Response to the questions/topics uploaded on the website of the Judicial Academy on 22.4.2020.

Dear friends,

At the outset, we must acknowledge that by and large very well-researched responses to the questions and topics set for interaction and exchange have been received and we have incorporated the relevant parts in our answers.

Topic I for the Principal District Judges was to just ignite a thinking process in areas where there exists gaps between law and justice, and to reflect and to dwell upon such issues so that our system remains a live and responsive institution of justice dispensation.

For District Judges, Question no.2 is a grey area and we have proposed our stand on the point.

There were differences in opinion among officers on the point of applicability of customary laws of inheritance among tribal Christians. We have tried to sum up the law on this point.

It was not possible to upload all the responses and we are selectively uploading some of the responses of the Principal District Judges. With regard to the rest of the responses, we will upload their names and grades of their responses as per our assessment.

Officers are free and welcome to send their opinion, if they differ on any point in our answers.

I may add as a disclaimer that views expressed hereunder are that of the Judicial Academy staff and officers and are not intended to be cited in any Judicial Proceeding.

Director
Judicial Academy

Question for the officers in the rank of Principal District Judge (PDJ) including those working in Family court and Labour Courts

Question 1:

Professor Ronald Dworkin in his books law's Empire writes : "*Law Suits matter in another way that cannot be measured in money or even liberty. There is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice. A judge must decide not just who shall have what, but who has behaved well, who has met the responsibilities of citizenship, and who by design or greed or insensitivity has ignored his own responsibilities to others or exaggerated theirs to him.*"

Do you agree with the above proposition? Give your views in the light of different provisions and case laws in Civil and Criminal matters.

Answer:

The given statement encapsulates broadly two key concepts which, according to the author, need to be factored in the adjudicatory process. The **first** is the **moral dimension** involved in any action at law. The **second** is the matters which though not *strictu sensu* in issue, like **behaviour and conduct of parties, their discharge of citizenship responsibilities** may be considered by the Judge in adjudication of the dispute.

MORAL DIMENSIONS

There is a fundamental difference between administration of law and administration of justice which has been highlighted in **(2010) 13 SCC 780, *Ramchandar Bhagat v. State of Jharkhand*,** wherein it has been he observed that *the separation of law from morality by the British Positivist jurists, Bentham and Austin, was great advancement in legal history. The oft quoted story in this connection, is of the famous Lord Chancellor of England, Sir Thomas More (1478-1535) who once went for a walk on a street in London with his daughter, Margaret and her husband, Roper. On seeing a man running on the street, Margaret told Sir Thomas, "Father, get that man arrested". When Sir Thomas asked, "why", she replied, "because he is a bad man". Sir Thomas then asked, "but, which law has he broken?"to which she replied, "he has broken the law of God." Sir Thomas then said, "then let God arrest him. I arrest a man only if he has broken a law of the Parliament."*

Another interesting story has been narrated in this case when Justice Holmes and Judge Learned Hand once had lunch together. *Afterwards, as Holmes began to drive off in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, crying "do justice, Sir, do justice."Holmes stopped the carriage and replied to Hand, "that is not my job. It is my job to apply the law."*

Jurisprudential postulates are, therefore, emphatic on law, morality and justice. The roles of court of law and of court of justice are distinct and in order to decide a lis there should be some basis in the statutory or customary law. But the question that often confronts the District Courts exercising civil and criminal jurisdiction is whether morality and justice are completely beyond the ken of their consideration? Whether there is no room to address the spirit of law beyond the letters of the statute? Whether the courts of law are mechanical systems of administration of the bodies of law and statutes?

There are no straight answers to these questions as the jurists are divided on the moral and the legal dimensions of justice. **Michael J. Sandel,** in his book**, *Justice: What's the right thing to do?,*** talks about these moral dilemmas and says that life in democratic societies is rife with disagreements about right and wrong, justice and injustice. Professor Sandel poignantly sets the following plot on the question whether torture is justified? Imagine you are the Head of the local CIA Branch. You capture a terrorist suspect, who you believe has information about a nuclear device, set to go off in Manhattan, later the same day. In fact, you have a reason to suspect that he planted the bomb himself. Would it be right to torture him until he tells you where the bomb is and how to disarm it?

To put it simply, morality and justice cannot be completely divorced from law because it is on its foundation that the edifice of law is raised. The preambular essence of justice pervades the legal system. Conceptually, justice can mean different things and law can be perceived as a means to achieve justice which is the end. The silence, voids and gaps of law are to be replenished with interpretations which further the ends of justice. Laws cannot capture all the possible physical conditions that a Kaleidoscope of life may present and there are situations for which wide discretions are given to court. We are well aware of the fact that procedural codes are exhaustive only with respect to the matters they lay down and beyond that the Courts can and do fill up the gaps by logic, reason and justice.[1] Professor Dworkin, in his book, cites the example of *Elmer's* case, where a will was made in favour of *Elmer* by his grandfather . But since his grandfather had remarried, *Elmer* apprehended that his grandfather might change the will and, therefore, he murdered him. *Elmer* was convicted and sentenced for a term in jail. It was contended that since *Elmer* had murdered his grandfather, he cannot inherit his grandfather's property. According to the New York statute of wills, the will was legally valid and the statute did not say anything about whether someone named in the will could inherit according to its terms if he had murdered the testator. The Judges filled the gap and interpreted the statute by relying on legislative intent and by constructing

[1] *See,* for example, *Tahsildar Singh and Anr. v. The State of Uttar Pradesh,* AIR 1959 SC 1012.

the texts of the statute against the background of general principles of law based on morality and justice.

Thus it can be safely summed up that wherever discretion is conferred on the Court, the same is to be exercised **for the ends of justice** and therefore the principles of morality, Justice and conduct of the parties are beacon light to guide in adjudication by all the courts.

CONDUCT OF PARTIES

One of the propositions set forth in the statement of Prof. Dworkin is "*A judge must decide not just who shall have what, but who has behaved well, who has met the responsibilities of citizenship, and who by design or greed or insensitivity has ignored his own responsibilities to others or exaggerated their's to him.*"

The jurisprudence involved, can be studied separately under the civil and criminal jurisdictions. While in criminal cases, the *post litem motam* conduct of the accused can be considered only in a limited sense involving the laws of bail, sentencing and probation. But, the behaviour and conduct of the defendant in a civil suit has a large and wide implication and can be taken into account by the court concerned. Equity based reliefs, award of costs and penal costs are the areas where the conduct of the parties become not only relevant but also, sometimes, become the deciding factor.

Our system of criminal justice is adversarial in nature, however, lately there has been a trend in the shift of the role of a Judge in a criminal Court and he cannot be a passive onlooker in the criminal trial. The proactive role of judges in a criminal trial and the quest of the Court to find truth in a trial find support from a catena of judgments of the Hon'ble Supreme Court. In ***Zahira Habibulla H. Sheikh & Anr v. State of Gujarat***, reported in AIR 2004 SC 3114, the Hon'ble Apex Court emphasised that the Courts must take a participatory role in a trial[2] as the principles related to a criminal trial involve a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

In order to play an active or participatory role in a trial, a Judge must analyse all the aspects of the case, one of which is the conduct of the parties particularly the accused. It is pertinent to mention here that conduct of the accused does not refer to the character of the accused which may or may not be relevant as per the provisions of the Indian Evidence Act. The conduct of the accused indicate more towards the

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2 *See* also, *Bablu Kumar and Ors. v. State of Bihar and Anr.*, (2015) 8 SCC 787.

responsibilities and duties of the accused as a citizen of the country and his allegiance thereto or dereliction thereof becomes relevant in criminal adjudication particularly in matters of sentencing, probation and bail.

Sentencing is an area where a wide discretion has been conferred on the Trial Court. The principles of law dictate that any exercise of discretion must not be arbitrary, whimsical and unbridled. One of the factors which aid the Courts at the time of sentencing **is the conduct** of the accused at the time of the incident and also after the incident.

The sentencing law has evolved through judicial precedents in which the conduct of the convict is also one of the factors in awarding sentences. The sentencing is based on the degree of harm caused and it varies on the conduct and background of the offender. It is for this reason that whereas under Section 406 the sentence of imprisonment is upto three years or with fine or with both, but under Section 409, when the criminal breach of trust is conducted by a public servant or by a banker, merchant or agent, the sentence extends upto imprisonment for life. The provisions of the IPC and of other penal statutes contain several such examples. The penal Code draws a distinction between offences which affect individuals and the offences which affect the society and the nation at large. Thus, the quantum of sentence may vary on the conduct of the parties. The post offence conduct is a relevant factor in awarding sentence. In ***Dhananjoy Chatterjee @ Dhanna v. State of West Bengal,*** 1994 (2) SCC 220, it had been *inter alia* held: *"In our opinion, the measure of punishment in a given case must depends upon the atrocity of the crime, the conduct of the criminal and the defenseless and unprotected state of the victim"*.

In **B.A. Umesh v. Regr. Gen. High Court of Karnataka**, reported in 2011 SCC OnLine SC 5, the Hon'ble Supreme Court opined :-

"In the special facts of this case we had rejected the petitioner's appeals and had confirmed the death sentence awarded since in our view this was one of the rarest of rare cases where the rape and murder of the victim, Jayashri, was committed with utmost violence, depravity and brutality. We also recorded in our judgment that ***far from showing any remorse, he was caught within two days of the incident by the local public while committing an offence of a similar type in the house of one Seeba."***

Similarly, in ***Vasanta Sampat Dupare v. State of Maharashtra,*** reported in (2015) 1 SCC 253**,** the fact that the accused had remorse for his act and the act was not premeditated can be a mitigating factor in cases where death sentence can to be awarded. However, there may be cases where even though the offender expresses remorse, it would not have any effect on the Court in relation to sentencing. For example, in the case related to the Parliament attack, even if one of the convicts expressed remorse for the act, it would not be considered to be a mitigating factor

inter alia because of the fact that he not only failed in his duty as a citizen of the country but also attack the very foundation and emblem of Indian democracy.

CAN THE FAILURE OF CITIZENSHIP RESPONSIBLITIES BE CONSIDERED BY THE TRIAL COURTS?

The answer to this question can again be given in the affirmative and a few illustrations in support thereof shall suffice.

Causing arson in a family dispute and causing arson and damage of public property by an unruly mob are visibly similar, but on the point of sentencing they will invite different quantum of punishment.

Theft of any property and theft of public property cannot be weighed by the same golden scale.

A malignant act likely to spread infection of a disease dangerous to life, and deliberately spreading pandemic disobeying quarantine rule and in the teeth of lock-down are not equal acts and on the point of sentence will invite proportionally different sentences.

The principles of probation under Section 360 of the CrPC and under the Probation of Offenders Act are squarely based on the conduct of the offenders. In matters of probation, whether it is for release after admonition or otherwise, the conduct of the offender is one of the most important factors which are to be taken into consideration by the Court.

BAIL

An accused is always granted bail under certain conditions which take into account the conduct of the accused. The principal grounds include the conduct of the accused and the possibility of the evidence being tampered with along with the fact that the presence of the accused can be ensured at the time of investigation, inquiry or trial. The conduct of the accused again becomes relevant while considering the application for cancellation of bail or when the previous bail is cancelled and fresh application for bail is moved. Section 438(2) specifically mentions different conditions that can be imposed regulating the conduct of the accused whose anticipatory bail application is being allowed.

CIVIL LAW

In the domain of civil law, conduct and behaviour of the party are relevant particularly where the relief claimed is equity based. The principles of equity such as "*he who seeks equity, must do equity*", "*equity aids the vigilant, not those who slumber on their rights*" and "*he who comes into equity must come with clean hands*" are accepted

principles of civil law which have evolved through the judgments of the Court of law. The conduct of the parties is relevant at all stages of a civil proceeding – before an action is brought, during the proceeding and after the suit is over. For the sake of brevity, only some of the instances have been discussed hereinunder.

Before even an action is brought before a Court, the conduct of the parties becomes relevant in civil cases. For instance, in a suit, if a party fails to produce a document or answer an interrogatory under Orders 11 and 12 of the Civil Procedure Code, the Court may draw an adverse inference from such a conduct of the party. The Limitation Act is dependent upon the conduct of the parties and if the aggrieved party fails to initiate the action within the prescribed time limit and is not vigilant of his rights, he is prohibited from seeking relief from the Court unless he has a reasonable justification for his conduct. Similarly in cases of adverse possession, it is the conduct of the actual owner which results in an adverse right in the other party, and by virtue of such conduct, he is prohibited from a relief against the party having adverse possession. In the laws related to contract and of Specific Performance, particularly Section 16 of the Specific Relief Act, there is a bar against a person from claiming specific performance of a contract, if he fails to prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant. In the cases related to maintenance, it is the conduct of the defendant/opposite party and his dereliction of his duty and responsibility to maintain the legally entitled claimant, which leads to an order for maintenance against him. Section 25 of the Hindu Succession Act, which addresses the question similar to that in *Elmer's* case, prohibits the murderer of a person from inheriting the latter's property solely because of his conduct of murdering him and failing in his duty and responsibility towards that person and towards the society.

There are other instances in civil law where the further proceeding is dependent on the conduct of the parties. A relief may be granted or refused primarily on the basis of the conduct of the parties during trial before a Court. The order dismissing a suit for default of the petitioner or passing an *ex-parte* decree in the absence of the defendant are some of the instances where the decision of the Court is dependent solely on the conduct of the parties during the trial and his sincerity towards his duties and responsibilities as a responsible litigant before the Court. The provisions related to costs including exemplary costs are dependent upon the conduct of the parties during the trial before the Court. In ***Mandali Ranganna and Others v. T.Ramachandra and Others,*** reported in (2008) 11 SCC 1, it has been held by the Hon'ble Supreme Court that in matters of injunction, one of the important and relevant factors to be considered by Courts is the conduct of the parties.

The doctrine of *lis-pendens* and the principles related to injunction are other areas of civil law where the proposition of Dworkin is apposite.

Conduct is relevant even after a suit is disposed of. In cases of maintenance, if there is a change in the circumstances such as the wife in whose favour the order has been made, does not remain chaste or remarries, she is not entitled for the maintenance under the order. Similarly, if she stays separately from her husband without any reasonable ground for doing so, she is not entitled for maintenance.

Question for the officers working in the rank of District and Additional Sessions Judge (DJ)

Question 1:

What are the protocols to be followed in examination of a victim in sexual assault cases including POCSO? Answer in the light of different guidelines issued by the Hon'ble Courts and the Government of India.

Answer:

The answer to this question lies in the cumulative reading of the following :-

- **The Criminal Procedure Code (CrPC)**
- **The Protection of Children against Sexual Offences Act (POCSO Act)**
- **POCSO Rules**
- **Model Guidelines under Section 39 of the POCSO Act**
- **Guidelines and Protocols for Medico Legal Care for survivors/victims of sexual offences issued by the Ministry of Health and Family Welfare, Government of India has issued**
- ***Nipun Saxena* v. *Union of India, (2019) 2 SCC 703***
- ***Sakshi v. Union of India*, (2004) 5 SCC 518**
- ***State of Punjab v. Gurmit Singh (1996) 2 SCC 384***
- ***State of Kerala v. Rasheed*, (2019) 13 SCC 297**
- ***Mahesh Yadav v. The State of Jharkhand 2017 SCC Online Jhar 923***
- ***Virender v. The State of NCT of Delhi, Crl.A No. 121/08*** **(**MANU/DE/2606/2009)

Section 160 of the CrPC deals with the power of police officer to require attendance of witnesses who appear to be acquainted with the facts and circumstances of the case. It further provides a safeguard that no male person under the age of fifteen years or a woman or a mentally or physically disabled person shall be required to attend at any place other than the place in which such male person or woman resides.

Section 161 of the CrPC provides that the statement of a woman against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, section 376E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.

Under the POCSO Act, **Section 24** deals with the recording of statement of the child by a police officer. Section 24(1) is significant as it provides that the statement of a

child below the age of 18 years must be recorded in a place which is the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.
Section 24 reads:

> **24. Recording of statement of a child.**—(*1*) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.
> (*2*) The police officer while recording the statement of the child shall not be in uniform.
> (*3*) The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused.
> (*4*) No child shall be detained in the police station in the night for any reason.
> (*5*) The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.

Section 164 of the CrPC deals with recording of statements by the Magistrate. Section 164 (5A) deals with recording of statement of the victim of sexual offences as soon as the commission of the offence is brought to the notice of the police.

In cases of person making the statement who is temporarily or permanently mentally or physically disabled, the assistance of an interpreter or a special educator in recording the statement shall be taken by the Magistrate. The same should be video-graphed. Also, such statement recorded shall be considered a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial

Under the POCSO Act, **section 25** deals with the recording of statement of child by the Magistrate and provides that the same should be recorded as spoken by the child. Section 26 of the POCSO Act, in addition to section 25 provides that the statement shall be recorded by the Magistrate in the presence of the parents of the child or any person in whom the child has trust or confidence and wherever necessary may take the assistance of a translator or an interpreter.

Also, significant is the proviso to section 25 which provides that the advocate of the accused cannot be present when the statement of the child is being recorded by the Magistrate.

In cases of child having mental or physical disability, the Magistrate may seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field to record the statement of the child. Also, the Magistrate shall ensure that the statement of the child is recorded by audio video electronic means wherever possible.

Sections 25 and 26 read as follows:

> **25. Recording of statement of a child by Magistrate.**—(*1*) If the statement of the child is being recorded under section 164 of the Code of Criminal Procedure, 1973 (2 of 1974)(herein referred to as the Code), the Magistrate recording such statement shall, notwithstanding anything contained therein, record the statement as spoken by the child:
>
> Provided that the provisions contained in the first proviso to sub-section (*1*) of section 164 of the Code shall, so far it permits the presence of the advocate of the accused shall not apply in this case.
>
> (*2*) The Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code, upon the final report being filed by the police under section 173 of that Code.
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> **26. Additional provisions regarding statement to be recorded.**—(*1*) The Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence.
> (*2*) Wherever necessary, the Magistrate or the police officer, as the case may be, may take the assistance of a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, while recording the statement of the child.
> (*3*) The Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child.
> (*4*) Wherever possible, the Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video electronic means.

Section 164A of the CrPC provides for the medical examination of the victim of rape by a medical expert. Such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner

within twenty-four hours from the time of receiving the information relating to the commission of such offence.

Section 27 of the POCSO Act, provides for the medical examination to be conducted in accordance with section 164A, of a child in respect of whom any offence has been committed under the POCSO Act, irrespective of the fact that an FIR or complaint has been registered or not. In cases of the victim being a girl child, the medical examination shall be conducted by the woman doctor.
Also, the medical examination of a child has to be mandatorily conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence. In case of absence of any such person, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.

Section 27 reads as follows:

> **27. Medical examination of a child.—(***1*) The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973 (2 of 1973).
> (*2*) In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.
> (*3*) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.
> (*4*) Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.

Apart from the aforementioned provisions, it is pertinent to mention here that the Ministry of Health and Family Welfare, Government of India has also issued Guidelines and Protocols for Medico Legal Care for survivors/victims of sexual offences.

Child-friendly Approach

Sections 33 to 38 of POCSO Act, deal with the child friendly approach during trial to be adopted by the Special Court constituted under section 28(1). According to Section 33, the Special court may take cognizance of the case without the accused being committed to it for trial. The questions to the child have to be put by the Judge while recording the examination-in-chief, cross-examination or re-examination of the

child. The Child should be allowed frequent breaks during the trial. In order to create a child friendly atmosphere, a person in whom the child has trust or confidence should be allowed to be present in the court. The child should not be called repeatedly before the Court to testify. The identity of the child should not be revealed during the course of the investigation or trial.

In ***Nipun Saxena* v. *Union of India***, *(2019) 2 SCC 703,* the Supreme Court held regarding the rape victim that ,"Section 228-A IPC clearly prohibits the printing or publishing the name or any matter which may make known the identity of the person. It is obvious that not only the publication of the name of the victim is prohibited but also the disclosure of any other matter which may make known the identity of such victim."

Further, **Section 36** requires that the Special Court should ensure that the child is not exposed in anyway to the accused at the time of recording of the evidence. For this purpose the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.
In ***Sakshi v. Union of India***, (2004) 5 SCC 518, the Apex Court referred to its decision in ***State of Punjab v. Gurmit Singh*** *[(1996) 2 SCC 384]* and stated the following:

> *34. The writ petition is accordingly disposed of with the following directions:*
> *(1) The provisions of sub-section (2) of Section 327 CrPC shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC.*
> *(2) In holding trial of child sex abuse or rape:*
> *(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;*
> *(ii) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;*
> *(iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.*

Section 37 provides for the Trials to be conducted in camera and section 38 provides that the assistance of an interpreter or translator may be taken while recording evidence of child.

Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012 by the Ministry of Women and Child Development

The Guidelines state the following regarding examination of child victims and witnesses:

At trial

i) Children have the right to be heard in any judicial and administrative proceedings affecting them. They must be given a reasonable opportunity to express their views all matters affecting him and these must be taken into account. He should also be allowed to provide initial and further information, views or evidence during the proceedings.

ii) Children have the right to information about the case in which they are involved, including information on the progress and outcome of that case, unless the lawyer considers that it would be contrary to the welfare and best interests of the child. It would be best if the lawyer coordinates with other persons or agencies concerned with the child's welfare, such as the support person, so that this information is conveyed in the most effective manner.

Victims should receive the most appropriate information on the proceedings from all their representatives, and the assistance of a support person appointed under Rule 4(7) most often constitutes the best practice in ensuring that full information is conveyed to the victim.

Such information would include:

(a) Charges brought against the accused or, if none, the stay of the proceedings against him;
(b) The progress and results of the investigation;
(c) The progress of the case;
(d) The status of the accused, including his/her bail, temporary release, parole or pardon,escape, absconding from justice or death;
(e) The available evidence;
(f) The child's role in the proceedings;
(g) The child's right to express their views and concerns in relation to the proceedings;
(h) The scheduling of the case;
(i) All decisions, or, at least, those decisions affecting their interests;
(j) Their right to challenge or appeal decisions and the modalities of such appeal;
(k) The status of convicted offenders and the enforcement of their sentence, including their possible release, transfer, escape or death.

iii) Ensure ahead of time that equipment is working, recordings can be played and that camera angles will not permit the witness to see the defendant: Do not wait until the young witness is in the live link room to run checks: delays and malfunctions can be disruptive to the child. Where a live link is being used during the child□s testimony, ensure that they are able to see all of the questioner□s face.

iv) Explain that the judge or magistrates can always see the witness over the live video link: Explain that this is the case even when the witness cannot see the judge or magistrates.

v) Request the Public Prosecutor to himself to the child before the trial and to answer his/her questions: Judges and magistrates may also ask if the child would like to meet them before the trail starts, to help to establish rapport and put the child at ease. Under the POCSO Act, 2012 questions to the child will be routed through the Judge, and it would be useful for the child to be familiar with their manner of conversation, and vice versa.

vi) Encourage the child to let the court know if they have a problem: They may not understand a question or questions that are too fast, or they may need a break. However, many children will not say they do not understand, even when told to do so. Professional vigilance is therefore always necessary to identify potential miscommunication, and it is the child's counsel who will have to be mindful of any instance where the child is losing concentration, feeling ill, etc.

vii) Do not ask the child at trial to demonstrate intimate touching on his/her own body: This may be construed as abusive. The child can instead be asked to point to a body outline diagram.

In ***State of Kerala v. Rasheed*, (2019) 13 SCC 297,** the Apex court laid down the practice guidelines that should be followed by trial courts in the conduct of a criminal trial, as far as possible:

> **24.1.** A detailed case-calendar must be prepared at the commencement of the trial after framing of charges.
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> **24.2.** The case-calendar must specify the dates on which the examination-in-chief and cross-examination (if required) of witnesses is to be conducted.
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> **24.3.** The case-calendar must keep in view the proposed order of production of witnesses by parties, expected time required for examination of witnesses, availability of witnesses at the relevant time, and convenience of both the prosecution as well as the defence, as far as possible.
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> **24.4.** Testimony of witnesses deposing on the same subject-matter must be proximately scheduled.
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> **24.5.** The request for deferral under Section 231(2) CrPC must be preferably made before the preparation of the case-calendar.
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> **24.6.** The grant for request of deferral must be premised on sufficient reasons justifying the deferral of cross-examination of each witness, or set of witnesses.
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> **24.7.** While granting a request for deferral of cross-examination of any witness, the trial courts must specify a proximate date for the cross-examination of that witness, after the examination-in-chief of such witness(es) as has been prayed for.
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> **24.8.** The case-calendar, prepared in accordance with the above guidelines, must be followed strictly, unless departure from the same becomes absolutely necessary.
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> **24.9.** In cases where trial courts have granted a request for deferral, necessary steps must be taken to safeguard witnesses from being subjected to undue influence, harassment or intimidation

Regarding the examination of a ***child witness***, in ***Nivrutti Pandurang Kokate v. State of Maharashtra,*** (2008) 12 SCC 565, the Apex Court relied upon ***Dattu Ramrao Sakhare v. State of Maharashtra*** (1997) 5 SCC 341.

In ***Dattu Ramrao Sakhare*** **v.** ***State of Maharashtra*** [(1997) 5 SCC 341] it was held as follows:

> '5. … A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.'

Mahesh Yadav v. The State of Jharkhand 2017 SCC Online Jhar 923

The Hon'ble Jharkhand High Court in this case directed to issue notice to all the POCSO Courts, Jharkhand, annexing a copy of the judgment in ***Virender v. The State of NCT of Delhi, Crl.A No. 121/08*** **(**MANU/DE/2606/2009) which has laid down the compulsory guidelines, steps and duty of the police officer and also the Magistrate and Special Court and called for the information from all the POCSO courts, Jharkhand regarding the steps taken in compliance of the judgment

In the cases of sexual offences where there is a child victim or a child witness, the Delhi High Court in the case of ***Virender v. State of NCT of Delhi*** culled out several guidelines related to investigation, medical examination and trial which are as follows:

> **I. RECORDING OF COMPLAINT AND INVESTIGATION BY POLICE**
> (i) On a complaint of a cognisable offence involving a child victim being made, concerned police officer shall record the complaint promptly and accurately.(Ref: Court On Its Own Motion v. State &Anr.)
>
> (ii) Upon receipt of a complaint or registration of FIR for any of the aforesaid offences, immediate steps shall be taken to associate a scientist from Forensic Science Laboratory or some other Laboratory or department in the investigations. The Investigating Officer shall conduct investigations on the points suggested by him also under his guidance and advice.(Ref :Mahender Singh Chhabra v. State of N.C.T Of Delhi &Ors.)
>
> (iii) The investigation of the case shall be referred to an officer not below the rank of Sub-Inspector, preferably a lady officer, sensitized by imparting

appropriate training to deal with child victims of sexual crime.(Ref: Court On Its Own Motion v. State &Anr.)

(iv) The statement of the victim shall be recorded verbatim.(Ref: Court On Its Own Motion v. State &Anr.)

(v) The officer recording the statement of the child victim should not be in police uniform.(Ref: Court On Its Own Motion v. State &Anr.)

(vi) The statement of the child victim shall be recorded at the residence of the victim or at any other place where the victim can make a statement freely without fear.(Ref: Court On Its Own Motion v. State &Anr.)

(vii) The statement should be recorded promptly without any loss of time.(Ref: Court On Its Own Motion v. State &Anr.)

(viii) The parents of the child or any other person in whom the child reposes trust and confidence will be allowed to remain present.(Ref: Court On Its Own Motion v. State &Anr.)

(ix) The Investigating Officer to ensure that at no point should the child victim come in contact with the accused.(Ref: Court On Its Own Motion v. State &Anr.)

(x) The child victim shall not be kept in the police station overnight on any pretext, whatsoever, including medical examination.(Ref: Court On Its Own Motion v. State &Anr.)

(xi) The Investigating Officer recording the statement of the child victim shall ensure that the victim is made comfortable before proceeding to record the statement and that the statement carries accurate narration of the incident covering all relevant aspects of the case.(Ref: Court On Its Own Motion v. State &Anr.)

(xii) In the event the Investigating Officer should so feel the necessity, he may take the assistance of a psychiatrist.(Ref: Court On Its Own Motion v. State &Anr.)

(xiii) The Investigating Officer shall ensure that the child victim is medically examined at the earliest preferably within twenty four hours (in accordance with Section 164A Cr.P.C) at the nearest government hospital or hospital recognized by the government.(Ref: Court On Its Own Motion v. State &Anr.)

(xiv) The Investigating Officer shall ensure that the investigating team visits the site of the crime at the earliest to secure and collect all incriminating evidence available.(Ref: Court On Its Own Motion v. State &Anr.)

(xv) The Investigating Officer shall promptly refer for forensic examination,clothings and articles necessary to be examined, to the forensic laboratory which shall deal with such cases on priority basis to make its report available at an early date.(Ref: Court On Its Own Motion v. State &Anr.)

(xvi) The investigation of the cases involving sexually abused child may be investigated on a priority basis and completed preferably within ninety days of the registration of the case. The investigation shall be periodically supervised by senior officer/s.(Ref: Court On Its Own Motion v. State &Anr.)

(xvii) The Investigating Officer shall ensure that the identity of the child victim is protected from publicity.(Ref: Court On Its Own Motion v. State &Anr.)

(xviii) To ensure that the complainant or victim of crime does not remain in dark about the investigations regarding his complaint/FIR, the complainant or victim shall be kept informed about the progress of investigations. In case the complainant gives anything in writing and requests the I.O, for investigations on any particular aspect of the matter, the same shall be adverted to by the I.O Proper entries shall be made by I.O in case diaries in regard to the steps taken on the basis of the request made by the complainant. The complainant, however, shall not be entitled to know the confidential matters, if any, the disclosure of which may jeopardize the investigations.(Ref :Mahender Singh Chhabra v. State of N.C.T Of Delhi &Ors.)

(xix) Whenever the SDM/Magistrate is requested to record a dying declaration, video recording also shall be done with a view to obviate subsequent objections to the genuineness of the dying declaration. (Ref: Mahender Singh Chhabra v. State of N.C.T Of Delhi &Ors.)

(xx) The investigations for the aforesaid offences shall be personally supervised by the ACP of the area. The concerned DCP shall also undertake fortnightly review thereof. (Ref: Mahender Singh Chhabra v. State of N.C.T Of Delhi &Ors.)

(xxi) The material prosecution witnesses cited in any of the aforesaid offences shall be ensured safety and protection by the SHO concerned, who shall personally attend to their complaints, if any. (Ref: Mahender Singh Chhabra v. State of N.C.T of Delhi &Ors.)

(xxii) Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded.(Ref: Court On Its Own Motion v. State &Anr.)

II RECORDING OF STATEMENT BEFORE MAGISTRATE

(i) The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing.(Ref: Court On Its Own Motion v. State &Anr.)

(ii) In the event of the child victim being in the hospital, the concerned Magistrate shall record the statement of the victim in the hospital. (Ref: Court On Its Own Motion v. State &Anr.)

(iii) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.(Ref: Court On Its Own Motion v. State &Anr.)

(iv) The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.(Ref: Court On Its Own Motion v. State &Anr.)

(v) Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded.(Ref: Court On Its Own Motion v. State &Anr.)

(vi) No Court shall detain a child in an institution meant for adults.(Ref: Court On Its Own Motion v. State &Anr.)

III MEDICAL EXAMINATION

(i) Orientation be given to the Doctors, who prepare MLCs or conduct post mortems to ensure that the MLCs as well as post mortem reports are up to the mark and stand judicial scrutiny in Courts.(Ref : Mahender Singh Chhabra v. State of N.C.T Of Delhi &Ors.)

(ii) While conducting medical examination, child victim should be first made comfortable as it is difficult to make her understand as to why she is being subjected to a medical examination.

(iii) In case of a girl child victim the medical examination shall be conducted preferably by a female doctor.(Ref: Court On Its Own Motion v. State &Anr.)

(iv) In so far as it may be practical, psychiatrist help be made available to the child victim before medical examination at the hospital itself.(Ref: Court On Its Own Motion v. State &Anr.)

(v) The report should be prepared expeditiously and signed by the doctor conducting the examination and a copy of medical report be provided to the parents/guardian of the child victim.(Ref: Court On Its Own Motion v. State &Anr.)

(vi) In the event results of examination are likely to be delayed, the same should be clearly mentioned in the medical report.(Ref: Court On Its Own Motion v. State &Anr.)

(vii) The parents/guardian/person in whom child have trust should be allowed to be present during the medical examination.(Ref: Court On Its Own Motion v. State &Anr.)

(viii) Emergency medical treatment wherever necessary should be provided to the child victim.(Ref: Court On Its Own Motion v. State &Anr.)

(ix) The child victim shall be afforded prophylactic medical treatment against STDs.(Ref: Court On Its Own Motion v. State &Anr.)

(x) In the event the child victim is brought to a private/nursing home, the child shall be afforded immediate medical attention and the matter be reported to the nearest police station.(Ref: Court On Its Own Motion v. State &Anr.)

IV PROCEEDINGS IN COURT

(i) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.(Ref : Court On Its Own Motion v. State &Anr)

(ii) In case of any disability of the victim or witness involving or impairing communication skills, assistance of an independent person who is in a position to relate to and communicate with such disability requires to be taken.

(iii) The trials into allegations of commission of rape must invariably be "in camera". No request in this behalf is necessary. (Ref: State of Punjab v. Gurmit Singh)

(iv) The Committal Court shall commit such cases to the Court of Sessions preferably within fifteen days after the filing of the chargesheet. (Ref: (2007) (4) JCC 2680 Court On Its Own Motion v. State &Anr.)

(v) The child witness should be permitted to testify from a place in the courtroom which is other than the one normally reserved for other witnesses.

(vi) To minimise the trauma of a child victim or witness the testimony may be recorded through video conferencing or by way of a close circuit television. If this is not possible, a screen or some arrangement be made so that the victims or the child witness do not have to undergo seeing the body or face of the accused. The screen which should be used for the examination of the child witness or a victim should be effective and installed in such manner that the witness is visible to the trial judge to notice the demeanour of the witness. Single visibility mirrors may be utilised which while protecting the sensibilities of the child, shall ensure that the defendant's right to cross examination is not impaired. (Ref :Sakshi v. UOI).

(vii) Competency of the child witness should be evaluated and order be recorded thereon.

(viii) The trial court is required to be also satisfied and ought to record its satisfaction that the child witness understands the obligation to speak the truth in the witness box. In addition to the above, the court is required to be satisfied about the mental capacity of the child at the time of the occurrence concerning which he or she is to testify as well as an ability to receive an accurate impression thereof. The court must be satisfied that the child witness has sufficient memory to retain an independent recollection of the occurrence and a capacity to express in words or otherwise his or her memory of the same. The court has to be satisfied that the child witness has the capacity to understand simple questions which are put to it about the occurrence. There can be no manner of doubt that record of the evidence of the child witness must contain such satisfaction of the court.

(ix) As far as possible avoid disclosing the name of the prosecutrix in the court orders to save further embarrassment to the victim of the crime; anonymity of the victim of the crime must be maintained as far as possible throughout.

(x) The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing. (Ref : Court On Its Own Motion v. State of N.C.T Of Delhi)

(xi) The court should be satisfied that the victim is not scared and is able to reveal what has happened to her when she is subjected to examination during the recording of her evidence. The court must ensure that the child is not concealing portions of the evidence for the reason that she has bashful or ashamed of what has happened to her.

(xii) It should be ensured that the victim who is appearing as a witness is at ease so as to improve upon the quality of her evidence and enable her to shed hesitancy to depose frankly so that the truth is not camouflaged on account of

embarrassment at detailing the occurrence and the shame being felt by the victim.

(xiii) Questions should be put to a victim or to the child witness which are not connected to case to make him/her comfortable and to depose without any fear or pressure;

(xiv) The trial judge may permit, if deemed desirable to have a social worker or other friendly, independent or neutral adult in whom the child has confidence to accompany the child who is testifying (Ref Sudesh Jakhu v. K.C.J & Ors).This may include an expert supportive of the victim or child witness in whom the witness is able to develop confidence should be permitted to be present and accessible to the child at all times during his/her testimony. Care should be taken that such person does not influence the child's testimony.

(xv) Persons not necessary for proceedings including extra court staff be excluded from the courtroom during the hearing.

(xvi) Unless absolutely imperative, repeated appearance of the child witness should be prevented.

(xvii) It should be ensured that questions which are put in cross examination are not designed to embarrass or confuse victims of rape and sexual abuse (Ref :Sakshi v. UOI).

(xviii) Questions to be put in cross examination on behalf of the accused, in so far as they relate directly to the offence, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing. (Ref :Sakshi v. UOI)

(xix) The examination and cross examination of a child witness should be carefully monitored by the presiding judge to avoid any attempt to harass or intimidate the child witness.

(xx) It is the duty of the court to arrive at the truth and subserve the ends of justice. The courts have to take a participatory role in the trial and not act as mere tape recorders to record whatever is being stated by the witnesses. The judge has to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, the court can control the proceedings effectively so that the ultimate objective that is the truth is arrived at. The court must be conscious of serious pitfalls and dereliction of duty on the part of the prosecuting agency. Upon failure of the prosecuting agency showing indifference or adopting an attitude of aloofness, the judge must exercise the vast powers conferred under section 165 of the Evidence Act and section 311 of the CrPC to elicit all necessary materials by playing an active role in the evidence collecting process. (Ref :ZahiraHabibulla H. Sheikh &Anr. v. State of Gujarat &Ors.)

(xxi) The judge is expected to actively participate in the trial, elicit necessary materials from the witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. The judge has uninhibited power to put questions to the witness either during chief examination or cross examination or even during re-examination for this purpose. If a judge feels that a witness has committed an error or slip, it is the duty of the judge to ascertain whether it was so, for , to err is human and the chances of erring may

accelerate under stress of nervousness during cross examination. (Ref: AIR 1997 SC 1023 (para 12) State of Rajasthan v. Ani alias Hanif&Ors.)

(xxii) The court should ensure that the embarrassment and reservations of all those concerned with the proceedings which includes the prosecutrix, witnesses, counsels may result in camouflage of the ingredients of the offence. The judge has to be conscious of these factors and rise above any such reservations on account of embarrassment to ensure that they do not cloud the truth and the real actions which are attributable to the accused persons.

(xxiii) The court should ascertain the spoken language of the witness as well as range of vocabulary before recording the deposition. In making the record of the evidence court should avoid use of innuendos or such expressions which may be variably construed. For instance "gandiharkatein" or "batamezein" have no definite meaning. Therefore, even if it is necessary to record the words of the prosecutrix, it is essential that what those words mean to her and what is intended to be conveyed are sensitively brought out.

(xxiv) The court should ensure that there is no use of aggressive, sarcastic language or a gruelling or sexually explicit examination or cross examination of the victim or child witness. The court should come down with heavily to discourage efforts to promote specifics and/or illustration by any of the means offending acts which would traumatise the victim or child witness and effect their testimony. The court has to ensure that no element of vulgarity is introduced into the court room by any person or the record of the proceedings.

(xxv) In order to elicit complete evidence, a child witness may use gestures. The courts must carefully translate such explanation or description into written record.

(xxvi) The victim of child abuse or rape or a child witness, while giving testimony in court should be allowed sufficient breaks as and when required. (Ref :Sakshi v. UOI)

(xxvii) Cases of sexual assaults on females be placed before lady judges wherever available. (Ref: State of Punjab v. Gurmit Singh)

To the extent possible, efforts be made that the staff in the courtroom concerned with such cases is also of the same gender.

(xxviii) The judge should be balanced, humane and ensure protection of the dignity of the vulnerable victim. There should be no expression of gender bias in the proceedings. No humiliation of the witness should be permitted either in the examination in chief or the cross examination.

(xxix) A case involving a child victim or child witness should be prioritised and appropriate action taken to ensure a speedy trial to minimise the length of the time for which the child must endure the stress of involvement in a court proceeding. While considering any request for an adjournment, it is imperative that the court considers and give weight to any adverse impact which the delay or the adjournment or continuance of the trial would have on the welfare of the child.

V GENERAL

(i) Effort should be made to ensure that there is continuity of persons who are handling all aspects of the case involving a child victim or witness including such proceedings which may be out of criminal justice system. This may involve all steps commencing from the investigation to the prosecutor to whom the case is assigned as well as the judge who is to conduct the trial.

(ii) The police and the judge must ascertain the language with which the child is conversant and make every effort to put questions in such language. If the language is not known to the court, efforts to join an independent translator in the proceedings, especially at the stage of deposition, should be made.

(iii) It must be ensured that the number of times that a child victim or witness is required to recount the occurrence is minimised to the absolutely essential. For this purpose, right at the inception, a multidisciplinary team involving the investigating officer and the police; social services resource personnel as well as the prosecutor should be created and utilised in the investigation and prosecution of such cases involving a child either as a victim or a witness.This would create and inspire a feeling of confidence and trust in the child.

(iv) The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.(Ref : Court On Its Own Motion v. State of N.C.T Of Delhi)

(v) Courts in foreign countries have evolved several tools including anatomically correct illustrations and figures (as dolls). No instance of such assistance has been pointed out in this court. Extensive literature with regard to such aids being used by foreign courts is available. Subject to assistance from experts, it requires to be scrutinised whether such tools can be utilised in this country during the recording of the testimony of a child victim witness so as to accommodate the difficulty and diffidence faced. This aspect deserves serious attention of all concerned as the same may be a valuable tool in the proceedings to ensure that the complete truth is brought out.

(vi) No court shall detain a child in an institution meant for adults.(Ref : Court On Its Own Motion v. State of N.C.T Of Delhi). This would apply to investigating agencies as well.

(vii) The judge should ensure that there is no media reporting of the camera proceedings. In any case, sensationalisation of such cases should not be permitted.

Question 2:

In a case where a child in conflict with law above the age of 16 years and under 18 years, has been tried and convicted as an adult by the children's court under section 376 DA or 376DB IPC, what sentence can be imposed by the children's court. Discuss in the light of appropriate provision of law and case law if any.

Answer:

This question is specific on the point of sentence as it has been clearly stated that the child in conflict with law has been tried and convicted by the Children's Court under Sections 376 DA and 376DB of the Indian Penal Code (IPC). Therefore, different judgments on the point of heinous nature of crime and jurisdictions of Children's Court will not be discussed hereunder.

On the point of sentence, it shall be profitable to reproduce the relevant Sections:-

Section 21 of the JJ Act - Order that may not be passed against a child in conflict with law.—*No child in conflict with law shall be sentenced to death or for* ***life imprisonment without the possibility of release****, for any such offence, either under the provisions of this Act or under the provisions of the Indian Penal Code (45 of 1860) or any other law for the time being in force.*

376 DA of the IPC – Punishment for gang rape on woman under sixteen years of age.—

Where a woman under sixteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape ***shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life****, and with fine:*

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

376 DB – Punishment for gang rape on woman under twelve years of age.—

Where a woman under twelve years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with ***imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, or with death:***

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

Admittedly, there appears to be a direct conflict between the special Act which restricts the power of the Children's Court under Section 21 to award a death sentence or imprisonment of life without remission and on the other hand, the provisions of Sections 376DA and 376DB where the only punishments prescribed are *imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, or with death.* This lands children court in such cases in sentencing dilemma where with interdict in special law and sentencing limitation in general law. This anomalous situation may be result of legislative oversight but once the matter comes before the court, the appropriate sentence is to be passed. So far there is no direct authority on this point and consequently, the trial court has to follow the principles of *generalia specialibus non derogant*. Further the JJ Act is a special Act for the welfare of children below 18 years and, therefore, in the teeth of Section 21, a sentence of life without remission cannot be imposed. Further, in ***Master Bholu v. CBI*** reported in 2018 SCC OnLine P&H 747, the hon'ble Punjab and Haryana High Court dealing with the scope of Section 21 of the JJ Act, held as follows :-

> **16.** In the present case, the bare perusal of Section 21 of the Juvenile Justice Act would reveal that **any sentence other than 'death' and 'life imprisonment without the possibility of release' can be imposed upon a child in conflict with law.** It is apposite to mention herein that with the passage of time, two types of life imprisonment have been recognized by our Courts, which may be awarded to an accused. In this regard, reference may be made to the decision of a Constitution Bench of Hon'ble the Apex Court in the case of *Union of India* v. *V. Sriharan*, 2016 (1) RCR (Criminal) 234, wherein it has been held that imprisonment for life, in terms of Section 53 read with Section 45 IPC, means imprisonment for the rest of the life of the convict. However, it has also been held that a convict, who has been awarded life imprisonment, would have the right to claim remission etc., as provided under Article 72 and 61 of the Constitution of India, as the case may be. Further, Hon'ble Constitution Bench confirmed the view that the Courts can, in certain cases, create a special category of sentence - where, instead of 'death', they can impose a punishment of imprisonment for life - but, put the same beyond the application of the provisions of 'remission'. Thus, in certain cases, it is open for the Courts to grant life sentence to a convict but take away his right to seek remission etc., and thereby ruling out any possibility of release. **It is such a category of 'life imprisonment' without the possibility of release that has been excluded in the case of a child in conflict with law, by virtue of Section 21 of the Juvenile Justice Act. However, a sentence of life imprisonment simpliciter can always be imposed upon a child in conflict with law.**

In view of the above, we are of the opinion that in such cases JJ Act which is a special law shall prevail over the general provision of IPC and a sentence of imprisonment of life simpliciter can be imposed.

Question 3:

In what cases of sexual offences the plea of consent of the victim cannot be taken by the defence and in what cases the consent shall form a valid defence. Discuss the different provisions and evolution of law on this point particularly where the victim is +/- 1 year the age of giving valid consent.

Answer:

There are certain sexual offences where the presence or absence of consent of the victim is not a relevant issue as the same is not incorporated as an essential ingredient of the offence. The offences under the POCSO Act and the offence under Section 376C of the IPC are such examples where the presence of the consent of the victim is not a valid defence as it is not a relevant fact *vis-a-vis* the offences. Similarly, prior to the case of ***Navtej Singh Johar v. Union of India***[3], the offence under Section 377 also fell in the same category and the fact of consent was not a relevant fact and, therefore, not a valid defence. After the case, in some situations such as the one involving two adults, the consent of the victim will be a valid defence.

The fact of consent of the victim becomes a relevant fact in cases of rape, as the absence of the consent of the victim, is incorporated in the definition of the rape as an essential ingredient. The present question becomes more relevant in situations where the sexual offences are covered under the category of rape because it is under the allegation of rape, when the presence or absence of the consent of the victim is a relevant fact which needs to be adjudicated by the trial court. In such situation, the question whether the consent of the victim will be a valid defence or not becomes relevant. In cases of rape, consent is a valid defence. However, at present, there are following situations, mentioned in Section 375, when the consent of the victim will not be valid defence:-

- if the victim is below the age of 18 years, even if she is the wife of the accused
- when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt;
- when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;
- when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of

[3] (2018) 10 SCC 1.

any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent;

- when she is unable to communicate consent

It is with this background that the present question needs to be answered. There are two limbs of this question where the evolution of law, in particular, needs to be discussed. First is related to the cases where plea of consensual physical relation is taken by the accused and rebutted by the prosecution that it was pursuant to a false promise of marriage.

Second is related to the line that demarcates consent and no-consent

Consent –Meaning

Section 375. *Rape*.—A man is said to commit "rape" if he—

***

under the circumstances falling under any of the following seven descriptions—

Firstly.—

Secondly.—Without her consent.

***

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity."

Section 90 – Consent known to be given under fear or misconception.—A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

Consent with respect to Section 375 IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or

inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action (See ***Pramod Suryabhan Pawar v. State of Maharashtra*, (2019) 9 SCC 608**). "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of (See ***Dhruvaram Murlidhar Sonar* v. *State of Maharashtra*,** (2019) 18 SCC 191). "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances (See ***Kaini Rajan* v. *State of Kerala*,** (2013) 9 SCC 113).

Consent in the cases of false promise to marry- Whether Rape?

Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act. (See ***Pramod Suryabhan Pawar v. State of Maharashtra*, (2019) 9 SCC 608**).

However, in the context of a promise to marry, it has been observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In ***Anurag Soni* v. *State of Chhattisgarh*** , (2019) 13 SCC, it was held:

> "*12*. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Sections 375 IPC and can be convicted for the offence under Section 376 IPC."

In ***Uday* v. *State of Karnataka***, (2003) 4 SCC 46 the complainant was a college-going student when the accused promised to marry her. In the complainant's statement, she admitted that she was aware that there would be significant opposition from both the complainant's and accused's families to the proposed marriage. She

engaged in sexual intercourse with the accused but nonetheless kept the relationship secret from her family. The Court observed that in these circumstances the ***accused's promise to marry the complainant was not of immediate relevance to the complainant's decision to engage in sexual intercourse with the accused***, which was motivated by other factors.

The second part of the above question can be approached in three time frame:

(1) *Before the amendment Act 2013*
(2) *The period between 2013 Amendment Act and the decision in Independent Thought v. Union of India rendered in 2017*
(3) *The period after the decision in Independent Thought v. Union of India*

Before the amendment Act 2013

Prior to its substitution by Act 13 of 2013, (w.e.f. 3-2-2013), 376 (1) in the Indian Penal Code read as:

> "376. Punishment for rape.—(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine *unless the woman raped is his own wife* and is *not under twelve years of age*, in which cases, he shall be punished with imprisonment of either description for a term *which may extend to two years* or with fine or with both:
> Provided that the court may, for *adequate and special reasons* to be mentioned in the judgment, impose a sentence of imprisonment for a term of *less than seven years*.

Iqbal v. State of Kerala, (2007) 12 SCC 724 was a case of elopement wherein the girl was of the age of 13 years and 9 months. After invoking clause sixthly of the section 375, the Apex court stated that her consent for sexual intercourse was of no relevance. The relevant extract is:

> **8.** Clause "sixthly" clearly stipulates that sexual intercourse with a woman with her or without her consent when she is under 16 years of age, amounts to rape. The evidence on record clearly establishes that the victim was less than 16 years of age and, therefore, the conviction for offences punishable under Section 376 IPC cannot be faulted.
>
> (emphasis supplied)

However, in ***Jarnail Singh v. State of Punjab*, (1998) 8 SCC 629,** wherein the prosecutrix was around 15 years of age and the boy was found to be of 17 years, the sentence of imprisonment was reduced to the period already undergone on the finding that it was a "one time act" committed in the "flush of youth". The relevant extract from the judgment is:

> **2.** The finding recorded by the courts below is that offence under Section 376 IPC was made out solely on the ground that the prosecutrix was below 16 years of age (found to be around 15 years of age) even though she was a willing party to go with the appellant and have sex with him. The appellant, on the other hand, was found to be of 17 years of age. Evidently, the appellant and the prosecutrix, in the flush of youth, have committed an act which is a crime insofar as the appellant is concerned. Since it was a one-time act and not a continuous course of conduct, we, having regard to this aspect as also the young age of the appellant, reduce his sentence of imprisonment to the period already undergone under both counts, i.e., under Sections 376 and 366 IPC, but add a fine of Rs 12,000 to the count under Section 376 while sustaining the fine of Rs 500 imposed under Section 366 together with the default clause. In case there is default in payment of the fine now added, then he shall undergo further imprisonment equivalent to the unexpired portion of his sentence as imposed by the High Court. The fine of Rs 12,000 if paid or recovered, shall be paid over to Sarabjit Kaur, the prosecutrix, as compensation. The Court of Session is to oversee compliance.

In ***Mohd. Imran Khan v. State (Govt. of NCT of Delhi),*** (2011) 10 SCC 192, the Apex Court was considering a case of elopement. The Apex court upheld the sentence imposed on the accused by the High Court which was however less than the minimum sentence prescribed for the offence of rape. The relevant extract of the judgment is:

> **33.** The High Court after taking into consideration all the circumstances including that the incident took place in 1989; the appeal before it was pending for more than 10 years; the prosecutrix had willingly accompanied the appellants to Meerut and stayed with them in the hotel; and she was more than 15 years of age when she eloped with the appellants and the appellants were young boys, reduced the sentence to 5 years which was less than the minimum prescribed sentence for the offence. As the High Court itself has awarded the sentence less than the minimum sentence prescribed for the offence recording special reasons, we do not think it to be a fit case to reduce the sentence further in a proved case of rape of a minor.

In ***Charan v. State***, 2014 SCC OnLine Del 7188, the Delhi High Court was dealing with a case of runaway marriage wherein there were material contradictions in the statement of the prosecutrix under section 164 CrPC before the magistrate and her deposition before the Court. The Delhi High Court while acquitting the accused of the charges of rape because the Court found the girl to be aged 16 years, stated:

> 19.[...] Even if it is assumed for the sake of arguments that the Prosecutrix was 15 years of age at the time of entering into physical relation with the Appellant in the name of 'Suhaag Raat', sexual intercourse with a wife above 15 years of age, cannot be termed as rape as per Exception (2) to Section 375 IPC which provides that 'Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape'.
>
> (emphasis supplied)
>
> 20. The Prosecutrix in this case was a girl who was working as maid servant in a Kothi and on the date of occurrence, she herself left her cycle near Jhuggi

> No. 5 and accompanied the Appellant to his village. She herself expressed her desire to wear sari, marry the accused and enter into physical relations with the Appellant as his wife. She remained with Appellant for about a week till she was recovered by the police. Not only that, even at the time of making statement under Section 164 CrPC, she had only one desire i.e. to live with her husband i.e. the Appellant.

Therefore, in this case the Delhi High Court clearly stated that as per exception 2 to section 375 IPC protection can be given to a man from the charges of rape, who has engaged in sexual intercourse with his own *wife* , the wife not being under *fifteen years* of age. This is of particular significance in cases of runaway marriages by minor girl who willingly participate in sex after the marriage and are aged between 15-18 years.

A similar case of runaway marriage came up before the Delhi high Court in 2017 i.e. ***Sunil Khan v. State,*** 2017 SCC OnLine Del 12544 in which an appeal dated 18th August 2010 was challenged. The judgment in this case was delivered on December 20, 2017.

In ***Sunil Khan v. State***, 2017 SCC OnLine Del 12544, the Delhi High Court was dealing with a case of runaway marriage wherein, after registration of the case, efforts were made to search 'K' (the girl) and Guddu. On 5th February, 2009, both 'K' and the convict were located at railway station Lucknow. When the convict was apprehended and 'K' was recovered, they disclosed their relationship to be as husband and wife. They also produced the proof of marriage i.e. Nikahnama and marriage agreement. Both of them were sent for medical examination. Thereafter, 'K' was produced for getting her statement recorded under Section 164 Cr.P.C. Since 'K' refused to accompany her parents and insisted to live with her husband (convict), being minor, she was sent to Nari Niketan. After completion of investigation chargesheet was filed. Since the age of 'K', as per school record, was below the consenting age, the convict was charged for committing offence punishable under Section 363/366/376 IPC. The same was challenged. The relevant extract of the judgment are:

> **24.** Next comes the question as to whether the conviction of the appellant for the offence punishable under Section 376 is justified. The occurrence pertains to the year 2008. Section 376 IPC prior to the amendment carried out w.e.f. February 03, 2013, provided that the offence of rape of a woman under 16 years of age with or without her consent was punishable with imprisonment of not less than seven years but which may extend for life or for a term which may extend to ten years and payment of fine, provided, the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.
>
> **25.** Exception 2 to Section 375 reads as under:
>
> *Exception 2-Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.*

> **26.** Section 376 of Penal Code, 1860 provided punishment for rape. Section 376(1) IPC reads as under:—
>
> *'Whoever, except in the cases provided for in sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.'*
>
> **27.** In the instant case, it is the case of the prosecution that on the date of leaving the house she was aged about 13 year. Thus, at best, *prosecution's case can be that the convict had physical relations with his wife who was below 15 years of age. For that he could have been held guilty under Section 376 IPC for committing rape on his wife who was below 15 years of age and the sentence provided for the said offence was imprisonment for a period of two years or with fine or with both.*
>
> (**emphasis supplied**)
>
> **28.** For the reasons given in the preceding paragraphs, while acquitting the appellant Sunil Khan of the charges under Section 363/366 IPC, his conviction for committing the offence punishable under Section 376 IPC is maintained. However, in view of the fact that he had physical relations with his wife who was under 15 years of age, for which he could have been sentenced to a maximum period of two years, the substantive sentence of the appellant for committing the offence punishable under Section 376 IPC is modified to the extent that he is sentenced to undergo RI for two years. The sentence of fine awarded to the appellant for the offence punishable under Section 376 IPC is maintained.

In this case, the Delhi High court modified the sentence to two years by invoking the exception 2 to section 375 IPC. If the date of occurrence of the incident is prior to the 2013 Amendment Act and the girl, though aged under 15 years of age is not under 12 years of age, is the wife of the accused, then the accused can be sentenced to imprisonment upto 2 years or with fine or with both.

After the 2013 Amendment Act and prior to the Independent Thought v. Union of India Decision

The 2013 Amendment Act substituted the earlier section 376 in the following manner:

> 376. Punishment for rape.—(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

Thus, if the date of occurrence of an incident is after the 2013 Amendment Act and prior to the decision in Independent Thought v. Union of India, then in the cases of runaway marriages if the girl under 15 years, who had sex after marriage, the minimum applicable sentence under Section 376 was of 7 years imprisonment. However, if the girl was aged between 15 and 18 years, it did not amount to rape.

After *the Independent Thought v. Union of India*

On 11 October, 2017, the Apex court delivered a judgment in the case of ***Independent Thought v. Union of India***,[4] wherein the exception 2 to section 375 has now been read down. The Apex Court stated:

> 107. [....] Therefore, we are left with absolutely no other option but to harmonise the system of laws relating to children and require Exception 2 to Section 375 IPC to now be meaningfully read as: "*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape*." It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the Framers of our Constitution can be preserved and protected and perhaps given impetus.

After this judgment, if the date of occurrence of the incident is later in point of time than the date of judgment i.e.11th October, 2017, then the exception 2 to section 375 cannot come to the rescue of the accused if his wife is below the age of 18 years. And the punishment for the rape will be as governed by section 376 as amended by the 2013 Amendment Act. (now 2018 Amendment Act which prescribes a minimum punishment of 10 years)

4 (2017) 10 SCC 800

Question 4:

In a case of Rape and murder, the sole evidence produced on behalf of the prosecution is the video recording of the occurrence by the mobile phone of the victim recovered from the place of occurrence. Can this electronic evidence be the basis of identification and complicity of the accused in the offence? Discuss the principles, protocols, safe guards and procedure for admissibility of such electronic evidence in the light of different provisions and case laws. Will it make any difference in admissibility if the video was deleted and was later retrieved by FSL.

Answer:

The crux of the matter in this question is the admissibility of the mobile which video-recorded the incident, the mode of proof of the content of the video-recording and finally whether the video so proved can be the basis for conviction of offence.

With regard to the nature of evidence, pertaining to mobile, the following issues can be germane for our consideration:-

(i) Whether the content of videography in the mobile is a document?
(ii) Whether such a document is a primary or secondary evidence ?
(iii) The mode of proof
(iv) Whether the protocol of seizure has been followed and the prosecution has proved the chain of custody

Under Section 3 of the Indian Evidence Act, evidence means and includes all documents including electronic records produced for the inspection of the Courts. Electronic Records under the Indian Evidence Act, have been provided with the same meaning as assigned to them in the IT Act. According to Section 2(t) of the Information Technology Act, 2000, "electronic record" means *data, record or* ***data generated****, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.* Under Section 61 of the Indian Evidence Act, the contents of a document can be proved by primary or secondary evidence. The mobile set being a primary instrument, by which the commission of offence was video-recorded, it will be regarded as a primary evidence and when the document itself is produced before the Court which is a primary evidence, no secondary evidence in terms of Section 65 of the Indian Evidence Act shall be required. In ***P. Gopal Krishnan & Dileep v. State of Kerala and Another*** 2019 SCC online SC 1532, the Hon'ble Supreme Court, after referring to the Halsbury's laws of England, accepted the proposition that *there is no difference in terms of admissibility between a direct view of an incident and a view of it on a visual display unit of a camera or on a recording of what the camera has filmed. A witness who sees an incident on a display or a recording may give evidence of what he saw in the same way as a witness who had a direct view.*

As far as mode of seizure is concerned, since the same has been seized from the place of occurrence and not from a closed premise, the requirement for 2 witnesses as seizure-list witnesses under Section 100 will not apply. The seizure, if duly proved, by the Investigating Officer or the Police Officer who seized the mobile shall be sufficient prove of seizure. The chain of custody is also required to be proved by the Investigating Officer.

During trial, on identification by the Investigating Officer, the seized mobile will be marked as "e"cell-phone series and the digital video as "e" digital video series as per Rule 103 of Criminal Court Rules of High Court of Jharkhand.

It is pertinent to mention the case of ***R. v. Dodson,*** (1984) 1 WLR 971, which was a case of attempted armed robbery where photographs were taken by a secret camera. It was held that the photographs were relevant as to whether an offence was committed and who committed it. The jury could look into the photographs and decide whether they are of the accused.

The identity of the accused can be proved by screening of the video recording in the Court by the Judge. In the statement under Section 313 of the CrPC, evidence recorded on the basis of the video-recording need to be brought to the notice of the accused. At any stage, in case of any serious dispute, on the point of identity, the video footage and the actual photograph of the accused after due process may be sent to the FSL.

In ***Krishna Tripathi Alias Krishna Painter v. State*** reported in 2016 SCC Online Del 1136, CCTV footage was played in the Court for the purpose of the identification of the accused. In addition, the Court was of the opinion that the CCTV footage when matched with the photographs of the accused established the identity of the accused. It was further held that since the CCTV footage was a recording done without any human interference, the same is to be considered as a primary evidence and not a secondary evidence, and, therefore, a certificate under Section 65B was not required for the admissibility of the CCTV footage.

With regard to the cases where the data has been lost from the hard-disk and subsequently retrieved, the examination of the expert from the FSL who retrieved the data shall become necessary. Section 45A of the Indian Evidence Act provides for presumptions in favour of opinion the examiner of electronic evidence relating to any information transmitted or stored in any computer resource or any other electronic or digital form.

On the basis of the above discussion, it can be safely concluded that video recording of an offence is a substantive piece of evidence and if duly proved, can be the basis of passing a judgment of conviction. However, in any case, the electronic evidence

has to be looked into against the background of totality of circumstances and other evidences available on record.

Some of the responses have been received wherein it has been said that retrieval of data by the FSL will make the electronic evidence, secondary evidence. The nature of document does not change by the process of retrieval. Had the original film be destroyed and the data would have been generated by secondary sources, then it could be secondary evidence. Here the data is retrieved from the original by the expert who has proved the process of retrieval under Section 45A of the Indian Evidence Act.

Question for the officers in the rank of Civil Judge Junior and Senior Division

Question 1:

A man stalks and monitors a woman through a social media platform and attempts to contact such woman for personal interactions. Discuss what offences are made out if any and for what offences can he be charged and put on trial.

Answer:

Section 354D of the Indian Penal Code reads as under :-

354D. Stalking. —

1) Any man who—
   (i) follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or
   (ii) monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking:

   Provided that such conduct shall not amount to stalking if the man who pursued it proves that—

   (i) it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or
   (ii) it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or (iii) in the particular circumstances such conduct was reasonable and justified.
2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

In the present case, it has been alleged that the man stalks and monitors a woman through a social media platform and attempts to contact such woman for personal interactions. Therefore, the man has committed an offence under Section 354 D (1) (ii) since he monitors the woman through a social media platform and also attempts to contact her for personal interactions. The man can be charged with, tried for and convicted of the offence of stalking under Section 354D of the Indian Penal Code.

Some of the responses to this question have included sections 67,67A, 67B, 66E of the Information Technology Act and sections 507, 509 of the Indian Penal Code. In the question, the facts mentioned are:

-stalks and monitors a woman through a social media platform
-attempts to contact such woman for personal interactions

The given facts do not satisfy the ingredients of the above mentioned sections, as there is no mention of sending any message depicting any sexually explicit act or obscene material that may come under the purview of the Information Technology Act or an insult to the modesty of a woman or any threat to cause injury, as required by section 509 and 507 respectively.

Q 2: When can a Hindu daughter claim her father's property. What are its exceptions. Discuss the principles of law with relevant case laws.

Answer:

Section 6 of the Hindu Succession Act after the 2005 amendment has introduced daughters as coparceners by birth in a joint Hindu family governed by the Mitakshara Law. The section stipulates that a daughter would be a coparcener from her birth, and would have the same rights and liabilities as that of a son. The daughter would hold property to which she is entitled as a coparcenary property, which would be construed as property being capable of being disposed of by her either by a will or any other testamentary disposition.[5]

Section 6 of the Hindu Succession Act	*Section 6 on and from the commencement of the Hindu Succession (Amendment) Act, 2005*
"**6.*Devolution of interest in coparcenary property*.**—When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act: Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship. *Explanation I.*—For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately	"**6.*Devolution of interest in coparcenary property*.**—(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall— (*a*) by birth become a coparcener in her own right in the same manner as the son; (*b*) have the same rights in the coparcenary property as she would have had if she had been a son; (*c*) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener: Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition
before his death, irrespective of whether he was entitled to claim partition or not. Explanation 2.—Nothing contained in the proviso to this section shall be construed as enabling a person who had	of property which had taken place before the 20th day of December, 2004. (2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded,

5 *Danamma v. Amar*, (2018) 3 SCC 343

separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein. 7. Devolution of interest in the property of a tarwad…."	notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition. (3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and— (a) the daughter is allotted the same share as is allotted to a son; (b) the share of the predeceased son or a predeceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such predeceased son or of such predeceased daughter; and (c) the share of the predeceased child of a predeceased son or of a predeceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such predeceased child of the predeceased son or a predeceased daughter, as the case may be. Explanation.—For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.
	(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect— (a) the right of any creditor to proceed

	against the son, grandson or great-grandson, as the case may be; or (b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted. Explanation.—For the purposes of clause (a), the expression 'son', 'grandson' or 'great-grandson' shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005. (5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004. Explanation.—For the purposes of this section 'partition' means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court."

The issue that troubles a trial Court is cases in which the father and owner of the property dies before 09.09.2005 when the Amendment came into force and there has been no partition among his heirs and successors, whether the daughter can claim her share in her father's property in terms of the 2005 Amendment?

This question can be considered under the following heads:-

1. Where, after the death of the father, there is evidence of partition before 20th December, 2004. In such cases, the claim of the daughter will be barred in light of the provisions of Section 6(5) of the Hindu Succession Act.
2. Where, the father has died before the 2005 Amendment but a formal partition has not taken place. In such circumstance, there is difference in opinion whether the daughter will have a right to claim partition or not?

In ***Prakash v. Phulavati***[6], the Apex court has held that the daughter will not be entitled because her father was not alive at the time of the Amendment. The relevant paragraph is quoted hereunder:-

> **17.** The text of the amendment itself clearly provides that the right conferred on a "daughter of a coparcener" is "on and from the commencement of the Hindu Succession (Amendment) Act, 2005". Section 6(3) talks of death after

6 (2016) 2 SCC 36.

> the amendment for its applicability. In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. **An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective. [*Shyam Sunder* v. *Ram Kumar*,** (2001) 8 SCC 24, paras 22 to 27] In the present case, there is neither any express provision for giving retrospective effect to the amended provision nor necessary intendment to that effect.

Therefore, the Apex court held that :

> **23.** Accordingly, we hold that the rights under the amendment are applicable to ***living daughters of living coparceners as on 9-9-2005 irrespective of when such daughters are born***. Disposition or alienation including partitions which may have taken place before 20-12-2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation.
>
> **(emphasis supplied)**

However, in ***Danamma v. Amar***[7], the Apex court stated:

> **23.** Section 6, as amended, stipulates that *on and from* the commencement of the amended Act, 2005, the daughter of a coparcener shall *by birth* become a coparcener in her own right in *the same manner as the son*. It is apparent that the status conferred upon sons under the old section and the old Hindu Law was to treat them as coparceners *since birth*. The amended provision now statutorily recognises the rights of coparceners of daughters as well *since birth*. The section uses the words *in the same manner as the son*. It should therefore be apparent that both the sons and the daughters of a coparcener have been conferred the right of becoming coparceners *by birth*. It is the very *factum of birth* in a coparcenary that creates the coparcenary, therefore the sons and daughters of a coparcener become coparceners by *virtue of birth*. Devolution of coparcenary property is the later stage of and a consequence of death of a coparcener. The first stage of a coparcenary is obviously its creation as explained above, and is well recognised. One of the incidents of coparcenary is the right of a coparcener to seek a severance of status. Hence, the rights of coparceners emanate and flow from birth (now including daughters) as is evident from sub-sections (1)(*a*) and (*b*).
>
> *******
>
> **25.** Hence, it is clear that the right to partition has not been abrogated. *The right is inherent and can be availed of by any coparcener, now even a daughter who is a coparcener*.

Also, significant is the paragraph 26 of the judgment:

> **26.** In the present case, no doubt, suit for partition was filed in the year 2002. However, during the pendency of this suit, Section 6 of the Act was amended as the decree was passed by the trial court only in the year 2007. Thus, the rights of the appellants got crystallised in the year 2005 and this event should have been kept in mind by the trial court as well as by the High Court. This

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7 (2018) 3 SCC 343.

> Court in *Ganduri Koteshwaramma* v. *Chakiri Yanadi* [*Ganduri Koteshwaramma* v. *Chakiri Yanadi*, (2011) 9 SCC 788 : (2011) 4 SCC (Civ) 880] held that the rights of daughters in coparcenary property as per the amended Section 6 are not lost merely because a preliminary decree has been passed in a partition suit. So far as partition suits are concerned, the partition becomes final only on the passing of a final decree. Where such situation arises, the preliminary decree would have to be amended taking into account the change in the law by the amendment of 2005.

At this point, it would be relevant to refer to the judgment of the Hon'ble Supreme Court in ***Mangammal v. T.B. Raju***, (2018) 15 SCC 662. The relevant para of the judgment in ***Mangammal*** is:

> **16.** It is pertinent to note here that recently, this Court in *Danamma* v. *Amar* [*Danamma* v. *Amar*, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385 : (2018) 1 Scale 657] dealt, inter alia, with the dispute of daughter's right in the ancestral property. In the above case, father of the daughter died in 2001, yet court permitted the daughter to claim the right in ancestral property in view of the amendment in 2005. On a perusal of the judgment and after having regard to the peculiar facts of the *Danamma* [*Danamma* v. *Amar*, (2018) 3 SCC 343 : (2018) 2 SCC (Civ) 385 : (2018) 1 Scale 657] , **it is evident that the Division Bench of this Court primarily did not deal with the issue of death of the father rather it was mainly related to the question of law *whether daughter who was born prior to 2005 amendment would be entitled to claim a share in ancestral property or not?* In such circumstances, in our view, *Prakash* [*Prakash* v. *Phulavati*, (2016) 2 SCC 36 : (2016) 1 SCC (Civ) 549] , would still hold precedent on the issue of death of coparcener for the purpose of right of daughter in ancestral property. Shortly put, only living daughters of living coparceners would be entitled to claim a share in the ancestral property.**
>
> **(emphasis supplied)**

From the above discussions, it can be summed up that the decision rendered in ***Mangammal v. T.B. Raju***, (2018) 15 SCC 662 holds the ground in this field in which the Apex Court has clarified that the decision rendered in the case of ***Phulavati*** (supra) would hold precedent on the issue of death of coparcener for the purpose of right of daughter in ancestral property. According to the Hon'ble Apex Court, only living daughters of living coparceners would be entitled to claim a share in the ancestral property.

The cases of *Phulavati, Danamma, and T.B. Raju* have been referred to a larger Bench in ***Vineeta Sharma v. Rajesh Sharma***, (2019) 6 SCC 164.

The following are the exceptions, when a daughter cannot claim her father's property :-

- If the daughter was not alive till 09.09.2005
- If the father was not alive till 09.09.2005
- If the partition has been effected before the 20th day of December, 2004 either through Registered Deed through decree of a Court (Section 6(5) of the Hindu Succession Act)

- If she comes under the heads of disqualifications laid down under Sections 25 (*Murderer disqualified*) or Section 26 (*Convert's descendants disqualified*) of the Hindu Succession Act.

Question 3:

What are the different dimensions of the customary laws of inheritance of tribals in Jharkhand? Whether the law of inheritance of a tribal of Christian faith will be governed by the tribal customary laws or Indian Succession Act? Critically examine in the light of customary and case laws on the point.

Answer:

Tribe has been defined as a social group of a simple kind, the members of which speak a common dialect, have a single government and act together for such common purposes as warfare. Other typical characteristics include a common name, a contiguous territory, a relatively uniform culture or way of life and a tradition of common descent. Tribes are usually composed of a number of local communities e.g. bands, villages or neighbourhoods and are often aggregated in clusters of a higher order called nations.[8]

Munda and Oraon

Munda tribe is the main Kolarian tribe residing in the highlands of Chotanagpur division. The Oraon are the one of the purely aboriginal tribes of Chotanagpur divisions of the Jharkhand State.

The conception of property is very rigid among the Munda and the Oraon. Like other similar tribes, they do believe that all landed property including the natural resources is the property of the community and not of an individual and it is only meant for the livelihood of all the members of the community.

According to Dr. Jai Prakash Gupta,[9] the general rules of inheritance and succession are as follows:

Son's right to inherit

After the death of the father, if the sons do not agree to live together, a Panchayat is convened and the property is divided according to the Mundari and Oraon rules of inheritance. When the deceased leaves behind a widow and grown up sons and daughters, the Panch will first set apart some land, generally equal to a younger son's share, for the maintenance of the widow. In the land allotted to her she can only have a life interest. If for the rest of her days, she decides to live separate from her sons and independent of any pecuniary benefits from any of the sons in

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8 W.H.R. Rivers, EncyclopediaBritanica. Vol. 22, 1961 Edn.at page 465 as cited in "The Customary Laws of the Munda and the Oraon" by Dr. Jai Prakash Gupta.

9 The Customary laws of the Munda and the Oraon, Jharkhand Tribal Welfare Research Institute, 2002

particular, then on her death the maintenance land will be divided equally among the sons. But, usually, the widow chooses to live with one of the sons and in that case, her maintenance land is cultivated and enjoyed by that son. If the son meets all her funeral expenses, then he becomes entitled to those lands.

Now the residue of the real and personal property left by the deceased father will be divided by the Panchayat in equal shares among all the sons except that the eldest son will usually get a little land in excess. If there had been a partition during the lifetime of the father and since then other sons were born to the father, the entire immoveable property will be re partitioned on the father's death by the Panch among all the sons of the deceased father on the principles as indicated above.

However if for some reasons like marriage with a non –Mundari girl, the legitimate son of the deceased has been outcaste and lost his tribal rights , he will not be entitled to a share at partition unless he has been restored to the caste by the Panch after he has given up the alien wife.

Widow's maintenance

When the deceased owner leaves no son but only a child less widow or a widow with daughters only, the widow is allowed a life interest in the property left by the husband. The widow may give temporary leases such as Zurpeshgi of the real property left by her husband but she has no authority to sell any real property by her husband without the consent of the all bhayads or agnates of her deceased husband. However, if she leaves the village of her deceased's husband and goes to reside permanently with her father or brother, her right to enjoy the usufruct of her husband's land will be forfeited, and it will then go to the nearest agnates. If the widow remarries, she at once loses all right to all moveable and immoveable properties left by her deceased husband. She is just allowed to take away with her the jewellery she has on her and her wearing apparel.

Inheritance rights of daughters

Daughters among the Mundas do not inherit. Nor are the sons of the deceased owner under any obligation to make over to their sisters anything which their father either on his death bed or earlier desired them to give her. The sons are however bound to support unmarried sisters until their marriage. But an unmarried sister may choose to live in the house of any one of the brothers. On her expression of such desire, the Panch may allot some additional land to the brother under whose care the daughter chooses to live. The additional land will be repartitioned in equal shares among the brothers after the marriage of the sister.

When a deceased Munda leaves an unmarried daughter or daughters and no widow or son, the unmarried daughter or daughters will be entitled to the personal

property left by their father and will be in possession of the lands left by the deceased till their marriage. Neither a daughter's husband nor a daughter's sons are entitled to inherit.

In the absence of sons, widow, or unmarried daughters of a deceased Munda, his property goes to the nearest male agnate(s). If the deceased's father is alive, the property passes to him. If he is dead, the brothers of the deceased owner will inherit in equal shares. The sons of a predeceased brother will take the share that would have fallen to their father if he had been living at the time

Ghar-dijoa

The Ghar-dijoa who lived with his son-less deceased father –in –law till his death and assisted him in his cultivation and other affairs till his death, will get all the moveable property left by the deceased, and such share of the real property, if any , as according to the circumstances, the Panch may think proper to give him, the rest going to the nearest male agnate(s).Any land that may be given to the ghar-dijoa by the Panch may be enjoyed by him as long as his wife is alive, after which the inheritance passes to the nearest bhayad, as a daughter's son does not inherit.

Illegitimate sons

Illegitimate sons of the deceased owner, or sons of the deceased's wife by a former husband, do not get any share in the property left by the deceased. But if any such son had been living in the same house with the deceased, he is sometimes given a small plot of land for his maintenance, although he cannot claim this as a matter of right. He cannot have a legal right even to any lands that his father (the deceased owner) might have given him to cultivate. On the death of the father, he is bound to give up such lands if the legitimate heir of the decease owner so demands. Even when the deceased leaves no legitimate sons, and his widow taking a life interest in the property allows the illegitimate son to continue to hold the lands, the latter is bound to give up the lands on the death of the widow if the reversioner requires him to do so.

Adopted Son belonging to the same clan

If the last owner has left a duly adopted son of one of his *bhayads* or agnates, he shall, if he was duly adopted with the consent of other *bhayads,* inherit all the property left by the deceased after deducting a suitable portion for the maintenance of the widow and the widows, if any, of the deceased, which again after the death of such widow or widows, devolves to the adopted son.

Adopted Son from a different clan

If the last owner has left an adopted son belonging to a clan different from his clan, he shall inherit the *non-bhuinhari* lands left by the deceased and the material articles left by him. The *Bhuinhari* lands of the deceased shall, in such a case, remain in the possession of the widow or widows during their lifetime, and on their death shall revert intact to such member/members of the *khun*tof the last male owner as stand nearest to him in agnatic relation. If there is no *bhayad* left, the Punch may make over the property left by the deceased to the *non-bhayad*or adopted son from a different clan.

Bhayads or Agnates

If an owner of property among both the tribes dies living behind him neither a son nor a lineal male descendant of such a son, nor a *ghar-damad* adopted in the house as a prospective son in-law, nor a widow, nor an unmarried daughter, the property belonging to him either real or personal shall go to the nearest male agnates in the following order:-

a. If the father is alive, he shall inherit the property.
b. In the absence of father, his brother or brothers together with the sons of any of the predeceased brother(s), or their male descendants shall inherit the property.
c. In the absence of a father, or brother, or brother's sons, the deceased owner's, father's brother together with the sons, if any, of a predeceased brother of the father, shall inherit the property, the sons of a predeceased uncle taking between themselves the share that their father would have received if he had been alive.
d. In the absence of father's brothers, the sons of the father's brothers shall inherit the property per stripes and in the absence of father's brother's sons, the property shall be divided in equal shares among those of the surviving agnates, provided always that the sons of such a predeceased kindered shall receive between themselves the share that their father would have received if he had been alive.

According to the custom prevailing among both the tribes, the inheritance is not limited to agnates upto any particular degree of relationship. When all relatives with whom any agnatic relationship can be traced are exhausted, and in the case of a deceased *bhuinhar,* it is only when all his fellow *bhuinhars* of the same village and belonging to the same clan (whether actually living in the same village or elsewhere) are extinct, the property remains unclaimed, then it shall vest in the state.

Customary Laws of Inheritance among Santhals

According to L S S O'Malley[10], the family share all they have in common till the death of the father, when the property is divided equally among the sons. It is only the eldest son who gets a bullock and a rupee more than the others. The daughters however have no right to any of the property, the idea being that she is expected to get married and be supported by her husband and her sons. She gets a gift, customary and therefore demandable, but it is not inherited. Lately , however with the sanction of the courts, only daughters have been given a life tenure of the father's land, and this virtually means inheritance by daughters.

If a man dies without sons or daughters, the property passes to the father if he is alive, and if he is dead, to the brothers of the deceased by the same father (not necessarily by the same mother); if the latter are dead, their sons will succeed. In default of these, the deceased's paternal uncles and their sons succeed. The widow of a childless man is allowed one calf, one bandi (10 to 12maunds) of paddy, on ebati and one cloth, and returns to her parent's house, unless a sometimes happens, she is kept by her husband's younger brothers. If one of them keeps her, he is not allowed more than the one share of the deceased man's property, which he would get in any case.

If a man leaves only daughters, their paternal grandfather and uncles take charge of them and of the widow, and the property remains in their possession. When the daughters grow up, it is the duty of these relatives to arrange for their marriages and to give them the presents which they would have been given by their father. When all the daughters have been disposed of, the widow gets the perquisites of a childless widow and goes to her father's house or lives with her daughters. A widow with minor sons keeps all the property in her own possession, the grandfather and uncles seeing that she does not waste it. If the widow remarries before the sons are married, the grandfather and uncles take possession of all the property; the mother of the children has no right to get anything, except sometimes a calf is given to her out of kindness. There are special rules in case where there is a son in law who has married under the *ghardi jawae* form. If his wife has no brothers, and the son- in -law stays on in the house and works for his father in law till he dies, then he inherits all the immoveable property and half the moveable property the other half of which goes to the relatives of the deceased. If there is more than one such son -in -law, they divide the property between them.

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10 Bengal District Gazetteers Santal Parganas, Logos Press, New Delhi, Second Indian Reprint 1999

In ***Haradhan Murmu v. State of Jharkhand***[11] Mangal Soren had no male issue and had three daughters namely Dewla, Jowa and Singo. Mangal Soren had married his three daughters in 'Ghar-jamai' form and all his three daughters were given equal shares in the property of Mangal Soren and they were cultivating the land separately.

During his life time, Mangal Soren applied for granting permission for making gift of his share of property to all the three daughters. This case was registered as Revenue Misc. Case No. 83/1960-61 and vide order dated 29.06.1961, the Sub Divisional Officer granted permission for gifting his property to his three daughters. Prior to passing the order, Jamabandi raiyats i.e 16 anna raiyats were heard in the matter and there was no objection on their part. However, inspite of permission, Mangal Soren could not execute gift deed in favour of his three daughters and expired, but his three daughters continued to separately possess and cultivate the property. Thereafter Devla Soren, the eldest daughter died issueless and specific case of the petitioners was that upon death of Devla Soren, the land of Mangal Soren devolved on two remaining daughters of Mangal Soren i.e. Jowa Soren and Singo Soren who are the mothers of two writ petitioners.

The Hon'ble Jharkhand High Court was of the considered view that the gift in favour of the three daughters having not been executed by the recorded tenant inspite of permission granted under section 20 of the aforesaid Act of 1949, the rights of the three daughters will be governed by status of their respective husbands and/or their status as per the customary law amongst Santhals as has been noticed in Gantzer's Settlement report.

The Hon'ble Jharkhand High Court further held that the *three married daughters of the recorded tenant through their husbands, all having been married in ghar jamai form of marriage, had right to inherit the property through their husbands having the status of adopted sons under the customary law of Santhal Pargana.* In such circumstances all the three sons in law will have equal status in the matter of inheritance as ghar jamai under the customary law of santhals who are treated as sons. Therefore upon death of the eldest "son in law" and eldest daughter dying issueless, their respective share will devolve upon the other two "sons in law" in the capacity of sons of the recorded tenant.

In ***Rijhu Pahan and Ors. v. State of Jharkhand and Ors.,*** reported in (2008) 4 JCR 575 (HC), the order of restoration passed under Section 71A of the CNT Act was set-aside mainly on the ground that under Section 71A of the CNT Act, protection can be extended only to a *raiyat* belonging to a member of Scheduled Tribe who has been forcibly dispossessed by any illegal mean. In this case, there was no forceful

11 2018 SCC OnLine Jhar 1903

dispossession and further according to customary right in the Scheduled Tribe community, widow or daughter does not have a right of inheritance and the property in the absence of male descendants would revert to the legal heirs or near agnates. According to the Hon'ble Court, after the death of the recorded tenants, the petitioners stepped into the shoes of the recorded tenants and the order of restoration in favour of *ghar-damad* was illegal and without jurisdiction.

In ***Narayan Soren v. Ranjan Murmu***[12]it was the plaintiffs' case that in Santhal community a widow is not entitled to adopt any child and if her husband died issueless the properties are inherited by other surviving agnates.The Court held thatit was specifically pleaded by the defendants/respondents that according to Santhal custom a widow is also competent to adopt a child. The defendants asserted that formal ceremonies like *Bonga Tola* and *Nim Da Mari* were duly performed. Subsequently, a deed of adoption was also registered. Witnesses of the same community were examined by the defendants who have consistently deposed about the custom prevalent in Santhal Community for adoption of a child by a widow. Not only that one of the witnesses D.W. 5 Misil Soren has deposed that he was taken in adoption by Maino Tudu, a widow after the death of her husband Jiwan Besra. Therefore, the Hon'ble Jharkhand High Court upheld the finding of the trial court that the defendants by adducing positive evidence proved that a Santhal widow is competent to adopt a child in absence of her husband.

Whether the "Christian tribals" will be governed by the customary laws of inheritance or the provisions of the Indian Succession Act?

The Hon'ble Supreme Court, in ***Madhu Kiswar v. State of Bihar*** 1996 (5) SCC 125, relying upon the provision of Indian Succession Act stated that " *under Section 3 of the Indian Succession Act the State Government is empowered to exempt any race, sect or tribe from the operation of the Act and the tribes of Mundas, Oraons, Santhals etc. in the State of Bihar, who are included in our concern, have been so exempted.* ***Thus neither the Hindu Succession Act, nor the Indian Succession Act, nor even the Shariat law is applicable to the custom-governed tribals. And custom, as is well recognized, varies from people to people and region to region.*** *In the face of these divisions and visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of personal laws applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-boggling effort.*" (Emphasis supplied)

According to Hon'ble Patna High Court, in ***Kartik Oraon v. David Munzni***, AIR 1964 Pat 201, "*Christian Oraons are Oraons in spite of their conversion and are entitled to the rights and privileges of the tribals*."

12 2013 4 JLJR 18

Similarly in ***Lusia Tirkey v. Joseph Ekka*** 1990 (2) PLJR 649, the Hon'ble Patna High Court, relying on Notification No. 550 dated 2-5-1913 issued by the Governor General in Council, held that the provisions of the Indian Succession Act would not be applicable to the tribal (*Munda* in this case). As per the Notification, the tribes, namely, Mundas, Oraons, Santhals, Ho's, Bhumijs etc dwelling in the province of Bihar and Orrisa will be governed by their customary rules of succession and inheritance and the provision of Indian Succession Act shall not applicable in their cases. This notification is still prevalent after the enforcement of Indian Succession Act, 1925 by virtue of Section 6 of the General Clauses Act, as held in the case.

In ***Junas Amrit Theophil Tirkey v. Anandini Tigga***, 2011 SCC OnLine Jhar 817, the Hon'ble High Court of Jharkhand held that "*Oraons and others tribes are exempted from the certain provisions of Indian Succession Act, 1925 by notification issued under Section 3 of the Indian Succession Act, thus unless another notification issued by the Governor under Clause 5(1) of 5th Schedule of the Constitution of India, or under Section 3 of Indian Succession Act, 1925, the same will not apply in the scheduled area i.e. in the district of Ranchi. Nothing has been brought on record to show that Governor of unified Bihar and/or Governor of Jharkhand issued any notification under Clause 5(1) of 5th schedule of Constitution of India or under Section 3 of Indian Succession Act, 1925 directing that the provisions of Indian Succession Act, 1925 henceforth apply to Oraon and other tribes of the district of Ranchi.*"

At this point, it is pertinent to mention the case of ***Sanjay Kumar Raha v. Michael Tigga,*** F.A. No. 2/2004 decided by the Hon'ble Jharkhand High Court where the Hon'ble Court was dealing with the limited issue of whether or not the will in that case would be governed by the provisions of the Indian Succession Act. The applicant/appellant No. 1 had initially filed an application for the grant of probate under Sections 270/276 of the Indian Succession Act on the basis of the will dated 20th February, 1994 executed by late Poulosh Oraon. The probate case was, after objections, converted to Title Suit No. 1 of 1998. The issues in the case were:-

(i) Is the application filed by the Petitioner u/s 270 and 276 of the Indian succession Act, 1925 maintainable?

(ii) Whether the provisions of Section 46 of the C.N.T. Act are to be applicable and whether Pouloush Oraon was required to obtain permission of the Deputy Commissioner, Ranchi for execution of the alleged Will dated 20.02.94?

(iii) Whether Pouloush Oraon executed his last Will and Testament on 20.02.94 as claimed by the Petitioner?

(iv) Whether the execution of the alleged will has been proved by the Petitioner in accordance with the law?

(v) Is the Petitioner entitled to grant of Probate with respect to the alleged Will?

Before the Hon'ble Court, appeal was preferred against under Section 299 of the Indian Succession Act, 1925, being aggrieved and dissatisfied by the Judgment and

order in Probate Case No. 94 of 1995, Title Suit No. 1 of 1998, whereby the application for grant of probate had been dismissed. In this case, the main issue was not related to inheritance amongst tribals or the applicability of customary laws of the tribals or the Indian Succession Act thereon. The Hon'ble High Court, upheld the probate as the principles of the Indian Succession Act applied in this case.

The probate proceedings are summary in nature and from this, a general proposition of law cannot be drawn that the inheritance in cases of Christian tribals would be governed by the Indian Succession Act and not by their customs.

The Hon'ble Supreme Court in ***State of Kerala and Anr. v. Chandramohanan,*** reported in (2004) 3 SCC 429, dealt with the issue whether a tribal converted to Christianity loses his status as a tribal. According to the Hon'ble Apex Court, *although as a broad proposition of law it cannot be accepted that merely by change of religion, person ceases to be a member of scheduled tribe, but the question as to whether he ceases to be a member thereof or not must be determined by the appropriate court as such a question would depend upon the fact of each case.*

Although this judgment is on the question of the applicability of the provisions of the SC ST Act, the principle of law has been stated that conversion *per se* does not result in alteration of the tribal status. Furthermore, the preponderance of judicial opinion, to a name a few[13] , is also on the same line.

Therefore, in view of the above discussions based on the caselaws, it can be concluded that generally, a Christian tribal will be governed by the customary laws of the tribe and not by the provisions of the Indian Succession Act.

[13] *Kartik Oraon v. David Munzni*, AIR 1964 Pat 201; *Lusia Tirkey v. Joseph Ekka* 1990 (2) PLJR 649; *Junas Amrit Theophil Tirkey v. Anandini Tigga*, 2011 SCC OnLine Jhar 817

Question 4:

What are the principles of apportionment of shares on inheritance among Muslims? Discuss the right of inheritance of the son of a predeceased son of a Mohammedan?

Answer:

General Principles

- The Muslim law makes no distinction between movable and immovable property for the purposes of inheritance. Under Muslim law, there is no 'joint family property' or 'separate property'. Heirship does not necessarily go with membership of the family. A 'member' of the family may not be an heir, and vice versa. The inheritance, for the first time, opens with the death of a Muslim.
- **Doctrine of Representation** – Under the Hindu law, doctrine of representation and per stirpes rule are recognised for survivors as well as partition. The doctrine of representation are utilised for two purposes :- For determining the quantum of shares of heirs or group of heirs. Per stirpes rule means where there are branches, the division of property takes place according to the stock. i.e at the place where branches bifurcate.
  Both Sunnis and Shias do not recognise the principle of representation. So far as the determination of heirs is concerned, the **rule of exclusion** applies, that is, the nearer in degree excludes the more remote.
- **Per Capita and Per Stirpes Distribution** – In a per capita distribution, the succession is according to number of heirs.
  On the other hand in per strip distribution several heirs who belong to different branches, get their shares only from ancestral property which is available to the branch to which they belong.
  Under Sunni law distribution of assets is per capita. Under Shia law if there are several heirs of same class but they descend from different branches, the distribution amongst them is per strip.
  One illustration will clarify the rule of *per capita* and *per stirpes* districution of assets under the Sunni and the Shia law respectively. A Shia leaves two grandsons- X and Y from his pre-deceased son Z and also one grandson F from his another pre-deceased son D. Here as rule of representation applies amongst Shias, the division shall be *per stirpes* and accordingly X and Y will both get ½ while F alone shall get ½ . If the estate were to be divided *per capita* in case where A had been a Sunni Muslim, the three grandsons will get 1/3 each.
- **Female's right of inheritance** – Males and females have equal right of inheritance upon the death of muslim, if his heirs include also the female

heirs. Males have no preferential right of inheritance over the shares of females but normally the share of men is double the shares of females.

- **A Child in womb** – A child in womb of its matter is competent to inherit, provided he is born alive.
- **Primogeniture** – Under this principle of inheritance the eldest member of the deceased enjoy certain special privilege. The Muslim Law applicable to Sunnis do not recognise the rule of primogeniture. However, amongst Shias, they recognise the exclusive rights to the eldest son of such articles of the father as his wearing apparel, Quran, ring, alms etc.
- **Step children** – The step children are not entitled to inherit the properties. Similarly parents do not inherit from their step children.
- **Escheat** – When the deceased Muslim has no legal heir, the properties shall revert to the Government.

Law of Inheritance amongst Sunni

Hanafi jurists divide heirs into seven classes, the three principal and the four subsidiary classes.

Principal classes:

(i) Quranic Heirs - *dhawul-furud* (Sharers);
(ii) Agnatic Heirs - *asabat* (Residuaries);
(iii) Uterine Heirs - *dhawul-arham* (Distant Kindred).

Subsidiary classes:

(i) The successor by contract;
(ii) The Acknowledged kinsman;
(iii) The Sole Legatee;
(iv) The State, by Escheat.

Quranic Heirs – They are the persons whose shares have been specified by the Quran. They are entitled to receive a fixed share allotted to them in a certain order of preference and mode of succession. The sharers are twelve in number. Two of the close legal heirs of every deceased person are invariably regarded as his or her Quranic heirs - the mother and the surviving spouse.

Seven other female relatives of the deceased may be regarded as Quranic heirs in some prescribed circumstances. These are the mother's mother, the father's mother, daughter, son's daughter, and sister- full, half and uterine. Three male relatives of the deceased may be regarded as Quranic heirs in some prescribed circumstances. These are the father, father's father and uterine brother. Among the twelve Quranic heirs, notably, as many as nine are women.

After the payment of funeral expenses, debts and legacies, the first step is to ascertain which of the surviving relations belong to the class of sharers and which again are entitled to a share of the inheritance and then to assign their respective shares. The shares assigned to Quranic heirs have been given in the table in teh next page

The following are the rules for determining shares of Quranic heirs or Sharers:

- First of all, the heritable property is to be determined; it is the residue that remains after payment of the funeral expenses, debts and legacies.

- Then, it is ascertained as to which of the surviving relations of the deceased-(i) belong to the class of sharers, and (ii) are entitled to a share of the inheritance, that is, they are not totally or partially excluded. Whoever is related to the deceased through other person shall not inherit while that person is living. Further within the limits of each class of heirs, the nearer in degree excludes the more remote.

- Then the respective shares, to which the sharers are entitled, are assigned to them. If it is found that the total of the shares exceeds unity then the shares of each sharer is proportionately diminished by the process called "increase". (*Doctrine of "aul" or increase*)

- If there is any residue left after satisfying the claims of the sharers, it devolves upon the residuaries. If, however, there is no residuary, the residue reverts to the sharers in proportion to their shares by the process called "return".(*Doctrine of "radd" or return*)

Sharers	Normal share (2)		This column sets out— (A) Shares of Sharers Nos. 3, 4, 5, 8 and 12 as varied by special circumstances ; (B) Conditions under which Sharers Nos. 1, 2, 7, 8, 11 and 12 succeed as Residuaries	
	of one	of two or more collectively*	Condition under which the normal share is inherited	
1. Father	1/6		When there is a child or child of a son h. l. s.	When there is no child or child of a son h. l. s., the father inherits as a residuary.
2. True Grand-father	1/6		When there is a child or child of a son h. l. s. and no father or nearer true grandfather.	When there is no child or child of a son h. l. s., the Tr. G.F. inherits as a residuary provided there is no father or nearer Tr. G.F.
3. Husband	1/4		When there is a child or child of a son h. l. s.	1/2 when no child or child of a son h. l. s.
4. Wife**	1/8	1/8	When there is a child or child of a son h. l. s.	1/4 when no child or child of a son h. l. s.
5. Mother	1/6		(a) When there is a child or child of a son h. l. s., or	
			(b) When there are two or more brothers or sisters, or even one brother and one sister, whether full, consanguine or uterine.	1/3 when no child or child of a son h. l. s., and not more than one brother or sister (if any); but if there is also wife or husband and the father, then only 1/3 of what remains after deducting the wife's or husband's share.
6. True Grandmother	1/6	1/6	A. Maternal—When no mother and no nearer true grandmother either paternal or maternal.	
			B. Paternal—When no mother, no father, no nearer true grandmother either paternal or maternal, and no intermediate true grandmother.	
7. Daughter	1/2	2/3	When no son.	With the son she becomes a residuary.

* The collective share of two or more heirs is divided equally among them.

** A Mohammedan can have as many as four wives at a time.

8. Son's daughter h. l. s.	1/2	2/3	Where no (1) son, (2), daughter (3) higher son's son, (4) higher son's daughter, or (5) equal son's son.*	When there is only one daughter or higher son's daughter but no (1) son, (2) higher son's son (3) equal son's son, the daughter or higher son's daughter will take 1/2 and son's daughter, h. l. s. (whether one or more will take 1/6 (*i.e.*, 2/3—1/2) [with an equal son's son she becomes a residuary].
(i) Son's daughter	1/2	2/3	When no (1) son, (2) daughter, or (3) son's son.	Where there is only one daughter the son's daughter (whether one or more) will take 1/6, if there be no son or son's son. With the son's son she becomes a residuary.
(ii) Son's son daughter	1/2	2/3	When no (1) son, (2) daughter, (3) son's son, (4) son's daughter, or (5) son's son's son.	When there is only one daughter or son's daughter, the son's son's daughter (whether one or more), will take 1/6, if there be no (1) son, (2) son's son, or (3) son's son's son. [With the son's son's son she becomes a residuary :]
9. Uterine brother	1/6	1/3	When no (1) child, (2) child of a son h. l. s. (3) father, or (4) true grandfather.	
10. or sister				
11. Full sister	1/2	2/3	When no (1) child, (2) child of a son h. l. s. (3) father, (4) true grandfather or (5) full brother.	With the full brother she becomes a residuary.
12. Consanguine sister	1/2	2/3	When no (1) child, (2) child of a son h. l. s. (3) father, (4) true grandfather (5) full brother, (6) full sister or (7) consanguine brother.	With the consanguine brother she becomes a residuary. But if there is only one full sister and she succeeds as a sharer, the consanguine sister (whether one or more) will take 1/6, provided she is not otherwise excluded from inheritance.

* A son's son is a *higher* son's son in relation to a son's son daughter. Similarly, a son's son's son, is a *lower* son's son in relation to a son's daughter. And if there be a son's son and a son's daughter or a son's son and a son's son's daughter, the former is an equal son's son in relation to the latter' as both are equally from the deceased.

Agnatic Heirs – When there are Quranic heirs or sharers and a residue of estate is left after allotting them their shares, or when there are no Quranic heirs or sharers, then whatever is left in the former case, and the entire estate in the latter case, goes to the Agnatic heirs or residuaries. The Agnatic heirs may be classified into (i) Agnatic Descendants, (ii) Agnatic Ascendants, and (iii) Agnatic Collaterals (Father's agnatic descendants and Grandfather's agnatic descendants).

Uterine Heirs – In the absence of the sharers and the residuaries, the estate devolves on the uterine heirs or distant kindred. There is only one case in which the distant 143 kindred inherit along with a sharer. When the only surviving sharer is a husband or a wife and there is no residuary, then the husband or wife takes his or her share, and the rest of the estate to the distant kindred. In the class of uterine heirs or distant kindred are all those blood relations of the deceased who have not found a place either among the sharers or residuaries. These are: (a) female agnates, and (b) cognates, both males and females.

Subsidiary Classes

In the absence of a member of the three principal classes (i.e., Quranic, Agnatic and Uterine heir) the right of inheritance devolves upon subsidiary heirs, among whom each class excludes the next. *Successor by contract* is a person whose right of inheritance is based on a contract with the deceased in consideration of an undertaking given by him to pay any fine or ransom.

Acknowledged kinsman is a person of unknown descent in whose favour the deceased has made an acknowledgment of Kinship, not through himself, but through another. Consequently, a man may acknowledge another as his brother (descendant of father), or uncle (descendant of grandfather), but not as his son.

Universal legatee – In the absence of three classes of Principal heirs and the above-described classes of two Subsidiary heirs, a person is entitled to bequeath the whole of his estate to any person, who is called the Universal legatee.

The State, by escheat – In the absence of either Principal or Subsidiary heirs, or a will, the whole of a estate of a deceased would escheat to the Government.

Law of Inheritance amongst Shia

In modem India, according to the Shia law, there are only two groups of heirs –
(i) Heirs by consanguinity or *nasab* (ii) Heirs by marriage or by virtue of *sabab*.

For determining the share of heirs the Shias classify heirs into *sharers* and *residuaries*. There is no separate class of heirs corresponding to 'Distant Kindred' of Sunni law.

Sharers: The sharers are nine in number. They are-. (1) Husband, (2) Wife, (3) I Father, (4) Mother, (5) Daughter, (6) Full sister, (7) Consanguine sister, (8) Uterine brother, and (9) Uterine sister. Of the nine sharers, the first two are heirs by affinity. The next three belong to the first class of heirs by consanguinity, and the remaining four, namely, full sister; consanguine sister and uterine brother or sister belong to the second class. There are no sharers in the third class of heirs at all. The descendants how low so ever of sharers are also sharers.

Residuaries: All heirs other than sharers are residuaries. The descendants how low so ever of residuaries are also residuaries. Sons, brothers, uncles and aunts are all residuaries. Their descendants, therefore, are also residuaries.

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1. For the purposes of determining the shares, the heirs are divided into two classes, *viz.*, Sharers and Residuaries. There is no class of distant kindred under Shia Law.
2. The sharers together with the condition governing their allotment are given in the following Table :

Table of Sharers—Shia Law

Shares	Of one	Normal share of Two or more collectively	Conditions under which the share is inherited	Sharers as varied by special circumstances
1	2	3	4	5
1. Husband	1/4		When there is a lineal descendant.	1/2 when no such descendant.
2. Wife	1/8	1/8	when there is a lineal descendant.	1/4 when no such descendant.
3. Father	1/6	—	When there is a lineal descendant.	If there be no lineal descendant, the father inherits as a residuary.
4. Mother	1/6	—	(a) When there is a lineal descendant; or (b) When there are two or more full or consanguine brothers or one such brother and two such sisters, or four such sisters, with the father.	1/3 in other cases.
5. Daughter	1/2	2/3	When no son.	With the son she takes as a residuary.
6. Uterine brother	1/6	1/3	When no parent or lineal descendant.	
7. Uterine	1/.6	1/3	The same as above.	
8. Full sister	1/2	2/3	When no parent, lineal descendant, or full brother, or father's father.	The full sister takes as a residuary with the full brother and also with the father's father.
9. Consanguine sister	1/2	2/3	When no parent, or lineal descendant, or full brother or sister, or consanguine brother or father's father.	The consanguine sister takes as a residuary with the consanguine brother and also with the father's father.

Note :— The descendants how lowsoever of Sharers are also Sharers.

Following are the rules of distribution of shares:-

- The heirs are divided into three classes –
  i. Class I
     1. Parents
     2. Children and other Lineal descendants (how low so ever)
  ii. Class II
     1. Grandparents (how high so ever)
     2. Brothers and Sisters and their descendants (how low so ever)
  iii. Class III
     1. Paternal
     2. Maternal uncles and aunts of the deceased and of his parents and grandparents (how high so ever) and their descendants (how low so ever)
- *Distribution of Assets among Class I heirs* - The persons who are first entitled to succeed to the estate of a deceased Shia Muslim are the heirs of Class I along with the husband or wife, if present. Among the heirs of Class I, nearer in degree will exclude more remote. In case the heirs of Class I include grandchildren of pre-deceased children, then, the children of each son take the portion which their father, if living, would have taken. The children of each daughter take the portion which their mother, if living, would have taken.
- *Distribution of Assets among Class II heirs* – If there are no heirs of Class I, the estate will devolve upon the heirs of Class II after deducting the share of husband or wife, if any. The rules of succession among the heirs of Class II are different according as to the I surviving relations are: (1) Ascendants, without collaterals; (2) Collaterals, without ascendants; (3) Both ascendants and collaterals
- *Distribution of Assets among Class III heirs* – In the absence of the heirs of the first or second class, the estate devolves upon the heirs of the third class, after allotment of the share of husband or wife, if existing, in the following order:
  i. Paternal and maternal uncles and aunts of the deceased.
  ii. Their descendants how low so ever, the nearer in degree excluding the more remote
  iii. Paternal and maternal uncles and aunts of the parents.
  iv. Their descendants how low so ever, the nearer in the degree excluding the more remote.
  v. Paternal and maternal uncles and aunts of the grandparents.
  vi. Their descendants how low so ever, the nearer in degree excluding the more remote
  vii. Remoter uncles and aunts and their descendants in like order.

The members of each group must be exhausted before any members of the next group can succeed to the inheritance.

Exception-If the only claimants be the son of a full paternal uncle and a consanguine paternal uncle, the former, though he belongs to group (ii), excludes the latter who is nearer and belongs to group (i).

- *Doctrine of "Return" or "Radd"* . If there is a residue left after satisfying the claims of the sharers, but there are no residuaries in the class to which the sharers belong, the residue reverts to the sharers in proportion to their respective share.
- *Doctrine of 'Aul' or Increase* – The Sunni doctrine of increase has no place in the Shia law. According to Shia law, if the sum of the portions which would regularly accrue to different persons as 'sharers' exceeds unity, they do not abate rateably but the fraction in excess is always deducted from the share of the following heirs and of no others- (a) the daughter or daughters; or (b) full or consanguine sister or sisters.

Right of inheritance of the son of a pre deceased son of a Mohammedan

Muslim law does not recognise the doctrine of representation. Under Muslim law, the nearer heir totally excludes a remoter heir from inheritance. That is to say, if there are two heirs who claim inheritance from a common ancestor, the heir who is nearer in degree to the deceased, would exclude the heir who is remoter. Therefore, right of inheritance of the son of a predeceased son is excluded, if there is a paternal uncle. According to Macnaghten, in his book, *Principles and Precedents of Moohummudan Law*, (1825), "the son of a person deceased shall not represent such person if he died before his father. He shall not stand in the same place as the deceased would have done had he been living, but shall be excluded from the inheritance, if he have a paternal uncle. For instance, A, B and C are grandfather, father and son respectively. The father B dies in the lifetime of the grandfather A. In this case the son C shall not take *jure representationis*, but the estate will go to the other sons of A".

In the case of ***Mohd Amirullah Khan vs. Mohd. Haku Mullah***, (1999) 3 SCC 753 , it was stated that " *permissive occupation even for a decade by the children of a predeceased son of the deceased would not convert into a legal right to remain in their grandfather's property as only the surviving children and wife, if any, were the heirs of the deceased*."

The concept of principle of representation though totally alien in the Sunni Law is not so in the Shia Law. A simple illustration will explain this position. The father F dies leaving three grandsons one by the eldest son and two by the other, as his only heirs. Under the Sunni Law each of them will inherit as a grandson and shall take one-third. They will take the inheritance per capita and not per stripes. Under the Shia Law, the grandson by the eldest son will get his father's half share while the two

grandsons by the other son will get a quarter each, dividing equally the moiety assigned to their father.