IN THE SUPREME APPELLATE COURT GILGIT-BALTISTAN GILGIT

BEFORE:

Mr. Justice Wazir Shakeel Ahmed, Acting Chief Judge
(In Chamber)

Cr. Misc No. 14/2022 In
Cr. PLA U/O No. 84/2018

1. Shoaib Ahmed S/o Nisar Ahmed
2. Abrarul Haq s/o Shan Muhammad
3. Muhammad Usama s/o Meraj Khalid

Petitioners

Versus

The State

Respondent

PRESENT

For the State; Malik Sherbaz, Prosecutor General, Gilgit-Baltistan
For the Petitioner; Mr. Burhan Wali, Advocate

Date of Hearing : 29th September, 2022

ORDER

Wazir Shakeel Ahmed, Acting Chief Judge**…….**The instant miscellaneous petition # 14/2022 is moved by petitioner No. 03 namely Muhammad Osama in Cr.P.LA # 84/2018 for suspension of sentence till the disposal of main Cr.P.LA. The main ground of the petitioner is that he was juvenile at the time of occurrence and that being juvenile the Anti-Terrorism Court (the trial court) had no jurisdiction, and it was juvenile court which had the jurisdiction of trial.

2. Arguments heard and record perused. For the purpose of this miscellaneous petition, it is to be determined whether Anti-Terrorism or Juvenile Court had the jurisdiction for trial of offences of terrorism. The conviction of petitioner by Anti-Terrorism Court was maintained by learned Chief Court. The defence of being juvenile was raised before trial as well as Chief Court, but both the learned courts decided that cases of juvenile falling within the category of terrorism should be tried by Anti-Terrorism Court and not by Juvenile Court. In present Cr.P.LA the question of jurisdiction was again raised, and this court referred the matter for determining the age of convicts to

Medical Board and according to report all the three petitioners/convicts were juvenile at the time of alleged occurrence. The learned Chief Court while determining jurisdiction of Anti-Terrorism Court v Juvenile Court relied mainly on the following judgments."*Mehraj Hussain and 3 Others v Judge Anti-Terrorism, Northern Areas Gilgit and another"*[1]*and "Qamar Hussain Shah v The State"*[2].

3. The jurisdiction of Anti-Terrorism v Juvenile Courts has been the subject of following important judgments in Pakistan. Part I are those judgments which have favored jurisdiction of Juvenile Courts and Part II are those which have favored Anti-Terrorism Courts.

PART I

(i) *Ghulam Mustafa Shah alias PAPA v The State and another*[3]

(ii) *Aleem Ashraf v The State*[4]

(iii) *Ketno vJudge Anti-Terrorism Court*[5]

(iv) *Umar Afzal v Sprcial Judge Anti-Terrorism*[6]

PART II

(i) *Muhammad Din v Muhammad Jehangir and 4 others*[7]

(ii) *Azhar Bibi v State*[8]

(iii) *Qamar Hussain Shah v The State*[9]

(iv) *Mehraj Hussain and 3 Others v Judge Anti-Terrorism, Northern Areas Gilgit and another*[10]

(v) *Muhammad Rasool and another v The State*[11]

4. There are now many other Judgments of High Courts in Pakistan which have now predominantly followed the later view of Part II. After going through all these judgments one reaches the conclusion that in all these judgments of Part II the courts took into account the weightage of Section 32 of

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[1]2007 PCrLJ 1011
[2]PLD 2006 Karachi 331
[3] PLD 2003 Peshawar 138
[4]2005 MLD 1028
[5]2005 MLD 353
[6]PLD 2012 Lahore 433
[7]PLD 2004 Lahore 779
[8]2004 PCrLJ 1967
[9]PLD 2006 Karachi 331—Also reported asPLJ 2006 CR.C (Karachi) 1340 (FB)
[10]2007 PCrLJ 1011
[11]PLD 2012 Baluchistan 122

Anti-Terrorism Act,1997 (overriding section *vis a vis* Section 14 of the Juvenile Justice System Ordinance 2000), Section 12 of the Anti-Terrorism Act,1997 (*having non-obstante* clause qua jurisdiction) & Section 21-G of Anti-Terrorism Act, 1997. Sections 12(1) and 32(1) of Anti-Terrorism Court Act, 1997 are reproduced below for ready reference.

"**Section 12 (1). Jurisdiction of Anti-Terrorism Court.** ***Notwithstanding anything contained in the Code or in any other law, a scheduled offence committed in an area in a province [or the Islamabad Capital Territory][12] shall be triable only by the Anti-Terrorism Court exercising territorial jurisdiction in relation to such area."***

"*Section 32(1)Overriding effect of Act.—** (1) ***The provisions of this Act shall have effect notwithstanding anything contained in the Code or any other law but, save as expressly provided in this Act, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before an Anti-Terrorism Court and for the purpose of the said provisions of the Code, an Anti-Terrorism Court shall be deemed to be Court of Sessions".

Sections 4(3) and 14 of the Juvenile Justice System Ordinance,2000 are reproduced below.

"Section 4(3) Juvenile Courts. ***The Juvenile Court shall have the exclusive jurisdiction to try cases in which a child is accused of commission of an offence***."

"*Section 14. Ordinance not to derogate from other laws. -** ***The provisions of this Ordinance shall be in addition to, and not in derogation of, any other law for the time being in force."

The courts have also relied upon the effect of laws and amendments later in time if there were any competing sections in two statutes. In the judgments of Part I the issue is also discussed with reference to law later in time in case of contradictions between two special laws. With due deference to learned courts delivering judgments of both parts above the matter is not approached properly. The more detailed judgment of Part II is a judgment of Full Bench of Sindh High Court titled "*Qamar Hussain Shah v The State*" (*supra)* and all judgments of Pat II almost carry the same grounds as in Qamar Hussain Shah case. Now I will discuss this judgment below to highlight whether the conclusion in Qamar Hussain Shah Judgment is in accordance with settled rules of interpretation.

5. While making comparison between different *non-obstante* and overriding provisions of three statutes namely Anti-Terrorism Act, 1997 (hereinafter referred to as ATA), Control of Narcotics Substance Act, 1997

[12]Inserted by Act NO XX of 2013

(hereinafter referred to as CNSA) and Juvenile Justice System Ordinance 2000 (hereinafter referred to as JJSO), the worthy FB of Karachi High Court in Qamar Hussain Shah's case reached the conclusion that if different statutes conferred exclusive jurisdiction on different courts regarding some common offences then the one later in time would prevail and the courts constituted prior in time, though having exclusively jurisdiction would have no jurisdiction in the matter. This led to the conclusion that the JJSO had overridden the CNSA as section 4(3) of the JJSO was later in time than section 45 of CNSA. And section 21-G of ATA being later in time to section 4(3) of the JJSO was to prevail and all those offences committed by juveniles which were ATA offences prior to section 21-G would be continued to be heard by courts under the JJSO but those terrorism offences committed by juveniles which were mentioned in section 21-G (offences under the Act) would be heard only by Courts under ATA and not by Juvenile Courts. Section 21-G is reproduced below for ready reference

"Section 21- G. ***All offences under this Act shall be tried (exclusively)[13] by Anti- Terrorism Court established under this Act."***

The judgment concluded that cases involving Juvenile offences falling in item No. 1 & 3 of Schedule III to ATA and pending would be tried by Juvenile Courts and item No. 2 & 4 by Anti-Terrorism Courts. Third Schedule of ATA (as it stood at the time when Qamar Hussain Shah Judgment was delivered) is reproduced below.

Third Schedule.

Item 1. *Any act of terrorism within the meanings of this Act including those which may be added or amended in accordance with the provisions of section 34 of this Act.*

Item 2. *Any other offence punishable under this Act.*

Item3 *Any attempt to commit, or any aid or abetment of, or any conspiracy to commit, any of the aforesaid offences.*

[Item 4. *Without prejudice to the generality of the above paragraphs, the Anti-terrorism Court to the exclusion of any other Court shall try the offences relating to the following, namely:*

(i) Abduction or kidnapping for ransom.

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[13]"exclusively" added by Act II OF 2005.

(ii) Use of firearm or explosives by any device, including bomb blast in a mosque, imambargah, church, temple, or any other place of worship, whether or not any hurt or damage is caused thereby' or

(iii) Firing or use of explosive by any device, including bomb blast in the court premises.][14]

The reason behind this bifurcation, as given in the judgment, was that section 21-G conferred exclusive jurisdiction on AT Courts for only those offences under the Act and no other scheduled offences hence item 2 of the Schedule was in line with section 21-G & item No. 4 of the schedule having been included in 2005 itself conferred exclusive jurisdiction on AT Courts.

6. The judgment with due deference to Hon'ble Judges is not based on proper appreciation of law for the reasons discussed herein below. The effect of this judgment would itself speaks the outcome.

7. The principle derived by this judgment was that when different special laws contained *non obstante* & overriding clauses or created exclusive courts for common offences than the one later in time was to prevail if no harmonious interpretation was possible and concluded that there was irreconcilable conflict between ATA (as amended in 2001) and JJSO qua exclusive jurisdiction of certain offences, hence jurisdiction of AT Courts was to prevail over courts under JJSO regarding those offences after 2001, the exclusive jurisdiction of ATA being later in time.

If this conclusion & *ratio decidendi* is carried as correct, then the following legal impact is unavoidable upon other laws carrying a similar situation.

8 JJSO VS SCMO

Small Claims & Minor Offences Courts Ordinance, 2002 (hereinafter called SCMO) which came into force on 15th July 2004 carries similar provisions of overriding effect (section 3 of the Act) and exclusive jurisdiction of the courts for small claims (civil) and minor offences (criminal) under section 5 of the Act. Section 3 &5 of SCMO is reproduced below for ready reference.

"**Section 3. Ordinance to override other laws*: -- The provisions of this Ordinance shall have effect notwithstanding anything contained in any other***

[14] . Item 4 inserted vide Act II of 2005

law for the time being in force."

"Section* 5. Jurisdiction:-- *(1) The Court shall have exclusive jurisdiction to: (a) try all suits and claims arising therefrom, specified in Part I of the Schedule to this Ordinance, the subject-matter of which does not exceed one hundred thousand rupees in value for the purposes of jurisdiction: Provided that the High Court may, by notification in the official Gazette, vary such value from time to time; and (b) try offences specified in Part II of the Schedule to this Ordinance."

The result is that the offences in Part II of the Schedule to the SCMO (all offences under PPC carrying punishment up to 3 years) shall be exclusively triable by courts established under the SCMO. And thus, all offences of Juvenile offenders under Pakistan Penal Code, 1860 (hereinafter referred to as PPC) carrying punishment up to three years shall be exclusively tried by SCMO Courts and not by the Juvenile Courts and hence almost all the cases tried by Magistrates are now covered by SCMO. The Juvenile Courts at magisterial level have become nonfunctional as per *ratio* of judgment of Qamar Hussain Shah case *supra.*

9. SCMO VS Anti-Corruption Laws.

The Pakistan Criminal Law (Amendment) Act, 1958 created special courts of exclusive jurisdiction for trial of Scheduled Offences (section 5 of the Act). Section 5(1) is reproduced below for ready reference.

"Section 5(1) ***Notwithstanding anything contained in the Code of Criminal Procedure,1898, or in any other law, the offences specified in the Schedule shall be triable exclusively by a Special Judge*.**"**

The Schedule of the Act of 1958 contains only the offences under PPC. After the promulgation of SCMO all the offences falling in item (a) of the Schedule of the Act of 1958 fall within the jurisdiction of SCMO courts. Item (a) of the Schedule to the Act of 1958 deals with chapter IX of PPC concerning offences by or relating to public servants carrying punishment up to three years. Some offences covered under item (b) of the Schedule of the Act also carries punishment up to three years & hence falls within the exclusive jurisdiction of SCMO Courts. As per *ratio* of Qamar Hussain Shah Judgment the Anti-Corruption Courts have become *coram non judice* and almost all the decisions

made by Anti-Corruption Courts after the promulgation of SCMO Ordinance to the extent mentioned above are without jurisdiction nor these offences can be tried by Anti-corruption courts any further.

10. SCMO VS NAB Ordinance

NAB Ordinance 1999 has been given overriding effect (section 3) and jurisdiction (*non obstante* in section 16) though not exclusive. Both these sections are reproduced below for ready reference.

***"3. Ordinance to override other laws.** The provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force"*

"16. Trial of offences. —

(a) Notwithstanding anything contained in any other law for the time being in force an accused shall be prosecuted for an offence under this Ordinance in the Court and the case shall be heard from day to day and shall be disposed of within thirty days."

The Scheduled Offences appearing in item 6, 7 and 9 of NAB Ordinance, 1999 fall under SCMO Court Jurisdiction being PPC offences of up to three years punishment. As per *ratio* of Qamar Hussain Shah judgment, SCMO having overriding effect and having exclusive jurisdiction and later in time shall prevail over NAB Ordinance and hence the decisions made so far by NAB Courts after promulgation of SCMO 2004 with respect to item No. 6, 7 & 9 of Schedule to NAB Ordinance are without jurisdiction being from *coram non judice* nor these offences can be tried by NAB Courts any further.

11. Position of Civil Offences under Army Act, Air Force & Navy Laws.

On the basis of the said principle the position of civil offences covered under Armed Forces Law emerges as under: -

The civil offences covered under PPC, and other special laws committed by persons subject to Army Act and other military laws are almost triable by Court Martial (section 59 of the Army Act,1952 and other similar sections of Air Force & Navy Laws). Now as per *ratio* of Qamar Hussain Shah judgment the offences committed by Armed Forces personnel regarding offences of Narcotics shall be exclusively tried by CNSA Courts to the exclusion of Court Martial and all offences under PPC not carrying punishment of more than 3 years committed by Armed Forces personal shall be covered by SCMO Courts to the exclusion of Court Martial. The reason is that both the laws i.e CNSA 1997 and SCMO 2002 carry overriding provisions and exclusive jurisdiction and are later in time and

all civil offences covered by special laws above shall be tried by the Special Courts established under these laws to the exclusion of any other court. The Court Martial does not stand at a higher pedestal than Juvenile Court because the JJSO does contain exclusive jurisdiction &*non-obstante* clause but Army Act etc. do not contain such overriding provisions and are earlier in time. Only a *non-obstante* clause in the form of subsection 4 of Section 59 is inserted in the Army Act, 1952 but that too in 1967. And if Juvenile Courts have been overridden by subsequent Special Courts carrying exclusive jurisdiction than how Armed Forces Law would continue to enjoy the jurisdiction for offences falling under CNSA and SCMO. It is settled jurisprudence in Pakistan that person subject to Army Act for civil offence shall be tried by Court Martial despite Army Act having no overriding effect or exclusive jurisdiction clause in it except one mentioned above which is earlier in time to all these special laws.

12. How Qamar Hussain Shah judgment is not convincing and not in accord with principles of interpretation

(i). Qamar Hussain Shah judgment has mainly focused on the apparent form and the face value of sections of laws and interpretative principles without having a holistic approach of scheme of different laws and without looking deep into the words which are implicit/hidden in the statutes. The result of this approach is manifest by bringing many laws head on collision with each other. Some of the examples have been given above.

(ii). The emphasis in the judgment is *non obstante* and overriding clauses between two or more special statutes governing the same offences and then giving weight to latest in the series. If this approach is presumed to be correct based on face value of express words then the overriding section 32 read with section 7 of ATA, 1997 shall apparently give the following result.

Section 32 says that the provisions of the ATA shall have effect notwithstanding anything contained in the Code or any other law. This has resulted, apparently, in overriding all the laws vis-a-vis the express provisions of the ATA. The result of this interpretation would be that in section 7 of the ATA the words "***Whoever commits an act of terrorism under section 6***" is liable for punishment provided therein. The word "**whoever**" does not carry any exception and hence child under 10 years of age is also no exception to it as such

exception is provided by General Exceptions of PPC which law has been overridden by Section 32 of the ATA and hence the word "**whoever**" is in clear conflict with general exception of PPC, therefore, all children below 10 years of age shall be awarded punishment under section 7 of ATA.

(iii). But this by no means is correct approach. The overriding and *non obstante* clause in a statute cannot be read as carrying sweeping dominance even over a general law. Now the question is that how this conflict is to be reconciled. In fact, as pointed earlier, the apparent visible words in a statute are not the only embodiment of a section of law but such words do carry with them hidden and implicit words (within overall and holistic scheme of all concerned laws) which are very much part of the visible words used in a statute.

The present word "**whoever"** carries with it implicit words **"whoever** *(not including persons excepted and dealt with by all other general and special laws)*".

(iv). The laws [JJSO, Military Laws, Anticorruption Laws etc.] mentioned above in comparison part of this judgment which are head on collision with each other because of *ratio* of Qamar Hussain Shah judgment deal with not specific offences but with specific class of persons. The Armed Forces laws put the Armed personnel out of jurisdiction of all other criminal courts (and hence these persons are not subject to all other special statutes).

Similarly, JJSO puts juvenile offenders out of the jurisdiction of all other criminal courts.

Anti-Corruption laws put civil servants and some others out of the jurisdiction of other criminal courts.

NAB Ordinance puts a particular class out of jurisdiction of all other criminal courts.

(v). Now the bottom-line is that while interpreting provisions conferring exclusive jurisdiction in a special statute the overriding and exclusive jurisdiction provision shall carry the exceptions of laws of persons not subject to the law conferring such exclusive jurisdiction.

In ATA, 1997 section 21-G (which has been made the basis of Qamar Hussain Shah judgment) shall be read as follows:

21-G: - "**All offences (*committed by person subject to this Act*) shall be tried exclusively by the Ant Terrorism Court established under this Act."**

The misleading interpretation of Section 21-G which is the basis of whole confusion is that it has been wrongly read as "All Offenders" instead of "All offences"

If similar exceptions are read in CNSA & SCMO laws, then the head on collision would be averted. Further details of reading exceptions shall be dealt with in later part of this judgment. These exceptions are read under principle of implication and not supplying words against *causus omissus*. Such implications and intendments arising from the language of a statute are as much part of it as if they had been expressed.[15]Many juristic maxims and principles come in aid of interpretation and are read implicitly in laws though not specifically mentioned like "*non sui juris".* Would those legal disabilities which are accepted by jurists to be implicit part of all laws can be done away with by express provisions to the contrary?

(vi). It is but acknowledged rule of construction that repeal by implication is seldom resorted to and only and only when harmonious construction between two laws is highly improbable. The overriding effect of a law or insertion of *non-obstante* clause in a later statute is not an express repeal and is only to give weight vis-à-vis those earlier laws with which there is clear contradiction, and no reconciliation is possible on any score (*Qazi Hussain Ahmed v General Pervez Musharraf" [16] --Aljehad Trust v Federation of Pakistan& Others*" [17] ."*Aftab Shahban Mirani v Muhammad Ibrahim*" [18] — "*Waqar Zafar Bakhtawari v Haji Mazhar Hussain Shah"[19]*

(vii). Qamar Hussain Shah judgment has not gone to explore all probabilities to avoid contradictions and has presumed implicit repeal of JJSO jurisdiction vis a vis ATA contrary to interpretive restraint approach for striking harmony between two laws on all probable planes. The conclusion was based on exclusive jurisdiction of AT Courts without appreciating whether the exclusive jurisdiction clause did mean to include all persons not subject to ATA. To make this view clearer let us resort to the difference between General and Special law. A law made for trial of all offences for all people is called 'General Law'. A law

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[15]Crawford's The Construction of Statute at page 266 Garvon v Marconi Wirelss Tel.Co., 275 Fed. 486
[16]PLD 2002 SC 853
[17]PLD 1996 SC 324
[18]PLD 2008 SC 779
[19]PLD 2018 SC 81

made for trial of some offences for all people is called 'Special Law'. The later shall have precedence over former. A law made for trial of some offences for some people only is special among special. The last being more special in special shall prevail because for this last law the middle one (special law) is general. General & special are relative phenomenon[20]. While deciding that what is special the main question would be special in relation to what? Once it is decided that special in relation to Law 'A' then comparison of Law 'B' will be made with Law 'A' for determining whether law 'B' is special or general in relation to Law 'A'. If a Law is branch of another law, then it is special to law of which it is branch. There can be a series of sub branches of Laws then every next in series is special to former in series.

Therefore, Law dealing with Armed personnel or Juvenile are special to ATA which is meant for all. Jurisprudentially local law is more special than special law[21]. The definition of Local Law is also not absolute and depends upon relative circumstances. What does locality mean for the purpose of defining 'Local Law'. The example of ATA being promulgated in erstwhile PATA would clarify that how dominance of local over special law is not universal. ATA being special law but *Nizam e Adl* Regulations of 1999 & then 2009 in vogue in PATA was local law which was confined to locality of erstwhile PATA only. If local law was to take precedence over special law, then courts established under *Nizam e Adl* Regulation were to take cognizance of offences of terrorism and not courts under ATA which was not the case. And especially when *Nizam e Adl* Regulation, 2009 had an overriding paragraph 18 and was subsequent to ATA and subsequent to Section 21-G of ATA which was made basis for whole dominance of ATA being later in time. The theory of local over special law also fails here. The answer to this question lies in the formula of special in special and relative determination of special in special. To put it in another way *Nizam e Adl* Regulation is local in relation to whole Pakistan or Province of KPK. But *Nizam e Adl* Regulation also provides a system of *Qazi* courts which is general law of procedure of courts for whole of PATA for all offences and civil litigations of all residents of PATA. When a law dealing with only some offences (though not locality bound) is compared to this general law of PATA

[20]Syed Mushahid Shah v Investigation Agency2017 SCMR 1218
[21]"GunepalleyThammaya and Others v Sri Raja ThadapusapatiKhandendu"AIR Mad 963

then this law becomes special to general law of PATA so far as offences of terrorism are concerned. That is why despite paragraph 18(overriding effect) of *Nizam e Adl* Regulation and later in time the special law of ATA prevailed over *Nizam e Adl* Regulation, 2009 being general. This practice of trial of cases by AT Courts continued till 2013 in PATA then in Section 21-G of ATA a proviso was added in 2013 which is reproduced as below; "***Provided that the Courts of Zila Qazi or Izafi Zila Qazi established under the Shariah Nizam-e-Adl Regulation, 2009 shall deemed to be the court and shall try all cases so assigned to them by the administrative judge designated under sub-section (2) or sub-section (4) of section 13, as the case may be."***But by this proviso only name of Presiding Officer was changed as *Zila Qazi/Izafi Zila Qazi*. The cases were never transferred to *Zila Qazi/Izafi Zila Qazi* under *Nizam e Adl* Regulation 2009, nor the Regulation was followed rather ATA which prevailed over *Qazi* Courts under the Regulation. And if say a law was confined to the territory of a district only of PATA region then such law would be more local as compared to whole PATA but as we saw above that mere being local law does not mean that it being more special shall prevail.

(viii). But again, we will have to see such more local law in its context & purpose for determining its being special or more local in relation to many other laws with which comparison shall be made while deciding which one is to prevail. If comparison is with law for special class than class is more special than locality or subject. That is why despite *Nizam e Adl* Regulations having overriding effect and local, the same was never considered dominant over laws dealing with class like Army Act, JJSO, Civil Servants Laws, Family Laws Ordinance (despite reservation of some sections being un-Islamic). Not only that *Nizam e Adl* Regulation, 2009 had overriding effect but this Regulation was meant to promulgate Sharia in PATA and AT Courts were not run by *Qazis* nor procedure of *Sharia* was followed in AT Courts. The importance of *Sharia* is far ahead of overriding provisions & exclusive jurisdiction being the dominant law in PATA as well as one of basic features of the Constitution of Pakistan and Islam being the state religion under the Constitution. Despite all weaknesses ATA was given precedence in PATA for only one reason of being special to general. No other factors were taken into consideration as are made basis of Qamar Hussain Shah judgment. Germane to present issue of difference between

general, special and local law a ruling from Indian Jurisdiction is very much relevant which is in a case titled "*Gunepalley Thammaya and Others v Sri Raja Thadapusapati Khandendu*"[22]. Other judgments of our own jurisdiction on the same issue are "*Hafeez Ahmed v Civil Judge"*[23] and *Inspector General Police v Mushtaq Ahmed Warraich*[24]. A relevant extract form paragraph 9 of *Hafeez Ahmed v Civil Judge supra is reproduced below "****Any law which prescribed a period of Limitation for a suit, appeal or application different from the one prescribed by the First Schedule of the Limitation Act shall be treated as a special law for the purpose of the Act. The Code, in this context, is a special law for all legal and practical purposes inasmuch it prescribed a period of limitation for filing a revision petition. West Pakistan Land Revenue Act,1967 is, no doubt, a general law but it is considered as a special law for the purpose of Limitation Act inasmuch as it prescribed a period of limitation for filing a revision petition. So is the case with Code of Criminal Procedure as it, too, prescribed a period of limitation for filing of a petition for leave to appeal".*** *The* Court in determining whether a statute is general, local or special shall have to see the entire law with surrounding circumstances, reasons for its passage and the purpose to be accomplished[25] In these judgments the imbroglio of these three terms is hard to assimilate. However, at the end it was concluded that every law can be special and general from different points of view. And that while interpreting the effect of new law qua earlier one extra care should be taken and inference of repeal, ineffectiveness, or subordination of earlier law in the field should be avoided. And if new law expressly so directs or wordings of new law are such that there can be no way to save the earlier law then adverse effect on earlier law can be interpreted.

(ix). It is also a settled position that a general code like Pakistan Panel Code is not all general while dealing with all matters. It may contain special provisions, local provisions, and general provisions.[26] The example is that of exception of children under 10 years of age and by this way dealing with a particular class of children PPC becomes special law and hence is more special

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[22]AIR 1930 Madras 963
[23] PLD 2012 SC 400
[24]PLD 1985 SC 159
[25]Crawford"s the Construction of Statutes p 112. Handy v Johnson 51 Federal (2) 809
[26]Life Insurance Corporation v DJ Bahadur IR 1980 SC 2181- Hafeez Ahmed V Civil Judge PLD 2012 SC 400

than ATA in this respect. And similar is the case of person of unsound mind dealt with by PPC. General Exceptions are available before Anti-Terrorism Court[27] Chapter XVII-B was inserted in Pakistan Penal Code, 1860 vide Criminal Law (Amendment Act VI of 2016) and it was decided by Sindh High Court that though this Chapter is part of General Penal Code but is special law and would have overriding effect over Electricity Act 1910, a special statute (*K-Electric (PVT) LTD V The State and others"*[28]. The principle of effect of statute later in time can be only between same category of laws if both laws of same class cannot be reconciled on any plane. The maxim *leges posteriors priores contrarias abrogant* cannot be applied as sweeping principle for bringing all categories of laws within its fold. *If* one law is special and other general, then rule of interpretation is different and principle of later in time does not apply to different classes of laws and special law will prevail over general law even earlier in time (*Generalia specialiabus non- derogant)*[29]. If law is local, then it will override special law regardless of earlier or later in time[30]. Local law is more special than special[31] But in between same class means two competing general laws (later in time shall prevail) two special laws (later in time shall prevail) two local laws (later in time shall prevail) provided no conciliation is possible between two competing laws of same class on any plane. But no comparison of one class of law with other based on being later in time can be made. The later in time principle of two irreconcilable special laws is elaborated in "*Syed Mushahid Shah v Investigation Agency"*[32]. An extract from *Syed Mushahid case supra* would explain that how two laws (general or special) can be reconciled and work together which should be the first effort of interpreter not to presume repeal or subordination of one to the other. " Paragraph 13 (vi)— ***In so far as the Penal Acts are concerned, if a latter statute again describes an offence created by a former one, and one provides a different punishment, creates a new jurisdiction and remedy and varies the procedure-modifying the***

[27]Inayatullah v The State 2011 PCrLJ 1114—Naseebullah V Special Judge Anti-Terrorism PLD 2017 Quetta 37
[28]PLD 2019 Sindh 209
[29] Muhammad Muhsan Ghuman v Government of Punjab 2013 SCMR 85
[30]"*Gunepalley Thammaya and Others v Sri Raja ThadapusapatiKhandendu*"AIR 1930 Mad 963
[31]Unnoda v Kristo Kum 19 WRS (Privy Council) at page 156 of Understanding the statutes(Fourth Edition) by SM Zafar.
[32]2017 SCMR 1218

manner or changing the forum of trial or appeal, the earlier statute is impliedly repealed by the later unless, of course, both of them can exist in parallel application to different <u>localities, subjects or objects</u>. (vii) When the words are clear and capable of proper operation, the revocation or alteration of statute by construction is not permissible. The legislature is normally not presumed to have intended to keep two contradictory amendments on the statute-book with the intention of repealing the one with the other, without expressing an intention to do so. Such an intention cannot be imputed to the Legislature without some strong reasons and unless it is inevitable. Before adopting the last-mentioned course, it is necessary for the courts to exhaust all possible and reasonable constructions which offer an escape from repeal by implication. [emphasis supplied]". The emphasis supplied to words "**localities, subjects or objects**" in paragraph 13 (vi) of this reported judgment is very important. The subject and object of JJSO and ATA are quite different. According to paragraph (vii) of this reported judgment in case of two contradictory enactments no intention of repeal can be attributed to legislature without strong reasons. It is beyond understanding that how legislature wanted to make JJSO Courts ineffective and if Legislature intended so what was hurdle in not clearly expressing so.

(x). The matter of conflict between two laws can be seen and resolved by another approach which I think would answer the whole questions in the mind of everyone regarding general, special, and local law and also that how hidden words can be read in a law or provision as discussed in para (iii) above. Almost every law begins with a provision of Extent, Application /or sometimes Operation. These provisions generally show the area to which a law is extended and in some cases the persons to whom it applies. Generally, the extent reads as "*It extends to whole of Pakistan*". In most of such provision the Application clause is missing, and it is not written that to whom shall it apply in the area to which it is extended. For example, in the above-mentioned Extent clause there is no mention that in Pakistan to whom shall it apply. Sometimes the Application is mentioned in preamble. In ATA the Extent clause is section 1(2) which is like one mentioned above. It does not speak to whom shall it apply? Nor does its preamble speak about application to persons. Similar is the case of CNSA. But in Criminal Law (Amendment) Act, 1958 in Section 1(2) the wordings are "***it***

extends to whole of Pakistan and applies to all citizens of Pakistan and Public Servants wherever they may be". In NAB Ordinance section 4 deals with Application which reads "***it extends to whole of Pakistan and shall apply to [all citizens of Pakistan][33], and persons who are or have been in the service of Pakistan wherever they may be including areas which are part of Federally and Provincially Administered Tribal Areas*****"** In SCMO the same is position as that of ATA. In JJSO the extent clause is also same, but preamble reads as "***Whereas it is expedient to provide for criminal justice system and social integration of juveniles***". In Army Act, 1952 sections 1 to 5 mention detail of those persons to whom Act applies or may be made applicable.

(xi). Now million-dollar question would be that to whom ATA or CNSA shall apply when there is no clause of Application. These two laws define only offences. But mere definition of offences with extension to whole Pakistan would not be sufficient to identify the persons to whom these offences shall apply. There is nothing in both these laws. First it will be determined to whom these two laws apply then all provisions in these two laws shall apply to only those persons to whom it applies and not to those to whom it does not apply and word "whoever" in Section 7 of ATA shall apply to those to whom it applies. All the provisions including offences, overriding provision or exclusive jurisdiction provision in these two laws will apply to only those persons to whom these two laws apply. How to determine the persons to whom these two laws apply? As discussed in para (iii) above that General Exceptions of PPC would be read in ATA and hidden words shall be read in many provisions of ATA to make sweeping provisions of ATA meaningful and to save children below 10 years from being punished under ATA. This legal impasse of Application of ATA can be resolved only by seeking help from general law to make ATA meaningful & workable. But before discussing this let another aspect of application of General Exceptions of PPC to be read into ATA be looked into. One can say that this issue can be resolved by presuming that General Exceptions of PPC are not in conflict with ATA and hence can be read in ATA though not specifically mentioned in ATA. But if we read Section 21-C (5) read with definition clause 2(d) of ATA then all children under 18 years of age are punishable for that specific offence for not less than 6 months and more than 5

[33]Inserted vide Ordinance CXXXIII of 2002

years. There is no mention of exception of child under 7(now 10) years of age. And if we read Section 32 (overriding) of ATA which clearly says that provisions of ATA shall have effect notwithstanding anything contained in the Code (CrPC) or any other law. Then this section further goes on to allow certain provisions of Code (Crpc) if not inconsistent with ATA to apply. But there is no application of any section or part of PPC and according to Section 32 ATA punishment provided by Section 21-C (5) for children shall be awarded as under rule of interpretation apparent from visible words (as is the approach in Qamar Hussain Shah judgment) PPC conflicts with ATA to this extent and both cannot run together. The ATA being later in time having overriding effect shall prevail as per *ratio* of Qamar Hussain Shah judgment. But still this approach is not acceptable on any plane giving result that face value of overriding effect, *non obstante* clause, exclusive jurisdiction are not final factors of interpretation and need is for an in-depth appreciation of schemes of all relevant laws.

(xii). Coming back to resolve the question of Applicability of ATA to persons we seek help from PPC. Section 1 of PPC reads "**This Act shall be called the Pakistan Penal Code and shall take effect throughout Pakistan."**

"Section 2 of Pakistan Penal Code reads "***Every Person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Pakistan***."

Section 3 reads "***Any person liable, by any Pakistan Law, to be tried for an offence committed beyond Pakistan shall be dealt with according to the provision of this Code for any act committed beyond Pakistan in the same manner as if such act had been committed within Pakistan."***

Section 4 reads "*Extension of Code to extra-territorial offences.* ***The provisions of this Code apply also to any offence committed by: – 2(1) any citizen of Pakistan or any person in the service of Pakistan in any place without and beyond Pakistan; (2) Omitted (3) Omitted (4) any person on any ship or aircraft registered in Pakistan wherever it may be.***

Explanation. *—In this section the word —offence‖ includes every act committed outside Pakistan which, if committed in Pakistan, would be punishable under this Code.*

Section 5 **reads "Nothing in this Act is intended to repeal, vary, suspend or**

affect any of the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the State or of any special or local law."

If one goes through section 1 to 5 PPC it becomes clear that these provisions are not contained in other special laws. Section 1 makes PPC applicable to whole territory of Pakistan. Section 2 make all persons within territory of Pakistan punishable under PPC. Section 3 makes all those persons liable by any Pakistani law to be tried for an offense to be dealt with according to provisions of PPC for any act beyond Pakistan in the same manner as if such act had been committed within Pakistan. Section 4 makes PPC applicable to all citizens of Pakistan or any person in the service of Pakistan in any place without and beyond Pakistan. Any offence committed by any person on any ship or aircraft registered in Pakistan wherever it may be. No other penal law in Pakistan covers all these areas of applicability to persons, offenses, and territory as PPC. It is, therefore, general law on these three areas (offence, area & persons). Now each new special law can bring any of these three areas wholly or partially outside PPC by specifically so providing. Army Act,1952, for instance, took away their own persons from PPC. But other provisions of PPC regarding these persons committing offences on ship, aircraft or outside Pakistan shall be read in Army Act, 1952. Similarly, JJSO took juveniles outside the purview of PPC and other provisions of PPC to be applicable as in Army Act. Likewise NAB Ordinance and Criminal Law (Amendment)Act, 1958 took some persons out of PPC. CNSA and ATA took only certain offenses outside PPC and not persons or area and other provisions (like commission of offences on ships, aircraft or in foreign territory). The persons who are out of PPC and are subject to other laws cannot be subject to CNSA & ATA. The CNSA & ATA took away only specific offences in 1997 from the purview of PPC and adding some new offences. In 1997 Army Act was already in the fields hence despite overriding effect and exclusive jurisdiction Army personnel could not be made subject to courts under CNSA. At that time JJSO was not in the field hence juveniles were subject to Court under CNSA and ATA. But the moment JJSO was promulgated it took away class of juveniles from the purview of ATA, CNSA and all other laws to the extent of jurisdiction of juvenile courts and all other specific provisions made for juveniles. Similarly, Section 6 of PPC lays down that everywhere in

the Code the definition of an offence and every illustration of every such definition shall be understood subject to exceptions contained in the Chapter "General Exceptions" This clearly shows that how hidden words of exceptions etc. were read in the paras (iii) to (v) above. Though section 6 of PPC is not meant for Special/Local Laws but when special/local law fails to meet a situation then general law is to be resorted to and general law in this case is more special than special containing a specific provision. In place of word "Code" in section 6 the word 'ATA' Or 'CNSA' shall be read.

(xiii). As discussed above no hard and fast rules can be set for determining which law is general, local, or special. It cannot be said that ATA, CNSA, SCMO or JJSO are special in all respects, but PPC can be special in some respects to these laws which are classed as special. To remove this confusion, the easiest formula is that the law which is applicable to some persons or class is special for them and those laws which do not contain any Application clause shall apply to those who are residuary by seeking help of Application clauses of general law. Now ATA and CNSA having no Application clause shall apply to residuary means to those people only who have no courts of their own as a class under any law for the time being in force. When Juveniles, Armed personnel etc. have their own courts then they are not residuary to fall within the scope of courts established under ATA or CNSA. And if a class has its own court, but offences are not mentioned in their law then offences of other special or general law shall apply as offences of PPC, CNSA and ATA apply to juveniles. Those provisions of any law having overriding effect etc. shall not apply to those persons or locality to the extent to which their own laws have corresponding provisions. But persons residing outside locality to which section 3 or 4 of PPC applies can in appropriate cases be dealt with under such special law partially or wholly except those provisions for which the class or locality has special provisions. While giving effect to any earlier or later law there is no sweeping ouster of all provisions of a law considered to be subordinate and no dominance of all provisions of a law considered to be overriding. For instance, ATA, SCMO, CNSA and JJSO have not ousted all provisions of PPC despite being special laws in many respects. As discussed above the JJSO being law for Juvenile does not define offences whether of PPC, CNSA or ATA therefore, all offences of these laws shall be read as part of JJSO. Similarly in all other

procedural and substantive matters all laws shall seek help from each other unless prohibited and cannot be read without conflict. In Qamar Hussain Shah judgment one learned judge (his lordship Mr. Justice Rehmat Hussain Jafferi) tried to approach the matter on the scheme of offender's specific law and offenses specific law and concluded that JJSO being offender specific law is special qua ATA and CNSA which are offense specific laws. But the majority view (authored by his lordship Mr. Justice Sabihuddin Ahmed) differed with this and opined that offense specific laws can be special qua offenders' specific law and it cannot be said that offender specific law is more special than offense specific law. But the new approach in present judgment has shown that how class specific law is special than other specific laws. Here just to remove confusion it is added that in Criminal Law (Amendment) Act,1958 and NAB Ordinance the Application clauses mention public servants and citizens of Pakistan. Basically, these laws are for public servants but there are some situations in which private citizens are involved with public servant that is why citizens are also included.

(xiv). Every individual and institutions do commit mistakes for many reasons including courts and legislature which may result in change of whole scheme of things. Every word in a legal instrument in addition to what is required may result not of its being superfluous but lead to many absurd results both in the law of which it is part and other laws as well. For example, in above comparison while discussing the head on collision of different laws the ATA and the Pakistan Criminal Law (Amendment) Act 1958 with laws of Armed Forces are not included because Section 36 of ATA specifically ousts Armed Forces from the purview of ATA. Similarly, the Pakistan Criminal Law (Amendment) Act, 1958 also contains Section 13 to exclude Armed Forces. This leads one to the conclusion that had these sections been not included in these two laws then Armed Forces personnel would have been subject to these two laws. If this legislative action is correct, then CNSA and SCMO do not contain any exclusion provision of Armed Forces and would it not lead to the conclusion that Armed Forces are subject to CNSA & SCMO? And similarly, all those laws in which there are no such exclusion provisions and are later in time having overriding effect or exclusive jurisdiction the Armed Forces shall be subject to those laws and not to Military Laws. This by no means is a correct approach. The Armed Forces as explained above cannot be made subject to such special or local laws

not meant for them regardless of presence or non-presence of any exclusion provision in any law or presence or non-presence of any overriding or subordinate provisions in Armed Forces Laws or any other law or any such law being earlier or later in time. The only way to make them subject to other laws is specific and express provision in later law. But many a jurist even have been misled due to inclusion of these exclusions clauses in both ATA and the Pakistan Criminal Law (Amendment) Act, 1958 by concluding that Armed Forces are not subject to ATA or Act of 1958 for these exclusion provisions otherwise would have been subject to ATA. That is why it was added above that laws should not contain even a single word which, at times, is not superfluous but is misleading in interpreting whole scheme of laws. These two provisions excluding Armed Forces is typical example of bad legislation/drafting. No one can take defense that these exclusions provisions were inserted as precautionary measure to obviate confusion in a law. It has removed confusion to the extent in the law in which it was inserted but has multiplied confusion for other laws and the whole scheme.

13. <u>Why was Section 21-G inserted in ATA in 2001?</u>

(i). In Qamar Hussain Shah judgment the main focus was on the insertion of section 21-G in ATA through an Ordinance XXXIX of 2001.And it was adjudged that since section 12 (1) was already available on the statute giving overriding effect to offences under ATA, 1997, then what was the need of insertion of section 21-G and the conclusion was drawn that this section was inserted to undo the overriding effect of JJSO and to bring the juvenile offenders within the ambit of ATA. Again with due respect to all the hon'ble judges this amendment was not brought for bringing the juvenile offenders within the ambit of ATA. The real position is that so many amendments made in 1999 and thereafter in ATA mainly focused on accommodating all those observations and directions given by the August Supreme Court of Pakistan in Mehram Ali's case[34] . One of the observations of Supreme Court in said case subsequently adopted in so many other cases including *Sheikh Liaqat Hussain and others v Federation of Pakistan*[35]was that mere falling an offence in Schedule to ATA

[34]PLD 1998 SC 1445
[35]PLD 1999 SC 504

did not make predicate offence an offence unless it had nexus with the object of the Act and offence was covered by section 6, 7 and 8 thereof. These judgments, therefore, struck out such offences out of the jurisdiction of AT Courts though falling in the Schedule if they had no nexus with the object, scope, and definition of the Act. After the delivery of these judgments section 12 (1) did not serve the full purpose as it was confined to Scheduled offences and nexus principle with section 6,7 and 8 was not covered. Section 12 of ATA is again reproduced below.

"12-jurisdiction of Anti-Terrorism Court- Notwithstanding anything contained in the Code or in any other law, a ***scheduled*** *offence committed in an area in a Province shall be triable only by Anti-Terrorism Court exercising jurisdiction in relation to such area"*.

This section had given the exclusive jurisdiction to special courts regarding Scheduled offences only and the judgment of Supreme Court & others quoted above had nullified this section that by mere falling of a case in Schedule would not bring it automatically within the exclusive domain of AT Court unless the offence was in line with the Act. Since there was no other provision in the Act to cover such eventuality of bringing offences committed under the Act within the exclusive domain of special court the provision in the shape of S 21-G was inserted to add the words "*all offences under the Act"* instead of only Schedule Offence as given in section 12 (1) *ibid*. Though the original Schedule did cover in item No. 1 "*Any offence punishable under the Act*", but as was held in Mehram Ali's judgment *supra* that schedule did not regulate the substantive provision of statute rather substantive provision regulated the schedule and other appendices to a statute, the legislature wisely thought that S 21-G (being substantive part) be inserted to cover this lacuna. The relevant portions of Mehram Ali's case is reproduced below" "**We** ***are, therefore, of the view that the above section 34 is not ultra vires , but the offences mentioned in the Schedule should have nexus with the object of the Act and the offences mentioned in section 6,7 and 8 of the Act, as held by us in the short order."***In another paragraph at page 1492 of Mehram Ali's case the following passage is relevant "***However, it may be observed that the Offences mentioned in the Schedule should have nexus with the object of the Act and offences covered by section 6,7 and 8 thereof. It may be stated that section 6 defines act of terrorist***

acts, section 7 provides for punishment of such acts, and section 8 prohibits acts intended or likely to stir up sectarian hatred in clauses (a) to (d) thereof. If an Offence included in the Schedule has no nexus with the above sections, in that event notification including such an offence to the extent will be ultra vires"

(ii) It was also held in Qamar Hussain Shah judgment (by his lordship Mr. Justice Arif Hussain Khilji) that the word "all" used in section 21-G of ATA included offenses committed by juveniles. If one examines the drafting pattern of some laws, one will reach the conclusion that in these laws where reference is made to schedule offenses then the word 'all' is not used. But when reference to offenses is other than schedule then the words 'all''any' or mere 'offenses' are used. For instance, in Army Act, 1952 in section 24 the words "*Any person subject to this Act who commits any of the following* ***offenses***" are used. In CNSA in section 45 the words "*The Special Courts appointed under this Act shall have the exclusive jurisdiction to try* ***an offense*** *under this Act*". In NAB Ordinance in section 16(a) the words "*Notwithstanding anything contained in any other law for the time being in force an accused shall be prosecuted for* ***an offence*** *under this Ordinance in the Court and the case shall be heard from day to day and shall be disposed of within thirty days".* In Pakistan Criminal Law(Amendment) Act,1958 in section 4(1) the words "*A special judge shall have jurisdiction within such territorial limits as may be fixed by the appropriate Government by a notification in the Official Gazette and may take cognizance of* ***any offense*** *committed*---"The word 'all' is not used in all of these laws, but the end result is that all offenses which are covered by these laws shall fall within the jurisdiction of courts under these laws. The absence of word 'all' does not lead to conclusion that some offences under these laws fall outside the jurisdiction of courts established under these laws. Now the second category of laws are those in which reference is made to schedule offenses and these laws do not use the word 'all 'or 'any' but '**scheduled offences**. Examples are section 5(1)(b) of SCMO which reads "*try offenses specified in Part II of the* ***Schedule*** *of this Ordinance*". Section 4 of the Suppression of Terrorist Activities Special CourtsAct,1975 (now repealed) which reads "*Notwithstanding anything contained in the Code, the* ***scheduled offenses*** *shall be triable exclusively by a Special Court*". And above all ATA itself is the model example of this

scheme/pattern of legislation. When originally only Schedule Offenses of ATA were made triable by AT Courts section 12 was worded like this "*Notwithstanding anything contained in the Code or in any other law, a* ***scheduled offence*** *committed in an area in a province shall be triable only by the Anti-Terrorism Court exercising territorial jurisdiction in relation to such area.****"***. When after judgment in *Mehram Ali supra* the offences under the Act were to be made triable by AT Court then section 21-G was worded as "***All offences*** *under this Act shall be tried by Anti- Terrorism Court established under this Act*." (As inserted vide Ordinance No. XXXIX of 2001). The legislature could have used the words 'any offense 'or 'offense' instead of 'all offenses and the result would have been the same. But the word 'all' was preferred for meeting the observations in *Mehram Ali* case *supra* to cover both Scheduled offences and other offences having nexus with section 6 etc. as held in *Mehram Ali's* case so that no room for confusion was left. Due to covering both Schedule Offences and offences under the Act the use of word 'all' was must. The word 'all' was not included to oust juveniles' offenders out of the ambit of JJSO. Similarly, the word 'exclusively' used in section 21-G in 2005 has not brought any class including armed forces or juveniles within the ambit of ATA.

14. **<u>Why was word "Exclusively" added to Section 21-G in 2005?</u>**

After Mehram Ali's case *supra* section 21-G was inserted vide Ordinance XXXIX of 2001 which did not carry the word "**exclusively**". The insertion of word "exclusively" in 2005 vide Act No II of 2005 has been interpreted in many judgments of category of Part II of para 2 above as if this word was meant to clear all doubts about absolute jurisdiction of AT Courts qua Juvenile Courts. Had this been the intention of legislature then what was the hurdle for legislature in making Juvenile Courts subordinate to AT Courts expressly. Here again with great reverence to learned judges expressing such opinion in different judgments I would again go into history of including word "exclusively" not in 2001 but in 2005.If we go through whole Act II of 2005 we will know that through this Act some other amendments were made in ATA. The relevant for present discussion is addition of item no 4 in Third Schedule to ATA vide same Act. This item is reproduced below:

"(4) *Without prejudice to the generality of the above paragraph, the*

Anti-Terrorism Court ***to the exclusion of any other Court*** *shall try the offences relating to the following namely:-*
(i) Abduction or kidnapping for ransom;
(ii) use of fire-arms or explosives by any device, including .bomb blast in a mosque, imambargah, church, temple or any other place of worship, whether or not any hurt or damage is caused thereby; or
(iii) firing or use of explosives by any device, including bomb blast in the Court premises;"

Here the words "to the exclusion of any other Court "were added in the start of item 4 and the word "exclusively" were also added to section 21-G by same Amending Act. After Mehram Ali's case the original Third Schedule was drastically changed by omitting all those offences having no nexus with terrorism as defined in section 6. Now the only way open for legislature was to bring those omitted scheduled offences in the definition of section 6. Consequently section 6 was substituted by changing the definition of terrorism and making it broad based. But after this Amendment another situation cropped up forcing legislature to include item No 4 in third Schedule. The situation was that vide Ordinance No XXXIX of 2001 the Suppression of Terrorist Activities Act 1975(XV of 1975) was repealed. After this repeal an issue arose about jurisdiction of courts regarding certain Scheduled Offences included in STA of 1975 and relevant for present discussion were the offences under Arms Ordinance, 1965 which included offences under section 13 of Ordinance of 1965 committed in respect of cannon, grenade, bomb, rocket explosions etc. The question of jurisdiction came up before Sindh High Court in a judgment titled "*Roshan Ali v The State"*[36]. It was held that after repeal of STA Court of Session shall try these cases. In the repealed section which was added to ATA in the form of Section 39-C (2)(e) (f) by Ordinance XXXIX of 2001 all the cases which were transferred to Court of Session from STA and not covered under ATA were

[36]2004 PCrLJ 365

protected with addition that those cases shall be tried by Court of Session under Code of Criminal Procedure. Though these offences in respect of cannon, grenade, bomb, rocket explosions etc were included in original Third Schedule of ATA in item 2 (a) (i) but after Mehram Ali's Judgment this item was also omitted from third Schedule having no nexus with the Act.

15. The second issue was that apart from offences under Arms Act & Arms Ordinance mentioned above the Schedule to STA also contained some offences of PPC in item (a) including Section 365-A. Though Section 365-A PPC was included in original Third Schedule of ATA overriding STA but was omitted by Notification No S.R.O. 663(1)/97 dated 21-08-1997. Then vide Ordinance XXXIX of 2001 kidnapping for ransom was included in Section 6 (2) (e) of ATA in the definition of 'Action" only . But again the question was that mere including offence of kidnapping for ransom in definition of 'Action' was not sufficient unless the 'Action' was made for the purpose of (b) or (c) of section 6 . According to scheme of definition of section 6 'Action' are mentioned in 6(2) and all those actions would constitute terrorism if action is committed for the purpose mentioned in section 6 (1) (b) or (c). Mere kidnapping for ransom did not fall in definition of terrorism and only fall in 'action'. The result was that Section 365-A PPC which otherwise deals with kidnapping or abduction for extorting property and as substitute of kidnapping for ransom was to be tried by Court of Session with repeal of STA.

16. The third issue was that in item (b) of Schedule to STA offences punishable under Explosive Substances Act,1908 were also included which after the repeal of STA fell to the jurisdiction of Court of Session as these offences were not mentioned in ATA or Third Schedule to ATA and offences under Explosives Substances Act, 1908 were to be tried by ordinary courts. All three offences simpliciter by themselves if committed without intention of terrorism as explained in Section 6(1)(b) or (c) ATA had no nexus with terrorism as defined in section 6. These could be terrorism if committed with intention of terrorism or combined with other offences. In order to remove the lacunae as a result of repeal of STA the Act II of 2005 introduced amendments to accommodate these three offences in ATA in Third Schedule in the form of

item No 4. Through same Act sub-section 6(2) (ee) & 7(ff) were inserted to bring use of explosives etc. within definition of 'Action' in line with Mehram Ali's nexus principle & also to make this offence punishable . These sub sections are reproduced below

> ***"6(2) (ee) Involves use of explosives by any device including bomb blast".*** Subsection 7(ff) is reproduced below.
>
> "***7(ff) the act of terrorism committed falls under section 6 (2) (ee), shall be punishable with imprisonment which shall not be less than fourteen years but may extend to imprisonment for life".*** In the same Act of 2005 sub section 19 (8b) was inserted to cover some aspect of explosives related hurdle in the form of sanction of Provincial Government under Section 7 of Explosives Substance Act, 1908 which subsection is reproduced below.
>
> "***19(8-b) Notwithstanding anything contained in section 7 of the Explosive Substances Act,1908 (VI of 1908), or any other law for the time being in force, if the consent or sanction of the appropriate authority, where required, is not received within thirty days of the submission of challan in the court, the same shall be deemed to have been given or accorded and the court shall proceed with the trial of the case***."In this Act of 2005 in item No 4 the words "**to the exclusion of any other court"** read with word "**exclusively"** in section 21-G were inserted to oust the jurisdiction of Court of Session for the offences mentioned in item No 4 in Third Schedule and not for taking juveniles out of the jurisdiction of Juvenile Courts. The holistic reading of Act of 2005 would clearly show that this Act was mainly aimed to make the jurisdiction of AT Courts exclusive regarding these three offences inserted in item 4 qua Court of Session.

17. The question here would arise that had there been no word "**Exclusively**" inserted in Section 21-G or the words "to **the exclusion of any other Court**" in item No 4 of Third Schedule then would AT Court be not competent to try these offences mentioned in item 4 being an amendment introduced later in time to Arms Ordinance/Arms Act and Explosive Substances Act? Of course not. The reason is that as discussed thoroughly in para 12 above

that if there are two special laws governing same subject then mere being later in time would not repeal earlier by implication or cannot make earlier redundant so long as both can run concomitantly. But before that the problematic question is whether a particular law is special or general. Here the competing laws are ATA v Explosives Substance Act. For offences of Explosives Substance simpliciter the later law is special and ATA general. Similar is the case between ATA & Arms Laws. For offences under Arms Laws simpliciter Arms Laws are special and ATA general. However, if terrorism is committed with firearms or explosives than ATA would be more special. To remove this difficulty, there must have been express words of exclusion of jurisdiction of courts under both the laws and it was necessary to have inserted the word "**exclusively**" and "**to the exclusion of any other court**". If we look again at the wordings used in the beginning of item No 4 it starts with these words "**Without prejudice to the generality to the above paragraphs".** These words mean that if an offence, say, committed with respect to firearms mentioned in new item No 4 falls under above mentioned three items of Third Schedule which three items have nexus with terrorism then there is no need to resort to item No 4 as the offence shall fall within an offence under the Act. But if the offence committed with, say, firearm does not fall within above mentioned three items then despite having no nexus with terrorism no other court can try these offences in item No 4 except AT Court. Here a question arises that when offences in item No 4 by themselves have no nexus with terrorism then how AT Court can try these offences in view of Mehram Ali's judgment. Mehram Ali's Judgment did rule that Schedule does not regulate Act and any offence included in Third Schedule having no nexus with section 6,7 & 8 were struck down. But this judgment did not strike down section 34 and allowed inclusion of offences in Schedule so long as it had nexus with the object of ATA and section 6, 7 & 8 of ATA. In later jurisprudence it is settled that if an offence has nexus with the object of the Act or section 6,7& 8 then irrespective of the fact that an offence falls within the definition of 'terrorism" or not it can be included in Third Schedule and offender shall not be convicted for terrorism but for offence for which he is charged. [37]The object of the Act as contained in preamble includes "speedy trial for heinous offences".

[37]Basharat Ali v Special Judge Anti-terrorism PLD 2004 L ah 199—Farooq Ahmed v State & another PLJ 2017 SC 408—Amjad Ali & other v State PLD 2017 SC 661—Muhammad Bilal v The State 2019 SCMR 1362—Ghulam Hussain & other v State & other PLD 2020 SC 60

Here while including item No 4 in Third Schedule the legislature has included kidnapping for ransom and explosives in section 6 to overcome the hurdle of nexus principle. But it has been explained above that why word "**Exclusively**' and "**to the exclusion of any other court**" were used was due to peculiar situations of three cases mentioned above.

18. <u>Has Section 14 of JJSO made JJSO a subordinate law to other laws?</u>

Section 14 of JJSO discussed in Qamar Hussain Shah Judgment is reproduced below for ready reference.

> **"14. Ordinance not to derogate from other laws. -** ***The provisions of this Ordinance shall be in addition to, and not in derogation of, any other law for the time being in force.***

The other main ground in Qamar Hussain Shah judgment was the subordinate character of JJSO *vis a vis* ATA which has superior effect containing overriding provision. Now let us go deep into the wisdom behind insertion of section 14 of JJSO. Was it meant to make all provisions of JJSO subordinate to all laws having overriding effect or there was any other wisdom. If it was the first intention then JJSO was an ineffective law and juveniles could not be tried by Juvenile Courts as pointed above in cases falling under ATA, CNSA and even SCMO which means repeal of jurisdiction by implication qua all these three laws, at least. And if wisdom behind section 14 was other than this then JJSO would be saved. It is also principle of interpretation and also a rule of universal application that each principle admits of exceptions. As explained in (*K-Electric (PVT) LTD V The State and others*)[38] that a General Law is not to be construed to abrogate an earlier Special enactment is not an absolute principle and is not automatic and is dependent upon many factors. Every section and every law are to be construed by taking all factors leading to enactment of a law or a provision. Looking at scheme of ATA, SCMO, CNSA, NAB Ordinance and Anti-Corruption law one reaches the conclusion that these laws are meant for not extending benefits to the accused but to devise such legal ways and means which ensure conviction of accused and also provide for effective punishments to accused as compared to general laws and other special laws. But JJSO is for the benefit of accused unlike the category of laws mentioned above. Overriding effect to former category of laws is to ensure that

[38]PLD 2019 Sindh 209

if any concession/leniency is provided in any other laws *vis a vis* these special laws then that leniency/concession would not be available to accused. But JJSO as its preamble goes has a different purpose. The preamble is reproduced below "***Whereas it is expedient to provide for a criminal justice system and social reintegration of juvenile; it is hereby enacted as follows***". Some of the preambles of statues of former category are reproduced below; Preamble of ATA "***Whereas it is expedient to provide for the prevention of terrorism, sectarian violence and to speedy trial of heinous offences and for matters connected therewith and incidental thereto***". Preamble of the Pakistan Criminal Law (Amendment) Act 1958. "***Whereas it is expedient to repeal and re-enact, with certain amendments the Pakistan Criminal Law (Amendment) Act,1948, providing for more speedy trial and for more effective punishments of certain offences***". The preamble of NAB Ordinance is long enough but the gist is that the law is enacted to take effective measures for detection, prosecution and speedy disposal of cases involving corruption etc. Similarly, preamble of CNSA also speaks of controlling the production, processing, and trafficking of drugs & substances. The intent and purpose behind both categories of laws mentioned herein are quite different, that is why JJSO by insertion of Section 14 allows all those leniencies/concession/facilities which are more friendly for the rehabilitation and social reintegration of juvenile provided in other laws and is a beneficial statute in contradistinctions to penal statutes. The purpose was not to make JJSO subordinate to all other laws. An example would make the issue clearer. JJSO provides for the bails of Juvenile accused in non-bailable offences which is more lenient than general law of bails. But if there is any other law which is even more lenient in bails to juvenile than JJSO then JJSO would give way to other law and JJSO would not be a hurdle in granting bails to juvenile under other law. But in statutes of former category if any other law is lenient in granting bails, then other laws shall not be resorted to. Many other situations may arise where any other law is more friendly to juvenile in social reintegration or rehabilitation or probation then the other laws shall be resorted to but not in statutes of former category. In Qamar Hussain Shah judgment his lordship Mr. justice Rehmat Hussain Jaffrey (minority view) added that words used in section 14 of JJSO "in addition to, and not in derogation of" were meant for making JJSO an appendix to other

laws like CNSA,ATA and other laws. His lordship clarified that words "in addition to" meant that all provisions of ATA and CNSA and other laws can be made applicable in JJSO, and it never meant to make JJSO subordinate to other laws in all respects. His lordship also added another point that in section 14 of JJSO the words 'for the time being in force 'have made JJSO workable with all other laws whether before JJSO or after JJSO and that in section 32(1) of ATA the words "for the time being in force" are missing hence ATA cannot be said to override future laws. This ground also did not find favor with majority.

19. <u>Legislative Offshoots of adherence to Judgments in Part II and damage caused</u>

As discussed above that legislature never intended to make JJSO subordinate but judicial interpretation in judgments in Part II making JJSO subordinate to ATA lead to following legislative actions which have caused severe damage to legislation on Juvenile subject and also to jurisprudence. In the first attempt the legislature due to these judgments was forced to introduce an amendment in JJSO in the year 2012 in the form of an Ordinance [JJSO (Amendment) Ordinance 2012 (No V of 2012] which Ordinance lapsed by efflux of time. Through this Ordinance an amendment was introduced in JJSO for conferring powers of Juvenile Courts on ATA Courts. This was due to paras 16 & 17 of majority view in Qamar Hussain Shah Judgment in which it was held that powers of Juvenile Courts could not be given to AT Courts under Section 4 of JJSO as it was not a Sessions Court. But it will be seen in following paras of this judgment that this discussion and consequent legislation in the form of this Ordinance of 2012 was a futile exercise having no relevance to the issue nor conferment of powers of Juvenile Courts on AT Courts could resolve the main issue of jurisdiction. But the most damaging legislative initiative was to enact a new Juvenile Justice System Act, 2018 in which Section 23 is introduced in place of Section 14 of JJSO 2000 giving this Act of 2018 an overriding effect. The intention of legislature was at the time of JJSO 2000 not to make it subordinate but beneficial to juveniles but due to this interpretation this law was made subordinate to other laws. Now to remedy the defect (which was not there in JJSO 2000 as interpreted above) the legislature has given JJS Act, 2018 an overriding effect but this overriding effect has

damaged the whole scheme of JJSO and new Act of 2018. One of the learned judges (his lordship Mr. Justice Arif Hussain Khilji) in Qamar Hussain Shah Judgment suggested that JJSO be given overriding effect in order to save the JJSO from subordination of ATA and also to make it beneficial in terms of extending benefits of rehabilitation and social reintegration to Juveniles. But this proposal was not sound. The JJSO was not subordinate to ATA but for the interpretation made in Qamar Hussain Shah Judgment. Now after this overriding effect no concession/leniency etc. provided in any other law in terms of sentence, procedure or social reintegration or rehabilitation would be available to juvenile, and this of course is/was not the intention of the legislature. For instance, concession in sentence granted to child in between age of 12 and 15 years under KPK Child Protection & Welfare Act,2010 could have been granted under JJSO 2000 due to section 14 but now under new Act of 2018 due to section 23(giving overriding effect on all laws including juveniles' friendly laws) grant of this concession would be a big question. And to extend this concession the courts will have to make another interpretation that this concession is not in conflict with JJSO or Act of 2018 which will open another controversy. Such controversies may arise in different Borstal Institution Laws or Reformatory School Laws *vis a vis*JJS Act of 2018. It would be in the fitness of things if old section 14 is restored by legislature in place of new section 23 to avoid further controversies and damage done to whole scheme of laws in general and juveniles in particular. This judgment of Qamar Hussain Shah with great respect resulted in disturbing all legislative scheme and the legislature started inserting ouster provisions in new laws for instance, section 44(3) of the Prevention of Electronic Crimes Act, 2016 excluding juveniles from the purview of this Act. It means that if there is no such exclusion provision then JJSO shall be subordinate to all new laws.

20. The present issue of ATA V JJSO came up before the worthy Supreme Court of Pakistan when the jurisdiction of AT Court in offences of terrorism by juvenile offender was an issue.[39] The matter was taken cognizance of by worthy Supreme Court of Pakistan against order of Baluchistan High Court in a case titled *"State v Wali Muhammad"*. The Supreme Court at preliminary stage also referred to Qamar Hussain Shah case and ordered for

[39]2012 SCMR 201

constitution of a larger bench being a case of first impression. The matter was then placed before the larger bench of the Supreme Court but the same was disposed of not on merits.[40]The matter was disposed of mainly on the ground that since the concerned AT Courts has also been given powers of Juvenile Courts the issue of jurisdiction is no more relevant. The gist of this order was that if any issue of jurisdiction was still there the same had been resolved by conferring powers of Juvenile Court on the AT Court. But no judgment was given on merits whether juveniles could be tried by AT Court But here one can say that if matter was disposed of on the ground that same court was also given powers of Juvenile Courts which meant that terrorism offences could only be tried by Juvenile Courts. But it cannot be concluded that Supreme Court did mean so as it was a short order and not decided on merits and all the issue decided in Qamar Hussain case were left undecided. Whatever was observed in this disposal order was summary in nature.

21. Another ground on which the learned Chief Court relied is Notification of 30-05-2012 whereby Anti-Terrorism Courts were given powers of Juvenile Courts on the strength of Ordinance V of 2012 discussed above. The Ordinance lapsed after 120 days of its promulgation. The present offences were committed in 2014 then how come this Notification and lapsed Ordinance could be relied upon and especially when no reenactment of the Ordinance was made thereafter. Secondly it is to be seen if the Ordinance was ever extended to Gilgit-Baltistan. Thirdly the record shows that if Judge AT Court was given powers of Juvenile Court also then this case was not decided by that judge as Juvenile Court but as AT Court. The AT Court did not accept the plea of accused that they be treated as juveniles nor any procedure of JJSO was observed rather the AT Court specifically determined that this case was not a case of Juvenile Court but of AT Court which was main ground of appeal before Chief Court and learned Chief Court also maintained the order of AT Court in this regard. Fourthly this argument is just like when a court is to decide jurisdiction of a case between Family Court & Civil Court and then it is decided that since Civil Judge is also Family Court the matter of jurisdiction stands resolved. The issue still would be whether the case is to be decided by same Judge as Family Judge or

[40]Wali Muhammad v State & another CA No 932 of 2011 decided on 18-01-2012 (unreported)

Civil Judge. Fifthly this Ordinance No V of 2012 only conferred powers of Juvenile Court on Anti-Terrorism Court but never said that offences of terrorism committed by Juveniles would be triable by Juvenile Courts. Relevant Section 4 (1) and 4(2) (ia) of JJSO as inserted by Ordinance V of 2012 is reproduced below. Section "4 (1) ***The Federal Government, or if so directed by it, the Provincial Government, shall in consultation with the Chief Justice of High Court concerned establish, by notification in the official gazette, one or more Juvenile Courts in relation to any area as may be specified in this behalf by the Federal Government or the Provincial Government, as the case may be, or, the Federal Government, or if so directed by it, the Provincial Government, may designate an existing Anti-Terrorism Court established under the Anti-terrorism Act, 1997 (XXVII of 1997) to exercise the power of a Juvenile Court."***

In Sub-section (2), in paragraph (a), after sub-paragraph (i), the following new sub-paragraph shall be inserted, namely.

"(ia) An Anti-Terrorism Court or any other Special Court established under law; or".

The example is rule 3 of West Pakistan Family Court Rules, 1965 reads as under "***The Courts of the District Judge, the Additional District Judge, the Civil Judge, the President of Majlis-e-Shoora, Kalat and the Qazi appointed under the Dastur-ul-Aml Deewani Risalat Kalat, shall be the Family Courts for the purpose of this Act."*** It never says that civil cases involving husband and wife shall be heard by Family Judge or a family case shall be heard by Civil Judge having both powers of Family and Civil Judge. If an ATC is also empowered as Juvenile Court, then it means that the same judge who is also ATC judge can also try all cases of all juveniles falling within JJSO as Juvenile Courts. The terrorism cases can be decided by same judge while exercising powers of AT Court. The reason is that the *ratio* as per Qamar Hussain Shah & all other cases in Part II of paragraph 2 of this judgment has settled the jurisprudence that Juvenile Court cannot try cases of terrorism then how these cases are heard by Juvenile Courts (does not matter whether same judge is conferred both the powers or not).It can be legally possible only when the whole jurisprudence on the subject is rectified (as is the subject of present judgment). One can say that Ordinance V of 2012 was a later legislation, and it

was aimed at rectifying the effect of judgment of Qamar Hussain Shah. It is correct that legislature can override judgments or legislate any *intra vires* legislation. But the wordings of this Ordinance V of 2012 have never given overriding effect to JJSO nor was there a single word that cases of terrorism if committed by juveniles should be tried by the same AT Court who was given the power of Juvenile Court. There was also nothing of the sort in the Ordinance to show that it had the intention of nullifying the *ratio* of Qamar Hussain Shah & the group judgments by supplying *non obstante* clause like (***notwithstanding anything contained in any judgment***). Had this Ordinance been on these lines then there would have been a conclusion that now after this Ordinance the effect of judgments of Qamar Hussain Shah and group have been corrected.

22. Mere conferring powers of Juvenile Court on AT Court would not serve the purpose rather this last approach is self-contradictory. And if terrorism offences are tried by Juvenile Court (regardless of same judge having both powers) then as observed above the whole *ratio* of judgments in Part II is disobeyed (though this *ratio* is not a good one) as no conciliation and harmonization is possible by sticking to both *ratio* of these judgments and holding that terrorism cases can be tried by Juvenile Courts. If this was the jurisprudence, then the Chief Court could not rely on cases of Qamar Hussain Shah and group and also holding that Juvenile Court (same judge) could try offences of terrorism which is not the *ratio* of Qamar Hussain Shah judgment. And then also refusing to determine ages of accused for treating them as juveniles. These are paradoxes of highest degree. If *ratio* of Qamar Hussain Shah Judgment is correct, then this case cannot be tried by Juvenile Court (regardless of same judge having powers of Juvenile courts). If Juvenile Court can try this case of terrorism, then *ratio* of Qamar Hussain Shah judgment cannot be relied upon. The Ordinance of 2012 has not overruled *ratio* of Qamar Hussain Shah judgment as discussed above. Not only learned Chief Court in this case but other High Courts of Pakistan continued to refer to *ratio* of Qamar Hussain Shah judgment & the group after Ordinance V of 2012.[41]The question of conferring Juvenile Court jurisdiction on AT court came up for discussion in Qamar Hussain Judgment when in the Notification dated 20-11-2004 it was shown that powers of Juvenile Courts were conferred on AT Courts under

[41]Mujahid Iqbal v The State and another 2019 PCr.LJ 1432---

Section 4 of JJSO. It was held in that judgment in paras 17 & 18 (majority view) that neither Provincial Government nor High Court could confer such powers on AT Courts and notification was set aside. In view of these paras 17 & 18 Ordinance V of 2012 was promulgated to amend Section 4 of JJSO for conferring powers of Juvenile Courts on AT Courts. But in a judgment of same group in Part II of para 2 above titled "*Muhammad Din v Muhammad Jehangir*"[42] it was held that such powers of Juvenile Courts on AT Court could be conferred. This difference of opinion has no material consequence on the issue of jurisdiction between Juvenile Courts and AT Courts. This difference of approach also appeared in Baluchistan when in unreported judgment of worthy Supreme Court referred to above in para 20 above the matter was disposed of on the ground that AT Court had been conferred the powers of Juvenile Court by Baluchistan High Court and this unreported case was heard by worthy Supreme Court before promulgation of Ordinance V of 2012. And again a DB of Lahore High Court in a judgment of Part I of para 2 of this judgment reported as *Umar Afzal v Special Judge Anti-Terrorism*[43] held otherwise by holding that mere conferring of powers of Juvenile Court on AT Court will not serve the purpose and offence of terrorism involving juveniles shall be tried by juvenile court and not by AT Court. In the nutshell whether the powers of Juvenile Court could be conferred on AT Courts or not and who can confer these powers it could not upset the *ratio* of Qamar Hussain Shah & group Judgments by mere conferring of powers of Juvenile Courts on AT Courts nor could it resolve the issue of jurisdiction between two *foras* in the presence of this *ratio.* The issue of jurisdiction could be resolved only by overruling the *ratio* of Qamar Hussain Shah and group judgments.

23. The judgment in Qamar Hussain Shah case is also not proper appreciation of whole legal scenario. On one hand the judgment mainly relies on overriding effect of ATA vis a vis JJSO and then in para 21(iv) it is held that some beneficial provisions of JJSO may be applied by ATA if not inconsistent with the ATA but AT Court is not bound to follow the procedure of JJSO. But how these beneficial provisions can be applied when in the same judgment it is said that separate trial of juveniles is not consistent with section 19(7) of ATA

[42]PLD 2004 Lahore 779
[43]PLD 2012 Lahore 433

(para 15 of the judgment). The determination of inconsistent procedural provision is another complexity. The judgment also lacks clarity that how some offences under ATA & Schedule III are triable by Juvenile Court and some by ATA courts. The bifurcation of some items from Schedule III to be tried by AT Courts and some by Juvenile Courts might be relevant for pending cases at the time when Amendments in 2001 were promulgated but this bifurcation is not relevant to all those cases which were filed after those amendments. In fact, this judgment was delivered on two references by an AT Court for transfer of pending cases to Juvenile Courts and the learned Court confined itself to transfer of pending cases by bifurcating pending cases in two groups not clarifying as to fate of future cases. But many other judgments of same group mentioned in Part II of para 2 above has clearly laid down that juvenile Courts cannot hear all cases which fall under ATA.

24. In some of these judgments of Part II of para 2 like *Azhar Bibi v State*[44] it has been held that as by virtue of Ordinance XXXIX in 2001 some amendments were made in ATA inserting definition of "child" in section 2(d) and also inserting section 21-C through which some offences were mentioned which are child specific and made punishable. These offences are under Section 21-C (5) and 21-C (7) (e) & (f) hence child who is under 18 years of age is triable under ATA. Whatever is discussed in present judgment by me to convince that juveniles are not triable by AT Courts has been finally supported by insertion of these provisions regarding child in ATA which were not there before 2001. If all the offences under ATA committed by juveniles are triable by AT Courts, then what was the fun in making only three child specific offences as part of Section 21-C. If reasons given in *Azhar Bibi* case are presumed to be correct, then this amendment clearly supports the view that children are not subject to ATA in the presence of JJSO unless some specific provision is given in ATA to bring the children within the fold of ATA. As discussed in detail above that JJSO is special in special being concerned with a class and ATA being general cannot override JJSO and if ATA intends to bring class of Juveniles within its fold, then it will have to specifically provide for that. The legislature, therefore, made this amendment to bring children subject to jurisdiction of ATA only for offences mentioned in Section 21-C (5) and 7 (e) &

[44]2004 PCrLJ 1967

(f) and no more. Had children been subject to jurisdiction of AT Court then what was the need of mentioning only three offences only. But this whole approach is incorrect. The purpose of defining these three child specific offences was to provide for lesser punishment for children if compared with same offences committed by major persons as is manifest from looking into other subsections of 21-C which deals with same offences for major offenders. This last approach is nearer to legislative intention because if legislature intended to make children culpable to only these three offences, then result would be that they are not culpable for all other offences of ATA. In fact, under Section6, 7,8 & Schedule III of ATA all major and children are culpable for all offences though trial is to be conducted by Juvenile Courts. These three children's specific offences are to provide for lesser punishment for children and not to make children subject to AT Courts. And if the intention of the legislature was to make children subject to AT Courts, then it can at the most be to the extent of these three offences only. Children are included in all offences of ATA and are to be tried by Juvenile Courts for all the offences including these three offences. A proviso to Section 21-F inserted in 2013 shall also be interpreted that if a child convicted for offences under ATA (and not by AT Courts) shall be granted remissions. Another aspect of the matter which is left for decision in appropriate proceedings in future is that if intention of legislature was to bring these three child specific offences within the jurisdiction of AT Courts, then question of *vires* of these provisions would arise in the light of Fundamental Right of Article 25 (3) of the Constitution of Islamic Republic of Pakistan read with Article 26(3) of Government of Gilgit-Baltistan Order, 2018. As per these Articles State can make special provisions for protection of children. State did promulgate JJSO for protection of Children and if any provision of ATA militates against JJSO it can be struck down being *ultra vires.*

25. Another aspect of this case is peculiar to Gilgit-Baltistan which needs further discussion. Section 21-G was inserted by Ordinance XXXIX of 2001. The ATA was extended in this region vide The Northern Areas Anti-Terrorism Order 2000 on 11th July.2000. This extension was to the extent of ATA as in force immediately before the commencement of this order of 2000(Section 2 of the Order 2000). It is not argued before the learned Chief Court or discussed whether Ordinance XXXIX of 2001 whereby section 21-G

was inserted has ever been extended to GB like two amending Acts in ATA in 2014 (No I of 2014 and No VI of 2014) were extended to GB vide the Gilgit-Baltistan Council Adaptation of Laws Act,2015. The parties are directed to assist the Court on this point when main CrPLA shall be listed for hearing. The learned Chief Court in present case referred to a judgment of Chief Court reported as *Meraj Hussain & 3 Others*[45]already referred to in para 2 above. But there is another unreported judgment of DB of Chief Court[46] which is later in time which falls in category of Part I of para 2 of this judgment which held that Juvenile Court and not AT Court had jurisdiction in offences of terrorism committed by juveniles. The Chief Court in present case has not discussed this unreported judgment. It might be possible that this judgment of DB (being unreported) might not have been brought into the notice of learned Chief Court in present case.

26. <u>Way Forward.</u>

Before parting with this judgment and coming to conclusion I deem it necessary to provide an easy way forward for whatever is discussed above. After going through the whole issue of competing provisions of exclusive jurisdiction and overriding effect amongst different categories of laws the following challenges emerge for deciding which of the two laws is to prevail. The courts are often confused in determining which law is to be preferred or given weightage as there is no comprehensive comparative chart for easily reaching the conclusion. The following chart which might not cover all situations but is designed to cover almost all probabilities. The courts in Gilgit-Baltistan can take benefit from this chart in future keeping in view the other factors, if any. The *ratio* of Qamar Hussain Shah judgment can be tested on the criteria of this chart. This chart is only for determining jurisdiction and not weight of other provisions in competing laws.

> While drawing this chart 3 factors with 7 variables are considered. Any other factor might change the result which is not the subject of present judgment. These three factors with 7 variables are given below.
> **Factor 1**. ---Exclusive Jurisdiction with 2 variables (i) Earlier in time (ii) Later in time.

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[45]2007 PCrLJ 1011
[46]*Massod Raza V The State* bearing No. Cr. Appeal. 23/2007 decided on 24-06-2009

Factor 2. ---Overriding Effect Simple with 2 variables (i) Earlier in time (ii) Later in time.

Factor 3. ---Overriding Effect having Future Effect also with 3 variables (i) Earlier in time (ii) Later in time. (iii). No overriding effect.

a. <u>Category I-- Two Competing Special Laws (Offence Specific)</u>

(i) Two special laws both having *pari materia* overriding and exclusive jurisdiction provisions and both provision of one of the laws being earlier in time and of the other later in time.

(ii) Two special laws both having *pari materia* exclusive jurisdiction provisions out of these only one is having overriding effect with no application to future laws "(*notwithstanding anything contained in any law for the time being in force" is missing*) but in this later law both exclusive jurisdiction and overriding provisions are earlier in time.

(iii) Two special laws both having *pari materia* exclusive jurisdiction provisions out of these only one is having overriding effect but in this later law both exclusive jurisdiction and overriding provisions are later in time.

(iv) Two special laws both having *pari materia* overriding provisions out of these only one is having exclusive jurisdiction and overriding provision and both provisions are earlier in time.

(v) Two special laws both having *pari materia* overriding provisions out of these only one having exclusive jurisdiction later in time.

(vi) Two special laws both having overriding provisions and exclusive jurisdiction provisions(exclusive jurisdiction *pari materia* only). But one earlier in time and having overriding effect on all future laws by including the sentence "*Notwithstanding anything contained in any law for the time being in force*"

(vii) Two special laws both having *pari materia* overriding and exclusive jurisdiction provisions. But none of the two having effect on future laws by not including the sentence "*Notwithstanding anything contained in any law for the time being in force*"

(viii) Two special laws both having *pari materia* exclusive jurisdiction provision and one having overriding effect earlier in time by including the sentence "*Notwithstanding anything contained in any law for the time being in force*"

(ix) Two special laws both having *pari materia* exclusive jurisdiction provision and one having overriding effect earlier in time by not including the sentence "*Notwithstanding anything contained in any law for the time being in force*"

(x) Two special laws both having *pari materia* exclusive jurisdiction provision and one having overriding effect later in time by including the sentence "*Notwithstanding anything contained in any law for the time being in force*"

(xi) Two special laws both having *pari materia* exclusive jurisdiction and one having overriding effect later in time by not including the sentence "*Notwithstanding anything contained in any law for the time being in force*"

(xii) Two special laws both having *pari materia* overriding effect but one having exclusive jurisdiction earlier in time by including the sentence "*Notwithstanding anything contained in any law for the time being in force*"

(xiii) Two special laws both having *pari materia* overriding effect but one having exclusive jurisdiction later in time by not including the sentence "*Notwithstanding anything contained in any law for the time being in force*"

(xiv) Two special laws both having *pari materia* overriding and exclusive jurisdiction provisions. But both having effect on future laws by including the sentence "*Notwithstanding anything contained in any law for the time being in force*"

(xv) Two special laws both having *pari materia* overriding provisions by including the sentence "*Notwithstanding anything contained in any law for the time being in force".* Out of these two laws one is having exclusive jurisdiction provision earlier in time.

(xvi) Two special laws both having *pari materia* overriding provisions by including the sentence "*Notwithstanding anything contained in any law for the time being in force*". Out of these two laws one is having exclusive jurisdiction provision later in time.

(xvii) Two special laws out of which one having exclusive jurisdiction and the other having only overriding effect later in time.

(xviii) Two special laws out of which one having exclusive jurisdiction and the other having only overriding effect earlier in time.

b. <u>Solution of 18 probabilities of Category I</u>

i. Later in time shall prevail as to jurisdiction
ii. Later in time shall prevail as to jurisdiction.
iii. Later in time shall prevail as to jurisdiction.
iv. Earlier in time shall prevail as to jurisdiction.
v. Later in time shall prevail as to jurisdiction.
vi. Earlier in time shall prevail as to jurisdiction.
vii. The one having exclusive jurisdiction provision later in time shall prevail.
viii. Earlier in time shall prevail as to jurisdiction.
ix. The one having exclusive jurisdiction provision later in time shall prevail.
x. One having overriding effect later in time shall prevail even if exclusive jurisdiction in the law containing overriding effect is earlier in time.
xi. The one having exclusive jurisdiction provision later in time shall prevail.
xii. Earlier in time shall prevail as to jurisdiction.

xiii. The one having exclusive jurisdiction provision later in time shall prevail
xiv. Later in time shall prevail as to jurisdiction.
xv. Earlier in time shall prevail as to jurisdiction.
xvi. Later in time shall prevail as to jurisdiction.
xvii. Earlier in time shall prevail as to jurisdiction.
xviii. Later in time shall prevail as to jurisdiction.

Note: - When a special law is promulgated, and a special court is constituted to try offences under the law then such court becomes court of exclusive jurisdiction regardless of the word "exclusively" is prefixed to jurisdiction or not. If, for instance, in an earlier law the word 'exclusive" is prefixed to jurisdiction and in later law dealing with same subject/offences new special court is constituted with no word "exclusive". Both the laws having overriding effect or both not having overriding effect the later in time shall prevail and mere word 'exclusive' cannot make the second law subordinate. The word 'exclusive' is implied for courts having jurisdiction under a special law. And if intention of new law is not to confer exclusive jurisdiction, then such new special law specifically provides that other courts can share the jurisdiction with special court. But in criminal law we can hardly visualize the last situation of sharing of jurisdiction of one offence by two courts by design. The example is that of ATA. Original ATA in 1997 was promulgated having section 12 as conferring jurisdiction on ATA but word "exclusively" was not mentioned in section 12. At that time when ATA was promulgated another law STA was already in force. Section 4 of STA conferred exclusive jurisdiction on special court. An offence under section 365-A PPC figured both in Schedule of STA & ATA. But despite word 'exclusive' missing in section 12 of ATA it was ATA to have jurisdiction and STA was to give way to ATA. Then to give jurisdiction back to STA the offence of Section 365-A was omitted from ATA Schedule on 21-08-1997.

c. <u>Category II-- Two Competing Special Laws (Class Specific)</u>

Amongst two same Class Specific Laws same 18 probabilities can emerge, and solution is the same as given in each of the 18 above probabilities.

d. <u>Category III-- Two Competing Special Laws (Offence Specific & Class Specific)</u>

Since these both laws fall in different categories whatever be the position not a single probability out of 18 can give overriding effect to offence specific law over class specific law if there are competing provisions. Because class is more special than offence special laws. And other special laws are not applicable to class save to the extent allowed by class law. The only possibility of overriding class specific law is express mention of same in either of the two laws. The extent to which one allows application of another law can be seen from scheme of both laws, for instance, offences of offence specific laws can be read into class specific laws.

e. Category IV-- Two Competing Special Laws (Offence Specific & Locality Specific)

Since both these fall in different categories no probability out of 18 mentioned in category, I would give precedence of offence specific law over local specific law if there are competing provisions. Because locality specific law is more special than offence specific law. But the only intricacy in these two categories is first to determine which one is more local as compared to the other. Generally, no confusion arises but sometimes confusion may arise as was the case of Nifaz e Nizam e Adl Regulations v ATA in PATA explained in middle part of this judgment.

f. Category V-- Two Competing Special Laws (Locality Specific)

Amongst two same locality Specific Laws same 18 probabilities can emerge, and solution is the same as given in each of the 18 above probabilities.

g. Category VI-- Competing General and Special Law.

Competing provisions of Special Law shall override General Law even if no overriding or exclusive provisions are available in special law. Special Law shall prevail over General law no matter earlier or later in time except express provision to the contrary. But the only intricacy is to decide that all provisions in general law are not general. Many provisions can be special. And in this last situation the same 18 competing probabilities may arise and same are the solutions.

h. Category VII-- Two Competing General Laws

First step would be to decide whether both competing provisions of both the laws are general or special. If it is decided that one is special and other general, Then the same consequence as in between General and Special Law. But if both are general then later in time shall prevail except express provision to the contrary.

i. Test of *ratio* of Qamar Hussain Shah Judgment on the chart given above.

While comparing CNSA with JJSO in the judgment of Qamar Hussain Shah it is concluded that JJSO having exclusive jurisdiction is later in time to CNSA hence JJSO shall prevail as to jurisdiction. The question would be that if at all comparison was allowed between these two (which is not allowed between two different categories) categories of laws then what about overriding provision of CNSA which is not available in JJSO. And had JJSO been supplied with overriding provision then in presence of two overriding provisions the CNSA would have precedence as the overriding provision of CNSA was not confined to only those laws which were made prior to CNSA but for future laws as well. Section 76 of CNSA is reproduced below.

"Section ***76. Act to override other laws. -The provisions of this Act shall have effect notwithstanding anything contained in any other law for the time being in force"***

Based on the *ratio* of Qamar Hussain Shah judgment JJSO could not be given precedence merely on the ground that exclusive jurisdiction provision of JJSO is later in time. Presuming both laws to be of same category I above then had both laws been couched with *pari materia* provisions of overriding effect and *pari materia* provisions of exclusive jurisdiction then JJSO could have been given upper edge being later in time. This comparison can be tested on criteria given in table of category I of this paragraph above. This case falls in probability viii of category I (if both laws are of same category which is not the case here). The only way to save JJSO is by bringing it in category III of this paragraph.

27. The result is that the *ratio* of judgments of Part II above as followed by learned Anti-Terrorism Court Gilgit and learned Chief Court Gilgit-Baltistan in case under challenge before this Court cannot be said to be based on proper appreciation of rules of interpretation and within overall scheme of laws and have resulted in head on collision of many laws as pointed out in this judgment above. Nor the conferment of powers of juvenile courts on AT Courts have brought the cases within the ambit of Juvenile Courts in the presence of *ratio* of judgments of Part II above as held by learned Chief Court in this case under challenge before this court. After the new *ratio* the Juveniles Court will have jurisdiction to try cases of juveniles involved in terrorism regardless of separate juvenile courts or same judge empowered to deal both juvenile and terrorism cases. Irrespective of effect of Ordinance V of 2012 as discussed above being a permanent law or temporary law it will also be seen by bench hearing this case whether the Ordinance V of 2012 was extended to Gilgit-Baltistan and if so then what was its effect after 120 days when it lapsed. The present miscellaneous petition which is for suspension of sentence of petitioner awarded to undergo rigorous life imprisonment with fine of Rs 3 lac is filed under Section 426 Cr.PC. Under the Supreme Appellate Court Rules, 2008 this petition should have been filed under rule 7 of Order XXIII. The petition is converted to one under rule 7 of Order XXIII of Supreme Appellate Court Rules, 2008 and judgments of ATA & Chief Court are suspended in Chamber in exercise of the powers in Chamber under Order V rule 2(18) of Supreme Appellate Court Rules, 2008, and petitioner is released on bail provided he furnishes bail bonds to the tune of Rs 2 lacs with two reliable sureties to the

satisfaction of Registrar of this Court, if he is not required to be detained in any other case(s). The main Cr.PLA be listed immediately on the availability of Bench.

Announced
31.10.2022 **Acting Chief Judge**

Approved for Reporting.