1959 states that "[t]his Act shall apply throughout Malaysia" without giving any indication of the actual date of application. This too can be seen to contravene Principle 1 of the Rule of Law. This is because the enforcement authority could misuse by enforcing the Act on cases that have taken place prior to the date of enactment for it does not have the phrase "take effect on a date to be appointed by the Prime Minister by notification in the Gazette" as found in the other Acts analysed.

Principle 2 of the Rule of Law states that law should be stable and should not be changed too frequently. In order to evaluate this principle, one must not look at the provisions of the Acts themselves but rather analyse the number of times the Acts have been amended. The analysis of the six Acts clearly indicates that AMLATFPUAA 2001 and POCA 1959 are the two Acts that have gone through numerous amendments to increase the ambit of applications to enable more and more people to be subjected to these Acts. These amendments clearly contravene Principle 2 that requires laws to be stable to ensure people are aware of the consequences of breaching the provision. As such, constant changes could lead to confusion among society due to the lack of consistency. Beside these

two Acts, section 4(11) of SOSMA 2012 stipulates that it is mandatory for subsection (5) to be reviewed every 5 years with resolution passed by both Houses (House of Lords and House of Commons) to extend the period of operation in the said provision. This mandatory requirement takes away the element of stability in the law.

Principle 3 of the Rule of Law requires a need for laws to be clear in terms of rules as well as procedures. The analysis of the six anti-terrorism laws in Malaysia shows that the provisions of the Acts are clear except for AMLATFPUAA 2001 and POCA 1959. In AMLATFPUAA 2001, it has been argued that the Act lacks clarity for certain terms used are not defined within the Act and one has to refer to other legal documents for clarification (Rahman, 2013). For instance, the word ‘**abet**’ has been used 15 times while ‘**conspiracy**’ has been used 4 times in the Act but no definition of what amounts to these words is given in the interpretation section. As such, reference has to be made to other statutes such as section 107 and section 120A of the Penal Code to understand the meaning of ‘abet’. Further, to understand the term ‘**terrorist property**’, one has to refer to Section 130B of the Penal Code. Other sections in the Act which has been identified to be unclear include section 6(2), section 6(4), section 17(3) subsections (1) and (2), section 35(3) subsection (2), section 45(4), section 51(4) subsection (3), section 55 (3), section 61(1) and section 66B(10). If these sections are analysed, they indicate that the laws and procedures can lead to subjective decision taken on offences under these provisions due to the lack of clarity for there are too many exceptions to the general principles with ultimate decision being placed ‘**in the opinion of the court**’. In the case of POCA 1959, there have been many unclear rules and provisions which have led to the numerous amendments of the Act. According to SUARAM (n.d.), POCA 1959 grants “the Royal Malaysian Police power to arrest and detain an individual based on the ambiguous provisions under the Act without trial for a period of up to 60 days”. This is further supported by the International Center for Not-for-Profit Law (ICNL) who asserts that this “undermines the right to a fair trial because of the prolonged pre-trial detention” (Civil Freedom Monitor, 2018).

Principle 4 of the Rule of Law stipulates that the independence of the judiciary should be upheld at all times. The analysis of all six Acts clearly indicates that the independence of the judiciary has been upheld as all the Acts have specific provisions to uphold the powers of the court and the Public Prosecutor except for SOSMA 2012. The requirement for the independence of judiciary is questionable for section 11(4) of SOSMA 2012 limits the court’s power to compel the public prosecutor to produce documents if the Minister claims that the “production of statements or summary” is prejudicial to the national security or interest.

Principle 5 requires that all nations should observe the principle of natural justice. There are two key elements under this principle which are ‘*nemo iudex in causa sua*’ which means ‘no one should be made a judge in his own cause’ or Rule Against Bias and ‘*audi alteram partem*’ which means ‘no one should be condemned unheard’ or Rule of Fair Hearing. Principle 7 which stipulates that ‘no man be denied justice’ is discussed with Principle 5 as there is an overlap. There are clear evidences of provisions that contravene these principles in the anti-terrorism laws in Malaysia. Section 87(1) AMLATFPUAA 2001 can also be criticised for it provides that “a person who is body corporate or an association of persons’, director, controller, officer, or partner or who is concerned in the

management of its affairs is deemed to have committed that offence unless that person proves that the offence was committed without his consent or connivance and that he exercised such diligence to prevent the commission of the offence”. This provision is contradictory to the principle of natural justice which asserts that no man is guilty unless proven otherwise. In this Act, the burden of proof has been shifted to the accused and this is contrary to the principles of criminal law. Further, in addition to the section analysed, the Act has also been criticised for having provisions that are non-observant of the principle of natural justice. Among these are section 5(1), section 24 and section 30 (which provide immunity to certain parties), section 31 (burden of proof placed on third party in cases of possession of properties) and section 32 (liability for non-corporation). However, there is no provision under AMLATFPUAA 2001 that indicates non-compliance of the requirement of Principle 7.

There are also provisions in SOSMA 2012 that contravene the principle of natural justice under Principle 5 of The Rule of Law. These are seen in section 4, section 8, section 9 and section 30(1). Section 4(1) empowers a police officer to arrest and detain without warrant, any person whom he has reason to believe to be involved in security offence while section 4(5) states that “a police officer of or above the rank of Superintendent of Police may extend the period of detention for a period of not more than twenty-eight days, for the purpose of investigation”. Section 8 and Section 9 deal with procedures related to sensitive information. However, the conditions attached to this procedure are applied differently to the public prosecutor and the accused where “the public prosecutor can apply to the court by way of ex parte application to be exempted from the obligation under Section 51A of the Criminal Procedure Code”. On the other hand, the accused is required to give two days’ notice to the public prosecutor and the court in writing if “he intends to disclose or cause the disclosure of sensitive information”. Besides this, section 30(1) which states “notwithstanding Article 9 of the Federal Constitution, if the trial court acquits an accused of a security offence, the Public Prosecutor may make an oral application to the court for the accused to be remanded in prison pending a notice of appeal to be filed against his acquittal by the Public Prosecutor” clearly contravenes the principle of natural justice. In regards to Principle 7, section 5(2) which states “a police officer not below the rank of Superintendent of Police may authorize a delay of not more than forty-eight hours for the consultation with a legal practitioner of his choice”, section 5(3) which states that section 5(2) applies irrespective of “anything inconsistent with Article 5 of the Federal Constitution” and section 24(4) that provides for the withholding of the identity of prosecution witnesses negates cross-examination are clearly serious breaches of Principle 7. The power of interception and withholding the identity of prosecution witnesses which negates cross-examination erodes citizens’ rights and individual protection by providing the police force to carry out this action.

Provisions that do not comply with the principle of natural justice can be seen in POTA 2015. Section 3(1) which allows for arrest without warrant with power to detain for 7 days on mere suspicion as well as section 4(1) and (2) which allow an addition to be made to the period of detention up to 21 days and further extend to 38 days without the right to counsel except the time for recording statement are further examples of affronts to the principle of natural justice. These provisions that violate the principle of natural justice

are intensified by the powers given to the Prevention of Terrorism Board (POTB) to detain the person for 2 years without trial with possible extension of unlimited number of 2 years' detention terms. There are no evidences of non-compliance of Principle 7 in POTA 2015. An analysis of SMATA 2015 indicates that section 5 which provides for "suspension and revocation of Malaysian travel document" and section 6 which calls for "the surrender of a person's foreign travel documents for fourteen days" on the instruction of Inspector General of Police clearly contravene the principles of natural justice as the person has not been given a fair trial. There are no evidences of non-compliance of Principle 7 in SMATA 2015.

NSCA 2016 can be said to be the most controversial of all the Acts in terms of violating the principles of natural justice. This Act gives absolute power to the Prime Minister and is a step towards dictatorship. Thiru, the former President of the Malaysian Bar, called the Act "an insidious piece of legislation that confers and concentrates vast executive powers in a newly created statutory body called the National Security Council" (cited in Palatino, 2015). Further, the Human Rights group, Suara Rakyat Malaysia (Voice of Malaysian Citizens) asserted that "the only reason why the Government of Malaysia wished to implement this legislation is to provide its leaders with unparalleled power to control the country and silence all form of dissent with violence and threat of violence" (Palatino, 2015). This is clearly proven as the NSCA 2016 enables the Council to take control of the police, armed forces and maritime enforcement agencies directly. The law effectively attempts to bypass safeguards through proclamation of emergencies (Ngee, 2016). The sections that give power to the Prime Minister and the National Security Council namely section 24 (1) (a) (b) (c), section 25, Section 26 (1) and (2), section 27 (1) (a) (b) (A) (B) (C), section 28 (a) (b), section 29, section 30(1) are clearly violating the principles of natural justice for the power lies in one man, the head of the executive instead of the judiciary. However, there is no evidence of non-compliance of Principle 7 in NSCA 2016.

Evidences of non-compliance to the natural justice requirement under Principle 5 are also found in POCA 1959. In 2017, POCA was amended yet again and now section 2 takes away the right of the accused to be heard before the inquiry officer. Further, under section 4 of POCA (Amendment) 2017, the authority may detain an individual without even giving him/her a chance to be heard. Theoretically, the inquiry officer does not have to question the detainee in preparing his report to be submitted to the Prevention of Crime Board (POCB) in deciding whether he should be detained or not. The detainee has no opportunity to challenge the officer's recommendation to the board because the right of a detainee to know the decision of the inquiry officer has been removed. In an interview with the Malay Mail newspaper, Paulsen (Aliran, 2017), a human rights lawyer commented that the procedure under POCA (Amendment) 2017 is unfair as there is no court trial nor any evidence provided that can stand up in a court of law to prove the detainee is guilty of any particular criminal offence. He added that it is similar to a secret trial where the detainee could not defend himself as he will not know his accusers and the exact allegations or evidence against him. In addition, there is no tenure limitation to the board (section 5). The board's power includes ordering the detainee to be detained for a maximum of a two-year period without trial before extending it for another two years for an unlimited number of times (section 19A). The board can also order the detainee to be

placed under police supervision for a maximum of a five-year period. In addition, it is renewable for the same maximum period for unlimited times with restrictions on movement, residence, communication access and with an electronic monitoring device attached (section 7). All these provisions are clear indication of non-compliance with Principle 5 of the Rule of Law on natural justice. The amendment of POCA 1959 in 2017 shows evidence that there is non-compliance of Principle 7 that everyone has the rights to justice. This is seen in section 3 of POCA (Amendment) 2017 which takes away the rights of the accused to be heard before the inquiry officer by repealing section 6 of the original Act.

Principle 6 of the Rule of Law which prohibits any curtailing of the judicial review is the main concern when any anti-terrorism law is enacted. Similarly, the six Acts in the current study have provisions that restrict judicial review except for SOSMA 2012 and SMATA 2015. Section 77 of AMLATFPUAA 2001 is the provision that clearly contravenes Principle 6 of the Rule of Law. This section limits “the court’s power to review as seen in the phrase “no action, suit, prosecution or other proceedings shall lie or be brought, instituted, or maintained in any court or before any other authority” (section 77 AMLATFPUA 2001). Section 19 of POTA 2015 also does not permit judicial review of the Board’s action other than “on questions of compliance with procedural requirement”. In the case of NSCA 2016, section 38 also prohibits any action against the Board as indicated by the phrase “no action, suit, prosecution or any other proceeding shall lie or be brought, instituted or maintained in any court against the council, any committee, any member of the council or committee, ... in respect of any act, neglect or default done or omitted by it or him in good faith, in such capacity”. POCA (Amendment) 2017 has a provision that limits judicial review, as seen in section 15A (1) which states that “there shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Board in the exercise of its discretionary power in accordance with this Act, except in regard to any question on compliance with any procedural requirement in this Act governing such act or decision” (section 15A POCA [Amendment] 2017). However, under section 19A(2) of POCA (Amendment) 2015, there is a provision to review the Board’s decision on detention order as indicated by the phrase “the direction of the Board under subsection (1) shall be subject to review by the High Court”.

Principle 8 of the Rule of Law clearly prohibits the availability of discretionary power among the law enforcement and crime prevention agencies to pervert the law. This principle appears to be disregarded by all of the preventive detention laws in Malaysia. The six Acts analysed in this study have provisions which contravene this principle. In AMLATFPUAA 2001, section 30 and section 31 under Part V titled ‘Investigation’ have provisions that clearly disregard Principle 8 of the Rule of Law where it gives wide powers to the law enforcement and crime prevention agencies to disregard normal criminal procedures. Further section 66B empowers the Minister of Home Affairs to “declare the entity to be a specified entity” which has serious implications on the function of the entity. This clearly contravenes Principle 8 as they are purely administrative actions. Principle 8 which discourages law enforcement and crime prevention agencies to pervert the law is also disregarded in SOSMA 2012 as indicated in section 6(3) and 6(4) which allow a police officer not below the rank of Superintendent of Police to intercept

communication without prior permission from the court. Further, Section 31 which allows “the Minister to make regulations as may be necessary or expedient for giving full effect to or for carrying out the provisions of this Act” can also be seen as giving discretion to the executives to intervene in the implementation of the law. Section 33 and 34 of POTA 2015 give indication that the Prime Minister as the Head of POTB has powers to amend the schedule (Form) which stipulates the conditions/requirements when electronic monitoring device is fixed and to make regulations for carrying out the purposes of the Act. Similarly, section 10 of SMATA 2015 allows the Minister to make regulations as may be necessary or to expedient for giving full effect to or for carrying out the provisions of this Act. Like POTA 2015 and SMATA 2015, section 5 of NSCA 2016 also has provision that “the Council shall have the power to do all things necessary or expedient for or in connection with the performance of its functions”. This enables the Council to take control of the police, armed forces and maritime enforcement agencies directly. Further, this Act can be said to be the most controversial piece of law that the Parliament has enacted. This is because it is widely seen as invading or usurping the power of the King to declare emergency as this Act enables the Prime Minister to declare emergency as seen under section 18(1) where the Prime Minister can declare an area as a ‘security area’. An analysis of POCA 1959 shows that there are provisions which contravene Principle 8 of the Rule of Law which prohibits law enforcement and crime prevention agencies from perverting the law as indicated in section 22 and 23 where it empowers the Minister to amend the Schedules by an order published in the Gazette as well as make regulations for carrying out the purpose of the Act. One important point to note is that these sections are identical to section 33 and 34 of POTA 2015 as discussed.

Conclusion

It can be concurred that anti-terrorism laws are important to safeguard the harmony and security of a country. There is nothing wrong with having such laws but they should be based on the existing legal principles. Enhancement in the preventive law system is necessary to ensure that there is a balance between protection of national security and basic human rights. Since terrorism is a criminal offence, the elements of crime such as *mens rea* and *actus reus* need to be proved as far as possible except for cases where the threat of future act could be disastrous and there is a need for an immediate action. Although there is no doubt that the act of terrorism is a global threat and every nation has stepped up their laws to combat such terrorism activities and laws passed are for the betterment of national security, there is a need for those laws not to infringe basic human rights. It is crucial that safeguarding the nation and upholding human rights has to coexist side by side. The analysis of Malaysia’s anti-terrorism laws has demonstrated that there is in fact no balance struck between national security and the principles of Rule of Law as well as basic human rights. Although there is a lot of criticism on the anti-terrorism laws of Malaysia for having provisions that infringe the principle of Rule of Law and basic human rights, it must be noted that the Federal Constitution too contains provisions enabling the breach of fundamental human rights by way of Article 149 and 150 which allows for all rights and liberties protected in the Constitution to be suspended in cases of emergency with the exception of freedom of religion.

Thus, it can be concluded that the balance between protecting national security with principles of Rule of Law, basic human rights and criminal law is difficult to achieve in regards to counter-terrorism legislations which are enacted basically to protect the nation in times of crisis. This is because terrorists are basically extending their territories by using new technologies and methods that target innocent civilians and therefore disrupting the national security and public order. However, in order to avoid innocent people to be arrested and detained as terrorists, basic criminal law elements such as *mens rea* and *actus reus* need to be added into the anti-terrorism laws in order to prove the case and involvement of the individuals beyond reasonable doubt before sentencing the individuals. It is the authors' opinion that the anti-terrorism Acts in Malaysia should be repealed or at least significantly amended to protect individual liberties. Nevertheless, if the argument stands that Malaysia does indeed need these laws, then the country has to work very hard in striking a balance between ensuring security of the country and upholding the various principles of natural justice as per Motto's (2016) statement, "whilst national security is important, individual liberties must not be thrown out the window".

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