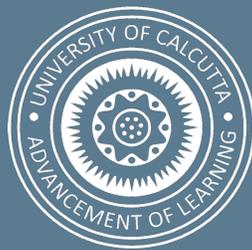

CALCUTTA LAW REVIEW



REPORT OF THE DIALOGUE

ON

Advocacy in the Higher Judiciary and its
Contribution to Evolving Jurisprudence

INCLUDING

THE FULLY TRANSCRIBED AND ANNOTATED
MINUTES OF THE PROCEEDINGS OF THE DIALOGUE

VOLUME 1

AUGUST 2019

SPECIAL ISSUE

CALCUTTA LAW REVIEW

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VOLUME I



SPECIAL ISSUE

CONTAINING

THE REPORT OF THE DIALOGUE ON ADVOCACY IN THE HIGHER
JUDICIARY AND ITS CONTRIBUTION TO EVOLVING JURISPRUDENCE

AUGUST 2019



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A DIALOGUE ON ADVOCACY IN THE HIGHER JUDICIARY
AND ITS CONTRIBUTION TO EVOLVING JURISPRUDENCE

AUGUST 3, 2019

In a constitutional republic, whereby an independent judiciary is vested with the discretion of judicial review; every decision of the Court plays a profoundly significant role in affecting the ordinary lives of its citizens. The Dialogue intends to provide qualitative academic discourse on the contribution of advocacy, as an integral component of the legal profession, in establishing case laws, setting precedence and empowering the Supreme Court and 25 High Courts of India to qualitatively exercise their writ jurisdictions under Articles 32 and 226 of the Constitution, respectively. The Dialogue addresses several underlying themes relevant to the importance of appellate advocacy in India, including its contributions to the preservation of civil liberties, evolving comparative common law jurisprudences, and in dispensating guidance to the Courts in furtherance of administering justice; in addition to the persuasive role of oral arguments in judicial decision-making, among others.

The Journal and Seminar Committee of the Department of Law, University of Calcutta expresses its sincerest gratitude to all the speakers of the Dialogue, the Honourable Justices Dipankar Datta and Ashis Kumar Chakraborty for their inspiring views on the instrumental role of lawyers within the realms of a modern democratic order and the importance of trial advocacy in evolutionary civil and criminal jurisprudences respectively, among others; the Learned Sabyasachi Choudhury for his exhaustive and thorough contributions on oral and written precedent-oriented advocacy, among others; and the moderator, the Learned Arunabha Deb for enriching the event by synergising and coalescing the opinions of all Panelists. The Committee acknowledges the instrumental cooperation and support rendered to its Executive Office-Bearers, both elected and appointed, by the Dean and his Office at the Faculty of Law, and the Student Convenor of the Departmental Student-Committees. The Journal and Seminar Committee also takes this opportunity to convey its appreciation to the Joint-Secretaries of the Committee for aiding, advising and mentoring the designated support teams for the discussion; and all General Appointees to the Journal and Seminar Sub-Committees for conclusively bringing the Dialogue and its appertaining obligations to fruition.

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REPORT OF THE DIALOGUE ON ADVOCACY IN THE HIGHER JUDICIARY AND ITS CONTRIBUTION TO EVOLVING JURISPRUDENCE

Abstract

This paper-based report publishes an editorial preface authored by designated Executive and Associate Editors of the Calcutta Law Review and the annotated transcript of a dialogue held with judges and advocates of the Calcutta High Court on the role of advocacy in the higher judiciary and its contribution to evolving jurisprudence. Featured participants to the dialogue include: The Honourable Mr. Justice Dipankar Datta, The Honourable Mr. Justice Ashis Kumar Chakraborty, The Learned Sabyasachi Chaudhury and Professor (Dr.) Jatindra Kumar Das with The Learned Arunabha Deb as the moderator.

* * *

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EDITORIAL PREFACE TO THE REPORT OF THE DIALOGUE

ATREYA CHAKRABORTY,* SAMRIDDHA SEN,**
ANOUGH CHAKRABORTY,*** SUBHAYAN CHAKRABORTY,**** &
SWATI BANERJEE*****

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* * *

INTRODUCTION

“Historically, there are three ideas involved in a profession: organisation, learning and a spirit of public service”

— Roscoe Pound¹

Legal advocacy, a quintessential component of the modern legal profession, is widely regarded as one of the most ancient and honourable of all callings. It recognises the perennial right of a person to select another for pleading his cause. Although ancient customs of advocacy bear notable difference from its modern equivalent, both in terms of procedure and conventions, modern legal advocacy largely owes its genesis to the great advocate orators of Greece and Rome, the latter having performed most of its present-day functionalities and making indelible oral compositions to that effect. The positivist influence of advocacy in the ancient administration of justice was only scarcely less potent, than what it is in the present.²

Ancient Greek custom prescribed a client to place his case before a reputed orator or writer of the day, for preparing an oration which the client would present at the time of trial of the same. Chief Justice Sharswood of the Pennsylvania Supreme Court, in reference to this ancient practice, states:³

“In all countries advanced in civilization, and where laws and manners have attained any degree of refinement, there has arisen an order of advocates devoted to prosecuting or defend-ing the lawsuits of others. Before the tribunals of Athens, although the party pleaded his own cause, it was usual to have the oration prepared by one of an order of men devoted to this business, and to

¹ Roscoe Pound, “What is a Profession - The Rise of the Legal Profession in Antiquity”, 19 NOTRE DAME L. REV. 203 (1944), at p. 204.

² E.W. Timberlake, *Origin and Development of Advocacy as a Profession*, 9(1) VIRGINIA L. REV. 25 (1922), at p. 25.

³ SHARSWOOD, PROFESSIONAL ETHICS, p. 137.

compensate him liberally for his skill and learning. Many of the orations of Isocrates, which have been handed out of us, are but private pleadings of this character. He is said to have received one fee of twenty talents, about eight thousand dollars of our money, for a speech that he wrote for Nicocles, the King of Cyprus. Still, from all that appears, the compensation thus received was honourary and gratuitous.”

Advocacy in the era of the Roman Empire, as enunciated by Alexander H. Robbins in his treatise on American Advocacy, saw the public recognition of the professional *advocatus* whose qualifications, duties and manner of compensation for services rendered were regulated by statute; gradually supplanting the ancient and more honourable relation of patron and client.⁴

In any constitutional republic, the twin elements of the Rule of Law, intrinsic to its qualitative practical realisation, are an independent judiciary and an independent legal profession, the latter playing a pivotal role in aiding and assisting the former in its administration of justice.⁵ The role of a lawyer is therefore, not merely “*that of a person called upon to use mere forensic skills in court rooms and moderate the outcome of adjudication and litigation. From this twin aspect, one can see that the role of a person equipped with the study of law becomes an activity of social evolution*”.⁶ It is therefore, also incumbent upon the legal professional fraternity to undertake ethical obligations in service of society (by advocating *pro bono* cases) and in upholding the sanctity of constitutional values and liberties. Legal professionalism thus exists “*not as a fixed unitary set of values but instead as multiple vision of what constitutes proper behavior by larger*”.⁷ A legal practitioner, compelled to reconcile between conflicting loyalties; is answerable not only to the interests of the client whom he represents, but also to the Court of which he is an officer and further to his colleagues at the Bar and to the traditions of the profession.⁸ In the words of Chief Justice Marshall of the U.S. Supreme Court:⁹

“The fundamental aim of legal ethics is to maintain the honour and dignity of the law profession, to secure a spirit of friendly cooperation between the Bench and the Bar in the promotion of highest standards of justice, to establish honourable and fair dealings of the counsel with his client, opponent and witness; to establish a spirit of brotherhood in the Bar itself; and to secure that lawyers discharge their responsibilities to the community generally”.

⁴ ROBBINS, AMERICAN ADVOCACY, p. 3.

⁵ R. Venkataramani, *Lecture Regarding Professional Ethics*, INDIAN LAW INSTITUTE at p. 2.

⁶ *Id* at p. 30.

⁷ Nelson, Robert L., & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *LAWYERS IDEALS/LAWYERS PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 177-214 (1992).

⁸ HENRY S. DRINKER, *LEGAL ETHICS* (1953).

⁹ C.L. ANAND, *GENERAL PRINCIPLES OF LEGAL ETHICS* at p. 63.

Legal advocacy, or in simpler terms, lawyering is essentially akin to the trades of other professional practitioners; in terms of its transactional value, the base model for services rendered, social ramification and public welfare utility. While medicinal or other technical professionals engage and practice in their respective trades, rendering their intellectual and technical services in return for stipulated fair compensation; what lawyers sell is the art of advocacy, and their stock in trade essentially consists of legal arguments.¹⁰

Advocacy is the process of trying to convince an audience (be it judges or a jury or in general) through the technique of persuasion¹¹ and the usage of constructive (legal) arguments. The primary objective of an advocate is to convince the Court that his/her client should prevail.¹² In achieving such an objective, the advocate must understand and appreciate the procedural and conventional relevance of oral argument-persuasion and education.¹³

I. IMPORTANCE OF ORAL AND WRITTEN ARGUMENTS IN JUDICIAL DECISION-MAKING

1.1. *Legal Argumentation*

The very exercise of legal advocacy is predicated on oral and written legal arguments. Lawyers are required to take legitimate legal arguments seriously;¹⁴ which play a material role in resolving most cases, by assisting the Courts in adjudicating a dispute by applying the law within its factual ambit. A legal argument, be it oral or written, should be sensible, persuasive and attuned to the important balance existing between tradition and stability, on one hand, and change and idealism, on the other.¹⁵ Therefore, a sound legal argument represents a prism-like structure. It addresses the past upon which it places reliance, the present where it resolves cases, and

¹⁰ WILSON HUHNS, THE FIVE TYPES OF LEGAL ARGUMENTS 41 (2008) at 85.

¹¹ See Honorable Jacques L. Wiener, Jr., *Ruminations from the Bench: Brief Writing and Oral Arguments in the Fifth Circuit*, 70 TUL. L. REV. 187 (1995).

¹² James D. Dimitry, *Stepping up to the Podium With Confidence: A Primer for Law Students on Preparing an Appellate Oral Argument*, 38 STETSON L. REV. 75, 79 (Fall 2008) at 78; See also Alfonso M. Saldana, *Beyond the Appellate Brief: A Guide to Preparing and Delivering the Oral Argument*, 69 FLA. B. J. 28 (May 1995).

¹³ *Id.*

¹⁴ See Richard S. Markovits, *Taking Legal Arguments Seriously: An Introduction*, 74 CHI.-KENT L. REV. 317 (1999).

¹⁵ "On the one hand, the law must have stability and predictability so that people may order their conduct and affairs with some rationality. On the other hand, the judge must consider the harm of compounding error by reflectively applying a clearly erroneous decision..." Texas Dep't of Mental Health and Mental Retardation v. Petty, 848 S.W.2d 680, 689 (Tex. 1992).

the future towards which it is oriented. Irrespective of the factual dimensions or the jurisprudential basis appertaining to its cause, an artfully represented oral or written legal argument essentially takes one archetypal form:

“Your Honor. These are the facts. Here is the law. Here is how the law applies to the facts. Please decide the case in accordance with your duty to apply the law correctly. The legally-correct conclusion in this case is the one which happens to favor my (very sympathetic) client. More importantly, it is the only just result”.¹⁶

1.2. Oral Advocacy

Oral advocacy entails an articulate verbal presentation of an advocate’s case before the Court, as well as interacting with and spontaneously responding to the judge’s enquiries.¹⁷ It therefore presents a valuable opportunity to convince the Court of the merits of the case and to dispel any doubts the judge may encounter, after perusing through the briefs.¹⁸ In common law, advocacy, through both oral and written arguments, operates as a measure of inductive reasoning: enabling the Courts to interpret and apply statutes;¹⁹ and synthesize antecedent rulings to create general legal principles, before applying the said principles to the facts of a particular case.²⁰

Beyond elucidating as to why the Courts interpret and apply constitutional principles within a discernable epistemological framework, advocacy also provides value in revealing the operational predicament of law around human controversy;²¹ involving cases vitiated with untimeliness,²²

¹⁶ Michael S. Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655 (1999) at 657.

¹⁷ See BOARD OF STUDENT ADVISERS, HARVARD LAW SCHOOL, INTRODUCTION TO ADVOCACY 69.

¹⁸ *Id.* at 69. Oral arguments should remain conventionally formal and conversational between the judges and the advocates, whereby the latter discusses his/her opinion on how the case should be resolved, while simultaneously addressing the reservations of the judges regarding questions of law and fact; *Id.* at 73.

¹⁹ ELLEN S. PODGER & JOHN F. COOPER, OVERVIEW OF U.S. LAW 3 (2009) at p. 5.

²⁰ *Id.*

²¹ The first few minutes of Attorney St. Clair’s arguments, in legal representation of President Nixon, commenced with a grave indication that the Courts must resist entry into a political dispute. However, the dialogue subsequently slipped abruptly into confusion and laughter about what relief would fit his request—dismissal, vacatur or any other disposition; See Oral Arguments on July 8th, 1974, *United States v. Nixon*, 418 U.S. 683 (1974).

²² See Oral Arguments on February 26th, 2001, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (addressing whether a property owner who acquired title to a property after it was subjected to wetlands regulation, is entitled to initiate a takings claim under the Fifth Amendment of the U.S. Constitution).

inconsistency of position,²³ and *locus standi* (lack of standing);²⁴ among others. Although these concepts are fundamental in nature, entire rules of litigation are built on them, eventually culminating in precedent-setting outcomes. It is lawyering these boundaries into the Courts, which remains an indispensable terrain for advocates to cover.²⁵

Listening to lawyers argue before the Courts, assist not just in the prediction of future outcomes, but also reconciling past decisions. Vexing issues stressing on the functionality of constitutionalism in the future receives considerable clarity only upon hearing justices discuss the said issues aloud; along with the oral and written arguments of both persuasive and unpersuasive lawyers within the context of an actual case.²⁶

Taking existing empirical research data, examining the determinant capacity of oral advocacy in the U.S. Supreme Court,²⁷ there exists a substantial basis to argue that litigants' arguments, including the information presented through oral arguments, decisively affect the justices' decisions. To address factual uncertainties, justices often require requisite information about the case and the relevant legal provisions, in order to establish proper interpretive or jurisprudential policy. It is in this context, that lawyers appear before the Courts and attempt to provide justices with the information which is beneficial to their client's interests, by providing "*a clear representation of the issues, the relationship of those issues to existing law, and the implications of a decision for public policy*".²⁸ Although justices often arrive upon oral arguments after going through the written briefs and the orders of the lower courts, and therefore being reasonably acquainted with the subjects of the cases; oral proceedings themselves provide additional and relevant information to the Courts.²⁹ In fact, it has been exhibited that justices often "*seek new information during these proceedings*" to assist them in reaching new

²³ See Oral Arguments on January 18th, 1984, *New York v. Quarles*, 467 U.S. 649 (1984) (questioning whether other issues were raised in the lower courts).

²⁴ *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (landmark case on the American conception of the standing doctrine which illustrates the imperative of studying what lawyers add to the constitutional mix). The Court dismissed the *locus standi* of the petitioner's injunction against the use of police chokeholds, which did not meet threshold requirements set forth by Article III of the U.S. Constitution. *E.g.*, JESSE H. CHOPER ET. AL., CONSTITUTIONAL LAW 1558-59 (2006).

²⁵ Stephen A. Higginson, *Constitutional Advocacy Explains Constitutional Outcomes*, 60 FLA. L. REV. 857 (2009) at 865.

²⁶ *Id.*

²⁷ See TIMOTHY R. JOHNSON, PAUL J. WAHLBECK, JAMES F. SPRIGGS II, THE INFLUENCE OF ORAL ARGUMENTS ON THE U.S. SUPREME COURT (2004).

²⁸ Paul J. Wahlbeck, *The Development of a Legal Rule: The Federal Common Law of Public Nuisance*, 32(3) LAW & SOCIETY REVIEW 613, 638 (1998).

²⁹ Timothy R. Johnson, *Information, Oral Arguments, and Supreme Court Decision Making*, 29 AMERICAN POLITICS RESEARCH 331, 351 (2011).

decisions as proximate as possible to the desired outcome.³⁰ In addition to the foregoing findings being corroborated by several comprehensive case-studies,³¹ it has been discovered that oral arguments focusing on the procedural posture of a case, have led to many if not most of the U.S. Supreme Court's *per incuriam* decisions.³² Moreso, justices themselves have substantiated upon the value of oral advocacy in providing relevant information to them. Chief Justice Rehnquist stated that "if an oral advocate is effective, how he presents his position during oral arguments will have something to do with how the case comes out".³³ Justice Brennan concurringly stated that he had "too many occasions when (the) judgment of a decision has turned on what happened in oral argument ...".³⁴ Justice Brennan also stated that while oral arguments did not decisively affect his case voting, it helped him develop his substantive thoughts on particular cases, and even changed his general ideas on the shaping of the cases.³⁵

1.3. Advocacy in Guiding the Exercise of Judicial Discretion

The Supreme Court of India in *Dwarka Nath v. IT Officer*,³⁶ in addition to a plethora of other important cases, has stressed on the importance of the discretionary power which has been constitutionally vested upon an independent judiciary. Intelligible advocacy through oral and written argumentations, with the assistance of such discretionary power, continues to play a pivotal role in evolving jurisprudence, thereby, not only helping Courts to arrive at decisions in congruence with the requirements of an ever-changing society, but also facilitating the annulment of archaic laws, impeding the development of a modern progressive social order.

³⁰ See TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE U.S. SUPREME COURT (2004) at 5.

³¹ See generally Stephen L. Wasby, Anthony A. D'Amato & Rosemary Metrailler, *The Functions of Oral Arguments in the U.S. Supreme Court*, 62 QUARTERLY JOURNAL OF SPEECH 410, 422 (1976); Donald Cohen, *Judicial Predictability in United States Supreme Court Advocacy: An Analysis of the Oral Argument in Tennessee Valley Authority v. Hill*, 2 UNIVERSITY OF PUGET SOUND LAW REVIEW 89, 136 (1978); William Benoit, *Attorney Argumentation and Supreme Court Opinions*, 26 ARGUMENTATION AND ADVOCACY 22, 38 (1989).

³² Stephen L. Wasby, Steven Peterson, James N. Schubert & Glendon A. Schubert, *The Supreme Court's Use of Per Curiam Dispositions: The Connection to Oral Arguments*, 13 NOR. ILL. UNI. L. REV. 1, 32 (1992); See also James N. Schubert, Steven Peterson, Glendon A. Schubert & Stephen L. Wasby, *Observing Supreme Court Oral Argument: A Biosocial Approach*, 11 POLITICS AND LIFE SCIENCES 35, 51 (1992).

³³ WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS (1987) at 277.

³⁴ ROBERT L. STERN, EUGENE GRASSMAN & STEPHEN M. SHAPIRO, SUPREME COURT PRACTICE: FOR PRACTICE IN THE SUPREME COURT OF THE UNITED STATES (1993).

³⁵ *Id.*

³⁶ AIR 1966 SC 81.

Judicial discretion, giving course to a discretionary decision, is exercised when a judge is granted the authority, either under statute (statutory discretion) or common law, to choose between several different, but equally valid courses of action; thereby implying the power to make a choice between alternative courses of action, which presupposes no uniquely right answer to the problem.³⁷ It is here, where intelligible advocacy, through oral and written deliberations, assist the judges in navigating “*the space ... between legal rules*” wherein legal actors are provided the autonomy to exercise a choice.³⁸ An advocate’s position, when facing a Court divided on the philosophies of judicial decision-making; should be to argue on a narrow fact-based ruling, one that will not force the Bench to re-examine the validity of old precedents.³⁹

Justice Posner of the United States Court of Appeals for the Seventh Circuit states that advocacy, along with the opinion of the Court, cannot be divorced from judicial decision-making. He argues for the existence of a continually causal and mutually reciprocal relationship between the decision-making processes of a judge and the arguments of lawyers before the Courts, wherein “*how judges make up their minds about the outcome of the case ... should also influence how lawyers argue before judges*”.⁴⁰

A lawyer being a practitioner on one day, may be elevated to the Bench on the next. As such, the transition is near-seamless and often involves minimum (or often no) additional training. It is therefore natural for the lawyer, newly appointed as a judge, to continue with as minimal changes as possible, with the accustomed approach. Lawyers submit their interpretations of legal materials pertinent to a particular case before the Court, and the judges correlate the said submissions with the materials; and decide “*which advocate is more faithful to the language of the statute or the holdings of decisions that have the status of precedents*”,⁴¹ thereby making the judge’s role “*umpireal*”.⁴² Chief Justice John Roberts of the U.S. Supreme Court, in his confirmation hearing before the U.S. Senate, famously described that a judge’s role is to call balls and strikes, and not to pitch and bat.⁴³ Thus, for

³⁷ S.A. DE SMITH & J.M. EVANS, *DE SMITH’S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* (1980) at 278.

³⁸ Keith Hawkins, *The Use of Legal Discretion: Perspectives from Law and Social Science* in *THE USES OF DISCRETION* (1992) 11, 11.

³⁹ Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1. J. APP. PRAC. & PROCESS 7, 23 (1999) at 21.

⁴⁰ Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts – One Judge’s View*, 51 DUQ. L. REV. 3, 39 (2013) at 3.

⁴¹ *Id.* at 6.

⁴² *Id.*

⁴³ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005).

a judge to appropriately adjudicate disputes by calling bats and strikes, without going into “*issue creation*”;⁴⁴ lawyers must pitch and bat by submitting pertinent and significant legal arguments.

II. ADVOCACY AND THE PRESERVATION OF CIVIL LIBERTIES

2.1. *Case Study: Freedom of the Press*

A glaring example of the role of advocacy in assisting an independent judiciary to preserve constitutional liberties, is the case of press freedom in India, a principle which finds no explicit mention within the plain text of the Indian Constitution. While the First Amendment to the Constitution of the United States, adopted on the 15th of December, 1791; precludes the Federal and State Governments from enacting any law restricting the freedom of the press;⁴⁵ the Indian Constitution of 1950, although adopted one and a half century later, makes no express provision for safeguarding the said. Such absence had paved the way for several significant legal deliberations,⁴⁶ which consequently enabled the Supreme Court to read Freedom of Press into the Right of Freedom of Speech and Expression, as guaranteed by Article 19(1)(a) of the Indian Constitution.⁴⁷ In *Romesh Thapar v. State of Madras*,⁴⁸ the Governor of Madras had imposed an Order banning an English Journal named “*Cross Roads*” under §9(1-A) of the Madras Maintenance of Public Order Act, 1949 on grounds of protection of public safety. Counsels appearing on behalf of the petitioners contended that the imposition of the foregoing Order interferes with the fundamental rights enshrined under Article 19(1)(a) of the Constitution.⁴⁹ The Supreme Court, accepting the contention of the petitioners, quashed the Order and

⁴⁴ Judicial issue creation, that is raising legal claims and arguments which the litigating parties have overlooked or ignored, is widely considered as judicial overreach; wherein judges, in raising new issues within a case, act as “policy entrepreneurs”, thereby eroding the distinction between judicial and legislative mandates. See Kevin T. McGuire & Barbara Palmer, *Issue Fluidity on the U.S. Supreme Court*, 89 AM. POL. SCI. REV. 691, 699 (1995); See also Amanda Frost, *The Limits of Advocacy*, 59 DUKE LAW JOURNAL 447, 517 (2009).

⁴⁵ FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”.

⁴⁶ See *Romesh Thapar v. State of Madras*, AIR 1950 SC 124; *Sakal Papers Pvt. Ltd. & Ors. v. Union of India*, 1962 AIR 305.

⁴⁷ See CONSTITUTION OF INDIA, 1950, Article 19(1)(a) reads: “All citizens shall have the right to freedom of speech and expression”.

⁴⁸ *Romesh Thapar v. State of Madras*, AIR 1950 SC 124.

⁴⁹ *Id* at ¶2.

ruled that the issuance of said Order tantamounted to a privation of the fundamental right to freedom of speech and expression.

This position of the Supreme Court was subsequently upheld in *Sakal Papers Pvt. Ltd. & Ors. v. Union of India*,⁵⁰ whereby the Central Government, in framing the Daily Newspapers (Price and Page) Order, 1960, prescribed limitations on the number of pages and supplements that could be published and issued respectively by newspapers, in accordance with the price charged. Counsels appearing on behalf of the petitioners argued that if the petitioner were to comply with the foregoing Order and keep the number of pages unchanged, it would raise the selling price of the paper; while conversely, if the number of published pages were to be reduced, it would adversely affect the right to disseminate information and opinion, thereby directly infringing fundamental rights guaranteed under Article 19(1)(a) of the Constitution.⁵¹ Upholding the precedent established in *Romesh Thapar*, and in concurrence with the submissions made by the Counsels for the petitioners, the Supreme Court declared the Daily Newspapers Order of 1960 as *ultra vires*; opining that the fundamental right to freedom of speech and expression, as provided under Article 19(1)(a) of the Constitution, is inclusive of the freedom to propagate ideas, which in turn, is ensured by the freedom to circulate, both in terms of content and volume.

Blackstone had stated that "*the liberty of the press consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press.*"⁵² One of the first instances of legal contention on the issue of pre-censorship of the press can be traced back to the matter of *Brij Bhushan & Anr. v. State of Delhi*.⁵³ In the said matter, determination of the *vires* of an order issued by the Chief Commissioner of Delhi, dated 2nd March, 1950 under §7(1)(c) of the East Punjab Public Safety Act, 1949⁵⁴ (as extended to the Province of Delhi) was the subject matter of the contention. The aforementioned Order directed Brij Bhushan, the publisher and K.R. Halkani to submit a true copy of every weekly issue of the "*Organizer*" for scrutiny by the Provincial

⁵⁰ *Sakal Papers Pvt. Ltd. & Ors. v. Union of India*, AIR 1962 SC 305.

⁵¹ *Id* at ¶7.

⁵² WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: VOLUME IV 151,152.

⁵³ AIR 1950 SC 129.

⁵⁴ EAST PUNJAB PUBLIC SAFETY ACT, 1949, §7(1)(c) read: "the Provincial Government or any authority authorised by in this behalf, if satisfied that such action is necessary for preventing or combating any activity prejudicial to the public safety or the maintenance of public order may, by order in writing addressed to a printer, publisher or editor require that any matter relating to a particular subject or class of subjects shall before publication be submitted for scrutiny".

Government, before publication of the same. Arguments advanced on behalf of the petitioners contended that "*this provision infringes the fundamental right to the freedom of speech and expression conferred upon them by Article 19(1)(a) of the Constitution inasmuch as it authorises the imposition of a restriction on the publication of the journal which is not justified under clause (2) of that article.*"⁵⁵ Accepting the said deliberations, a Majority Bench of the Supreme Court held that the Order in question is *ultra vires* the Constitution, as it violated the principle of Press Freedom, inclusive within the fundamental right of Freedom of Speech and Expression as guaranteed under Article 19(1)(a) of the Constitution of India.

2.2. Case Study: Article 21

Justice Field, in the matter of *Munn v. Illinois*,⁵⁶ while referring to a provision in the Fifth and Fourteenth Amendments to the U.S. Constitution, spoke of the right to life in the following words: "*By the term 'life', as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed.*"⁵⁷

Article 21 of the Constitution states that no person shall be deprived of his life or personal liberty except according to procedure established by law.⁵⁸ Article 21, being a negative right by nature, confers upon every person the fundamental rights to life and personal life and has become an inexhaustible source of many constitutional rights. Owing to the activist jurisprudence of the Indian Supreme Court, new fundamental rights which are otherwise beyond its textual purview, have been gradually read into Article 21, thereby significantly enhancing the scope and ambit of its constitutional application.

2.2.1. Right to Privacy

Unlike the Fourth Amendment to the Constitution of the United States which alludes to an individual's right to privacy by being "*secure in their persons, houses, papers, and effects, against unreasonable search and seizures ...*",⁵⁹ the constitutional acknowledgement of an individual's right to privacy bears

⁵⁵ *Supra* note 53 at ¶3.

⁵⁶ 24 L Ed 77: 94 US 113 (1187).

⁵⁷ V.N. SHUKLA, CONSTITUTION OF INDIA (2017) at 210.

⁵⁸ (1964) 1 SCR 332; Justice Ayyanagar, speaking for the majority of the Bench presiding over matter, held that the right to privacy is not a guaranteed right under our Constitution. On the other hand, Justice Subba Rao, speaking for the minority of the Bench presiding over the matter held that, right to privacy is an essential ingredient of personal liberty. *See Id.* at 219.

⁵⁹ FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

no explicit mention within the plain text of Article 21 of the Indian Constitution. One of the first instances wherein the Supreme Court of India discussed the viability of the inclusion of right to privacy within the said Article was in *Kharak Singh v. State of Uttar Pradesh*.⁶⁰ In recent account, in the matter of *Justice K.S. Puttaswamy (Retd.) & anr. v. Union of India*,⁶¹ a nine-Judge Bench of the Supreme Court held that right to privacy is a fundamental right of every citizen. While the Attorney General relied upon the judgments delivered in *M.P. Sharma v. Satish Chandra, District Magistrate Delhi*,⁶² and the majority opinion delivered in *Kharak Singh* both of which contained observations, indicating that right to privacy cannot be specifically protected by the Constitution of India; *per contra*, the minority opinion provided by Justice Rao in *Kharak Singh* was relied upon by the petitioners in furtherance of their claim that right to privacy should be considered to be a fundamental right. The fact that such minority opinion was subsequently upheld by the seven-Judge Bench in *Maneka Gandhi v. Union of India*⁶³ was also stressed upon by the petitioners. More-over, the petitioners in the present case had argued that the principle followed in *A.K. Gopalan v. State of Madras*⁶⁴ "which construed each provision contained in the Chapter on fundamental rights as embodying a distinct protection, was held not to be good law by an eleven-judge Bench in *Rustom Cavasjee Cooper v Union of India*".⁶⁵ As a result thereof, it was argued by the petitioners that the judgments delivered in *M.P. Sharma* and the majority opinion in *Kharak Singh*, relied upon by the Attorney General cannot be held to be sustainable as good in law because they were based upon the principle followed in *A.K. Gopalan*. Upon finding the arguments put forward by the petitioners to be more compelling, the presiding Bench held that right to privacy must be considered to be a fundamental right of every citizen.

2.2.2. Due Process

A similar argument for legal advocacy and its positive effects in restraining the curtailment of fundamental liberties by a coercive Indian State, can be derived from the legal history of Due Process in India. Akin to the cases of Press Freedom (§2.1, *supra*) and the fundamental right to Privacy (§2.2.1, *supra*) the notion of Due Process enjoys no explicit mention within the bare text of the Indian Constitution. The expression "*procedure established by law*"

⁶⁰ (1964) 1 SCR 332.

⁶¹ (2017) 10 SCC 1.

⁶² (1954) SCR 1077.

⁶³ (1978) 1 SCC 248.

⁶⁴ AIR 1950 SC 27.

⁶⁵ (1970) 1 SCC 248.

under Article 21⁶⁶ was initially interpreted as procedure prescribed by the law of the State.⁶⁷ In *A.K. Gopalan v. State of Madras*,⁶⁸ it was held that Articles 14, 19 & 21 of the Indian Constitution are mutually exclusive; such theory of mutual exclusivity of the three aforementioned articles meant that the requirement of reasonableness of any law providing for the deprivation of life or personal liberty, would not occasion. It may also be argued at that, adherence to such an interpretation would significantly reduce the scope of judicial review in respect of laws passed by the legislature, and restrict such scope to the determination of *vires* of executive action, only.

The foregoing interpretation of “*procedure established by law*” was in stark contrast with the “*due process*” clause in the Fifth⁶⁹ and Fourteenth Amendments⁷⁰ to the Constitution of the United States. The guarantee of due process requires that prior to the deprivation of life, liberty or property of any person by the government, it must adhere to and afford all rights, guarantees and protections as enshrined in the U.S. Constitution and all other applicable statutes.⁷¹ While the Fifth Amendment only applies to the Federal Government, the identical text in the Fourteenth Amendment explicitly applies this due process requirement to the Federal States.⁷²

While the theory of mutual exclusiveness of Fundamental Rights was rejected in *Rustom Cavasjee Cooper v. Union of India*,⁷³ it was in *Maneka Gandhi v. Union of India*,⁷⁴ where the requirement of the reasonableness of procedure in Article 21 was established.⁷⁵ In *Maneka Gandhi*, the passport of the petitioner was impounded arbitrarily by the authorities under the Passport Act of 1967. The Counsels representing the petitioner contended that the right to go abroad is a part of “*personal liberty*”, guaranteed under Article 21. As such, infringement of such right by procedure laid down under the said Act, not providing the holder of the passport with an opportunity to be heard against the issuance of said Order; is a significant departure from

⁶⁶ See CONSTITUTION OF INDIA, 1950, Article 21 reads: “No person shall be deprived of his life or personal liberty, except according to the procedure established by law.”

⁶⁷ V.N. SHUKLA, CONSTITUTION OF INDIA (2017) at 219.

⁶⁸ AIR 1950 SC 27.

⁶⁹ FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA reads: “No person ... shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law ...”.

⁷⁰ FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA reads; §1 reads: “... No state shall make or enforce any law which shall the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law ...”.

⁷¹ Legal Information Institute, *Fifth Amendment: An Overview*, CORNELL LAW SCHOOL.

⁷² *Id.*

⁷³ (1970) 1 SCC 248.

⁷⁴ (1978) 1 SCC 248.

⁷⁵ *Supra* note 67 at 220.

the principles of natural justice, and therefore cannot be held to be good in law. The Counsels stressed on the importance of establishing a relationship between Articles 14, 19 & 21, so as to ensure that any procedure established by law warranting the deprivation of liberty under Article 21, is just, fair, reasonable and in consonance with principles of natural justice. Accepting the views and arguments submitted by the Counsels for the petitioner, the Supreme Court ruled that the requirement of reasonableness of procedure in Article 21 is necessary.⁷⁶

Following the principles laid down in *Maneka Gandhi*, the requirement of reasonableness of procedure has been read in Article 21. As is evident from the judgement delivered in *Sunil Batra v. Delhi Admn.*,⁷⁷ wherein Justice Iyer had opined that although "... *our Constitution has no due process clause ... but ... after Cooper and Maneka Gandhi, the consequence is the same*".⁷⁸

2.3. Case Study: Basic Structure Doctrine of the Indian Constitution

The Supreme Court in the landmark decision of *Kesavananda Bharati v. State of Kerala*⁷⁹ held that there was no tacit limitation of the Parliament's right to amend the Constitution, in so far as it doesn't interlope with its basic structure.⁸⁰ Further, it authenticated the Supreme Court's right of judicial review and, therefore, established its supremacy on constitutional matters. Counsels appearing on behalf of the petitioner, placed their primary emphasis on the alternative submission that the word "*amend*" or "*amendment*" in Article 368 must be narrowly construed, so that the Article may not comprehend the power to repeal, abrogate, emasculate, damage or destroy the "*essential elements*" or "*basic features*" of the Constitution.⁸¹ The Fundamental Rights are thus illustrative, and not exhaustive.⁸²

The view that the power of amendment conferred upon Parliament must be coextensive with the power of "*judicial review*" conferred upon the judiciary, counteracting the attainment of judicial supremacy; was opposed by the articulation that the power of judicial review certifies the pre-eminence of the Constitution and not the judiciary, but the same cannot be said about the amending power of Parliament.⁸³ The petitioners

⁷⁶ Justice Chandrachud had observed that the procedure established in Article 21 "has to be fair, just and reasonable, not fanciful, oppressive or arbitrary". *See Id* at 221.

⁷⁷ (1978) 4 SCC 494.

⁷⁸ *Supra* note 67 at 221.

⁷⁹ (1973) 4 SCC 225.

⁸⁰ *Id* at 666, ¶1212(2).

⁸¹ *Id.*

⁸² *Id* at 486, ¶666.

⁸³ *Id* at 451, ¶576.

contended that the Constitution bequeathed eternal freedoms to Indian citizens, and was drafted with the intention to unbind the nation from the likelihood of tyranny perpetrated by elected representatives.⁸⁴ It is this freedom from tyranny which, according to the petitioners, has been infringed by the impugned Article 31C, as inserted by the Constitution (Twenty-Fifth Amendment) Act of 1971.⁸⁵ Should Article 31C be deemed valid, as submitted by the Counsels representing the petitioners, Parliament and State Legislatures and not Constitutional provisions shall thereafter determine how much freedom is “good” for the citizens.⁸⁶ It was also contended that constitutionally sanctioned liberties will eventually and gradually wither away if not preserved and protected from the unqualified law-making authority of Parliament.⁸⁷

The Learned Counsel further elucidated that the 24th Amendment is to be deemed void and illegal for the reasons as elucidated: A creature of the Constitution, as the Parliament is, can have only such amending power as is conferred by the Constitution, which is granted by the people unto themselves.⁸⁸ While purporting to exercise such amending power, Parliament cannot attempt to increase the said power. Although there is no doubt in respect of whether Parliament enjoyed the legislative competence to amend Article 368 of the Constitution in itself, but such should not necessitate or imply that Parliament enjoys an absolute authority to amend the said, so as to enhance its own law-making (amending) authority beyond constitutional sanction.⁸⁹

Overturning the earlier precedent established in *I. C. Golaknath v. State of Punjab*,⁹⁰ whereby restrictions were placed on the unfettered right of Parliament to amend the Constitution, in so far as the fundamental rights are concerned; the Supreme Court in a constitutional bench consisting of thirteen judges, with a narrow majority of 7:6; opined that Article 368 does not enable or empower the Parliament to alter the Basic Structure of the Indian Constitution.⁹¹ The bench reiterated the validity of Twenty-

⁸⁴ *Id* at 306, ¶12.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id* at 348, ¶222(iii).

⁸⁸ *Id* at 387, ¶390.

⁸⁹ *Id* at 312, ¶¶ 37, 39(iv).

⁹⁰ 1967 AIR 1643.

⁹¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 at 1007, ¶(2).

Fourth⁹² and Twenty-Ninth Amendments;⁹³ and §§ 2(A)⁹⁴ & (B)⁹⁵ and the first part of §3 of the Constitution (Twenty-Fifth Amendment) Act, 1971,⁹⁶ while declaring its second part,⁹⁷ *ultra vires*.⁹⁸

2.4. PILs: Advocacy in the Public Interest

Given the multidimensional functionalities of lawyering in the 21st Century, as expert practitioners, counselors and leaders in assisting the institutional administration of justice; it is imperative that lawyers are correspondingly aware of their ethical obligations in service of the broader public interest. The sources for such ethical obligations, arising both from trained professional lawyers and their status as highly educated members of society, include among others: Model Rules or Codes of Professional Conduct; an implied social contract between state-licensed professionals and the rest of society; preserving the interests of the institutions they serve; the role of law, regulation and norms as the foundation and expression of public policy and private ordering; and lessons about the role of lawyers in

⁹² THE CONSTITUTION (TWENTY-FOURTH AMENDMENT) ACT, 1971.

⁹³ THE CONSTITUTION (TWENTY-NINTH AMENDMENT) ACT, 1972.

⁹⁴ THE CONSTITUTION (TWENTY-FIFTH AMENDMENT) ACT, 1971, §2(A) read: “For clause (2), the following clause shall be substituted, namely:- “(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash: Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1) of article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause”.”

⁹⁵ THE CONSTITUTION (TWENTY-FIFTH AMENDMENT) ACT, 1971, §2(B) read: “After clause (2A), the following clause shall be inserted, namely:- “(2B) Nothing in sub-clause (f) of clause (1) of Article 19 shall affect any such law as is referred to in clause (2)”.

⁹⁶ THE CONSTITUTION (TWENTY-FIFTH AMENDMENT) ACT, 1971, §3 read: “Insertion of new article 31C.-After article 31B of the Constitution, the following article shall be inserted namely:- “31C. Saving of laws giving effect to certain directive principles—Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31;...”.”

⁹⁷ *Id* at “...and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy”.

⁹⁸ *Supra* note 91.

the history of our constitutional republic and political economy.⁹⁹ In furtherance of public interest, lawyers share two broad responsibilities: one to the legal system and to uphold the Rule of Law which operate as the foundation of our constitutional republic and political economy, by strengthening domestic and international legal institutions; and the other to secure a safe, fair and just society wherein individuals and institutions can thrive in the long-run.¹⁰⁰

Akin to every other profession, the issue of public interest places substantive limitations on the professional prerogative and discretion of legal practitioners, in advancing the cause of social justice. In balancing the simultaneous obligations a legal practitioner has, both as an officer of the Court, acting as an agent of justice; and as a legal representative of his or her client, defending the said's rights and interests; it is an established principle of common law legal ethics that:

*“The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case ... It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow”.*¹⁰¹

It is this overarching aim of advocacy and the legal institutional apparatus at large, which has been used to achieve social justice through Public Interest Litigations (PILs). Public Interest Litigation (PIL), an exclusively Indian justice dispensation mechanism; plays a crucial role in the

⁹⁹ Ben. W. Heineman, Jr., William F. Lee & David. B. Wilkins, *Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century*, HARVARD LAW SCHOOL at 11.

¹⁰⁰ *Id* at 12.

¹⁰¹ G.T. Pagon, *The Advocate's Duty to the Court in Adversarial Proceedings*, MELBOURNE: SUPREME COURT OF VICTORIA (2008); citing *Giannarelli v. Wraith*, (1988) 165 CLR 543, 556-7.

sustenance of democratic values, by serving as a vehicle for creating and enforcing inalienable fundamental rights.¹⁰² PILs in India have traditionally addressed the immediate public interest needs of the country, when confronting a bewilderingly complex bureaucracy, institutionalised corruption and a Parliament crippled with legislative inertia.¹⁰³ Lawyers, engaged and involved with Public Interest Litigation driven (non-governmental) Organisations or PILOs,¹⁰⁴ raise awareness on public interest issues and inspire the effectuation of public pressure through strategic litigation.¹⁰⁵ Professor Jack Greenberg, an eminent public interest litigator and a Columbia University Professor of Law explains the two functionalities of public interest litigation in the judicial system: first, public interest litigation persuades the judicial system to interpret the law by urging the Courts to substantiate or re-define rights in constitutions, statutes and treaties to progressively address the wrongdoings of government and society, in alleviating the sufferings of the said wrongdoings; and secondly, to influence the Courts to apply existing, favourable statutory provisions or regulations which are otherwise underutilised or ignored.¹⁰⁶ The foregoing explanation has been derived from the experience of public interest lawyers in the

¹⁰² See S.P. Gupta, V.M. Tarkunde, J.L. Kalra & Ors. v. Union of India & Ors., 1981 (Supp) SCC 87 at 210. BHAGWATI, J. stated: “where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal position or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of any breach of fundamental right of such persons or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons”.

¹⁰³ Zachary Holladay, *Public Interest Litigation in India as a Paradigm for Developing Nations*, 19(2) INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 555, 573 (2012).

¹⁰⁴ PILOs contribute to civil society by providing a voice to citizen interests and empowering them to engage in democratic debate. Some scholars argue that advocacy organisations provide an opportunity framework by linking marginalised sections of society and aggregating citizen interests, who cannot otherwise overcome collective action challenged. See Kenneth T. Andrews & Bob Edwards, *Advocacy Organizations in the U.S. Political Process*, 30 ANN. REV. SOC. 479 (2004) at 481-82; See also Debra C. Minkoff, *Producing Social Capital: National Social Movements and Civil Society*, 40 AM. BEHAV. SCI. 607 (1997) at 6011-12.

¹⁰⁵ Strategic litigations (also referred to as “impact litigation” or “test case litigation”) are advocated by lawyers who intend to reach beyond the immediate case or the individual client. Through litigation, these lawyers seek to change the law or how it is applied in a way that will affect the society as a whole; See EDWIN REKOSH, KYRA A. BUCHKO & VESSELA TERZIEVA, *PURSuing THE PUBLIC INTEREST: A HANDBOOK FOR LEGAL PROFESSIONALS AND ACTIVISTS* (2001) at 81, 82.

¹⁰⁶ *Id.*

United States, who have “*saved lives, protected fundamental rights, established crucial principles, transformed institutions, and ensured essential benefits for those who need them the most ...*”.¹⁰⁷ Although the very conceptual notion of PILs in India have been borrowed from the United States,¹⁰⁸ public interest litigators in India, with the co-operation and assistance of activists and judges of the Supreme Court, have innovated its procedural efficacy by expanding the traditional rules of standing in constitutional litigation, thereby allowing any individual or PILO to approach the Courts, on behalf of marginalised communities having limited to no access to the institutions of justice.¹⁰⁹ Lawyers and legal aid organisations, representing aggrieved parties who are deprived of access to proper legal representation, serve at the forefront of public interest litigations as court-appointed *amicus curiae*.¹¹⁰ Being fundamental to the inception of PILs in India, lawyers play a critical role in public interest litigations by acting as a mediator between the Court and the people. For example, when Prime Minister Indira Gandhi declared the Internal Emergency of 1975, N.M. Palkhiwala refused to appear for the Prime Minister in the Allahabad High Court in protest of the declaration, while the All India Bar Council challenged the same.¹¹¹ Lawyers remain actively engaged in public interest litigations in several ways: by either being petitioners themselves, fling applications in response to newspaper articles depicting drastic deficiencies in the enforcement of legally defined rights,¹¹² or as office-holders in PILOs or civil liberties organisations,¹¹³ by

¹⁰⁷ Deborah L. Rhode, *Public Interest Law: The Movement and Midlife*, 60 STAN. L. REV. 1, 13-14 (2004).

¹⁰⁸ Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in LAW AND POVERTY (1988), 387-415.

¹⁰⁹ Jayna Kothari, *Reshaping Public Interest Lawyering in India*, AZIM PREMJI UNIVERSITY.

¹¹⁰ See *Kishore Singh Ravinder Dev v. State of Rajasthan*, AIR 1981 SC 625 (public interest litigation involving prisons and state institutions); See also *Dhronamraju Satyanarayana v. N.T. Rama Rao & Ors.*, AIR 1988 AP 62 (public interest litigation involving politics and elections).

¹¹¹ See *N P Nathwani v The Commissioner of Police*, 1975 (78) BLR 1, (for a petition filed by lawyers in Bombay after they were prevented from holding a conference to discuss “Civil Liberties and the Rule of Law under the Constitution”).

¹¹² *Hussainara Khatoun v. State of Bihar*, (1980) 1 SCC 81; See also Kapila Hingorani, *Public Interest Litigation*, INDIAN EXPRESS (unpublished article, [1987]) at 3, reads: “I started reading the article while sipping my tea. I felt choked. How can such a situation exist in our country? We are lawyers of so many years' standing and we are not even aware of it, we must do something about it”.

¹¹³ Examples are V.M. Tarkunde and Govind Mukhoty in the Supreme Court and M.A. Rane in the Bombay High Court. V.M. Tarkunde was a member of the People's Union for Civil Liberties (PUCL) and the Citizens for Democracy, M.A. Rane was a member of the PUCL, and Govind Mukhoty was a member of the People's Union for Democratic Rights (PUDR); See Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in LAW AND POVERTY (1988), 387-415 at 379.

catalysing public dialogue and momentum on civil rights abuses, as well as personally filing the petitions. Beyond this, in public interest litigations concerning the independence, integrity and impartiality of the judicial and criminal justice systems; often senior advocates, imbued with a comprehensive understanding of constitutionalism and a deep respect towards the Rule of Law, take up public interest causes in courts, thereby reinforcing the initiatives with greater legitimacy and credibility before judges who would've been otherwise dismissive of entertaining it.

III. ADVOCACY AND THE EVOLUTION OF COMPARATIVE COMMON LAW JURISPRUDENCE

The influence of advocacy within common law is defined not only in terms of its contribution to judicial decision-making in the past, but also keeping the body of common law perpetually “*in flux*”, i.e., in a continual “*process of becoming, developing, and transforming, as it cloaks itself with the habits of past decisions, tailored to the lines of the pending situation*”;¹¹⁴ and in contributing to its evolution “*with the ongoing derivation of legal standards from prior judicial decisions*”, defined by a continuous motion.¹¹⁵ Advocacy, is thus, not simply restricted to deciding the evolutionary outcome of (a body of) laws through litigation; but how procedurally or substantively compatible an individual statute or any provision thereof is, with respect to constitutional conventions and the existing legal apparatus.

3.1. *Role of Advocacy in Changing the Law*

There exist two broad theories of the effect of litigation on legal change. One such theory is that judges are the principal actors of legal change, and are therefore primarily responsible for it. Such a theory is postulated upon the law tracking the conscious and subconscious preferences of judicial behaviour.¹¹⁶ The alternative theory is that litigants drive the law; the latter being the import of the evolutionary models of legal change.¹¹⁷ Research has indicated that common law will generally come to favour the more concentrated class of parties or organised interests groups having a bona fide interest in the law.¹¹⁸ One particularly relevant case-in-point would be the evolution of tort law in the United States. The structure of products

¹¹⁴ EVA A. HANKS ET AL., ELEMENTS OF LAW 164; *See also* Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 77 (2001) at 75.

¹¹⁵ *Id.*

¹¹⁶ RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1992) at 534.

¹¹⁷ Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 63 (1977).

¹¹⁸ Martin J. Bailey & Paul H. Rubin, *A Positive Theory of Legal Change*, EMORY UNIVERSITY (Law and Economics Working Paper, 1992); *See also infra* note 119.

liability law in the US can be best understood by examining the ability of different classes of lawyers to organise and seek their goals by litigating to change precedents.¹¹⁹ The major group with a preponderant interest in changing tort law in the US is tort lawyers.¹²⁰ Tort Law in the United States has been significantly influenced by the ability of the plaintiff's attorneys to organise, and by the interest of the lawyers in the future value of precedents; the basic hypothesis being that: "*the shape of modern product liability law in the US is due to the interests of tort lawyers*".¹²¹

In the common law legal system, such as the United States, the United Kingdom and to a relative extent, India; many important cases are made, not by the legislature, but by appellate courts adjudicating upon specific cases and thereby creating precedents.¹²² One of the principal ways advocates engage with the judges in presiding over consequential cases and settling precedents in that regard, is by submitting an unconventional interpretive application of the relevant statutory provision or theoretical (jurisprudential) principle. Such lawyers, in representing clients, commonly enjoy sufficient incentive to formulate and argue for new variations on existing laws.¹²³ As judges remain perpetually burdened with critical decisional responsibilities, they tend to follow the old rule, especially when the said rule has emanated from a superior court;¹²⁴ rather than propound an unprecedented policy. The lawyer who unsuccessfully advocates a new rule has a convincing explanation for his or her client, that the lawyer who unsuccessfully relies on an old rule does not. The latter is, therefore, more likely to file an appeal.¹²⁵ Even the Bar plays a determinate role in promoting the stability of such rules. As a social system, the legal profession, regulated through the Bar, operates so as to reduce internal exchanges that are punitive, in favour of exchanges that are not; favouring settlement to outstanding claims or disputes. Therefore, pressures internal to the professional order, produce results having minimal relevance to current

¹¹⁹ Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23(2) J. LEGAL STUD. 807, 831 (1994) at 808.

¹²⁰ Christopher Curran, *The Spread of the Comparative Negligence Rule throughout the United States*, 12 INT'L REV. L & ECON. 317 (1992).

¹²¹ *Supra* note 119.

¹²² Nicola Gennaioli & Andrei Shleifer, *The Evolution of Common Law*, 115(1) J. POL. ECON. 42, 68 (2007).

¹²³ M.B.W. Sinclair, *The Use of Evolution Theory in Law*, 64 UNIVERSITY OF DETROIT LAW REVIEW 451, 477 (1987) at 456.

¹²⁴ Judges are mostly reluctant to invite the possibility of appeal or overruling of unprecedential rules or standards; See Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 489, 501-07.

¹²⁴ *Supra* note 123 at 458.

¹²⁵ *Supra* note 123 at 458.

adaptiveness.¹²⁶ In such a way, the foregoing system can minimise personal costs to lawyers, without necessarily passing them onto clients; whereby the settlement is justified by the “*state of the law*”.¹²⁷

3.2. *Advocacy in Determining the Judicial Interpretation of Statutes*

Legislations, the subject-matter of the Court’s interpretation, often bear contrarian implications under different factual or contextual circumstances. A statute has no full meaning, until each complication relating to its substantive or procedural application arises. Legal advocacy, the practical outcome of such complication, enables the Courts to opportunely exercise existing principles of statutory interpretation, in remedying the outstanding legal controversy. The role of advocacy in contributing to the Court’s interpretation of a statute is evident from the discovery of the broader meanings of the said statute, as derived from the facts and circumstances existing at the time of the interpretation. Such broader meanings are usually derived in two following ways:¹²⁸

Firstly, through the exercise of judicial function, presently regarded as both administrative and interpretive. Litigations involving disputes on application of statutory provisions, enable the trial court not only to investigate and ascertain abstractly the legislative intent of the concerned statute, but also what it ought to intend in terms of the present requirements and aspirations of modern society. Secondly, every legislation acquires its “*meat and bones and bite*” from its administrative application, i.e., from the practical problems it encounters and the enforcement techniques operational in its aid.¹²⁹ Lawyers, by litigating cases arising out of the said problems and submitting their corresponding interpretations of the law, to that effect, provide the foundational basis for Courts to discernably apply the most appropriate interpretation formula. From the standpoint of the lawyer, the more important problems of legislations do not appear either preceding to or during the drafting of the legislation, but rather in the courtroom or the administrative agency tasked with its enforcement, when conflicting ideas have emerged with respect to the application of its provisions.¹³⁰

As the answers to these incongruities are rarely answerable from traditionally or literally interpreting the erring statute or any provision thereof; lawyers guide the modern court in determining the most appropriate

¹²⁶ Campbell, *Variation and Selective Retention in Socio-Cultural Evolution*, in SOCIAL CHANGE IN DEVELOPING AREAS 19, 29 (1965).

¹²⁷ *Supra* note 123 at 458.

¹²⁸ See generally Arthur W. Phelps, *Factors Influencing Judges in Interpreting Statutes*, VANDERBILT LAW REVIEW 457, 469 (1950) at 469.

¹²⁹ *Id.*

¹³⁰ *Id.*

method of interpreting the said, either by reconciling the existing conflict, be it procedurally or substantively; or advising the Court to annul the incompatible provision.

IV. ADVOCACY AND PRECEDENT IN THE ADMINISTRATION OF JUSTICE

While most proponents of precedent, remaining remiss about its inherent justice-seeking value, instead extoll its pragmatic value;¹³¹ precedents operate as the cornerstone of the common law method,¹³² the conceptual vehicle allowing for the very mergence of law and justice as one.¹³³ Since the inception of Professor Dicey's treatise on the Rule of Law,¹³⁴ advocacy, within a common law frame-work, has enabled a free and progressive society to increasingly and effectively engage with the Courts in settling precedence on emergent legal disputes and constraining judges "to justly decide like cases alike rather than ruling according to their individual prejudices"¹³⁵ in application of the principle of *stare decisis*;¹³⁶ thereby providing the Higher Judiciary with the discretion and opportunity to sparingly and qualitatively exercise their respective writ jurisdictions. The role of advocacy in repeatedly challenging age-old mainstream and conservative traditions has enabled the Courts to effectuate positive societal change by establishing precedence, in furtherance of inalienable rights premised on natural law and the principles of justice, equity and good conscience. The relevance of advocacy, in facilitating the effectuation of such reformation, is neither restricted nor isolated to any one branch of law.

¹³¹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (providing a fine and legally important survey of the pragmatic rationale for adherence to precedent).

¹³² WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS* 69.

¹³³ See William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 DUQ. L. REV. 35 (2011) at 36.

¹³⁴ A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 110.

¹³⁵ See William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 9 (1994) at 8-9 (citing BLACKSTONE, *supra* note 132 at 69).

¹³⁶ James L. Dennis, *Interpretation and Application of the Civil Code and The Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 5 (1993) at 4-5; The doctrine of *stare decisis* (literally, to stand by things that have been settled) implies that the Courts should adhere to past legal precedents on issues of law when deciding pending cases. It is aimed at promoting predictability, consistency, and stability in the legal system and minimising costs in the administration of justice; There are vertical and horizontal *stare decisis*. The horizontal one is a rule of prudence, and may be diluted by factors *e.g.* manifest error, distinction on facts, etc. *vide* *Keshav Mills Co. Ltd. v. C.I.T.*, AIR 1965 SC 1636. The vertical principle requires only compliance, being a rule of law. Its breach would cause judicial indiscipline and impropriety. See *Nutan Kumar v. IInd Additional District Judge*, AIR 2002 SC 3456.

Judges generally do not feel at liberty to frame public policy or morality.¹³⁷ Instead, they endeavour to place a case into an established body of precedent, by taking into account the rationale behind its rules.¹³⁸ To materialise the Court's endeavours, legal advocacy assists the judiciary in (i) recognising factual parity between the cases; (ii) pleading for the interpretation of a rule developed from the material facts of the preceding case; and (iii) pleading for the application of the said rule to the subsequent case.¹³⁹ In giving effect to such an application, the Court may also be required to decide on the application of competing precedents governing the case before it. In such circumstances, as the precedents themselves do not direct the Court on which of the competing precedents to adhere to,¹⁴⁰ the onus is placed on the arguments of the litigating advocates to persuade the Court to accept and apply one precedent over the other.¹⁴¹

In addition to the freedom of devising new legal arguments from prior Court rulings, common law advocates also enjoy the opportunity to forge new legal standards by persuading the Court to adopt their arguments, however novel. The advocate, more perceptive to discerning how past case laws can be analogised and distinguished according to the needs of the client, can create law by presenting the more persuasive of the two conflicting precedential interpretations which the litigating parties argue before the Court.¹⁴² Using precedent, both as an argument and justification, is not only persuasive and pervasive;¹⁴³ but is essentially reasoning by analogy.¹⁴⁴ The success of an advocate is contingent on persuading the court of the accuracies of the analogies existing between the facts of the present case and the precedent cited. Conversely, the advocate must also persuade the Court of the factual dissimilarities existing between the said case and an unfavourable precedent.¹⁴⁵ Such persuasion must also represent that the advocate's interpretation of precedential case laws is accurately reflective of prevailing contemporaneous legal standards, and that the accumulated body of relevant precedent should compel the Court to decisively rule

¹³⁷ ROBERT L. STERN, *APPELLATE PRACTICE IN THE U.S. SUPREME COURT* (1989) at 421.

¹³⁸ *Id.*

¹³⁹ EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1951) at 1.

¹⁴⁰ *Supra* note 137 at 420.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ EVA A. HANKS ET AL., *ELEMENTS OF LAW* 165.

¹⁴⁴ D. Neil MacCormick & Robert S. Summer, *Introduction*, in *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY* (1997) at 1.

¹⁴⁵ Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 77 (2001) at 76.

in favour of the concerned advocate.¹⁴⁶ It is also required for the advocate to responsibly demonstrate why an unfavourable precedent is irrelevant to the case at hand.¹⁴⁷ Thus, common law advocates engage in “*complex factual triages, distinguishing as factually different and distant those cases whose outcomes would militate against the client’s interests and, conversely, presenting as analogous the facts of cases whose outcomes would militate in favour of their client*”.¹⁴⁸

CONCLUSION

The most incontrovertible case for the contribution of lawyers in the modern social order is one that of the liberalisation of the legal system, i.e., the preservation of the ideals of the “*Rule of Law*” and the promotion of a culture of legalism and legal-rights consciousness.¹⁴⁹ Tocqueville, in referencing lawyers in the United States, characterised them as an elevated class with conservative habits and instincts, serving as a check upon authoritarian and populist impulses; arguing that while engaged in the governing order, they prefer order and stability, if excluded however, could spearhead revolutions.¹⁵⁰ Lawyers are generally inclined to promote institutions and procedures which effectively use their skills, services and reasoning modes, such as, judicial review of legislative or administrative action, trial procedures for factual determinations etc. Such processes and procedural constraints often serve as practical limits on state power, and a means to make such power accountable and transparent, or at least obstruct its arbitrary exercise; and may even deliver resourceful legal weapons to the weak for use against stronger private parties or state agencies.¹⁵¹

This view is reflected in E.P. Thomson’s well-known defence of the Rule of Law as an “*unqualified human good*”, i.e., while law in general is an instrumentality of the powerful, it simultaneously places limits on the exercise of said power and provides legal remedies and resources to weaker adversaries;¹⁵² while at a minimum, substituting for violence and anarchy. In today’s India where “*delay is endemic*”; where cases sit on dockets for three to ten years; the Bar resists attempts at reform; the lower courts mostly favour dominating parties; and governmental bodies use the judicial delay

¹⁴⁶ *Id.* at 76-77.

¹⁴⁷ *Id.* at 77.

¹⁴⁸ *Id.*; See also Sabrina DeFabritiis, *Lost in Translation: Oral Advocacy in a Land Without Binding Precedent*, SUFFOLK UNIVERSITY LAW SCHOOL (Legal Research Paper Series, 2012) at 28-29.

¹⁴⁹ Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQ. L. 441, 468 (2010) at 459.

¹⁵⁰ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1966) 263-65.

¹⁵¹ *Supra* note 149 at 460.

¹⁵² E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* (1975) 259 *passim*.

and expenses to harass and intimidate adversaries;¹⁵³ the greater responsibility thereby falls on the Bar, and its cooperation with the Bench, not simply to expedite the dispensation of justice without bias or prejudice, but also to curb the throes of majoritarian populism acting against sacrosanct constitutional ethos and to deliberatively initiate and facilitate meaningful institutional reforms.

* * *

¹⁵³ Marc Galanter & Jaynath K. Krishnan, *Debased Informalism: Lok Adalats and Legal Rights in Modern India*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (2003) at 96, 100-01.

ANNOTATED TRANSCRIPT

A DIALOGUE ON ADVOCACY IN THE HIGHER JUDICIARY AND ITS CONTRIBUTION TO EVOLVING JURISPRUDENCE

SPEAKERS:

The Honourable Mr. JUSTICE DIPANKAR DATTA†,
The Honourable Mr. JUSTICE ASHIS KUMAR CHAKRABORTY††,
The Learned Mr. SABYASACHI CHAUDHURY†††,
Professor (Dr.) JATINDRA KUMAR DAS††††

MODERATOR:

The Learned Mr. ARUNABHA DEB‡

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I. OPENING REMARKS:

MR. PRATIK DAS:¹ Good morning everyone. Ladies and Gentlemen, thank you all for coming. May we now open up the floor to the Moderator for today's seminar, the Learned Mr. Arunabha Deb. Mr. Deb is a practicing advocate of the High Court Bar at Calcutta and is a registered partner at Avijit Deb Partners.

MR. ARUNABHA DEB: Thank you. I think the Learned is an overstatement, so I'll ignore it. This is a very good motion, and I think at the outset, heartiest congratulations are due to the Journal and Seminar Committee of this college for putting together a seminar that promises to be meaningful and very pertinent, in the present context.

¹ Year III B.A., LL. B, Senior Executive Editor, Calcutta Law Review; Joint-Secretary, Journal and Seminar Committee of 2018-19.

I'll introduce the Panel first and we are all very grateful to the dignitaries present here, for taking the time out of their busy schedules. We have the Honourable Justice Dipankar Datta, the Honourable Justice Ashis Kumar Chakraborty, Mr. Sabyasachi Chaudhury; and I don't think the man on my right requires an introduction here, but Dr. J. K. Das, Dean of the Faculty of Law, University of Calcutta.

I'll recall the topic, more as a formality, than anything else: "Advocacy in the Higher Judiciary and its Contribution to Evolving Jurisprudence". Now, it's really quite a mouthful, but I think if we bring it down to its essence, we could say that the topic essentially asks what is the role of lawyers in the evolution of law, and to what extent are the arguments made in court relevant or to what extent are their effect in the evolution, shaping or reshaping of jurisprudence, as we know it and as we experience it as practicing lawyers.

I think we can start by having Opening Remarks of each of our dignitaries and then we will get into the Question-Answer Session and ultimately there's the interactive session; and I also have a list of not-very-easy questions that have already been handed over to me from participants in the Seminar. We start with Justice Datta; before having your opening remarks on the role of advocacy in shaping jurisprudence, it is particularly significant as we have two the honourable judges in the Panel, how they see it and to what extent do arguments really make a difference in the decision-making.

JUSTICE DATTA: Very good morning to Mr Ashis Chakraborty, Judge, High Court at Calcutta; Mr. Sabyasachi Chaudhury, Advocate practicing in the Calcutta High Court as well as in other Courts; Professor Das; Mr. Arunabha Deb; Mr. Dipak Deb, Senior Advocate of the Calcutta High Court² here with us in the audience; and my children, you are all like my sons and daughters. It is indeed a pleasure to be back here. I do not know whether you are aware, that I was one like you. I was a student of the first five (5) year course at the Department of Law. It is pleasing to note that these sorts of seminars are being held. It is quite at variance with what we had experienced when we were students. When I passed out from college, I hardly knew what law was. But, with God's blessing as well as the blessings of my parents, I have reached a position in life. It is because of the hard labour and the commitment towards the profession, that has lifted me to where I am.

While discussing the role of lawyers, and delving deeper into the topic, you will hear from other speakers as well as from myself, that whatever law we lay down as judges, are on the basis of acceptance of the interpretation

² Barrister-at-Law; Senior Advocate of the High Court Bar at Calcutta; Director, Indian Law Institute (West Bengal State Unit).

of the law as made by the lawyers. While there are two sides to any legal proceeding: petitioners and respondents, Judges are required to interpret the statute. One can read the statute and thereafter understand it, in deference to perspectives. It is that reading of the law by the lawyer that appeals to us, gets reflected in our judgement, and we say that the judge has laid down the law, upon interpreting the statute.

Therefore, as an opening remark, I would say that the role of lawyers is so immensely important, that it forms the basis for the judges to lay down the law. We'll talk about that point later, but considering that you are all first, second, third, fourth or fifth-year students, I will try to bring myself to a few levels lower as I express my ideas, so that we can interact. As I was a student here during the 1980s, it may so happen that my ideas do not match with yours'. Why do I say this? Because my son is as old as you all are; he is a second-year student of law and my daughter is a legal practitioner. They have discarded my ideas; they say: "*Father, you are backdated; what used to happen in your time, cannot happen in ours*". However, I will still try to impress upon you; as I believe, what used to happen back in my time, is still relevant in the present context. How is that the case? I will gradually explain, in due course. I leave it to Justice Chakraborty, to give his introductory remarks.

JUSTICE CHAKRABORTY: Good morning to Justice Datta, Mr. Chaudhury, Mr. Deb and Prof. Das. I welcome all the future practitioners present here, with whom we'll be sharing the courtrooms, in the foreseeable future. It is a great pleasure to be here, within the college premises, where I used to appear for my University exams, as I was a student of the South Calcutta Law College.

The topic for today's Seminar has already been mentioned by Mr. Deb, as well as by Justice Datta. With regard to the evolution of law, I think everybody here will agree that, it's the product of a combined effort involving both judges and lawyers. The main contribution is, in my opinion, from lawyers, because they argue on new ideas based upon the facts (of the case) which they arrive upon in Court, and it's the duty of the judge to accept whichever is the correct argument. Therefore, the primary responsibility rests with the lawyer.

With regard to necessary traits essential for the success of a lawyer, I would say, that it depends on the hard work, effort, sincerity and deliberation skills of the legal practitioner. If a lawyer succeeds based on these essential traits and skills, it is not just the client who also succeeds, but it is society, which is made open to a new arena of law. Thus, the role of a lawyer is very important. The job of the judges is to accept whichever of the litigating parties is correct. I was told by my chamber senior that the success of a lawyer depends upon his perseverance. With these ideas, let us proceed with today's event.

MR. ARUNABHA DEB: Thank you very much, Justice Chakraborty. Mr Chaudhury, if we could have your thoughts on the subject.

MR. SABYASACHI CHAUDHURY: Greetings to Justice Datta, Justice Chakraborty, Professor Das, Mr. Arunabha Deb and the young minds present here; and ofcourse, to Ld. Senior Advocate Mr. Dipak Deb present in the audience. The topic as we all know talks about advocacy in the higher judiciary, that's one part of it; and the second part is the contribution it has or it may have to the evolution of jurisprudence.

So, the first question, as a lawyer which comes to my mind is, something which would also come to your minds: Is there any difference in advocacy in the lower judicial fora, than that of the higher judicial fora; *i.e.*, in Higher Courts, Supreme Court or in Higher Tribunals, is there any difference? The answer is no. The difference of advocacy in the Higher Judiciary as compared with that in the Trial or Lower Courts is that of a difference of responsibility; and what was referred to in the opening remarks of both the Honourable Judges that, the judges are laying down the law on the basis of what is being shown to them or presented before them. So essentially, advocacy in the Higher Judiciary involves a greater sense of responsibility; and that is why you find that when judgements are reported, they contain the names of the Ld. Advocates who have appeared for either side along with the names of the Hon`ble Judges who have authored the judgment. This is a feature of the reporting of case laws, as far as the Higher Judiciary is concerned, and this format of reporting is consciously done, so that the names of the persons who have been instrumental in laying down the law, by virtue of either proposing one set of ideas or opposing another set of ideas, is also made public. This is in line with what Justice Datta and Justice Chakraborty said, with regard to responsibility *vis-à-vis* lawyering; that: I am responsible, I take full responsibility of what I am stating before the Court as an argument or an interpretation of law; and I am conscious that if this is the law laid down, not only the learned judge, being the author of the judgement, is responsible for that, but equal and perhaps even more responsibility will come upon the lawyer by way of common reportage, for example, in a particular case, where the law was laid down with lawyer 'X' appearing. There are many instances where this has happened, because kindly remember that as judges, it is not possible to know all the law. Therefore, a great extent of dependency is on the lawyers to narrate what the correct position of law is.

Now there arises a question, which I discover as one of the sub-themes of today's seminar, that is to what extent are you in a position to balance your duties *vis-à-vis* the Court, your colleagues and your clients. Will the duty towards your client override the duty which is owed to the Court? The answer is also no. You have to be very clear about your duties and obligations; and at the same time, it is a very thin tread; as it does not

necessitate that you will volunteer and state in Court that your client has no case at all, after accepting fees. But at the same time, as a responsible officer of the Court, how you balance or strike a balance between your duty as an advocate, as an officer of the Court, and as an interpreter of law, as far as possible is particularly important to the profession; because now, with the advancement of computers and software, it is always possible to know the law, as it stands today. Few decades ago, as we were just now discussing, that when computers didn't exist, it was not possible for us to remain updated on the law laid down by the Supreme Court or High Courts on a daily basis, but now all such information is available readily at our fingertips. Thus, as far as possible, we appraise the Court, in the course of our advocacy, as to what is the correct law.

Now, if such a balance has been sustainably achieved, then ultimately it may have a qualitative impact on the evolution of jurisprudence. However, it is never proportionally guaranteed if your advocacy and hard-work will always have an effect on the evolution of law. It's like learning to play cricket: you must first get your basics right and play at all levels; then you may or may not receive an offer to play in the national team, and in case you do, you may score centuries and create records thereafter.

The bottom line in my opening remarks is: get the basics right; know the facts and be a master of the law, so far as the facts relate to; and try to convey to the judge, being the interface between your client and the law, as far as possible, the correct law. The ultimate impact on the evolution of jurisprudence is a consequential by-product which will follow involuntarily; you cannot be conscious of that. You can only be conscious of what is within you. So much, for the opening remarks. Thank you.

MR. ARUNABHA DEB: Thank you very much Mr. Chaudhury. Mr. Chaudhury has touched upon a sub-theme which we shall refer back to later, that is, how do we balance duty to client and duty to court. Is there any moral turmoil involved occasionally, if at all, and how do we reconcile that, as lawyers; and how do members of the Bench view that. Perhaps, we can have some views on that later, but before that, I leave it to Professor Das for his opening remarks.

PROFESSOR DAS: Good morning, everybody. At this juncture, I wish to convey my sincerest thanks to the Honourable Justices Dipankar Datta and Ashis Chakraborty; and Learned Advocates Sabyasachi Chaudhury and Arunabha Deb of the Calcutta High Court, for being present here with us. There are three objects or possibilities of institutionalised legal education: through hard work and dedication, you may choose to either pursue a career in judicial service, like Justices Datta and Chakraborty; legal practice, like Advocates Chaudhury and Deb; or in academia, like myself. The topic selected by my students, *i.e.*, how does the judiciary contribute to the evolution of the law, is brilliant in my opinion. So, the question that

I will try to deal with, is that how does a law evolve? Law evolves through both legislative and judicial processes, each involving its own variations of arguments. In the judicial realm, advocates function at the forefront of jurisprudential evolution, by placing relevant legal arguments before the appropriate judicial fora.

I consider the French Revolution to be quite significant in contributing to the evolution of modern jurisprudence. During the French Revolution, one lady was arrested, and she was tried by the State in an effort to compel her to disclose where her husband was. She said that even though she was aware of her husband's whereabouts, she will not disclose, what is, her privileged communication.³ Although she was arrested and punished, however, as soon as the French Revolution was successful, the first law has been amended, legalising privileged communication, which is a communication between the lawyer and client, or between husband and wife, and which should not be disclosed; as a part of the law of evidence.⁴

Now, after the Second World War, India became independent and the Indian Constitution was adopted.⁵ Constitution is the highest law of the land and all other laws must be made according to the provisions and principles of the said. Otherwise if any law is in conflict with the Constitution,

³ See THE INDIAN EVIDENCE ACT, 1872, §§122-132.

⁴ The first evidentiary principle to be recognised was that protecting the attorney-client relationship; cases upholding the attorney-client privilege appear as early as 1577, coincidental with the advent of compulsory process. See *Berd v. Lovelace*, 21 Eng. Rep. 33 (1577); *Dennis v. Codrington*, 21 Eng. Rep. 53 (1580); See also 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 126-222 (1956). A second broad privilege, shielding communications between spouses, was recognized at common law shortly thereafter, and was well established in both civil and criminal cases by the late 1600s. See *Bent v. Allot*, 21 Eng. Rep. 50 (1580), 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW? §2227, at 211 & nn. 1-2 (J. McNaughton rev. ed. 1961). In the mid-eighteenth century, the first treatises devoted to evidence—Chief Baron Gilbert's *The Law of Evidence* and Henry Bathurst's *The Theory of Evidence*—and the first treatments of the subject of evidence in general legal treatises confidently presented the attorney-client and spousal privileges thereby attesting to their wide acceptance. See G. GILBERT, *THE LAW OF EVIDENCE* (1754), H. BATHURST, *THE THEORY OF EVIDENCE* (1761). The two general privileges were not, however, absolute in application; exceptions to them developed in the case law of the seventeenth and eighteenth centuries, and successive treatise writers elaborated these changes. By the early 1800s, English courts had begun to develop a common law of evidentiary privileges, and American judges tentatively looked to this emerging law to help them decide privilege questions. The host of English treatises on evidence that appeared in the opening years of the nineteenth century, many of which soon appeared in American editions, served for several decades as the American judiciary's only authoritative source of evidence law. See generally C. WARREN, *A HISTORY OF THE AMERICAN BAR* 31-38, 157-80 (1911).

⁵ The Constitution of India, 1950 was adopted on 26th November, 1949 and became effective on 26th January, 1950.

it will be declared to be null and void by the appropriate Court.⁶ At this juncture, an issue came before the Supreme Court of India, time and again. The issue was whether Parliament had absolute power to amend the Constitution⁷ in accordance with the “*procedure established by law*”,⁸ as is the system in our case. Finally, as a result of the strong argument by the lawyers and which has been heard by the judges of the Supreme Court, it was held that the amending power of Parliament is subject to constitutional restrictions.⁹ The reason was given that every authority must have some limitation and although Parliament has the power to amend the Constitution, on the question of whether such power is absolute or not, the Supreme Court laid down the rule that the basic structure of the Constitution,

⁶ See CONSTITUTION OF INDIA, 1950, Article 13. Article 13(1) states that laws inconsistent with the provisions under Part III of the Constitution, shall be void to the extent of such inconsistency, and bars the State under Clause (2) from enacting any law taking away or abridging the rights conferred under the said Part.

⁷ See CONSTITUTION OF INDIA, 1950, Article 368. Article 368 of the Constitution lays down the power of Parliament to amend the Constitution and the procedure thereof; See also *Re: Berubari Union*, AIR 1960 AIR 845. In *Re: Berubari Union*, the Supreme Court held that Preamble was not a part of the Constitution and therefore, could not be regarded as the source of any substantive power.

⁸ See CONSTITUTION OF INDIA, 1950, Article 21 reads: “No person shall be deprived of his life or personal liberty, except according to the procedure established by law.” The expression “procedure established by law” under Article 21 of the Indian Constitution implies the procedure laid down by statute or prescribed by law of the state. See V.N. SHUKLA, CONSTITUTION OF INDIA 215. Unlike the plenary powers given to the US Supreme Court over federal and state agencies by the Fourth and Fifteenth Amendments to the US Constitution, the Indian Supreme Court has read in “due process” within the Indian Constitution by harmoniously interpreting Articles 14 and 21, thereby acquiring expansive authority over Union and State action, whether legislative or executive, which it perceives to be “arbitrary” and “unreasonable”. See T.R. Andhyarujina, *The Evolution of Due Process of Law by the Supreme Court* in SUPREME BUT NOT INFALLIBLE 193. The interpretive institutionalisation of due process within Article 21 occurs in two ways: Article 21 is required to be just, fair and reasonableness, because of its interactions with Articles 14, and 19; secondly, inter-relationships among Articles 20, 21 and 22, as a corollary of development under Article 21. See P. ISHWARA BHAT, FUNDAMENTAL RIGHTS 90 at 107; See also Atreya Chakraborty, Samriddha Sen, Anogh Chakraborty, Subhayan Chakraborty & Swati Banerjee, *Editorial Preface to the Report of the Dialogue on Advocacy in the Higher Judiciary and its Contribution to Evolving Jurisprudence*, 1 CALC. L. REV. 1, 26 (2019) at 12.

⁹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; The Supreme Court in overruling the precedent in *Re: Berubari Union*, AIR 1960 AIR 845, held that the Preamble was an integral part of the Constitution. By propounding the Basic Structure Doctrine in *Kesavanda Bharati*, the Supreme Court relied on the Preamble in imposing implied limitations on the amending power of Parliament under Article 368 of the Constitution, holding that the “*basic elements*” in the Preamble cannot be subject to the amending authority of Parliament under Article 368; See also Atreya Chakraborty, Samriddha Sen, Anogh Chakraborty, Subhayan Chakraborty & Swati Banerjee, *Editorial Preface to the Report of the Dialogue on Advocacy in the Higher Judiciary and its Contribution to Evolving Jurisprudence*, 1 CALC. L. REV. 1, 26 (2019) at 14.

as envisaged by the Preamble, cannot be amended.¹⁰ After such a landmark decision, a large number of jurists have criticised the doctrine of Basic Structure, but I am proud to mention that the Basic Structure Doctrine continues to retain constitutional validity.

If you look into mythological documents, such as the Mahabharata, you will find that equality principle has been propagated by *Bhisma* and as per the rules of war; mutually agreed upon by the *Kauravas* and *Pandyas*; which said that, war will begin in the morning and will end in the evening; a man will fight with a man and a woman will fight with a woman;¹¹ but whenever, *Shikhandi*, who was a transgender; being neither a man nor a woman; faced *Pitamah Bhisma*, he was reluctant to fight with *Shikhandi* because she was a female by birth.¹² In this way, a lawyer in a Court or in a tribunal, through brilliant argumentation, creates the law and I am proud of my students, they have selected a brilliant and exciting topic. Thank you very much for hearing me and I am also proud that distinguished dignitaries are present here this morning; and to the Panelists present here, I wish to convey the sincerest thanks on behalf of the Department of Law as well as the University of Calcutta. Thank you very much.

II. GENERAL DISCUSSION

MR. ARUNABHA DEB: Very well put by Professor Das. From mythology to Basic Structure, that was a very wide interpretation of today's topic, for which we are grateful. I think we can immediately get to the question that Mr. Chaudhury had touched on, that is, how does a lawyer balance his or her duty to the Court and his or her duty to the client from whom, as Mr. Chaudhury said, a lawyer accepts fees. To you, Justice Datta, you were a practicing advocate for a long time and then you were elevated to the Bench; how did you deal with such balancing as a practising advocate and did that change at all, when you were elevated to the Bench.

JUSTICE DATTA: Before answering this question, I would take this opportunity to communicate with you. I will definitely answer the question

¹⁰ *Id.*

¹¹ See MANMATHA NATH DUTTA, A PROSE ENGLISH TRANSLATION OF "THE MAHABHARATA" 2 (1987). "... (Such as) men equally situated should only fight with all fairness. If having fought with complete fairness, the combatants withdraw, that would be preferred ... Those who engaged in battle of words should be fought against with only words. Those that left the fight should never be killed ... A car-warrior should fight only with a car-warrior. He who rode on an elephant should fight only with another such combatant. O descendant of Bharata, a horse man must fight with a horse man and a foot-soldier with a foot-soldier ... One fighting with another, one seeking refuge, one retreating, one whose weapon is broken and one who is not clad in armour should never be struck ..."

¹² *Id.* at 206. Bhisma states: "... I shall not fight the Pandavas for two reasons, *viz.*, for the unslayableness of the Pandavas and for the femininity of Sikhandin ..."

at the conclusion of this session, but let me start from the basics. You are all budding lawyers; I believe, having regard to the topic, those who are present here, would like to join the profession leaving aside judicial service, academia or joining the private sector. Is it so? Do you all want to become lawyers? Or is there anybody who thinks that the time is not yet right for me to decide on my future course of action; Is there anybody? But I shall assume that the majority wants to join the Bar.

So therefore, my target would be those students who are willing to join the legal profession. Now, to be a successful lawyer, you will not get a smooth highway, you will get pitfalls and craters, full of craters. You will have to overcome that. How will you do that? That is up to you; how you will conduct yourself. Now, before proceeding further, I shall put a question: it is a very simple one, let me see whether my wavelength matches with yours' or not. I am looking for a six letter English word. You will have to identify that word. What are the hints? In contemporary society, everybody is performing that. I say it is a verb, but it can also be used as an adjective, but I am looking for the verb. Everybody is trying to do that. It is a six-letter word. Can anybody tell me? If any other hint is required, I will give it.

AUDIENCE: Survive?

JUSTICE DATTA: Six-letter word. I am looking for a six-letter word. "*Survive*" is a seven-letter word.

AUDIENCE: Success?

JUSTICE DATTA: "*Success*" is also a seven-letter word.

AUDIENCE: Duties?

JUSTICE DATTA: No, I am not looking for that. If everyone was aware what his or her duty is, and if he or she was performing his or her duty, this country would have been a better place. I will give you a hint. I am looking for a six-letter word, if you take out the first alphabet, then you get a five-letter word which is also very important in present-day context. If you take off the first letter, the remaining five, requires an act to be done by each one of us for good governance of our country.

AUDIENCE: Select and elect?

JUSTICE DATTA: Select and elect. Now see select; why do I pick out the word "*select*"? As soon as you were born, your parents selected a name for you. You grow up, they selected a school for you. As you go higher up in class, they selected a private tutor for you. Now after you have crossed higher secondary, you have become a major, now you select. That is why you are here in this college. Now, for this seminar, somebody has selected the topic. Someone has selected us to be participants here. After you

graduate, what you will have to do is to select. What is to be selected? As I said, I assume that majority will become lawyers. First thing, you will have to select is, in which court will you practice. Then, will come (your selection) in what branch of law you (choose to) practice; followed by, who will be your senior. So, these are the stages of selection that you will have to cross, and why do we say selection is so important? Everybody is selecting. We are selecting judges to join the subordinate judiciary.¹³ We are selecting out of many judgements; which judgement provides the correct view of law. So therefore, this selection is very important. Keep in mind, that it is your responsibility to select (what is) the best for you. Now after you cross the selection stage, you have selected the court where you will practice, you have selected which branch of law you will practice; you must all remember, as a lawyer, what you should possess. It is very important. My senior told me, two things you must possess: one is steel in your body; the second is, honey in your tongue. What is steel in your body? You must be physically absolutely fit. You know, when I joined the profession, there were only three or four elevators in the High Court.

Now, (if) you must have been to the High Court, you have seen that there are three stories; the ground floor, first floor and the second floor. If you compare it with modern buildings, the third floor, is equivalent to the ninth floor of a modern building. In those days, there was no display board showing in which court, which item is being considered. We had to run from Courts to Courts, to find out in which Court my case is being taken up, whether my case is to be taken up in the next few minutes or not. We had two Court buildings. We had to regularly shuttle between (the) two Courts. So, without a physically fit body, it would not have been possible for us to attend to our duties. Keep in mind, be physically fit. Second is, honey in your tongue. Why? It is because if you go on fighting with the judge; maybe you are on the right side, but you must know how to put your case across the Bench. I will share an experience: I was a very aggressive lawyer; I was appearing before a Division Bench and I was interpreting a particular provision of law and I had by way of support, relied upon a Division Bench judgement of the Orissa High Court and I was arguing that: “*this is the law My Lords, therefore my client should succeed*”. Now, a senior lawyer was observing me. Very soon, it was 04:30 or 04:15 (pm), and in those times, the Court rose (for conclusion of daily proceedings). The senior lawyer called me and said: “*look here what you are arguing is right, but how*

¹³ See CONSTITUTION OF INDIA, 1950, Article 233 reads: “Appointment of District Judges—(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State. This provision gives the High Court of the said State, the jurisdiction in selection of the Judges of subordinate courts.”

you are arguing is wrong". Remember, the pen is in the hand of the judge. We will later on come to writ remedies, which is also a sub-theme; the remedy under writs, is discretionary.¹⁴ Even if you have a good case, the judge may not grant you relief. The judge can assign any number of reasons to refuse relief to you. So therefore, today the Court has risen, tomorrow morning, you will start in a different way and he offered me the hint, as to how I should start. Next day I went there as if nothing had happened on the earlier day. I again placed the decision and said: "*My Lords, this is the law laid down by the Division Bench of the Orissa High Court. It could be so that Your Lordships have a different view but before expressing Your Lordships' view finally, kindly consider this judgment and indicate why this judgment does not appeal to your conscience*". This is an absolutely different way of putting it before the Court. The Court is not embarrassed. (The) Court realises that this is a Division Bench judgment delivered by another High Court, therefore, it must have some persuasive value. You have to try to take the judge to your side. Unless you do that, you may be very strong on your legal point, but the judge will have any number of reasons not to accept your argument. Therefore, honey in your tongue is also a must. Mr. Chaudhury is also a very aggressive lawyer.

¹⁴ The High Courts and the Supreme Courts of India enjoy writ jurisdictions under Articles 226 and 32 of the Constitution of India, respectively; The writ jurisdiction conferred to the High Courts under Article 226 provides wider discretion, than the Supreme Court under Article 32. While the right to seek remedy from the High Court for deprivation of fundamental rights is a constitutional guarantee under Article 226, no such guarantee is attached to Article 32. Therefore, the High Courts in exercise of the discretion attached with the exercise of its writ jurisdiction, may refuse to grant remedy under Article 226, albeit with justification. *See Manoranjan Panda v. State of Orissa*, AIR 2000 Orissa 36. PASAYAT Acting C.J., stated: "The language of Art 226 does not admit of any limitation on the powers of the High Court for exercise of jurisdiction, hereunder, though by various decisions of the Apex court with varying and divergent views it has been held that jurisdiction under Article 226 can be exercised only when body or authority, decision of which is complained was exercising its powers in discharge or public duty and that writ is a public law remedy."; *See also Than Singh v. Superintendent of Taxes*, AIR 1964 SC 1419 at 1413. SHAH J., stated: "The jurisdiction of the High Court under Art. 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief, which may be obtained in a suit, or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Art. 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy ... The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact and does not by assuming jurisdiction under Art. 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for a statute, the High Court normally will not permit, by entertaining a petition under Art. 226 of the Constitution, the machinery created under the statute to be bypassed and will leave the party applying to it to seek resort to the machinery so set up."

Whenever he argues before me, I am reminded of that incident that I was also like him. So, this is a lesson which you must keep in mind. It is not that in every case, you have to be very polite to the Court, but of course politeness is one of the virtues that a lawyer should have; these are the two basic things that you should remember.

The other thing which I spoke of in my opening comments, was that, why my children call me backdated and old-fashioned. When we joined our senior's chamber, we had no spare time for recreation; we had no time to mingle with our friends or attend social functions. Right from 7 o'clock in the morning I was in my senior's chamber, and quite literally, work involved everything. From marking the list, preparing bundles of briefs which would be taken to court that day, going back to my residence for getting ready, coming back to my senior's chamber, driving my senior's car to High Court, bringing him back from Court, half-an-hour recess, going back home, getting fresh, coming back and staying till 11pm, 12am, 1am, 2am, (and) for what? For the initial two years, I used to get Rs. 1000 per month, as remunerative stipend. After two years, as I got married, the salary was doubled to Rs. 2000 per month. Having regard to the value of money today, it could be Rs. 5,000 or Rs. 10,000 and that too if your senior is kind. I was not so kind. I did not give my juniors any money, during the first two years. It is because I wanted to see; I wanted to test their patience that whether even after not receiving any stipend for two years, they wished to stick to my chamber or not. I took this idea from my father. During the 1940s, my father went to his senior's chamber. For one year continuously, he was made to sit on a chair without having the liberty to touch the briefs or the books. His senior was testing whether he was patient enough to carry on. This might appear to be very hackneyed. I don't wish that after this seminar is over, you discuss among yourselves, that '*the Judge came and spoke rubbish*'), Right? We also used to do that; We used to go over our head, but we do not wish for that; we want promising students of Department of Law, Calcutta University, doing well in the profession and thereafter coming to the Bench.

So, I may be backdated but these are words of wisdom which we have derived from our seniors, which we are passing on to you. My daughter is in a solicitor firm earning in lakhs. She rhetorically asks that if today, she was in the profession, how much would she have earned? Well, if money is everything for you, you can join solicitor firms, but if you want to be a real lawyer, who can assist the judges in developing the law, you must start your career as a junior or a novice lawyer, and continue in your senior's chamber for five years without putting your head up; whatever the senior says, you will have to do that. If you think you can't, the legal profession is not for you, and therefore you cannot continue to directly contribute to the evolution of law; remember this. So far as the lawyer's life is concerned, for the first few years, you will be a junior lawyer. Then you graduate

yourself into a lawyer, who will have the opportunity of independently pleading cases. Then you will graduate into a senior advocate.

For understanding who a Senior Advocate is, you may refer to §16 of the Advocates Act;¹⁵ I will not refer to it in detail. There was a case; Senior Counsel Indira Jaisingh's case where she wanted the Supreme Court to lay down the modalities of designating an advocate as a Senior Advocate.¹⁶ Why was this Public Interest Litigation filed? This was because High Courts all over the country were adopting different criteria for designating advocates as senior advocates;¹⁷ so she wanted that the Supreme Court

¹⁵ ADVOCATES ACT, 1961, §16 reads: “ (1) There shall be two classes of advocates, namely, senior advocates and other advocates; (2) An advocate may, with his consent, be designated as senior advocate if the Supreme Court or a High Court is of opinion that by virtue of his ability standing at the Bar or special knowledge or experience in law, he is deserving of such distinction; (3) Senior advocates shall, in the matter of their practice, be subject to such restrictions as the Bar Council of India may, in the interest of the legal profession, prescribe; (4) An advocate of the Supreme Court who was a senior advocate of that Court immediately before the appointed day shall, for the purposes of this section, be deemed to be a senior advocate: Provided that where any such senior advocate makes an application before the 31st December, 1965 to the Bar Council maintaining the roll in which his name has been entered that he does not desire to continue as a senior advocate, the Bar Council may grant the application and the roll shall be altered accordingly.”

¹⁶ *See* Ms. Indira Jaising v. Supreme Court of India thr. Secretary General & Ors., 2017 (9) SCC 766. Ms. Jaising had filed the above-mentioned writ petition to urge the Supreme Court to bring parity in the varying criteria adopted by the High Courts in the process of designating “Senior Advocate”. At ¶65, GOGOI J stated: “Her endeavour, particularly in the rejoinder arguments, has been to make the exercise of designation more objective, fair and transparent so as to give full effect to consideration of merit and ability, standing at the bar and specialized knowledge or exposure in any field of law.”

¹⁷ *Id.* GOGOI J., observed that, various High Courts had their own individual guidelines. The High Court of Calcutta required that, “The advocate must not be less than 40 years of age at the time of moving an application, and he must have an experience of not less than 15 years at the Bar.”; while the High Court of Guwahati stated that, “The advocate shall not be less than 35 years of age at the time of moving an application and he must have an experience which is not less than 10 years either at the Bar or at the State Judicial Services.”; the High Court at Hyderabad required that, “The advocate must have a net annual taxable income which is not less than ten lakh rupees over the preceding three years.”, while the High Court of Orissa specified the same criterion as, “The advocate must have a net annual taxable income which is not less than three lakh rupees.”; and the High Court of Chhattisgarh, in a 2014 notification, mentioned that, “The advocate must have a net annual taxable income which is not less than five lakh rupees for the preceding three years.”, *etc.*; At ¶55, GOGOI J stated: “The exercise of the power vested in the Supreme Court and the High Court to designate an advocate as a Senior Advocate is circumscribed by the requirement of due satisfaction that the advocate concerned fulfills the three conditions stipulated under §16 of the Advocates Act, 1961, i.e., (1) ability; (2) standing at the bar; and/or (3) special knowledge of experience in law that the person seeking designation as acquired. It is not an uncontrolled, unguided, uncanalised power, though in a given case, its exercise may partake such a character. However, the possibility of misuse cannot be a ground for holding a provision of the statute to be constitutionally fragile.”

should lay down a criteria applicable to all the High Courts.¹⁸ Out of hundred (100) marks, we have to assess the advocates and out of hundred (100), twenty (20) or twenty-five (25) marks are earmarked for—how the concerned advocate has formulated a point before the Court leading to development of law.¹⁹ The advocate concerned is to cite judgments which are reported, or which may not be reported, where he has argued a point of law and based on his argument, the Court has laid down the law. Unless he can show that, he does not get a mark out of twenty-five (25). That stage is quite far away for you to reach but you must remember this, in the wake of the topic which we are discussing as to how does an advocate contribute to evolving and developing the law. These are the remarks that I intended to make. It is for you to accept or not to accept; there is no compulsion. Now, coming back to Mr. Deb's question, about duty towards client and duty towards Court; under the Advocates Act, if a client comes to an advocate, it says that it is the duty of the advocate to accept the brief irrespective of the merits.²⁰ Now, once the brief is accepted and when the matter comes up for hearing before the court and the advocate finds that there is a judgment directly on the point, binding upon the Court in which the argument is going on, is it his duty to bring the said judgment to the notice of the court or does he suppress it? Does he feign ignorance and argue? This is a question which is very tricky. Personally, I think that even though it is the duty of every lawyer to accept the brief of his client, if I know that ultimately, the client may not win the case because it is quite likely that the other side, will cite the judgment, my personal view was that I used to refuse the briefs, letting the client know where the demerit of his case lies. I do not know whether this is the approach adopted by all the other advocates or not; after all I had some independence, and as an independent legal practitioner, it was for me to decide which case to take and which case to refuse. If I discover or if I know for sure, that the client is not going

¹⁸ See, SUPREME COURT GUIDELINES TO REGULATE CONFERMENT OF DESIGNATIONS OF SENIOR ADVOCATES, 2018.

¹⁹ *Id* at 2. “The Committee will examine each case in light of the data provided by the Secretariat, interview/interact with the advocate concerned and makes it overall assessment on the basis is a point based format indicated below”; See also page 3, Sl. no. 2, “Judgments (reported or unreported) which indicate the legal formulations advanced by the advocate concerned in the course of the proceedings of the case; *pro bono* work done by the advocate concerned ...” The guidelines place a weightage of 40 marks on the advancement of jurisprudence by the concerned lawyer when determining his eligibility as a Senior advocate.

²⁰ See BAR COUNCIL OF INDIA, RULES ON PROFESSIONAL STANDARDS, Rules on an Advocate's duty towards the Client, Rule 1 reads: “Bound to accept briefs—An advocate is bound to accept any brief in the courts or tribunals or before any other authority in or before which he proposes to practise. He should levy fees which is at par with the fees collected by fellow advocates of his standing at the Bar and the nature of the case. Special circumstances may justify his refusal to accept a particular brief.”

to get any relief from the High Court, I used to refuse and I even heard from those clients later on, when they had approached some other advocate and they have got the relief. Well and good; if he gets relief from the Court, why should I bother? But I believe my conscience is my only master.

Therefore, at one point, if I am confronted with a situation where I am aware that the stakes and the law are against me, it is my personal opinion that it is better to not accept legal fees from the client, in such circumstances. Mr. Chaudhury sits at the Bar, and he may have a different view on the matter. I had the occasion to represent the Government and educational institutions all over West Bengal before the High Court, even serving as the Law Officer of the Government. I had asked that senior advocate who had given me the advice before, that what should be my duty, as a law officer. He said that since I was a law officer, I must be mindful of three (3) duties: be dutiful towards the client, i.e., the Government or the public body I was representing before the Court; dutiful towards the Court; and dutiful towards the citizens. This is because, the ultimate public responsibility rests upon the Government to take appropriate decisions for ensuring that the arbitrary actions of its officers do not adversely affect its subjects. Thus, as a law officer, the situation would be different, and thus it has to be viewed from a different perspective.

Apart from your duties towards the Government and the Court; you must also be mindful of the consequence, which is to be borne by the citizen, if you support an illegal executive action before the Court. It is in these cases that fairness demands the representing law officer to be fair and just before the Court, and submit that the officer responsible has not taken a legally flawed decision; and that the officer should be permitted to make the order or application afresh.

At this stage, these particularities may not be too comprehensible for you, but as time goes by, you will gradually figure it out.

MR. ARUNABHA DEB: Thank you very much Justice Dipankar Datta. These are immensely helpful words for all of us present here. Justice Chakraborty, if you may have your quick view on the question that was placed.

JUSTICE CHAKRABORTY: First of all, I would like to add a few more words regarding the choice of court and the chamber senior. Firstly, you have to decide which is the Court where you wish to start your practice. Once you have decided to practice in a particular Court, you will have to spend at least two to three months, roaming around the court in order to find out the person whom you can accept as your “Guru” (Sanskrit word—roughly translated into “mentor or teacher”).

For selecting a Guru, as Justice Datta has said, first ascertain as to whether the person under whom you want to join the profession, has the

qualities to be a successful lawyer, such as his acceptability in all courts due to his sweet words; because in the legal profession nothing succeeds like sweet words.

Next, a Guru should be a person who must be practicing for at least 12 years, *i.e.* he or she must be a senior of ten to twelve years. Drafting is the first thing that you have to learn, and if your senior has been practicing for twelve or thirteen years independently, he or she shall be the best person to teach you on the basics of advocacy, such as, how to draft a petition.

A lawyer's first learning is in drafting. Once you draft correct pleadings, you will get assistance in respect of how you should actually plead. So, after a certain period of time, you must make pleadings in Court based on those draftings, preferably on your own, and without the help of your senior.

Before that, however, there are two things to take into account: firstly, you must remember that even though there maybe a number of juniors in the chamber, the senior will prefer that particular junior with whom he can have confidential conversations such as private discussions involving attorney-client privileges between his or her client and himself or herself and the like. Thus, you must strive to gain the trust of your senior by never divulging the details of any such discussion that might have taken place between the client and himself; secondly, you must know the books in the chamber; which book is lying where or with whom; all such details must be at your fingertips. Someone should assist, when a senior is looking for a book. For instance, if he or she asks for a book you must be able to locate it. In such a manner, step-by-step, you will gain the confidence of your senior. A senior will prefer the junior upon whom he or she can depend, who can deliver him the best and from whom he or she can get the best assistance.

Justice Datta was just discussing on how we used to spend our days in senior's chamber. It became our second home. I'm quite sure the same thing happened to Mr. Chaudhury as well. It may so happen that at eleven o'clock in the night, he asks you to draft something for him, which he may need the next day. It is, by delivering in these instances, that you will gain the trust of your senior.

Also, for all this hard work, as Justice Datta was also saying, you need the physical fitness. Your temperament must be very cordial; otherwise it will be difficult for you to work for days and months at a stretch; because you will only be getting two holidays, one during the summer break and the other during Durga Puja.

You should also possess the virtue of patience. I was told by my senior that in all professions, a person who succeeds, invariably possesses the capability to slog. You need patience especially when you find that the effort you have put in, has not yielded a proportionate result. For instance, you might have to spend three or four nights in preparing for a matter, but the judge might not be ready to accept your argument.

So far as the question put by Mr. Deb is concerned, I will say that, first you must be a master of facts; only then can you be a master of law. When you become a master of law, then you know what your client is praying for and whether the relief sought by your client is maintainable in law or not. If you are confident that it is not maintainable, you must show your client, the relevant judgements and explain to him that: “*These are the difficulties as a result of which you (client) may or may not succeed.*” In spite of this, if your client insists, you may argue his or her case, but to a certain limit, *i.e.* do not press it upon the Judge.

MR. ARUNABHA DEB: Thank you very much, Justice Chakraborty. Since, Justice Datta has mentioned that he will prefer to hear Mr. Chaudhury's views on the subject as he is still at the Bar and is also known to be a man of very sweet words, I would request him to say a few words in this regard.

MR. SABYASACHI CHAUDHURY: Along with the description provided by Justice Datta with regard to having “*steel in your body, honey in your tongue*”, I might add that carry a small bottle of pepper with you as well. This leads me to the important aspect of the style of advocacy.

So, the question is that, “*Is there any particular style of advocacy?*”; “*Is there anything called a perfect advocate?*” The answer to these questions is also no. There is no style which you can call a perfect style. An aggressive style may not work all the time. Similarly, if you have a sweet tongue and you adopt that theory in all cases, it may not bear fruit every time. So, the key is to have a balance in your style and not to imitate anybody. In this respect, it is very important to know what your strengths and weaknesses are.

It would not be advisable to curb your natural style but yes, you must be cautious about it. I've been repeatedly drawing analogies from cricket so I might as well give another. You see, everybody could not have possessed the class of Sachin Tendulkar but at the same time, a boring batsman like Rahul Dravid came to be known as the “*The Wall*”.

Similarly, all out aggression does not fit the rule of test cricket but nonetheless you have players like Virender Sehwag. So, the point that I'm trying to make is that there is nothing as a perfect style. Never think that Mr. X's style is the best or Mr. Y's style is the best.

Unknowingly, because of your association in the chamber, you might try to imitate your senior; but you must learn to argue in such a style or manner which enhances your strength and suppresses your weaknesses. So, it is nearly a self-regulatory mechanism; it is very difficult to suggest that you must adopt only a particular style of advocacy. This is the reason why, I had said earlier, that along with the honey, you must also have the pepper so as to stay in a position where you can utilise both.

Do also remember that you are not always dealing with the Bench; you are also dealing with an adversary. You are dealing with an adversary who

is coming all guns blazing against you, and the Bench is silent. In such a situation you might have to adopt a style which is a little more aggressive than the manner in which you generally converse with the Bench.

Thus, my advice will be that you must be free to adopt a style of advocacy, best suited for you. Watch as many arguments as you can and please know your limitations. There is nothing wrong if your fluency is somewhat slow, or you are good in drafting but not good at expressing yourself in words. Nobody is good at everything. One of my favourite phrases is that “*you can't be an all-rounder*”. Once you come to terms with the fact that you cannot be an allrounder, you must begin to ascertain your strengths and weaknesses; focus on your strengths, and try to be a collector. I say collector in the sense, that you must imbibe all that you are seeing at your senior's chamber or that which you can learn directly from your senior. Here, the Bar has a tradition similar to the “*Guru-Shisya Parampara*” (Sanskrit phrase—roughly translated into “*Mentor-Mentee Tradition*”), as said by Justice Chakraborty; because, you are in your senior's chamber and whether you like him or not, you are there.

Let me also take this opportunity to clarify that you will most expect- edly, not get a senior whom you are going to like at the first instance. It is not possible. I am saying this with my own experience, I come from a chamber where my senior was very temperamental. He happened to be one of the best teachers at that point of time and from his chambers there have been judges and many successful advocates.

JUSTICE DATTA: Unless your chamber senior brings tears in your eyes, he or she is not your senior. We have worked with seniors who, quite literally, brought tears into our eyes. All of you here, will hear from Mr. Chaudhury, as he shares his experience.

(Laughter)

MR. SABYASACHI CHAUDHURY: This is where I disagree, I don't think you can have a universal policy. The methodology, which was applicable back then, may not be applicable in the present context. So, I think that you have to be flexible as a senior's role differs. Rebuking is essential to mentoring a junior, but it depends from person to person, in regard to its degree and manner.

Be flexible in your approach. As I said, there is no golden rule and for heaven's sake, don't read books on how to improve public speaking. Public speaking improves only when you speak more; the more you address the Court, the more opportunities you get.

At the junior stage, whenever a brief comes in your lap, do not at first, use your discretion in deciding if the client is going to get the relief. As juniors, it is very important to make yourself visible among the crowd. Therefore, it might be prudent to show your face in Court even though

you might face the wrath of the Court for arguing a case which is not in your favour. As juniors don't indulge in the luxury of deciding a proper case, because you will not have such luxury. Remember one thing, most of the litigation which goes to court are in shades of grey, there is no black and white. The person who is winning the case is not all white and the person who is losing the case is not all black. There are shades of grey and often it is a fight between the bad and the worst.

Now the second part of it is, what is its contribution to jurisprudence? This is something which occurs involuntary; you have no control over it whatsoever. You do your best and if you are lucky, you might address a Full Bench and extend arguments in respect of a law which has not yet been decided. Then, you can have your small contribution in the evolution of jurisprudence.

It is obvious that such chances are hard to come by, but then you have to be ready to grab it with both hands if you're provided with such an opportunity. For that you must be well versed with the law and the facts of the matter. Only if you know that there are two Division Benches which are contradicting each other, you will be able to appear in the court and argue that: "*My Lord these are the two views, kindly constitute a larger bench.*"²¹ Then perhaps, you will be getting an opportunity to address the issue. This will not happen if you are unaware of the law.

In case you are unaware of the conflict between two Division Benches over a point of law, you will only cite a judgment which supports your case and that is the end of it. It may also happen that the decision given in your favour continues to be the law for next five years, as you had failed to bring the afore-mentioned conflict between the Division Benches to the notice of the Court.

The worst part is, how it doesn't contribute to evolving jurisprudence. For five years you are indirectly responsible for having a contrary view to the majority one just because you have not done your research well. Even if the judgements are against you, kindly go through them. Only if you know the logic of what is against you, will you be able to overcome it. Also, kindly bear in mind that what is law today may not be law tomorrow and that the view you are propounding today may become the law tomorrow.

²¹ See *Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors.*, AIR 2011 SC 312. The Supreme Court held that the judgment of a larger Bench is binding on a smaller Bench or co-equal Bench. If the court doubts the correctness of the judgment, the only proper course would be to make a request to the Hon'ble Chief Justice to refer the matter to a larger Bench of appropriate strength; The Supreme Court has consistently held that in case of conflicting judgments of co-equal benches, it is desirable to refer the matter to a larger Bench. See also *State of MP v. Mala Banerjee*, (2015) 7 SCC 698; *Atma Ram v. State of Punjab*, AIR 1959 SC 519; *Zenith Steel Tubes and Industries Ltd. v. SICOM Ltd.* (2008) 1 SCC 533).

Talking of seniors, I can't help but mention there was a placard in my senior's chamber which talked of four rights. These were listed as:

I have a right to be right
I have a right to be wrong
I have a right to know that I'm right
I have a right to know that I'm wrong.

These aptly describe the pursuit of a junior lawyer, or for that instance any lawyer. It says: I have a right to be right, but always I may not be right; and only when I'm wrong will I know what is right. So, the first two rules are very easy to understand. Then, I have a right to know that I'm right, which the judges will confirm after hearing the arguments. Equally important is the right to know that I'm wrong, which brings us all to the Doctrine of Giving Reasons.²² So, only when I have that right to know that I'm wrong, I can work upon it. Either I can accept that I'm wrong and can rectify myself or I can go up higher and say that I'm not wrong. Even though, in the initial stages of my career, I looked upon these rights as mere jugglery of words; but as and when the years have passed, these four rights have impressed upon me and it is now that I fully comprehend the meaning of these rights. Until and unless you know that whether you are right or wrong and the last two rights that I talked of, you can't contribute to jurisprudence.

MR. ARUNABHA DEB: Thank you very much, Mr. Chaudhury.

JUSTICE DATTA: The concluding remarks of Mr. Chaudhury, that a person has a right to know why he is wrong, embodies as to why reasons are necessary in a judgment. Remember, a judge decides between two parties as to who is right and who is wrong. Now, if a case is filed and the judgment states that the plaintiff is right, and the defendant is wrong; does the defendant know why he is wrong? Therefore, in support of the

²² See G.P. SINGH, FOREWORD TO ADMINISTRATION OF NATURAL JUSTICE IN INDIA. SINGH C.J. reads: "Besides there is a third principle of natural justice, *i.e.*, a party is entitled to know the reasons for the decision. Natural justice, speaking generally, comprises three elements, *viz.*, absence of bias, fair hearing and reasoned order."; Giving reasons requirements are a form of internal improvement for administrators. A decision-maker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision than will a decisionmaker able to proceed by simple fiat. In another aspect, giving reasons is a device for enhancing democratic influences on administration by making government more transparent. In these aspects, giving reasons requirements are not "giving reasons to judges" requirements but "giving reasons to the public" requirements. Administrators must inform the citizens of what they are doing and why. Such requirements are a mild self-enforcing mechanism for controlling discretion. See also Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179 (1992) at 3.

conclusion, the judges are required to supply reasons; the reasons as to why one party is right and the other is wrong.²³ The reasons provide the link between rationale of the Judge and the outcome of the case. This is the reason why courts have been insisting that whatever decision is given, the same should contain reasons so as to demonstrate the application of mind by the adjudicator.²⁴

If you do not argue your point, the judge will simply say that no point has been argued and therefore the defendant is wrong; however, if you argue your points and then the judge on the basis of appreciation of those arguments, gives his own reasons for reaching such a conclusion, the judge contributes to the evolution of law. Whenever you argue; argue with force, support your arguments with authorities, try to make an interpretation which may not be coincidental to the law's earlier interpretations. You can interpret the law in a different way, and by way of supporting such an unconventional interpretation, refer to a judgment or legal authority you are considering for advancing the idea; and you may get a decision in your favour.

III. QUESTION-HOUR SESSION²⁵

MR. ARUNABHA DEB: Thank you, Justice Datta. As we don't have that much time, we shall now commence with the question-hour session. Question 1 is from Mihika Roy. The question is: "*To what extent are legal practitioners, confined by social obligations when they are putting forward their arguments.*" I

²³ See THE CODE OF CIVIL PROCEDURE, 1908, Order XX Rule 4(2) reads: "Judgements of other Courts—Judgements of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."; The High Court must exercise judicial discretion in exercising that power, because, the recording of reasons is intended to ensure that the decision was not the result of a whim or fancy but of a judicial approach, that the adjudication was according to law and procedure established by law, and that when the judgement is subject to appeal, the appellate court may have adequate material on which it may determine whether the facts were properly asserted and the law has been correctly applied resulting in a just decision. See *Swaran Lata Ghosh v. H.K. Banerjee & Anr.*, 1969 AIR 1167; See also THE CODE OF CIVIL PROCEDURE, 1908, §33 reads: "The Court, after the case has been heard, shall pronounce Judgement, and on such Judgement a decree shall follow."; A court of law must base its decision on appreciation of evidence brought on record by applying legal principles. Surmises and conjectures alone cannot form basis of a judgement. See also *Navanath v. State of Maharashtra*, (2009) 14 SCC 480.

²⁴ *Id.*

²⁵ For the convenience of the Moderator in conducting the proceedings of the Dialogue, the Journal and Seminar Committee provided a list of 12 Committee vetted questions for discussion over the course of the dialogue. Out of the 12 questions, the Moderator, in exercising his discretion, chose 10 questions for deliberative discussion in the designated Question-Hour Session.

think we have already covered a bit of this in our discussion. Is there anything that Justice Datta, Justice Chakraborty would like to add?

MR. SABYASACHI CHAUDHURY: At the end of the day, the trick is to strike a balance. It's like riding a bicycle; if you lean more on the left side, you are likely to fall. Similarly, if you are leaning more on the right side, you are equally likely to fall; it is inevitable. So, you have to strike a balance and this striking of balance differs from person to person. A person who is physically obese, will have a different set of balance as compared to someone who is lean and thin. The trick is thus, to know where your limitations are and then strike a balance between your social obligations; or the extent to which you are socially obliged to pursue a line of argument; and that of your legal obligation as a lawyer and as an officer of the Court. The most common example, which recently comes to my mind is that of the judgment pertaining to the LGBT community.²⁶ If you trace its history you will find that there has been a noticeable conflict of social obligations, *vis-à-vis* legal obligations, *vis-à-vis* moral obligations and as well as personal obligations in some cases.²⁷

²⁶ See *Naz Foundation v. Govt. of NCT of Delhi*, SCC OnLine Del 1762. Referring to the judgement delivered by the Delhi High Court, decriminalizing §377 of the Indian Penal Code, MISHRA C.J. in *Navtej Singh Johar & Ors. v. Union of India* thr. Secretary, Ministry of Law and Justice, (2018) 1 SCC 791, held in ¶66: “The Delhi High Court had taken the view that Article 15 of the Constitution prohibits discrimination on several enumerated grounds including sex. The High Court preferred an expansive interpretation of 'sex' so as to include prohibition of discrimination on the ground of 'sexual orientation' and that sex-discrimination cannot be read as applying to gender *simpliciter*. Discrimination, as per the High Court's view, on the basis of sexual orientation is grounded in stereotypical judgments and generalization about the conduct of either sex” and “... that the Constitution does not permit any statutory criminal law to be held captive of the popular misconceptions of who the LGBTs are, as it cannot be forgotten that discrimination is the antithesis of equality and recognition of equality in its truest sense will foster the dignity of every individual. That apart, the High Court had taken the view that social morality has to succumb to the concept of constitutional morality.”; See also *Suresh Kumar Koushal v. Naz Foundation* (2014) 1 SCC 1. The judgement of the Delhi High Court in *Naz Foundation* was overruled by the Supreme Court, observing in ¶65 that those who indulge in carnal intercourse in the ordinary course and those who indulge in carnal intercourse against the order of nature constitute different classes and the people falling in the latter category cannot claim that §377 of the IPC suffers from the vice of arbitrariness and irrational classification. The Supreme Court held in ¶66: “... While reading down Section 377 of the Indian Penal Code, it cannot be overlooked that only a minuscule fraction of the country's population constitutes lesbians, gays, bisexuals or transgenders and in last more than 150 years, less than 200 persons have been prosecuted under Section 377 of the Indian Penal Code which cannot, therefore, be made a sound basis for declaring Section 377 IPC *ultra vires* the provisions of Articles 14, 15 and 21 of the Constitution.”

²⁷ See *Navtej Singh Johar & Ors. v. Union of India* thr. Secretary, Ministry of Law and Justice, (2018) 1 SCC 791. §377 of the Indian Penal Code criminalised sexual activities “against the course of nature” with any man, woman or animal, with a ten-year maximum

Conflict of obligations of various nature will always be there and it may or may not apparently be in your favour, but don't lose heart, perseverance is the key. What everybody over here has said is that you have to fight it out. If you believe in something, pursue it even if the initial flow may be against you and ultimately, you may either succeed or you may not succeed. Success is not in your hand. Therefore, the question is, when you try to balance obligations, kindly do not compartmentalise yourself in terms of your social and legal obligations; and prioritise one over the other.

Try to maintain balance in a manner, such that you give equal weightage to both and then ultimately use your discretion. Since there is an element of discretion, the (legal) profession becomes very interesting and challenging. The drawback is also the biggest incentive in the profession as here, you are the master of your own territory and you can chart your own course. It will be foolish of me if I were to say that you should follow one particular path and not the other. You can't have a hard and fast rule; you can't have a straitjacket formula for that. Balancing is the key and remember the bicycle as an example to maintain that balance.

MR. ARUNABHA DEB: Thank you very much, Mr. Chaudhury. Professor Das, if we can have your reasons on the question discussed.

PROFESSOR DAS: The question posed, is an interesting one. It is said that a lawyer is a social engineer, which is a hypothesis of Roscoe Pound.²⁸

prison sentence and the imposition of fine. The Supreme Court, in declaring §377 of the Indian Penal Code as *ultra vires*, owing to its conflict with Articles 14, 15 & 21 of the Constitution, so far it criminalises sexual acts of adults in private; subsequently overruled its decision reached in *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1, holding in ¶253(i) that: "In *Suresh Koushal*, this Court overturned the decision of the Delhi High Court in *Naz Foundation* ... by stating a ground that the LGBT community comprised only a minuscule fraction of the total population and that the mere fact that the said Section was being misused is not a reflection of the vires of the Section. Such a view is constitutionally impermissible." The Supreme Court further held in ¶253(viii): "... The said reasoning in *Suresh Koushal*, in our opinion, is fallacious, for the framers of our Constitution could have never intended that the fundamental rights shall be extended for the benefit of the majority only and that the Courts ought to interfere only when the fundamental rights of a large percentage of the total populace is affected."

²⁸ Roscoe Pound defines law as a task of social engineering designed to eliminate friction and waste in the satisfaction of unlimited human interests and demands out of a limited store of goods in existence. See ROSCOE POUND, *SOCIAL CONTROL THROUGH LAW* 64 (1942); 8 *ENCYC. SOC. SCI.* 487 (1932); Pound argues that in the past, the process of social engineering has been governed by the ideals of the end of law and of the legal and social order, and submitted that such ideals must be relied upon in the present and future contexts. See ROSCOE POUND, *THE THEORY OF JUDICIAL DECISION* 953 (1923); Pound states that the chief agency of lawmaking is judicial empiricism—the judicial search for the *workable* legal precept, for the principle which is fruitful of good results in giving satisfactory grounds of decision of actual causes, for the legal conception into which the facts of actual

As the afore-mentioned school of thought is a prevalent one, our LLB syllabus is designed with an interdisciplinary approach, which includes the subject of Sociology. A lawyer argues just like an engineer; whenever there is a problem, one party will always try to extend reasons in favour of himself or herself and the other party will always try to negate the same. As a result, there arises a conflict. Ultimately, people come to the court for deciding the issue.

So, it is very common that a lawyer arguing before the Court is often called a social engineer. The way a matter is decided by the Court, shall depend on the point of law or on precedents. Whether it is the point of law or the Court's precedents, neither of the two, derives its origin from a divine source. Both originate from society through the long observance of laws by its inhabitants. Even though law might have its different branches and classifications, it is generally applied to the society which in turn, comprises of human beings. So, whenever there is a problem, the same is to be solved by the lawyer and the lawyer is to be called a "social engineer". Therefore, it can be said that there is a relation between society and law. I suggest that all of you read this theory of Roscoe Pound very carefully. Of course, Roscoe Pound's theory has been recently overtaken, overruled by the theory of John Finnis.²⁹ Irrespective of whether the theory of Roscoe Pound will regain its significance or not, it cannot be denied that a lawyer is a social engineer. Thank you very much.

MR. ARUNABHA DEB: Thank you, Professor Das. I have Justice Chakraborty on the same question.

controversies; may be fitted with results that accord with justice between the parties to concrete litigation. It is a process of trial and error with all the advantages and disadvantages of such a process. See ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 124 (1938); See also Linus J. McManaman, *Social Engineering: The Legal Philosophy of Roscoe Pound*, 33(1) ST. JOHN'S LAW REVIEW 1, 47 (1958).

²⁹ John Finnis considers Pound's notions of "social engineering" and "social control" as misleading notions of natural law. They are directly linked with that form of utilitarianism (associated with William James and Bertrand Russell) which (in the spirit of John Rawls's 'thin theory of the good') maintains that every desire of every person is in itself equally worthy of being satisfied, so that, in Pound's words, Social Control through Law, 64-5, 'there is, as one might say, a great task of social engineering ... of making the goods of existence, the means of satisfying the demands and desires of men being together in a politically organised society, if they cannot satisfy all the claims that men make upon them, at least go round as far as possible'. Or again, "... we come to an idea of a maximum satisfaction of human wants or expectations. What we have to do in social control, and so in law, is to reconcile and adjust these desires or wants or expectations, so far as we can, so as to secure as much of the totality of them as we can": See POUND, *JUSTICE ACCORDING TO LAW* 31 (1951); See also POUND, 3 *JURISPRUDENCE* 334 (1959); See generally J. STONE, *HUMAN LAW AND HUMAN JUSTICE* (1965) at Ch. 9.

JUSTICE CHAKRABORTY: Let us take a case where a company³⁰ has borrowed money from a nationalised bank and it has made defaults in honouring its repayments. In the present economic scenario, we find that there are many defaulters, even willful defaulters. Suppose one of these willful defaulters, comes to you and says that kindly accept my brief because the bank is taking forceful possession of my property; which is permissible under the SARFAESI Act, 2002.³¹ After going through the brief, if you find that your client has defaulted in honouring its repayments and that the bank is lawfully entitled to initiate proceedings for enforcement of its security,³² will you spontaneously reject the case?

Here, I would say that every matter has its own merits and demerits. So kindly put your best effort to find out if there are any legal requirements which the bank has not followed. You may say that ultimately, it is your client who has defaulted, as all of us are supposed to act in accordance with law.

Therefore, after accepting the case, if you succeed in proving that the bank has not fulfilled the necessary legal requirements, it will bring you another ten clients. The success of a junior depends on whether he or she can find out any fault which is within the legal parameters or a case of non-adherence of the proper precedent. As Mr. Chaudhury has said earlier, that strike a balance and give your best effort in sustaining the law.

MR. ARUNABHA DEB: Thank you, Justice Chakraborty. We go on to Question 2, which comes from Lalitendu Debakar. The question is: “*What is the efficiency and effectiveness of trial advocacy in Chartered High Courts?*” For this, I think we need to delve onto the robustness of our (High Court’s) Original Side jurisdiction and discuss this, and I request Justice Chakraborty to address this first.

JUSTICE CHAKRABORTY: Well what is a trial? Trial proceedings in the High Court happens only in civil cases.³³

³⁰ THE COMPANIES ACT, 2013, §2(20) defines “company” as: “a company incorporated under this Act or under any previous company law.”

³¹ THE SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTERESTS ACT, 2002, §§ 13, 14. §13 provides for the enforcement of security interest; §14 empowers the Chief Metropolitan Magistrate or District Magistrate to assist the secured creditor in taking possession of secured asset.

³² *Id.*

³³ *See* LETTERS PATENT ACT, 1865, Clause 12 reads: “Original Jurisdiction as to suits— And we do further ordain, that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary civil jurisdiction, shall be empowered to receive, try and determine suits of every description, if, in the case of suits for land or other immovable property such land or property shall be situated, or in all other cases if the cause of action shall be arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High

When a person files a civil case, like any other suit, there are two parts: one is the plaint and the second part is the evidence. As you know the Civil Procedure Code describes the essentials which are to be pleaded in the plaint.³⁴ My suggestion is kindly to follow and go through the provisions stated in Order 7 of the Code of Civil Procedure.³⁵ Thus, a plaint only contains the facts and not the law. The plaint does not contain any mention of the laws because it is the foundation of facts.

Once the plaintiff files his plaint, the defendant gets the opportunity to file his written statement; his version of facts, i.e. his defence to the plaint. So, these are the two pleadings. Now on the basis of these two pleadings, the issues are to be framed. Now, what are the issues? Issues are basically the points which are to be decided. The manner in which the issues are to be framed has been laid down in the Order 14 of the Code of Civil Procedure.³⁶

Now, the job of arguing counsel, or of a trial lawyer, even if he or she hasn't drafted the plaint or the written statement, starts from the framing of issues. For a primary example, let us take a case, where a person files a suit for eviction on the ground of an expiry of a lease by the effluxion of time.³⁷ Now in the plaint, the plaintiff must have stated that he is the owner

Court, or, if the Defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta in which the debt or damage, or value of the property sued for, does not exceed One Hundred Rupees.”

³⁴ THE CODE OF CIVIL PROCEDURE, 1908, Order VII Rule 1 reads: “The plaint shall contain the following particulars:—(a) the name of the Court in which the suit is brought; (b) the name, description and place of residence of the plaintiff; (c) the name, description and place of residence of the defendant, so far as they can be ascertained; (d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect; (e) the facts constituting the cause of action and when it arose; (f) the facts showing that the Court has jurisdiction; (g) the relief which the plaintiff claims; (h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and (i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court fees, so far as the case admits.

³⁵ *Id.*

³⁶ THE CODE OF CIVIL PROCEDURE, 1908, Order XIV Rule 1 reads: “Framing of issues—(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other; (2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence; (3) Each material proposition affirmed by one party denied by the other shall form the subject of distinct issue; (4) Issues are of two kinds: (a) issues of fact; (b) issues of law.”

³⁷ *See V. Dhanapal Chettiar v. Yasodai Ammal*, AIR 1979 SC 1745. The Supreme Court held that the jural relationship of a lessor and lessee would come to an end on the passing of an order or decree for eviction, holding further in ¶6 that: “... until then, under the extended definition of the word 'tenant' under the various State Rent Acts, the tenant

of the property and that there was a registered deed; as an essential requirement of a valid lease³⁸ is that it must be in writing. It is a registered document which is signed by the parties and it contains the grounds including the period for which it was given.

So, in the statement, the defendant may say that it is not a case of an expiry of lease by an effluxion of time. He may further state that even though the lease was valid for a fixed period of time, subsequent to expiry of such time, the plaintiff has agreed to accept himself as a tenant and that he has paid rent. In that background, the issues will be whether there is a valid lease, whether the lease has expired by effluxion of time and whether the issue of holding over under §116 of the Transfer Property Act,³⁹ can be proved by the defendant. Normally, you find in the Courts that the issues are generally framed along the lines of whether the plaintiff is the owner of the property, whether the plaintiff is entitled *de facto* to the decree and whether the suit is maintainable.

On many occasions, I have found that the obligation of the defendant to prove his case of holding-over is not mentioned in the issues. In those cases, where such an issue is not framed, I point out the failure of the plaintiff's lawyer to highlight the same points before the Judge, thereby making it a part of their issues.

Now in High Court, unlike the District Courts, the trials of the suits are taken before the Judge himself; with the recording of the evidence of the plaintiff and the defendant before the Judge.

Coming to what is essentially examination-in-chief, it is when the plaintiff's witness proves the facts which he has mentioned in the plaint and

continues to be a tenant even though the contractual tenancy has been determined.”; *See also* Krishna Prosad Bose v. Smt. Sarajubala, AIR 1961 Calcutta 505; Damadilal & Ors. v. Parshram AIR 1976 SC 2229.

³⁸ THE TRANSFER OF PROPERTY ACT, 1882, §§105-107. §105 defines lease of an immovable property as “a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.”; §106 provides for the duration of certain leases in absence of written contract or local usage; §107 lays down the process of how leases are made; and §108 lays down the rights and liabilities of the lessor and lessee.

³⁹ THE TRANSFER OF PROPERTY ACT, 1882, §116 states: “Effect of holding over— If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.”

produces the documents in support of his case.⁴⁰ Plaintiff's witness is either the plaintiff himself or anyone on his behalf who is conversant with the facts of the case.

Right at the beginning, the plaintiff must prove ownership. For the plaintiff to prove ownership of the property, the registered deed itself can be exhibited, provided the witness can successfully identify the signatures of the person on behalf of whom the plaintiff and defendant executes the deed, thereby proving the registered deed. Then the plaintiff has to say, as you know, that in a case of expiry of the lease by an effluxion of time, a notice is to be served unlike a case governed by §6 of the Premises Tenancy Act,⁴¹ for any forfeiture of tenancy.

After this plaintiff's witness has to clarify whether the defendant has vacated the suit property after the expiration of the lease. Furthermore, one important thing which needs to be taken care of by the plaintiff's counsel, is that he has to put a question to the plaintiff, as to whether the plaintiff accepts the claim of holding over raised by the defendant. It is very important. Otherwise, it may be argued that the plaintiff has already accepted the assertion of holding over made by the defendant earlier. Thus, the suggestion is whether he accepts the case of the other side.

Now coming to case of the other side; the defendant has stated that subsequent to expiry of the lease, there was an agreement, by virtue of which he was allowed to continue as a tenant and consequently it was a case of holding-over.

This is how a lawyer should handle the questioning of witnesses: while conducting an Examination-in-Chief, the Counsel must remember the rules laid down in the Evidence Act, 1872. He cannot put in a question which amounts to a leading question under §141 of the Evidence Act.⁴² What is a leading question? A leading question is something which contains the answer within itself.⁴³ Also, while examining the plaintiff's witness or any witness thereof, the Counsel must be very careful to have control over his emotions.

⁴⁰ THE INDIAN EVIDENCE ACT, 1872, §137 defines "examination-in-chief" as: "The examination of a witness by the party who calls him."; The "examination-in-chief" is the questioning of a witness by the party who called him to give evidence, the purpose being to elicit facts favourable to the case of the party conducting the examination. *See* ELIZABETH A. MARTIN, OXFORD DICTIONARY OF LAW 188 (2003).

⁴¹ THE WEST BENGAL PREMISES TENANCY ACT, §6 lays down the grounds for eviction of tenant from the premises, which is the subject matter of the tenancy agreement.

⁴² *See* THE INDIAN EVIDENCE ACT, 1872, §142. §142 provides that a leading question must not be asked in an examination-in-chief, or in a re-examination, if it has been objected to by the adverse party, except with the permission of the Court. §142 also provides that "the Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved."

⁴³ THE INDIAN EVIDENCE ACT, 1872, §141 defines a "leading question" as "any question suggesting the answer which the person putting it wishes or expects to receive."

It may so happen that as a result of fear psychosis or the like, the witness on his own, without any question being put to him, continues to divulge or say things in such a manner or in such a sequence, which may be detrimental to his own case. Then as a counsel who is examining the witness, you will be left-at-large because you do not know which question to put because he has answered all the questions. You must always maintain a cool-headed approach. From there, you should take control of your witness. This is very important for handling a witness during examination-in-chief.

The skill of the lawyer, who is cross-examining the plaintiff's witness, is to prove that the witness has either suppressed the fact or that the witness has withheld from mentioning the fact of the subsequent agreement after the expiry of the lease; only if he is successful to get that answer from the plaintiff, that, yes, there was an agreement after the expiry of the lease, then, the counsel of the defendant succeeds. In cross-examination, the counsel can ask many questions, although leading questions are not permitted,⁴⁴ repeating questions are allowed. While cross examining a witness, the counsel must be very careful, that once he has received some answer, he should not proceed with that issue any further; which might lead to the witness realising his mistake and clarifying it. So, while cross-examining a witness even if you have received two or three favorable answers, it is preferable that you stop there. If you go onto the fourth or fifth question, on the same issue or subject matter, he may realise his mistake and clarify it to the possible detriment of your case. Once the cross-examination of the plaintiff's witness is over, the turn comes to the defendant to address his witness.

Now, if the plaintiff, in his cross-examination has already admitted about the subsequent agreement, that supports the case of the defendant in holding-over; then the defendant must argue that he is not interested in the admission of fresh evidence or any evidence at all, because the plaintiff has already admitted to his case in the written statement. But if, the plaintiff's witness has not admitted such case, then the defendant must depose necessary evidence. The defendant's witness has to stay the examination-in-chief of the plaintiff's witness, whatever he has stated in the written statement of the defendant. Again, I am saying that it's not necessary that the defendant himself has to personally come and admit his evidence, any person who is conversant with the facts can come in behalf of the defendant and admit the evidence.⁴⁵ However, where the defendant says that the

⁴⁴ *Supra* note 42.

⁴⁵ THE INDIAN EVIDENCE ACT, 1872, §18 reads: "Admission by party to proceeding or his agent.—Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or

agreement was entered into between himself and the plaintiff, then the defendant has to come personally, because he is saying that he was a party to this agreement, by virtue of which he is getting the holding-over. But, otherwise, any second or third person, who was present there, at the time of the alleged agreement, may also make an attempt to prove the defendant's case.

So far as the cross-examination of the defendant's witness is concerned, the plaintiff's counsel has to be very careful, that he must go through the pleadings of the plaint and the written statement as well as the evidence adduced by the plaintiff. Once the registered document is proved, the only objective of the plaintiff's counsel would be to prove that the oral agreement or the subsequent agreement, that is alleged by the defendant, had never taken place. Now, so far as the examination-in-chief⁴⁶ and cross-examination⁴⁷ of both the witnesses is concerned, the respective counsels must bear in mind the issues which have been framed, because, only those parts of the evidence accused by the parties which relate and are relevant to the issues, will be considered by the Judge. The next thing, which is very important, is the argument stage.

At the stage of argument; Mr. Chaudhury will agree with me, because he's also a very good suit counsel; the arguer's job is to analyse the evidence of the respective witnesses. Suppose, there are two or three witnesses, you have to analyse those witnesses; and for that, the analyses should be organised, we used do it in a notebook or an exercise book, but that process takes a long time. It requires concentration, attention, and it records the relation between the issues of the suit and the answers given by the respective witnesses. So, the argument of the counsels of the respective parties will not only be based on the averments made in the written statement, but also the evidence adduced by the respective witnesses, on the issues.

impliedly authorized by him to make them, are admissions, by suitor in representative character.—Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character. Statements made by—(1) party interested in subject-matter.—persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested: or (2) person from whom interest derived.—persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements.”

⁴⁶ *Supra* note 40.

⁴⁷ THE INDIAN EVIDENCE ACT, 1872, §137 defines “cross-examination” as “the examination of the witness by the adverse party.”; The questioning of a witness by a party other than the one who called him to testify is called cross-examination. It may be to the issue, i.e. designed to elicit information favourable to the party on whose behalf it is conducted and to cast doubt on the accuracy of evidence given against that party; or to credit, i.e. designed to cast doubt upon the credibility of the witness. *See* ELIZABETH A. MARTIN, OXFORD DICTIONARY OF LAW 129 (2003).

Suppose the plaintiff's counsel has to say, that the issue was whether there was a registered document or not. By analysing the same, the plaintiff's counsel has to show to the judge that his witness has stated that the marked document is the registered document, and that the defendant's witness has admitted the execution of the said document. Thus, there is no dispute between the parties regarding this part of the case. Then, the plaintiff's counsel has to argue on whether there was a subsequent oral agreement, as adduced by the defendant. Thus, the plaintiff's counsel has to point out that the evidence adduced from the examination-in-chief indicates that the plaintiff has denied the case of any subsequent oral agreement between the parties. The counsel then has to analyse the evidence adduced by the defendant and his witness, to prove the alleged oral agreement. So, by referring to the answers given to the respective questions, the plaintiff's counsel has to point out whether the defendant has proved the existence of the oral agreement; and if he has not, whether this answer is a litigable case. That is how you have to build up oral arguments.

Therefore, oral arguments in a trial proceeding must be issue-wise, and on the basis of the aforementioned analyses of the evidence, the Judge, after taking into account, the considerable pleadings of both the litigants, will deliver his judgment on all the issues of the proceeding; because as per the requirement of the Code of Civil Procedure, the judgement of a Judge in a suit, must be on all issues.⁴⁸

Thus, such a procedure presupposes that the arguments of the counsels of the respective parties must only be based on the issues of the trial proceeding, and two things which are very important and are equally applicable to the counsels of both the plaintiff and the defendant are that: first, they must be conversant with the facts of the case, *i.e.*, the facts must be at their fingertips; secondly, they must be well aware of the legal provisions applicable to the said case. Otherwise, they are prone to committing mistakes while conducting the examination or cross-examination of the witnesses, because, the facts which are detailed, and the evidences which are adduced, are aimed to prove a specific point of law.

The respective counsels therefore basically act as the guides of their respective cases. I hope all of us will agree that, one who is very good trial lawyer, can handle any new matter in any situation. This is more or less applicable in the district courts as well, except, where there will be the opportunity to file affidavit evidence in support of the examination-in-chief. In those cases, the lawyer's involvement is not that important, and the Judge misses the opportunity to view the conduct of the lawyer.

⁴⁸ See THE CODE OF CIVIL PROCEDURE, 1908, Order XX Rule 4(2) reads: "Judgements of other Courts—Judgements of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."

MR. ARUNABHA DEB: Thank you very much, Justice Chakraborty; Justice Datta wanted to add something?

JUSTICE DATTA: I wanted to answer Question 3; half of the question has already been answered by Justice Chakraborty.

MR. ARUNABHA DEB: Mr. Chaudhury, you wished to add anything to what Justice Chakraborty just said?

MR. SABYASACHI CHAUDHURY: I only have a few lines to add, you have already heard from Justice Chakraborty on how a trial is to be conducted. The difference between a Chartered High Court and the District Court is that, the evidence in the lower courts are taken in the narrative; *i.e.*, what the witness says, the Judge translates it, and records it in the fashion that the Judge has understood; and in higher courts, or the practice that we presently have in our High Court, is in a question-answer form. Therefore, your questions have to be precise, and thus, it may or may not be that you receive an answer to your requirement.

The advantage of doing trial litigation is, that it is both practicable before courts and in arbitral proceedings, where you may have to have a trial, albeit in a private forum; but directly or indirectly, the same rules apply. In arbitration also, the same procedure or the procedure as followed by the arbitrators or laid down by the arbitrators, apply. The advantage of being a trial lawyer, is that, you are aware of not only, the substantive law, but also the procedural law, and of course, the Evidence Act. That is a significant advantage, and what sort of objection you raise matters a lot. It's not that you raise objections each and every time, and I can tell you one thing, that trials are not as dramatic as the movies in India make it out. You won't have any of the drama when an actual trial takes place. That's the first impression, I got, when I saw a trial, it was very boring. But then, only when you are involved, can you derive benefit out of it; and the advantage is, what to ask and what not to ask in a trial proceeding.

If you are arguing a case before a Judge; before whom, the evidential proceedings have already taken place, then from my experience, irrespective of how brilliant your advocacy is, the Judge has already made up his mind, because the Judge has seen both the witnesses, it is only in that case, and unfortunately, that is why we had a system called: it should be before the same Judge who has heard the evidence, the task becomes easier. But, it is only in the case, where it is before a Judge who was not privy to the trial or the witness examination proceedings, then the impact of argument; that is, how you analyse the evidence and present the case, has real value in determining the outcome of the trial, because, it's a case of first impression. But in the first instance, where the Judge has already heard the respective witnesses, anybody who has put in years of experience in the profession, and the Judge himself having that experience, has already

understood, what is right and what is wrong and which way the mind is likely to go. The arguments become more of a formality. The shortest argument, I had heard was in a District Court, which is somewhat reflected in the reading material⁴⁹ that we had been provided with, that, “*My lord, you have before you the two witnesses, it’s mentioned in the plaint, and the written statement. You have understood everything, kindly, adjudge the case, and pass the decree.*”⁵⁰ This is the shortest argument, and it is a fact.

However, if the Judge has heard the witnesses of both the parties, then have no doubt in your head that it is a very difficult task to dispel the viewpoint that the Judge has already formed, because, Judges often take into account the demeanour of the witnesses; along with how the witness and the lawyer is reacting, and whether the lawyer is unnecessarily raising objections, or not. That is all I have to say, to this regard.

MR. ARUNABHA DEB: Thank you very much. Justice Datta wants to take the third question.

JUSTICE DATTA: Yes, I will answer Question 3: “*What are the important aspects to be kept in mind by a lawyer when he prepares himself to argue in court?*”

MR. ARUNABHA DEB: Justice Datta, if you would kindly also see Question 9: “*What should be the characteristics of a legal argument - precise and direct or detailed and informative overall?*”

JUSTICE DATTA: First and foremost, a lawyer must earn the confidence of the Judge. We find in court, that the senior lawyer is there, assisted by a junior lawyer. Once we start directing questions to the senior lawyer, if he is half-prepared, at one stage or the other, he is bound to turn towards his junior and ask him, “*What will be the answer to this question?*”. This implies that the senior lawyer is not well versed with the facts of his case, and this might go against the party; because as judges, we are working under tremendous pressure, and often get irritated. We try to keep our calm, but sometimes the situation is such that from 10:30 in the morning till 4:30 in the evening, we have to be fully attentive to the parties appearing before us. Now, when we are into the matter, and we are asking a question; and the senior counsel who is arguing before us doesn’t know the answer, turns towards his junior, the link is severed and, it might go against the party who is being represented. Since this is coming from a budding lawyer, I would recommend that if you are a junior lawyer, you must have the facts

⁴⁹ The Reading Material, prepared by the editorial team of the Calcutta Law Review and provided to the Speakers and the Moderator for the dialogue, has been published as an Editorial Preface to the Report of the Dialogue. See Atreya Chakraborty, Samriddha Sen, Anogh Chakraborty, Subhayan Chakraborty & Swati Banerjee, *Editorial Preface to the Report of the Dialogue on Advocacy in the Higher Judiciary and its Contribution to Evolving Jurisprudence*, 1 CALC. L. REV. 1, 26 (2019).

⁵⁰ *Id* at 5.

on your fingertips. If your senior turns towards you, and asks a question, you must immediately provide the answer. So far as law points are concerned, you may not be as good as your senior, as it would take time for you to develop these skills. But once you grow into a senior lawyer, again, facts on fingertips, and you must have your arguments supported by authorities. Together with that, another very important aspect of lawyering; is to know the preferences and dislikes of the Judge. I'll share an experience: it was sometime in 1987 or '88, I had just lost my father. I went to his colleague and told him, that I am a law student, and that I would like to go to the High Court with an arranged chamber senior. He advised me that before being embedded within the chamber of a senior lawyer, I should be properly acquainted with the High Court for two years, and try to find out what are the likings and dislikings of the judges. One is pro-tenant Judge, the other is a pro-landlord Judge, some are pro-established Judges, while others are pro-workmen, so must find out which Judge has preference for which particular class of litigants. As regards to the subject of writ jurisdictions; writ jurisdiction has been vested with the High Courts, and there is no question of going to the lower courts. There are different subject matters, and a Judge has to be given a determination to adjudicate cases pertinent to one such subject matter. Determination, means the authority that the Chief Justice has bestowed on the judge to decide a particular matter.

A determination, therefore, provides the Judge with the authority to decide all sorts of matters. First and foremost, before getting the matter listed, it is your duty to find out, whether the Judge is a pro-tenant Judge, or a pro-landlord Judge. If you find out that he is a pro-tenant Judge and you are representing a tenant, you should get the matter listed before him, thereby guaranteeing your allotment. Thus, it is important for the lawyers to first assess the situation, and then get the matter listed. Once the matter has been listed, thereafter the entire field of advocacy is open before you.

Mind you, those who are good at advocacy; we Judges, we are also human beings; we are not immune from developing preferences; not the preference that whenever one particular advocate appears, he or she gets a favourable order, but if the advocate is fair, honest and prepared, we will give him some more time to establish his point, because, we know, that this counsel is aware of the law, and is gradually developing an important point of law. However, if we find that an advocate appearing before us, making an argument which is absolutely unfounded in law, we do not wish to give such time to that advocate. This is because, we, as judges, don't have that time to spare; therefore it is very important for you, as budding legal practitioners, to also earn the confidence of the Judge, at a very nascent stage in the profession; that with the right encouragement and proper time, you, being aware of the law and having the ability to make consistent arguments, can deliver better before the Court. This is the pleading part. For a

junior lawyer, as Justice Chakraborty said, drafting is an indispensable part of the profession. If we are in the midst of an argument and the counsel submits a factual narration, if the Judge has some doubts regarding the said narration, he or she will ask, “*Where have you stated it in your written statement or plaint, petition or affidavit-in-opposition?*”

Drafting is usually performed by the junior counsel; now if we find that the senior counsel is arguing beyond the records of the pleadings, our perception will immediately turn against that party; because, before a court of law, the averments or submissions cannot go beyond your pleadings, and it is the duty of the counsels to plead correctly and accurately. These are the very basic aspects that you must know at this stage. As and when, you grow older and join the profession, you will be under the guidance of senior lawyers, who will tell you what to do and how to do it. But, for the present, remember these things, that you must first earn the confidence of the judge.

Now, I will proceed onto Question 4,⁵¹ also related to the enhancement of advocacy; which deals with: between the High Courts and the Lower Courts, what will be the preference for new advocates? At the beginning, as I said, it is for you to select. For exercising Constitutional Writ matters, you need not go to the lower courts, you have to go to the High Court. Now, if you want to practice on the Civil side, in the High Court, there are two sides, Original Side,⁵² and Appellate Side.⁵³ In the Original Side, you have suits, appeals, being carried from the orders passed in suits as well as in appeals.⁵⁴ But, on the Appellate Side, you don't have suits. On the Appellate Side, suits are decided by the lower courts, and an appeal from a decree or an order is carried to the High Court,⁵⁵ or in an interlocutory

⁵¹ Question 4 reads: “Between the High Courts and the Lower Courts, what will be the preference for new advocates, to enhance advocacy?”

⁵² See THE RULES OF THE HIGH COURT AT CALCUTTA (ORIGINAL SIDE), 1914.

⁵³ See THE RULES OF THE HIGH COURT AT CALCUTTA (APPELLATE SIDE).

⁵⁴ *Supra* note 33; See also THE RULES OF THE HIGH COURT AT CALCUTTA (ORIGINAL SIDE), 1914, Chapter X Rule 37 reads: “List of appeals to the High Court; what is to be entered there—Every appeal from the Original Side of the Court, and every reference from the Calcutta Court of Small Causes shall be entered in the list of appeals to the High Court.”

⁵⁵ See THE CODE OF CIVIL PROCEDURE, 1908, §100 reads: Second appeal.—(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law; (2) An appeal may lie under this section from an appellate decree passed *ex parte*; (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal; (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question; (5) The appeal shall be heard on the question so formulated and the

order⁵⁶ may be challenged by Article 227.⁵⁷ Now, unless you know how advocacy takes place in the trial courts, it may not be feasible for you; I don't rule out the possibility, there have been lawyers who have never been trial lawyers, but they have been very successful in the High Court. But, since this question has come from one of you, it would be our advice, that if possible, devote some time to the trial courts, if you want to be a civil lawyer, or even if you want to be a criminal lawyer. On the Criminal Side what we have is, bail⁵⁸ and anticipatory bail applications,⁵⁹ appeals from

respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question. Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.; The Supreme Court held that a perusal of §100 CPC clearly indicates that the High Court had the jurisdiction to interfere only when a substantial question of law is involved and even then it is expected that such a question shall be so framed although the court is not bound by that question as the proviso indicates. *See Annapoorani Ammal v. G. Thangapala*, (1995) 6 SCC 213.

⁵⁶ *See* THE CODE OF CIVIL PROCEDURE, 1908, Order XXXIX Rules 6-10.

⁵⁷ *See* CONSTITUTION OF INDIA, 1950, Article 227 reads: "Power of superintendence over all courts by the High Court.—(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories interrelation to which it exercises jurisdiction; (2) Without prejudice to the generality of the foregoing provisions, the High Court may: (a) call for returns from such courts; (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and (c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts; (3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein: Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor; (4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces

⁵⁸ An accused person is admitted to bail when he is released from the custody of officers of the law on furnishing satisfactory sureties for his appearance in court. Bailable offence as per §2(a) of the Code of Criminal Procedure means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force.

⁵⁹ *See* THE CODE OF CIVIL PROCEDURE, 1908, §438. It defines "anticipatory bail" as a bail to direct the release of a person who has yet not been arrested at the time when the court so directs.

convictions⁶⁰ or acquittals,⁶¹ and criminal revisions.⁶² Now, Criminal Revisions is a very intricate subject, and unless you know the Code of Criminal procedure well, you may not be in a position to make a foothold in the Criminal Side. You must know, how the procedures before the Magistrates are conducted, how it is conducted thereafter before the Sessions Court, and then you come to the High Court,⁶³ therefore, the choice is absolutely on you. Not everybody gets the opportunity. You must first attend lower courts, then gradually come over to the High Courts. But if you want to be a successful lawyer, kindly bring it into your head, that you must know the Civil Law first. If you know the Civil Law, no other law will pose any impediment for you. Gradually, you will realise that all other laws are based on civil law. So therefore, as regards to Question 4, it is entirely up to you, on which side you will choose to practice, and if you choose to practice on either the Civil or Criminal Side, it is recommended that you start with the lower courts.

I will answer Question 5 as well, it'll be just one line. Question 5 is: "*How important have PILs become in these times wherein it has become so important to conserve the environment?*" Our jurisdiction, that is the jurisdiction of the High Courts has been taken away, to this effect. Public Interest Litigations concerning environmental matters do not lie before the High Court any

⁶⁰ See THE CODE OF CIVIL PROCEDURE, 1908, §374. According to the said section, any person convicted on a trial held by a High Court in its extraordinary original criminal jurisdiction may appeal to the Supreme Court any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or on a trial held by any other Court in which a sentence of imprisonment for more than seven years may appeal to the High Court.

⁶¹ See THE CODE OF CIVIL PROCEDURE, 1908, §378. According to the said section, the victim shall have the right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation.

⁶² See THE CODE OF CRIMINAL PROCEDURE, 1973, §397(1) provides for Criminal Revisions. As per the said section, the High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, - recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

⁶³ When a person is aggrieved by the decision of a judicial authority, the decision may be challenged in a higher judicial authority by way of an "appeal". The framework of appeal in Indian law is— (i) Judicial Magistrate; (ii) Sessions Court; (iii) High Court; and (iv) Supreme Court.

further.⁶⁴ Can anyone answer as to why that is the case? Why has High Courts ceased to have jurisdiction in respect of environment matters?

AUDIENCE: National Green Tribunal?

JUSTICE DATTA: National Green Tribunal;⁶⁵ all environment matters are dealt before the Tribunal. This is the answer to Question 5. Next is Question 9, right?

MR. ARUNABHA DEB: Yes, Question 9, along with-

JUSTICE DATTA: Question 9 is: “*What should be the characteristics of a legal argument - precise and direct or detailed and informative overall?*” It again depends on the Judge. Some of the judges are very quick in grasping matters, they want precise arguments. You just convey the point of law or contention; and the judge will readily perceive it. However, there are some other Judges like me, who are not so quick in grasping matters, we take time. So, before us, you can be elaborate in your submissions.

MR. ARUNABHA DEB: At your own peril, if I may add ...

(Laughter)

MR. ARUNABHA DEB: Justice Datta, we have heard Justice Chakraborty’s and Mr. Chaudhury’s views on the question. Would you like to add anything on the aspect of legal skills?⁶⁶

JUSTICE DATTA: You develop legal skills with the days you spend in Court. Besides that, even when your senior is not called before the Court in any matter, or you are not assisting him or her in any matter, make sure that you are not roaming in the corridors only. You must be spending the entire day; you have come to visit the court; for a particular purpose in

⁶⁴ The National Green Tribunal has original (to be the first judicial forum to hear a case) and appellate (review a regulatory authority's decision) jurisdiction with regard to the implementation of seven environmental laws. These are the Water (Prevention and Control of Pollution) Act, 1974, the Water (Prevention and Control of Pollution) Cess Act, 1977, the Forest (Conservation) Act, 1980, the Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986, the Public Liability Insurance Act, 1991, and the Biological Diversity Act, 2002. The notable exception is the Wildlife (Protection) Act, 1972 which is not included. A significant number of cases that may arise under the Wildlife (Protection) Act are criminal cases—and the Tribunal has no jurisdiction over criminal cases. *See* NATIONAL GREEN TRIBUNAL ACT, 2010, §14.

⁶⁵ *Id.* The National Green Tribunal has been established on 18.10.2010 under the National Green Tribunal Act of 2010 for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.

⁶⁶ Question 11 reads: “How can I improve my legal writing skills?”

order to develop your professional or legal skills. Unlike the profession of a doctor, our profession is dependent on the knowledge and experience we gather while in practice. So, the more you spend your time in the court, the more you can learn how lawyers, your seniors are arguing and how they are tackling the judges and their adversaries. With time, you will automatically learn and develop the required skills.

I was told by one of my seniors that, “*Make sure that while leaving the court premises in the evening, you must ask yourself how many new points of law have I learnt today.*” This is important because there will be a stage when you will find that on many occasions, the client is approaching you or the senior is asking you as to how a matter should be dealt with. Therefore, spending time in a courtroom is very important. Once again, it’s the patience, which is the main thing. Here, I must again refer to the quote of another senior lawyer who said that our (legal) profession is not the profession of a highly paid person. Atleast, for the first five years of independent practice, you will continually slog, without any expectation of monetary compensation.

MR. SABYASACHI CHAUDHURY: Since the seminar is on the higher judiciary and you all are the future of the legal profession and perhaps someday will also be a part of the Bench, you must be aware of the various tribunals that are being constituted. Here, a question arises as to what is the impact of tribunalisation on the higher judiciary? The question also raises a concern, which I would like to share with the are young minds present here today, that gradually there seems to grow, a tendency to make the higher courts, especially the constitutional courts and mainly the High Courts, merely ornamental. This is because, over the period of last thirty years, all issues in respect whereof the High Courts used to have jurisdiction, no longer fall within the ambit of their jurisdiction. This way, the High Courts are slowly being denuded of their jurisdiction to specialized tribunals who have a separate appellate authority; even though you have the Supreme Court as the ultimate appellate authority.

These questions, that is the High Court’s jurisdiction being denuded by tribunals and are the tribunals part of the higher judiciary, are quite interesting indeed.⁶⁷ In a sense they are a part of the higher judiciary because

⁶⁷ The enactment of Administrative Tribunals Act in 1985 opened a new chapter in the sphere of administering justice to the aggrieved government servants. Administrative Tribunals Act owes its origin to Article 323-A of the Constitution which empowers Central Government to set-up by an Act of Parliament. The basic objective of the administrative tribunals is to take out certain matters of disputes between the citizen and government agencies of purview. See ADMINISTRATIVE TRIBUNALS ACT, 1985, §14 reads: “Jurisdiction, powers and authority of the Central Administrative Tribunal.—(1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately

they are adjudicating the same issues which were previously adjudicated by the higher judiciary. In another sense, although, they may have strapings of court, they are not really the traditional court. So, this is an issue which is of significant concern and could be discussed at length as a subsequent topic.

MR. ARUNABHA DEB: Thank you very much, Mr. Chaudhury. There's Question 12, this is really my favourite question, so first we get to that and then we can talk about this as the closing topic. The question is: “*There are moments in the courts where you don't get the exact words or exact argument to put forward while arguing with the opposing lawyer.*” This is a reality which we have all faced, how to overcome that? This comes from Swagata Biswas.

before that day by all courts in relation to—(a) recruitment, and matters concerning recruitment, to any All-India Service or to any civil service of the Union or a civil post under the Union or to a post connected with defence or in the defence services, being, in either case, a post filled by a civilian; (b) all service matters concerning—(i) a member of any All-India Service; or (ii) a person [not being a member of an All-India Service or a person referred to in clause (c)] appointed to any civil service of the Union or any civil post under the Union; or (iii) a civilian [not being a member of an All-India Service or a person referred to in clause (c)] appointed to any defence services or a post connected with defence, and pertaining to the service of such member, person or civilian, in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation 40 [or society] owned or controlled by the Government; (c) all service matters pertaining to service in connection with the affairs of the Union concerning a person appointed to any service or post referred to in sub-clause (ii) or sub-clause (iii) of clause (b), being a person whose services have been placed by a State Government or any local or other authority or any corporation [or society] or other body, at the disposal of the Central Government for such appointment. [Explanation.—For the removal of doubts, it is hereby declared that references to “Union” in this sub-section shall be construed as including references also to a Union territory; With the establishment of National Green Tribunal in 2010, jurisdiction of High Courts with respect to environmental issues has been taken away. *See supra* note 64; The Company Law Tribunal constituted under the Companies Act of 2013 enjoys authority to adjudicate disputes with respect to: (a) companies incorporated under this Act or under any previous company law; (b) insurance companies, except in so far as the said provisions are inconsistent with the provisions of the Insurance Act, 1938 (4 of 1938) or the Insurance Regulatory and Development Authority Act, 1999 (41 of 1999); (c) banking companies, except in so far as the said provisions are inconsistent with the provisions of the Banking Regulation Act, 1949 (10 of 1949); (d) companies engaged in the generation or supply of electricity, except in so far as the said provisions are inconsistent with the provisions of the Electricity Act, 2003 (36 of 2003); (e) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act; and (f) such body corporate, incorporated by any Act for the time being in force, as the Central Government may, by notification, specify in this behalf, subject to such exceptions, modifications or adaptation, as may be specified in the notification; *See THE COMPANIES ACT, 2013, §1(4).*

We'll ask Justice Datta, Justice Chakraborty and Mr. Chaudhury, to have an understanding of both the perspectives from the Bench and the Bar.

JUSTICE DATTA: Well, in such a situation if you feel that your inability might prove costly for your client, pray for an adjournment⁶⁸ and come back ready the next day. It is often seen that after the petitioner's counsel has argued and cited certain decisions, the other side's counsel when called upon to answer, may say that he needs time to go through the said decisions. It is perfectly fair, and time is generally provided to the other side. We say that we are supposed to know the law but we may not always be aware of all the laws. It is the same thing for the Bar as far as the counsels are concerned. It is good if the counsel can anticipate a certain decision or argument which might be brought up by the other side and accordingly prepares himself. However, this is always not possible.

In these cases, it is better if you say that you are not being able to find the correct authority or maybe even the correct words. English is a foreign language and so if you are searching for the appropriate word which you cannot register in your mind, you should pray for an adjournment and come back the next day. However, you must satisfy the judge of the genuinity of the prayer for adjournment and that such prayer has not been sought to while away time or delay the proceedings. Now the question arises as to how to ask for time? Let the judge know that certain new points or new authorities have been cited and that you require time to get yourself prepared. Believe me, most of the judges grant that.

MR. SABYASACHI CHAUDHURY: I just want to add one line that if you are thorough with your case and your research, seldom will you come across these situations. But yes, the rarity in which it may occur, there's no shame in admitting that so far as an aspect is concerned, I have not checked it. You are responsible, directly and indirectly in laying down the law. Hence you must never make an argument on any aspect of law in which you have no knowledge or experience. The judge relies on what you are saying, so indirectly you are responsible for setting a view or making a precedent which is incorrect, solely because of your ignorance.

If you are always prepared, the question that has been framed will not occur at all, ninety-nine percent of the time, but it is that one percent of time in respect of which Justice Datta has stated that there's no shame; none of us are supposed to know all the law or all the precedents because laws are evolving everyday; new statutes are coming, old ones being repealed, amendments being made and so on.

⁶⁸ See THE CODE OF CIVIL PROCEDURE, 1908, Order XVII Rule 1 states that, the Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit for reasons to be recorded in writing.

There's no shame in saying that I have not checked up on a certain aspect. However, ninety-nine percent of the time, if you have worked out the brief, then you are unlikely to face such a situation where you might hesitate to put forward the exact argument or where you might be taken aback by a certain argument by the other side.

JUSTICE DATTA: There is one thing which I feel requires to be emphatically conveyed, don't try to be smart in Court. If you don't know the answer to a position of law or fact pertinent to the case, the judges usually understand; just state before the Court that you are not aware of it. If the judge finds that you are trying to waste away time, it might prove to be counterproductive to the interests of your case. Better to be fair, rather than smart.

JUSTICE CHAKRABORTY: The common substance is that you must satisfy the Court. You must be able to prove your thorough preparedness in the matter. This occasion should not arise in case of any factual issue, but may happen in case of a legal issue. If the judge is satisfied that you are ready for your clients and that you have already faced many points of law; and some additional points of law have been raised by the other side, for which you might not have been sufficiently prepared, then it is justifiable.

MR. ARUNABHA DEB: Thank you very much, Justice Chakraborty. We come to two questions together on precedent, so Mr. Chaudhury will deal with Question 6: "*What should be the scope and advantage of public and private litigation against artificial intelligence?*"; and Question 8: "*In view of constructive constitutionalism, will precedents be accepted as reference or will its persuasive application be limited?*"

We come to precedents as the last topic of discussion; if Mr. Chaudhury would deal with it.

MR. SABYASACHI CHAUDHURY: The reason that I am dealing with this question is that the question itself, imputing no disrespect to the person who has asked it, it shows the confusion which is prevalent in the young minds today; you are trying to assimilate too many things and you are trying to be intellectual in respect of a certain aspect or branch of law without understanding the basics of the same. Here, it must be made clear that there is absolutely no link with artificial intelligence vis-à-vis the scope of public litigation. Artificial intelligence, for or against can be a topic, it's only a subject matter. The term "*artificial intelligence*" could only be a subject matter of discussion just as any other civil, criminal or constitutional issue. There is no extra weight in the term "*artificial intelligence*". As a result, I am not being able to appreciate the question.

What this shows is that in the scenes which we are exposed to, these are terminologies which are not familiar to us. You are now having access to everything at your fingertips, and you may come across newer and more

complex technological terminology in the days to come. Hence, a confusion may prevail, but you must bear in mind that the question which you are framing, must stem from an aspect of the subject known to you. This is needed in order to ensure that the question you are framing is proper and clear. You do not need to sound very bombastic or intelligent by framing a complex question. However, all that I have said is not to demean anybody. It is just a risk that young minds are facing; a risk that we are bombarded with so many topics, there is always a possibility to mix up everything.

In respect of the question of selection of where you are going to practice, just remember that, wherever you think you can be successful or you can practice your profession with dignity, that is the best place for you. There is no extra attraction in Higher Courts or Supreme Court or even Trial Courts for that matter. Wherever you go, you must know your potential, so select the place according to your limitations. See, if you have hesitation in speaking the English language, it is better to go to the district courts where you can be as good a lawyer by arguing fluently in Bengali.

There is neither any harm, nor any shame, involved in it. There is no glamour in saying that you practice in High Court but your practice is below average. If you are a successful lawyer in a District Court, you are as successful as anybody in life.

Coming to Question 8. It was: “*In view of constructive constitutionalism, will precedents be accepted as reference or will its persuasive application be limited?*”

If it is a precedent, it is binding. Precedent, in the sense that if it is a precedent of the High Court, it is binding on the lower judiciary.; if it is a precedent of the Supreme Court, it is binding upon all other courts in India.⁶⁹

Now, what is it that we mean by the persuasive value of precedents? A judgment is said to have persuasive value when it is a judgement, maybe of a different court, or of the division bench or of another single judge, which is not binding on a division bench, but it may have persuasive value. You will never know whether the division bench will adopt the same logic or not; hence such judgment is said to have persuasive value. Therefore, once you understand the distinction between precedent and persuasive value, the question is automatically answered.

MR. ARUNABHA DEB: Thank you very much, Mr. Chaudhury. Coming to the question of precedent, since the topic speaks of the evolution of jurisprudence through advocacy; are they becoming more and more important to how jurisprudence is evolving? For instance, to what extent can the *obiter* of a higher court be considered either persuasive or as a binding

⁶⁹ See CONSTITUTION OF INDIA, 1950, Article 141 reads: “The law declared by the Supreme Court shall be binding on all courts within the territory of India.”

precedent. If you will share a little bit on this, particularly at a time when judicial activism seems to be the order of the day. We'll start with Justice Datta and then hear Justice Chakraborty.

JUSTICE DATTA: How many of you know what are precedents? (*show of hands*) Very good, most of you. When are precedents required to be placed before the courts? To me, if your case is strong on facts and the case is simple, you don't require any precedents. Therefore, if a case can be decided by a judge, without the aid of any precedents, do not unnecessarily burden the judge with precedents or give scope to the other side to find out something from the precedent which may be used against you.

So, be very careful while relying on precedents. There's a saying that don't be a slave of precedents. I started today's discussion by saying that I cited an Orissa High Court judgement before a Division Bench. Why did I cite that? Because the law was uncertain so far as Calcutta High Court was concerned and there was no judgment of the Supreme Court which would have been binding on the judges. As a result, I cited the precedent, because it was dealing with the same point, which was involved in my case.

Therefore when a legal issue comes up for consideration before a judge or judges and you find that your argument is not being accepted by the judge, then you wait, with honey in your tongue and bring (the factually relevant precedent) to the notice of the judges: "*My Lords, your Lordships perhaps are not agreeing with me but look here, the judges of another high court have thought the same way.*" This is how you place the precedent before the Court.

It is not necessary that the Calcutta High Court would be bound by the judgment given by any other High Court, but given the fact that the judgment, in this case, has been delivered by two judges of a separate High Court, the said judgment definitely demands some consideration.

Do not cite precedents only for the purpose of showing the judges as to how well you have researched before appearing in the Court. A precedent should answer or clarify the point which is being deliberated before the judge and has not been answered by the same Court earlier.

Now, one thing comes to my mind; let us speak of a situation where there is a central legislation passed by Parliament. Now, the constitutionality of one provision of such central legislation is challenged before the High Court. Right? The High Court upholds the challenge and the provision is struck down. What would now be the position? Would the judgment be applicable only in the territory where the High Court is situated, or would it be applicable to the entire country? I am repeating; central legislation, one section is challenged before the High Court at Calcutta. The Calcutta High Court upholds the challenge and says this particular provision is *ultra vires* the Constitution. What will be its effect? The answer is that if the Calcutta High Court has declared a provision of a central legislation

to be ultra vires, it will be treated as *ultra vires* in respect of the entire country.⁷⁰

These are many things that you will learn with the passage of time. First, prepare yourself on the theory part, in law school. Once you join the profession, you will find a vast difference. Whatever you have learnt here may not be applicable there. You will have to start a new innings, just as a batsman takes fresh guard at the beginning of his innings. Those of you who play cricket will understand the reference of taking fresh guard. Forget about what happened here, those who are very brilliant, always attaining the first position in class, may not necessarily find a foothold in the profession. Instances of mediocre students becoming extremely successful in the profession, are manifold within the legal fraternity. Don't worry, you will only have to put in hard work, nothing more.

I am reminded of two old adages: "*Struggle for Existence*"; it will be struggle for existence in the initial years (of practice); and later on, the "*Survival of the Fittest*". I have interns coming from various Universities, whom I have found to be brilliant. Within five (5) minutes, they find out precedents for us. If we give (them) a topic; brilliant research work, fantastic literary skills. But when I put out a question on the basics, it appears hollow. So when you construct a multi-storeyed building without the foundations being stable; what happens is that for five (to) ten years, it will be there; and afterwards, it will tumble (down). So, rather, put your head down for two to three years; go to college and get the license-to-practice; wait for the license-to-practice, and thereafter put your hard work and skills into it.

MR. ARUNABHA DEB: Thank you, Justice Datta. Justice Chakraborty and Mr. Chaudhury, if you wish to add something.

JUSTICE CHAKRABORTY: I share the same view with Justice Datta. What we mean by precedents, are (those) that are being decided by the Supreme Court. The Supreme Court's decision is binding throughout the Indian Courts;⁷¹ so if a particular point of law has already been decided by the Supreme Court, it is binding upon all Courts of India. Now, if someone wants to argue that, there is a change in the situation, due to socio-economic reasons, then that (argument) has to be presented before the Supreme Court; and only the Supreme Court by constituting a larger

⁷⁰ See Dr. T. Rajkumari v. Government of Tamil Nadu, W.P. (C) No. 36735 of 2015. It was held, "it is trite to say that once a High Court has struck down the provisions of a Central Act, it cannot be said that it would be selectively applied in other States." It was further held that the provisions declared unconstitutional were not applicable across the country unless the Supreme Court stayed or overruled the High Court judgment.

⁷¹ *Supra* note 69.

bench,⁷² can decide that question, and other Courts are bound by that decision of the Supreme Court.

MR. SABYASACHI CHAUDHURY: I just have one line to add: don't be unnecessarily bogged down by precedents. Now with this, what we term as the "Google Generation", the idea is to find out precedents very fast. Any topic you search you will get hundred hits, either of this High Court or that High Court or that of the Supreme Court. Promote your independent thinking and construction on the section or the provision of the law, and then see whether that precedent supports your independent thinking or not; don't just be a slave or a robot that says: "Alright for this provision there is so and so case and so v. so, and so on"; You get ten precedents, but you must bear in mind what the (relevant) section is and whether it has been correctly interpreted; because, we never know if all the precedents will be fit.

It may be the case that, one part of the precedent has already been overruled; and that is why precedents are as good as the day on which you are citing it. You never know what you are citing today, may not be the law tomorrow. So promote your independent thinking; and as everybody is saying, go to the basics, read the section first, the basic law first, and then come to the interpretation and the factual background in which it has been interpreted; but then if you just go into the software system and the search engines, you will get number of precedents; but you will have the tendency to blindly quote it without understanding whether it is applicable to the fact; and whether it is correctly interpreting the law.

So, the moral of the story, or the bottom line, is to get the basics right. If you are reading a particular law, ensure that you know the basic sections and the basic law right; and then of course, the precedents. Precedents are all enhancers, but don't be dependent upon or get bogged down by them. The flip side is that your own independent thinking, gets bogged down; all of us have a mind and sometimes (a) brilliant points are brought up by law juniors, which ultimately is more appealing than what has been laid down

⁷² See *Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors.*, AIR 2011 SC 312. The Supreme Court held that the judgment of a larger Bench is binding on a smaller Bench or co-equal Bench. If the court doubts the correctness of the judgment, the only proper course would be to make a request to the Hon'ble Chief Justice to refer the matter to a larger Bench of appropriate strength; The Supreme Court has consistently held that in case of conflicting judgments of co-equal benches, it is desirable to refer the matter to a larger Bench. See also *State of MP v. Mala Banerjee*, (2015) 7 SCC 698; *Atma Ram v. State of Punjab*, AIR 1959 SC 519; *Zenith Steel Tubes and Industries Ltd. v. SICOM Ltd.* (2008) 1 SCC 533).

in the precedents, because nobody has thought of it in that manner or viewpoint. Encourage independent thinking, but of course, have due respect to precedents, because they are the pillars of our legal system in establishing certainty of law; but also simultaneously encourage independent thinking.

MR. ARUNABHA DEB: Thank you, Mr. Chaudhury. I believe we have one question from the audience.

DR. SOHINI BANERJEE:⁷³ Thank you for the opportunity. I have one question for the Learned Lordships in the Panel, whom I thank for sharing their valuable insights on today's discussion. Would you like to inspire the future generation of judges and practitioners present here today, by sharing some of the most thought-provoking judgements you have had the opportunity of authoring.

JUSTICE DATTA: For the answer to that question, you need to read the judgements, as we can only provide references of certain judgements. I, however, intend to partially answer that question in reference to the subject of social obligations of a lawyer, as raised by one of the students. I can tell you, from my personal experience, the social obligations of a judge. Not to take any credit, but sometimes it gives us a sense of pleasure if we can say something positive about ourselves, everyone has experienced that feeling; and I don't find it to be particularly wrong; but whatever I have done, I have done it as a Judge of the Calcutta High Court, so that it glorifies the institution. I'll cite two instances.

As regards to the construction of the Maa Flyover in Calcutta, it so happened that the contractor who had been awarded the work order had faced certain difficulties which led to the premature stoppage of construction work. At one point of time, for four years there was no resumption of work on the flyover. After the change of Government in 2011, the administration floated a fresh tender and debarred the earlier contractors from participating in the new tender.

The debarred contractor responded by submitting a writ petition before the High Court, challenging the grounds for such debarment.⁷⁴ The Government defended such debarment by claiming that the debarred contractor did not complete the work on the earlier occasion. The aggrieved contractor, however, responded by submitting documents showing that the aggrieved had repeatedly written to the government regarding spatial difficulties faced in completing the work order; and unless the administration removed those difficulties, it will not be possible for the

⁷³ Guest Lecturer, Faculty of Law, University of Calcutta.

⁷⁴ *See Hindustan Construction Co. Ltd. & Anr. v. Kolkata Metropolitan Development Authority & Ors.*, 2014 SCC OnLine Cal 7562.

contractor to finish the work. It was noted that the Government neither replied to such correspondences, nor did it provide the contractor with a solution to the difficulty conveyed. This was the dispute that was raised before me.

On the first day of hearing, I directed the aggrieved contractor to place its bid along with other bidders, by way of an interim order,⁷⁵ to find out what is the overall position of the tender. It was discovered that apart from the aggrieved contractor, there were two other bidders, but they had quoted higher rates. Accordingly, as tenders are granted to the lowest bidders as an obligation towards the most judicious use of public money, I directed the Counsel for the Government to grant the award to the aggrieved contractor, being the lowest bidder; and that I will continually monitor the entire construction work and see to it that the construction for the Maa flyover is completed within the fixed deadline. Eventually, the flyover was inaugurated in the year 2014-2015.

On this occasion, I felt that I was able to do something for the society, without deciding solely on the issue as to who is right and wrong; rather squarely focusing on facilitating the completion of this infrastructural project for the benefit of the general public. I accordingly directed all my Court orders towards the completion of the project. That was one of the instances.

The second is the tunnel boring project under the river Hooghly, it was the same situation; people floated tenders without visualising what they might face in the future.⁷⁶ This tunnel from Howrah to Esplanade, which was being completed, was to pass by the sites of three Heritage Buildings and there is a statute,⁷⁷ which states that even underground, the distance to be maintained between the Heritage Sight and the tunnel has to be 100 meters.⁷⁸ Thus, without the necessary clearance of the Archaeological

⁷⁵ A temporary order issued by a judge pending a hearing on the matter where a final order will be issued. *See* THE CODE OF CIVIL PROCEDURE, 1908, §151 reads: “Saving of inherent powers of Court—Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

⁷⁶ *See* *Transtonnlestroy Afcons Jv & Anr. v. Kolkata Metro Railway Corporation Limited & Ors.*, 2017 SCC OnLine Cal 9206.

⁷⁷ ANCIENT MONUMENTS AND ARCHAEOLOGICAL SITES AND REMAINS (AMENDMENT AND VALIDATION) ACT, 2010.

⁷⁸ *Id.* §20A reads: “Declaration of prohibited area and carrying out public work or other works in prohibited area. —Every area, beginning at the limit of the protected area or the protected monument, as the case may be, and extending to a distance of one hundred metres in all directions shall be the prohibited area in respect of such protected area or protected monument: Provided that the Central Government may, on the recommendation of the Authority, by notification in the Official Gazette, specify an area more than one

Survey of India, the work could not progress. The tunnel boring machines, as you may have seen in the newspapers, are humongous and do not have a reverse gear, and thus can only proceed forward.

In terms of the actual contention, the Archaeological Survey had rightly submitted before the Court that the clearance sought cannot be granted under the provisions of the statute;⁷⁹ while the opposing counsel contended that, if the tunnel boring machines cannot go back, they will have to stay wherever they are under the river, and may invite a crisis. As luck would have it, I was in Delhi, and I happened to look into the Times of India and found that the Delhi Metro Rail Corporation had placed an advertisement, specifying the details of the inauguration of a Pink Line of the Metro, which was to go by the sites of the Jama Masjid, Red Fort, and another historical site. In that advertisement they had provided the distances as well: twenty meters, twenty-five meters, and thirty meters, for the said Heritage Sites respectively.

I knew what I should do; I took a copy of the Times of India, came back to Calcutta and showed it to the counsels for the Archaeological Survey and the Union. I said that if this construction can be permitted in Delhi, why can it not be allowed in Calcutta? They claimed that certain special benefits were given to the Delhi Metro. I asked for the application of those benefits to the Calcutta Metro as well. When the counsels argued that it cannot be done, I conveyed my interest in obstructing the construction of that Delhi Metro Line on the basis of the same statutory reasons for which the Calcutta Metro construction was denied; and summoned the Cabinet Secretary to appear before me.

On the very next day, the Archaeological Survey had granted the permission, although the statute was clear on the disallowance of tunnelling within 100 metres of a historical or heritage site. Thereafter, the Act has been amended.⁸⁰ At present, the tunnel from Howrah to Esplanade is complete.

This is a part of my social obligations as a judge. In addition to the adjudication of disputes and deciding whether any statutory violation has

hundred metres to be the prohibited area having regard to the classification of any protected monument or protected area, as the case may be, under section 4A.”

⁷⁹ *Id.*

⁸⁰ *See* ANCIENT MONUMENTS AND ARCHAEOLOGICAL SITES AND REMAINS (AMENDMENT) BILL, 2017, §3 reads: “The prohibition of new construction within prohibited area of a protected area or protected monument, is adversely affecting the various public works and developmental projects of the Central Government. In order to resolve the situation arising out of the prohibition on any construction under section 20A of the Act, a need has been felt to amend the Act to allow for construction works related to infrastructure financed and carried out by any Department or office of the Central Government for public purposes which is necessary for the safety or security of the public at large.”

occurred or not, I should also see to it that the benefit goes to the public; because what is the utility of the invested public money, if the (infra-structural) project is not taken to its logical conclusion. In order to do so, at times a judge has to be an activist, otherwise it becomes very difficult to perform the necessary social obligations. People now trust the judiciary; you have seen how the judiciary is made to interfere in almost every facet of lifestyle.

Many theorists may even contend that this is a subversion of the Separation of Powers theory⁸¹ as envisaged in the Constitution,⁸² but a Judge cannot help it; often in public interest and in justice, equity and good conscience. If there is an absence of proper governance, somebody has to step in and govern, and it is the judiciary which has now involuntarily inherited the mantle of governance.

(Applause)

JUSTICE CHAKRABORTY: As far as I am concerned, any decision authored by myself, whether it is good or bad, is to be decided by the

⁸¹ See MONTESQUIEU, THE SPIRIT OF LAWS 152 (1748). “When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. There would be an end of everything, where the same man or the same body, whether of the nobles or the people, to exercise those three powers, that of enacting the laws, that of executing the public resolutions, and of trying the cases of individuals”.; The Separation of Powers theory embodies a three-dimensional power distribution structure, involving: (i) that the same persons should not form part of more than one of the three organs of Government, e.g., the Ministers should not sit in Parliament; e.g., the Judiciary should be independent of the Executive or that Ministers should not be responsible to Parliament; and (iii) that one organ of the Government should not exercise the functions of another, e.g. the Ministers should not have legislative powers. See WADE & PHILIPS, CONSTITUTIONAL LAW 22, 34 (1960); Aristotle described three elements in every constitution: the deliberative element, the element of magistracies, and the judicial element. See generally Robinson, The Division of Governmental Power in Ancient Greece, 18 POLI. SCI. Q. 614 (1903); With the emergence of Parliament, the theory of the three-branched government appeared in Locke’s Treatise of Government (1689), wherein the three branches were defined as “executive”, “legislative” and “federative”. See also G.B. GWYN, THE MEANING OF SEPARATION OF POWERS 3 (1963).

⁸² See Kartar Singh v. State of Punjab, AIR 1967 SC 1643. RAMASWAMY J. stated: “It is the basic postulate under the Indian Constitution that the legal sovereign power has been distributed between the legislature to make the law, the executive to implement the law and the judiciary to interpret the law within the limits set down by the Constitution.” See generally THE CONSTITUTION OF INDIA, 1950, Articles 32, 50, 79, 105, 117, 145, 225, 226, 227 *et al.*

Appellate Court; and whether it is thought provoking or not, is to be decided by yourself. Thank you.

(Laughter)

IV. CONCLUDING SPEECHES

MR. ARUNABHA DEB: Very aptly put. Thank you very much everybody. With this session, we bring the dialogue to an end. It has been very engaging. Thank you very much Justices Datta and Chakraborty, Mr. Chaudhury, and Professor Das; and I think congratulations are, once again, due to the members of the Journal and Seminar Committee for putting this together and for holding this discussion on such a timeline. Thank you very much.

(Applause)

JUSTICE DATTA: If you are prepared to take more advice from us, please let us know. This is something we owe to our institution, from where we have graduated. We would be absolutely ready to help out all of you. We are not here to educate you on law; we are here only to guide and enrich you with our experience, so that you evolve as a lawyer; nothing more, nothing less. Like your parents, we are your elders; and as such, if any of you require any help, feel free to ask us. And if you want us to come back again, that is for the Committee to decide.

(Laughter)

JUSTICE CHAKRABORTY: We would all be very proud to see all of you succeed.

MR. SABYASACHI CHAUDHURY: Just to add, I am also an alumnus of this Department.

(Laughter)

MS. SURYASIKHA RAY:⁸³ Good afternoon everyone. The speakers, our faculty members and ladies and gentlemen; I, Suryasikha Ray, Joint-Secretary of the Journal and Seminar Committee of the Department of Law, University of Calcutta, would like to propose a vote of thanks on behalf of the Executive Board of the Journal and Seminar Committee. I personally would like to express my sincere gratitude to all the esteemed panelists for having spared their precious time in contributing to the panel in today's dialogue. I personally thank Mr. Arunabha Deb for having agreed to be a part of today's dialogue in the capacity of a Moderator and for having been

⁸³ Year III B.A., LL. B; Senior Executive Editor, Calcutta Law Review, Joint-Secretary, Journal and Seminar Committee of 2018-19.

very kind and accommodative of the Committee's unintentional errors in the organisation of the dialogue.

My heartfelt thanks go out to all the Special Invitees for having graced this event with their presence. I, on behalf of the Committee, would also like to express our heartfelt gratitude to Mr. Akash Mandal, the Student Convenor of the Student Committees of the Department of Law, University of Calcutta, to sincerely acknowledge his contribution to the organisation of today's dialogue.

I personally would like to thank Mr. Swapnil Karmakar, Partner of 2 Odd Cathodes, for designing the Posters, Flex, Attendance Certificates and Mementos for the Dialogue. The Executive Board also thanks, Susom Chatterjee '20, Ahana Bag '22, and Archisman Bhattacharya '22, for capturing some of the best moments of the dialogue through the lenses of their cameras. Concludingly, I would also like to thank all the attendees for having being a part of today's event and making it successful. Thank you and have a great day ahead.

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