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## CROSS-EXAMINATION: A LEGAL ART IN THE PURSUIT OF TRUTH

*Simrah Haindaday*

“Cross-examination is generally considered to be the most difficult branch of the multifarious duties of the advocate,” said Francis Wellman in his groundbreaking work, acknowledging that although genius is a gift, it takes even the most gifted “many years of training and careful observation to arrive at anything approaching perfection.”<sup>1</sup> This singular statement sums up the essence of cross-examination perfectly; it is not just a legal procedure but rather a high-stakes art form. It is the crucible where credibility is evaluated, testimonies are put to the test, and the narrative of the case is forged or fractured. In India’s adversarial system of justice, it continues to be the most effective means of determining the truth. It is the dramatic and intellectual test arena where the advocate’s skills can alter multiple lives.

The art of cross-examination, however, demands a unique set of qualities. According to Wellman, it calls for “ingenuity; a habit of logical thought; clearness of perception; infinite patience and self-control; power to read minds of men intuitively; to judge of their character by faces; to appreciate their motives; ability to act with force and precision; a masterful knowledge of the subject-matter in hand; an extreme caution; and above all the instinct to discover the weak point in the witness under cross-examination.”<sup>2</sup>

This article looks at this profound and complex art, exploring its roots, philosophy, its legal framework and what goes into mastering it.

### ETHICAL COMPASS OF CROSS-EXAMINATION

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<sup>1</sup> Francis L. Wellman, *The Art of Cross-Examination* (1903)

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The philosophy of cross-examination is built upon the foundation of the adversarial principle that holds that truth is best discovered through a vigorous contest of evidence. The dialectical process is employed to expose falsehood and validate the truth. However, the tool must be operated within strict ethical parameters.

The ethical line was drawn clearly in the 19<sup>th</sup> century by Archbishop Richard Whately who described the skill of “alarming, misleading, or bewildering an honest witness” as “one of the most base and depraved of all possible employments of intellectual power.”<sup>3</sup> He maintained that a lot of strategies employed in cross examinations are not only immoral but frequently ineffective. While “manoeuvres, and the browbeating” are best suited to confuse an honest witness, he held that a “gentle and straightforward, though full and careful examination<sup>4</sup>,” is the best way to get the truth. Many such philosophical divides highlight the fundamental conflict in cross-examination: it is a powerful weapon that can be used to either reveal the truth or obscure it, and the advocate’s conscience must drive its direction.

Over the years, two main principles have come to govern the art of cross examination:

- Good Faith Basis Rule: It holds that every question posed by a lawyer must be supported by facts. Asking questions based on suspicion, or worse, fabrication is unethical. Leading questions are permitted but it is not acceptable to ask hostile, demeaning or defamatory questions that are intended only to harass. The courts act as gatekeepers and ensure that questions are appropriate and pertinent.
  
- Prevention of Creating False Impressions: The objective of cross-examinations is to expose the truth, not to fabricate a story through selective questioning or omission of important facts. Francis Wellman perfectly captures this in his class, *The Art of Cross Examination* by stating that “the objective is not to make the false appear true<sup>5</sup>.” While many contend that using truthful but misleading evidence is an acceptable strategy, it goes against the lawyer’s higher duty as an officer of the court.

Based on these principles, the Indian legal framework has adopted the adversarial system of cross-examination.

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<sup>3</sup> Richard Whately, *Elements of Rhetoric* 293-94 (London, 7<sup>th</sup> ed. 1846)

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<sup>5</sup> Francis L. Wellman, *The Art of Cross-Examination* (1903)

## **HISTORICAL EVOLUTION: FROM ROOTS TO ITS LEGAL ESTABLISHMENT**

In India, the roots of cross-examination can be traced back to the common law tradition. However, its statutory foundation can be found in the Indian Evidence Act, 1872 drafted by Sir James Fitzjames Stephen. The Act codified the rules of evidence and laid out the procedure for examination, cross-examination and re-examination of witnesses in Section 137 to 166. The establishment of this act transformed the process of evidence evaluation from a system reliant on colonial and customary practices to a system that was logical and standardised. In 2023, this act acquired a fresh branding along with additions and refinements in the Bharatiya Sakshya Adhinyam, 2023.

- Scope and Nature: Section 142<sup>6</sup> defines cross examination. It describes it as the examination of a witness by the adverse party. Section 143<sup>7</sup> crucially stipulates that it need not be limited to the facts testified to in examination-in-chief, allowing broad exploration. Additionally, Section 149<sup>8</sup> gives the authority to question a witness to test their credibility, and knowledge.
- Right to Cross Examine: Section 143<sup>9</sup> also guarantees the right of every party to cross-examine a witness who testifies against them.
- Power of Asking Leading Questions: Section 146(4)<sup>10</sup> provides exclusive power to ask leading questions during cross-examination. This is the strongest tool for a defence counsel giving them the power to control the narrative and suggest answers, and thereby, testing the witness's commitment to a particular version of events,

India's robust legal framework ensures that cross-examination serves as a crucial element in trials and gives advocates a firm ground to master the art to discover the truth.

## **JUDICIARY AS THE UPHOLDER OF CROSS-EXAMINATION**

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<sup>6</sup> Section 142, Bharatiya Sakshya Adhinyam, 2023

<sup>7</sup> Section 143, Bharatiya Sakshya Adhinyam, 2023

<sup>8</sup> Section 149, Bharatiya Sakshya Adhinyam, 2023

<sup>9</sup> Section 143, Bharatiya Sakshya Adhinyam, 2023

<sup>10</sup> Section 146(4), Bharatiya Sakshya Adhinyam, 2023

Over the years, with changing community demands and post-independence grant of rights to citizens, the judiciary has consistently served as guardian of this process, refining it through significant judgements.

- **Defining the Right to Cross-Examine:** The case of *B. S. Balaji v. T. Govindaraju*<sup>11</sup> established the right of the adverse party whose interests are directly impacted by the testimony to cross-examine. This reinforced the principle that cross-examination is a right that is essential for a fair trial and not a mere formality.
- **Examining Expert Evidence:** In *Govind Narain v Smt. Chhoti Devi*<sup>12</sup>, the court reinforced that an expert witness must be treated like any other and must be subjected to rigorous cross examination to determine their credibility and the validity of their opinion. This has helped ensure that courts do not blindly accept expert testimony without independent scrutiny,
- **Protecting Child Witnesses:** Perhaps the most delicate evolution has taken place in how child witnesses are to be treated. In *S. Amruta v. C. Manivanna Bhupathy*<sup>13</sup>, the court ruled that although a child's testimony is admissible, it needs corroboration, and an initial inquiry must be done to assess the child's competency. Kerala High Court further adopted a rights-based approach, held in *Unnikrishnan R v. Sub Inspector of Police*<sup>14</sup>, that questions for a child under the POCSO Act must be pre-submitted to court so as to prevent trauma and ensure a comfortable environment.
- **Handling Contradiction:** In *State of Rajasthan v. Kartar Singh*<sup>15</sup>, the judiciary has provided clarity on how to handle contradictory statements. It has held that if a witness claims that they made a prior statement under duress, it establishes firm ground for cross-examination under Section 145 of the Evidence Act. Similarly, in *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat*<sup>16</sup>, it was held that even a minor contradiction grants the defence the right to cross-examination as every inconsistency is potentially material.

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<sup>11</sup> *B. S. Balaji v. T. Govindaraju*, MANU/KA/0554/1995 (India)

<sup>12</sup> *Govind Narain v. Smt. Chhoti Devi*, AIR 2002 SC 1003 (India)

<sup>13</sup> *S. Amutha v. C. Manivanna Bhupathy*, MANU/TN/7206/2007 (India)

<sup>14</sup> *Unnikrishnan R v. Sub Inspector of Police*, 2018 SCC OnLine Ker 4642 (India)

<sup>15</sup> *State of Rajasthan v. Kartar Singh*, AIR 1976 SC 2077 (India)

<sup>16</sup> *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat*, AIR 1964 SC 1563 (India)

These and several other landmark judgements show that the Indian judiciary not only upholds the sanctity of cross-examination but also continuously moulds it to be more just, inclusive, and effective.

## **TECHNIQUES THAT SHAPE THE TRUTH**

While the law lays down the procedure of cross-examination, it is the advocate's skill and mastery that transforms it into a high-stakes art form. While there are several strategies that can be adopted, they can be broadly categorised into two overarching approaches: constructive and deconstructive. What sets apart a true artisan of the courtroom and a competent lawyer is understanding when and how to deploy these approaches.

- **Constructive Cross-Examination:** This strategy is subtle and often unexpected. Its objective is to build and not to attack. By employing this technique, the advocate seeks to extract helpful testimony that supports their case from a witness called by the opposite party. The tone is purposefully calm and conversational, which gives it a dialogue-like quality instead of a confrontation. This approach can hold a lot of weight as the judge may perceive the testimony as a concession from the other side. It is the art of transforming a potential adversary into an unwitting ally at a crucial moment and thereby, using your opponent's testimony to build the foundation of your own argument.
- **Deconstructive Cross-Examination:** This approach stands in complete contrast to the constructive strategy. It has been preserved in legal lore as the classic, theatrical form where the witness's credibility or the basis of their testimony is directly attacked. The advocate, by employing this technique, aims to expose prior inconsistencies, omissions, or improbabilities in the witness' testimony.

These strategic techniques are given depth and vitality with David Paul Brown's "Golden Rules for the Examination of Witnesses"<sup>17</sup> as he lays down human-centric principles to be adopted by lawyers. These rules do not just guide a lawyer on what to do but they guide how to be, adding artistry to strategy. For example, Rules 1 and 2 emphasise on the power of observation and the importance of maintaining eye contact with the witness throughout, enabling you to spot any signs of doubt or dishonesty in their words. Most importantly, Rule 3 is the guiding stone in determining what kind of approach to employ based on the behaviour and personality

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<sup>17</sup> David Paul Brown, Golden Rules for the Examination of Witnesses (1856)

of your witness. Brown has also laid down one of the cardinal rules of cross-examination which is knowing when to stop. A lawyer's demeanour in a high-pressure setting and his discipline can either methodically dismantle the witness' testimony or destroy their own case.

When strategic approaches are backed by Brown's rules, they elevate cross-examination from a tactical skirmish to a profound art. In the unrelenting search for truth, strategy, ethics, and psychology must converge to master the skill of conducting an effective cross-examination.

## **HOW CROSS-EXAMINATION BECOMES AN ART FORM**

A good trial court advocate must understand not just the legal framework of cross-examinations but also the purpose of cross examination and blend it with psychological insight, meticulous preparation, calculated risk-taking and strategic execution

Often, the art of cross-examination is misunderstood as being a confrontational and only theatrical duel. However, the reality is far from it; it is a much more sophisticated, disciplined and methodical art, and instead of a duel, it's a psychological siege meant to destroy a constructed narrative. In a trial, it is the scalpel, not the sledgehammer, this is used to expose the gaps between truth and testimony. In order to master this art, one requires an alchemy of painstaking preparation, deep psychological understanding, and the strategic patience of a chess grandmaster. An advocate needs to be well-prepared and must know every detail and anticipate every response. This then allows them to be able to listen and observe every detail, and strike right when the witness's guard is down. The intention is not to bludgeon, but to guide the witness and the court to an inevitable conclusion that testimony alone cannot support. The pursuit of justice finds its most powerful engine here, in this crucible of question and answer, and this is where cases are truly won.

However, the art of cross-examination can be best understood in motion by looking at past trials where advocates have wielded this tool to turn the entire case around in their favour.

A timeless masterpiece in the art form is Edward Carson's cross-examination of Oscar Wilde that took place in 1895. It stands as a perfect blend of meticulous preparation and psychological insight. The cross-examination took place in Wilde's case against Lord Queensbury for criminal libel.

At first, Wilde was clearly winning and charming everyone in the courtroom with his dazzling wit and patronising smiles to all of Carson's questions. But Carson remained unfazed and began systematically disparaging Wilde's character through his written works and drawing associations. He questioned him on his philosophy that "wickedness is a myth," and broke down his novel "The Picture of Dorian Gray", where a character "adored another man madly."

The entire courtroom was against Carson, but only he knew that he was tactically setting up a trap. With careful investigation and preparation, Carson had acquired all facts, names and dates that could be used against Wilde. He questioned Wilde about his relationships with valets and grooms, to which, once again, Wilde replied with nonchalance, making everyone in the courtroom laugh, but this time, it was for the last time.

Then came Carson's deadly thrust. After establishing a pattern of Wilde's association with young men, he drew attention to a particular serving boy. He asked, "Did you ever kiss him?" Wilde, in an attempt to create another clever diversion, made a deadly mistake: "He was a particularly plain body. He was unfortunately very ugly. I pitied him for it."

With that one response, Wilde exposed his entire character. The ugliness of the boy was irrelevant unless the act of kissing him was a possibility. The brilliance lay in Carson's ability to restrain. He did not force the blow; he waited until Wilde's own arrogance stumbled him into the trap. While the subsequent prosecution of Wilde has drawn criticism over the years, it is important to note how Carson, like a great fighter in the ring who has just delivered a shattering blow, was able to break through a witty and impenetrable witness. This cross-examination serves as a prime example to show that patience, preparation and right instincts can deliver a fatal blow at the perfect moment.

In the Indian context, the case of *Zahira Habibulla H. Sheikh v. State of Gujarat*<sup>18</sup> serves as a very pivotal case where the exposure of a hostile witness led to the acquittal of several accused and in a subsequent appeal, a more successful cross-examination of the same witness defined the verdict of conviction.

The case stemmed from the Gujarat riots of 2002, when a mob attacked Vadodara's Best Bakery, killing 14 people in a fire. The daughter of the bakery owner, Zahira Sheikh was the key eyewitness who resolutely identified 21 accused in her first examination-in-chief.

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<sup>18</sup> *Zahira Habibulla H. Sheikh v. State of Gujarat*, (2004) 4 SCC 158 (India)

However, the cross-examination determined the verdict where Zahira Sheikh completely retracted her entire testimony. She claimed that she had not seen any of the accused as she was not present at the scene and had been forced by social activists to name the accused. Based on this abrupt and total turnaround, the trial judge acquitted all 21 accused.

During the retrial, Zahira was again cross-examined, but this time by the special public prosecutor who confronted her on her previous statements, statements made to the media, and even a sworn affidavit that was given to the National Human Rights Commission. He methodically exposed the many inconsistencies in her many testimonies, demonstrating that she had lied multiple times on the stand. The court concluded that she was a self-condemned liar” who had turned hostile under pressure. This led to the conviction of nine accused, showing that with mastery over the art and belief in the truth, a good lawyer can carry out justice.

What ties these two case studies together is the understanding that cross-examination is not an end in itself but rather it is the hinge upon which the credibility of the entire trial rests. It is here that the narrative laid out in the examination-in-chief can be put to test against logic, human weaknesses, and memory. Witnesses are forced to reconcile inconsistencies, or else collapse under their own weight.

The art lies in the lawyer’s ability to lead the court to the truth and not in degrading the witness. And the above case studies have shown that truth has the power to alter reputations, determine verdicts and even spark public outrage.

The ability to cross-examine has always been and will remain to be the defining skill of trial advocates. It is a sophisticated symphony of law, logic, psychology, and perhaps even theatrics. History shows that when practiced diligently, with integrity and patience, and a commitment to truth, it is indeed the finest engine ever invented for the pursuit of justice.