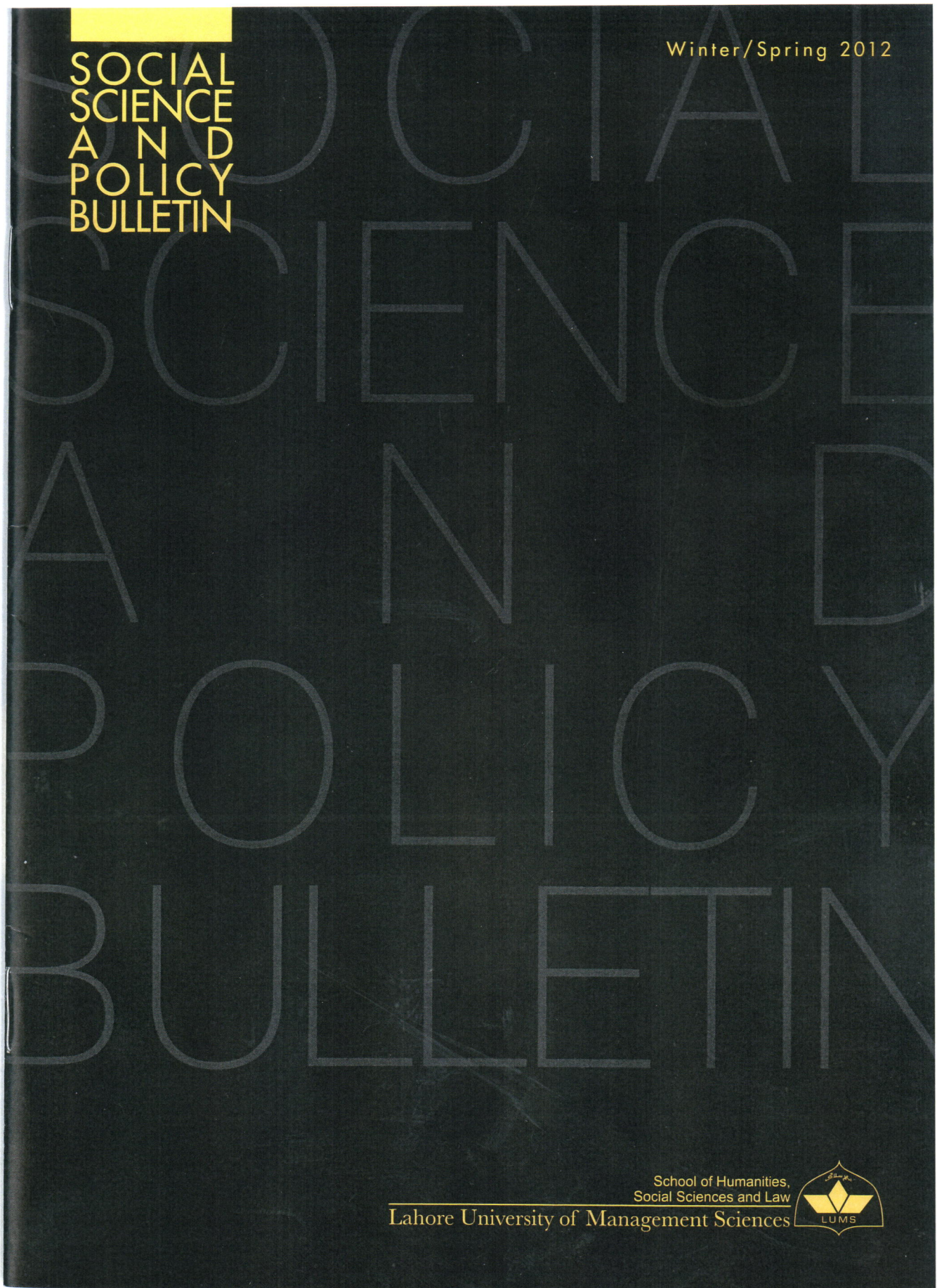


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The Anti-Terrorism Law of Pakistan: Need for Reform

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Pakistan has been in the eye of a storm of terrorist attacks that have damaged it in many ways during the last five years. There are a myriad of reasons for this exacerbated trend of attacks and the response to these attacks has not been as vigorous as it should have been. Part of the reason is deficiencies in prevailing laws dealing with terrorist acts.

There has been a metamorphosis in the phenomenon of terrorism due to several reasons, including geo-strategic considerations, ineffectiveness of the criminal justice system as a deterrent for terrorism, non-resolution of underlying issues leading to conflict, and the State-citizen relationship in Pakistan. The focus of this article is on the perceived ineffectiveness of the criminal justice system.

This article argues that the enervated response to the current threat of terrorism, both in terms of law enforcement and adjudication, stems in large part from the legislative framework within which the criminal justice system operates. It is, hence, essential to look at the areas in need of reform and suggest changes in order to ensure an effective legislative response, keeping in view comparative developments in other countries.

The existing anti-terrorism regime

The primary counterterrorism law of Pakistan, The Anti-Terrorism Act 1997 (hereinafter, the 'Act'), is a federal

statute that was enacted in August 1997 and adopted by the provinces at the same time.¹ It was enacted in the backdrop of heightened terrorist attacks in the 1990s and was intended as specialized legislation to expedite the process of adjudication of cases of ethnic and sectarian terrorism. The Act established Special Courts with additional powers and a much lighter workload with summary procedure to ensure quick disposal of terrorism cases. It laid down wide, albeit nebulous, definitions for 'terrorism' and 'terrorist acts', provided some additional powers to the law enforcement agencies, and enhanced the punishments for such acts.

However, it appears in hindsight that the Act has not produced the desired results and has not proved to be an effective legislative response to the threat of terrorism. The specter of terrorism has been haunting Pakistan for the last five years with renewed force and a ferocious intensity not seen in the past, and has left the law struggling to cope with the new challenges posed by these developments. An analysis of terrorist activities in the last three years shows an exponential increase in the number of incidents and casualties.² For the period between 1974 and 2007 (33 years), the number of incidents was 2,590 with an average of 78.5 incidents per year. In comparison, in just the three years between 2008 and 2010, the number of incidents tallied to 1,929 with an average of 643 incidents per year. The average number of incidents per year has increased more than eight times when we compare the two periods. In the first period, the number of people killed and wounded in terrorist incidents was 5,840 and 11,597, respectively (with an average of 177 people killed and 351 injured each year during this 33 year period). During the latter period between 2008 and 2010, the number of people killed and wounded, respectively, was 4,286 and 8,264. This translates to an average of 1,429 killed and 2,755 wounded each year during this three year period. Thus, the average number of people killed and wounded in

terrorist incidents per year has increased eight times — proportionate with the increase in the number of incidents per year. This data clearly demonstrates that the incidence of terrorist acts has increased immensely during the years after 2007 and underscores the importance of an effective response.

Changed milieu

Several characteristics marked the phenomenon of terrorism in the 1990s. Firstly, terrorist attacks were motivated by ethnic and sectarian hatred. Secondly, they generally targeted important personalities from the law enforcement agencies or the opposing sectarian or ethnic group and took the form of murders or murderous attacks. Thirdly, the perpetrators were mostly alone, even though in some cases they were assisted by a small group. Fourthly, the weapons used were firearms such as handguns and semi-automatic rifles. Finally, the area of operation was limited or was, at least geographically, not very vast.

In juxtaposition, the terrorist threat in the post 9/11 scenario has evolved so much that it has become quite distinguishable from the earlier phenomenon of sectarian terrorism. The differences are many and varied. To begin with, the recent terrorist attacks have been mostly suicide attacks or, in some cases, remote bombings with targets on a much bigger scale. During the period 1973 to 2007, in attacks involving firearms, an average of 4.3 persons were killed and wounded per incident; in attacks involving explosives an average of 9.4 persons were killed and injured per incident; and in suicide bombing incidents the average number of persons killed and wounded was 42 per incident, ten times the number involving firearms. Further, the weapon of choice for terrorists has changed from firearms to explosives. During the years between 1995 and 1997, the number of incidents involving firearms was in the hundreds, while explosives were used in less than 20 incidents per year during this period. However, in the years after 2005, explosives have dominated the scene of terrorism, with more than a hundred incidents involving explosives in 2006 and more than 175 incidents involving explosives during the year 2007. Thirdly, the lethality of the attacks

has increased manifold resulting, at times, in hundreds of casualties. Whereas the number of people killed and wounded per incident was two in 1995, this figure rose to 15 in 2007. Fourthly, during the years after 2006, the top target has been military forces, followed by police and educational institutions. Fifthly, the groups involved in the attacks are much larger in size as compared to the past, and are assisted by networks that in some cases may be national, if not international, with considerable financial resources at their disposal. Lastly, in some cases, there have been widespread armed insurgencies with whole areas being temporarily under the control of terrorist elements and with supporting groups being spread over hundreds of miles to provide planning, support, sanctuary, and other assistance to the actual perpetrators.

Inadequate legal response

At the time of the framing of the Act, these evolving threats had obviously not been foreseen. The Act was meant primarily to counter the threats of a limited, sectarian terrorist phenomenon. As a consequence, there has been limited success in punishing the culprits through the criminal justice system. There are several reasons for this failure, but one of the most important is the fact that the law on the subject has not been updated to respond to the evolving threat of terrorism. An additional reason is the want of exactitude in legal provisions. The loose definitions of 'terrorism' and 'terrorist act' have resulted in considerable ambiguity and misapplication of the Act in many cases. Numerous murder and attempted murder cases, which can and should ordinarily be covered by the general criminal law under the Pakistan Penal Code (PPC), have been registered under the Act whenever some sensationalism has been attached to the surrounding circumstances. This has been possible due to the vague wording of the Act. However, in many such cases, the real motive appears to be a wish on the part of the complainants or the police to ensure a higher legal sanction with the possibility of more severe punishment under the Act. Some new categories of offences, like throwing acid on women and kidnapping for ransom, have been added to the Act because of this desire for a stricter penalty

for these offences.

An indirect consequence of the liberal application of the Act is that real acts of terrorism involving weapons of mass destruction (which should be covered under the Act) receive less stringent treatment than required for such heinous acts. A better approach would be to exclude from the ambit of the Act those offences which are already adequately covered by the PPC — such as murder and attempted murder — and to introduce special legislation for distinct offences like acid throwing on women with provision for higher punishments and stricter procedural safeguards. This would result in better prosecution under the Act for more heinous acts of terrorism, thus enhancing the deterrent effect of the Act.

Areas requiring reform

This section identifies five areas that are particularly inadequate in terms of the legislative framework required to deal with the evolving trends in, and nature of, terrorist threats.

Defining new offences: There is a need to revise the Act to incorporate new types of crimes that have emerged in the last five years. Following are the issues that need special emphasis in this respect:

- 1) New types of crimes that need to be included in, and comprehensively defined by, the Act include a suicide attack, conspiracy or planning for a suicide attack, suicide bombing, armed insurgency, and planning to cause widespread disaffection against the State. In addition, the definitions of 'terrorism' and 'terrorist act' also need to be improved so that any attack attempting to, or resulting in, mass destruction or widespread damage falls within their ambit. Further, a special section on 'weapons of mass destruction' needs to be introduced along the lines of U.S. law which defines such attacks in a separate category to reinforce both their different nature and the gravity of consequences.³
- 2) The Act does not provide for a special category of

federal offences unlike the laws in the U.S. which have such categories.⁴ Crossing provincial boundaries for an act of terrorism, transportation of explosives,⁵ and planning acts of terrorism through use of explosives across provincial boundaries are examples of the kinds of terrorist acts that should be placed under the umbrella of a new category of federal offences in the Act. These offences should not be limited to investigation by provincial police forces since it is not possible for a province to take cognizance of an inter-provincial chain of events.

- 3) There is a need to create a strict liability offence for possession of a minimum quantity of explosives and for harboring people with such explosives. Although the Act already provides a presumption of proof against the accused for possession of explosive substances, it should also include a distinct offence for possession of such materials *per se*. A relevant example is the strict liability crime of possession of narcotics under the Control of Narcotic Substances Act of 1997 (CNSA).⁶ The CNSA increases the penalty in tandem with the quantity of narcotics possessed. This scheme should be replicated for the possession of explosives. The U.S. Federal Sentencing Guidelines also take a similar approach in increasing the level of punishment.⁷ For example, if the possession of one kilogram of high explosive entails a punishment of imprisonment of up to five years, possession of more than ten kilograms may result in life imprisonment or the death sentence. In fact, one can reasonably argue that possession of explosives is a much more heinous offence than possession of narcotics due to a much higher potential for causing damage to society.
- 4) A special category of offences for attacks on security installations, armed forces, and law enforcement agencies and their facilities should be created. Any symbol of national importance should be included in this category. Attacks on the Sri Lankan cricket team, General Headquarters, Mehran Naval Base, Police Academies in Manawan and Sargodha, and

Federal Investigation Agency (FIA) buildings underscore the importance of having such a separate category. The U.S. law incorporates such special categories like attacking, kidnapping, or assassination of the President,⁸ the Vice President, or any member of the staff of the President or the Vice President.

- 5) There is no provision in the Act for attacks on highly sensitive installations or infrastructure.⁹ There is a need to create a special category of offences covering attempts to take over or damage an installation or building related to national security like nuclear installations and installations critical to national infrastructure like dams, transmission wires, pipelines, etc.
- 6) The specter of attacks using chemical,¹⁰ biological,¹¹ or unconventional weapons has haunted several countries in the world in the recent past. A separate provision needs to be made for such attacks.
- 7) Recoveries of explosives and weapons are covered under the Explosive Substances Act 1908¹² and the Pakistan Arms Ordinance 1965,¹³ respectively, and are not offences under the Act. This implies that possession of arms, even if they are high caliber or automatic weapons, is only punished by limited imprisonment or modest fines. Historically, the courts have been very reluctant in awarding punishments under the Arms Ordinance and this tradition carries over even to cases that are registered under the Act. Therefore, possession of arms in relation to terrorist acts does not result in a sufficiently heavy penalty. Similarly, the Explosive Substances Act is an antiquated law that does not adequately provide for new types of explosives and modes of preparation. There is a need for the Act to define the new offences regarding possession of weapons and explosives connected with terrorism, thus modifying provisions in the old legislation.

Enhancing penalties: There are several offences which are either not adequately treated or do not entail

sufficient penalties in the Act. These include:

- 1) The possession of some types of explosives should entail exemplary punishments like the death penalty. These include suicide vests, anti-personnel mines, rocket propelled grenades, rockets, anti-aircraft guns, etc. Such increments of penalties would ensure a measure of deterrence that is much needed in the circumstances.
- 2) Possession of larger amounts of explosives and weapons should entail higher penalties. In addition, as mentioned previously, there is a need to convert offences of possession to strict liability crimes under the Act, provided they are sufficiently linked to a terrorist plan or attack.
- 3) Attacks on persons or places having national symbolic significance, defence-related facilities, and nationally important installations or infrastructure, including nuclear facilities, should entail special penalties, with a minimum punishment of life imprisonment and a maximum punishment of death. Such penalties can also be extended to the unauthorized possession of nuclear, chemical, or biological weapons.
- 4) Penalties for all newly defined offences should be stricter, with clearly delineated legislative guidelines for minimum punishments in order to ensure deterrence.
- 5) The Act should make provision for compulsory confiscation, in favour of the State, of all properties of persons convicted of terrorist attacks, with further penalties for repeat offenders under the Act.

Assistance, aid, and abetment in terrorism: Terrorist acts, in their modern form, require the active collaboration and assistance of several perpetrators for achieving their goals. Similarly, in the absence of an enabling environment in terms of people and resources, terrorist acts have a slim chance of success. However, the Act fails to sufficiently take into account these

attending circumstances of recruiting and radicalizing people, collecting financial resources, and aiding and abetting a particular act of terrorism. Therefore:

- 1) Penalties attached to offences dealing with facilitating terrorism should be much harsher. Acts like training suicide bombers, imparting training in preparation of explosives, weapons training, and harbouring terrorists, are some examples of offences in this category. Similarly, propagation and dissemination of ideas or literature leading to terrorism should also warrant more serious penalties.
- 2) There is a need to extend the scope of the Act to areas like Federally Administered Tribal Areas (FATA).
- 3) There is no provision for providing assistance from within Pakistan to international agencies for acts of international terrorism with links to Pakistan. A provision needs to be made with a prescribed mechanism for such assistance.
- 4) The area of terrorism financing has received a lot of attention worldwide but has largely been neglected in Pakistan. The sources of terrorism financing need to be identified and appropriate provisions need to be made for each source. One of the most obvious sources is donations by individuals or organizations. In several countries' laws,¹⁴ such financing, even if done recklessly, is an offence under the law and entails serious penalties. Money laundering and proceeds from crimes have to be expressly dealt with by the Act.

Powers of law enforcement and investigative agencies: Effective investigations by law enforcement agencies and adjudication of cases by courts are hampered due to a lack of legal powers, which are critical as a result of changes in technology and in the nature of terrorism.

- 1) There is a need to provide powers to the police and other investigative agencies like the FIA or the Counter Terrorism Department (CTD) for the

monitoring and surveillance of persons, financial transactions, and money flows in connection with terrorism. Compulsory reporting and sharing with law enforcement agencies of all relevant information needs to be made mandatory for all financial institutions.

- 2) Technical monitoring, wire tapping, and other technical facilities for the police need to be regulated and provided for through a legal framework. There has to be a mechanism for obtaining warrants for these activities from the Special Courts under the Act for these purposes. An example of a similar kind of legal framework is the Foreign Intelligence Surveillance Act of 1978¹⁵ in the U.S. which regulates the process for these activities.
- 3) The police or any other investigating agency acting under the Act should be able to request and obtain information regarding travel, residence, telephone calls, financial transactions, or any other relevant information from any source about any named person. Even though the law, in theory, has given some powers in this respect to the police, in practice these powers are limited and require several authorizations, thus considerably delaying the process of investigation. Clear powers need to be conferred upon the investigation agencies for expedited investigation.
- 4) There is a need for an effective victim and witness protection program under the Act. The police and the courts should be empowered to 'take all necessary steps' to ensure that the victims and witnesses are effectively protected in trials of terrorism. These steps could involve image and voice distortion, closed sessions, hidden identity of witnesses, and any other measures considered necessary and expedient in the interest of justice and the protection of witnesses.
- 5) The Special Courts under the Act should have the power to conduct trials *incognito*, in appropriate circumstances, in order to protect the identity of

the judges, investigating officers and witnesses. This means that where circumstances warrant, the government should be able to authorize a trial which does not involve the judge and witnesses being visible to the accused, and is conducted either through one-way video conferencing or one-way glass partition. This is especially relevant in cases where a jail trial is thought expedient.

Procedural issues: Procedural bottlenecks impede the successful prosecution and conviction in terrorism cases. The provisions contained in the law of evidence and court rules require revision vis-à-vis the changes in terrorist activities. Hence:

- 1) There is a need to amend the law of evidence as well as the Act to make the testimony of police officers admissible in evidence. This is the case in many countries around the world, and is especially important in the context of terrorism cases where witnesses are not forthcoming due to fear and where oral testimony is given a lot of importance. The Act has already made admissible as evidence a confessional statement in front of an officer of the level of Superintendent of Police. However, necessary amendments are needed in the law of evidence, specifically in the *Qanoon-e-Shabadat* Order, to take care of the substantive law in addition to the amendments in the Act itself. Further, there is a need to amend the law to make circumstantial evidence admissible in terrorism cases.
- 2) Safeguards need to be built into the Act to ensure that it is not misused. A much more precise definition of 'terrorist act' and circumstances where it can be applied need to be provided in the Act to preclude the possibility of abuse. Prior permission, in writing, of the gazetted police officer concerned for registering a case under the Act may be made a legal requirement in order to provide an additional safeguard against abuse of the Act.
- 3) Pakistan's traditional criminal law gives a lot of

importance to physical presence of the perpetrators at the scene of the crime. The nature of terrorism and more particularly of suicide bombing is such that the presence of all perpetrators on the scene of the crime is an impossibility. An additional complicating factor is the fact that the main perpetrator, the suicide bomber, dies in the act. The person planning the act of terrorism may be in a remote location. It stands to reason that such a person should be the main accused in a case like this. In these circumstances there is a need to devise a mechanism to do away with the requirement of physical presence at the scene of the crime. There is also a need to move away from the approach of connecting the persons present at the scene of crime to the persons planning the act of terrorism. In such circumstances, the standard of proof required in the *Qanoon-e-Shabadat* Order should be relaxed and circumstantial evidence should be made admissible. This is important especially if perpetrators in remote locations are to be brought into the net of the law.

It is with changes like the ones proposed above that the law on anti-terrorism in Pakistan would come at par with international best practices and be sufficiently robust to counter the menace of terrorism in Pakistan.

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For U.S. anti-terrorism law sources, see <<http://jurist.law.pitt.edu/terrorism/terrorism3.htm>>

For Australian anti-terrorism laws, see <<http://www.ag.gov.au/agd/www/nationalsecurity.nsf/AllDocs/826190776D49EA90CA256FAB001BA5EA?OpenDocument>>

For the Australian Parliament's Guide on anti-terrorism laws in Australia and other important countries with references to international treaties as well as practices around the globe, see <<http://www.aph.gov.au/library/intguide/law/terrorism.htm>>

For international treaties and other legal instruments on anti-terrorism, see <<http://www.un.org/terrorism/instruments.shtml>> and http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml>

Notes

¹Act No. XXVII of 1997 promulgated through publication in Gazette of Pakistan Extraordinary Part I on August 20, 1997.

²The data on incidents of terrorism in Pakistan has primarily been taken from the Global Terrorism Database (GTD), an open source database maintained at the University of Maryland's National

Consortium for Study of Terrorism and Responses to Terrorism (START).

³Title 18 US Code Chapter 113B deals with terrorism and contains a detailed treatment of the subject. 'Weapons of mass destruction' have been specifically defined in § 2332a.

⁴Title 18 US Code Chapter 113B makes use of the power to regulate inter-state commerce provided under §1958(b)(2) of the Code to create a federal crime of using, threatening or planning to use, or transporting weapons of mass destruction across state boundaries. The federal government not only has federal jurisdiction in such matters but has extra territorial jurisdiction for any act of domestic or international terrorism.

⁵Title 18 US Code, § 844(d) and (n) deal with transportation of explosives inside as well as outside state boundaries in the U.S.

⁶Act No XXV of 1997 promulgated on July 11, 1997. Section 9 of this Act prescribes differing levels of punishment varying with the quantity of narcotic substance or drug possessed or transported, etc.

⁷US Sentencing Guidelines § 2 K 1.3(b)(1)(c). Any offence of unlawful receipt, possession, transportation and prohibited transactions of explosives involves an enhancement of punishment in accordance with the increasing weight of the explosives.

⁸Title 18 US Code Chapter 84 § 1751. The penalty for causing death of any of the persons in the said section is the punishment of death or life imprisonment with fine. The penalties for lesser offences like kidnapping or attempts at kidnapping, etc., are life imprisonment or imprisonment of up to ten years.

⁹Title 18 US Code § 2332f deals with bombings of places of public use, government buildings, public transportation systems and infrastructure facilities, and prescribes death or imprisonment for life as punishment for such an offence.

¹⁰Title 18 US Code Chapter 11B. This entire chapter deals with offences related to chemical weapons and prescribes punishments of death or imprisonment for life for causing death of any person under such offences.

¹¹Title 18 US Code, Chapter 10. Offences relating to the development, production, stockpiling, transfer, acquisition, retention, possession or any attempt thereto, entail a punishment of imprisonment for life with any amount of fine.

¹²Act VI of 1908 promulgated on June 8, 1908.

¹³Act XX of 1965 promulgated on June 8, 1965.

¹⁴Australian Criminal Code Act 1995 as amended, Division 103 deals with terrorism financing and makes purposeful or reckless financing of terrorist activities an offence punishable with life imprisonment. Title 18 US Code § 2339C prohibits terrorism financing and makes the offence punishable with imprisonment of up to 20 years. Canadian Criminal Code Sections 83.02, 83.03 and 83.04 deal with terrorism financing and make offences like collection or possession of property for use in terrorism, etc., punishable with imprisonment of up to ten years. The 'International Convention for the Suppression

of the Financing of Terrorism,' adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999, is also a possible source of guidance for dealing with terrorism financing.

¹⁵Foreign Intelligence Surveillance Act 1978 as amended in 2008, and 50 US Code 1801 *et seq.*