

Academic freedom only for the online avatar?

– Calcutta High Court puts limits on sociological debate

By Hans Dembowski

First of all, it is necessary to state that I do not – and never did – intend to scandalise or belittle the Indian judiciary in any way. To the contrary, my work was driven from the outset by the understanding that an independent judiciary is essential for any country to enjoy the rule of law, democracy and good governance, and that India's performance in these fields is commendable given the bitter poverty the country struggles with.

I started my research fascinated by the phenomenon of public interest litigation in India. PIL is about citizens taking state authorities to court because of public grievances. In various fields, ranging from human rights to environmental matters or corruption, judges have not only heard such cases, but often ruled in favour of the petitioners against state authorities.

As a German journalist and sociologist dealing with issues of global development, I found PIL to be very interesting, and decided to embark on a PhD project. In the mid-1990s, the general prejudice in scholarship was that the courts do not really make a difference in poor countries; but apparently things were different in India. Moreover, I found PIL to be under-researched. In the mid 1990s, there was quite a bit of South Asian legal writing on PIL, but the social sciences had hardly taken notice of the phenomenon. So I decided to do case studies of environmental litigation in the megacity of Kolkata (then still Calcutta).

In academic terms, my work must have made sense, as my book “Taking the State to Court – Public Interest Litigation and the Public Sphere in Metropolitan India” was published by Oxford University Press, one of the leading companies in the field. Moreover, Camena Guneratne assessed the relevance of the book in the Cambridge Law Journal (November 2001, Vol. 60, p. 636) as follows: “The author ... has produced a readable and enlightening book. Its interest lies in the fact that many of his observations are probably applicable in varying degrees to many other countries of the region faced with similar issues of democratic governance and lack of ‘public sphere’. This book should prove useful to those working on these issues including public interest activists, legal practitioners and researchers.”

However, scholarship did not take much note of the book. The reason was that, a few weeks after the book launch at the Calcutta Book Fair of 2001, the Calcutta High Court started contempt-of-court proceedings against myself, the publisher and several others. As far as I know, all accused (with my exception, I was never officially notified) apologised to the court, and OUP discontinued distribution internationally. To my knowledge the case has been kept pending since. I was never contacted at my Frankfurt address, even though my whereabouts were known – and would not be hard to discover anyway. I am listed in the local telephone book, and Google will quickly reveal to anyone interested that I have a permanent job in my hometown.

The irony of the matter is that my book's assessment of the Indian judiciary in general and PIL in particular is, in sum, quite favourable. At the time of publication, two major arguments were being made against PIL. The first was that judges were overstepping their authority, busying themselves with issues under the jurisdiction of elected governments. The second was that PIL was something to be welcomed in legal terms, but hardly had any impact on the realities of social life. By contrast, my book argued that PIL was helping to entrench democracy in India and, in the urban agglomeration under scrutiny, had made a real difference in several places.

My case studies dealt with litigations concerning a) the East Calcutta wetlands and b) the state of civic amenities in Howrah. These issues are not inter-related; the locations are on either side of the Hoogly River. Both issues are highly complex. At the time of publication, court proceedings had been going for long enough to allow for a sociological assessment.

In the East Calcutta wetlands, the protection of a fragile environment on the urban fringes was at stake. The area, according to local experts, serves several functions for the metropolis – for instance, as a “Waste Recycling Region”. Nevertheless, urban expansion put pressure on this area. In retrospect, it is clear that a High Court Judgment to protect the Waste Recycling Region has been obeyed to a very large extent.

In the *Howrah Matter*, an assertive NGO demanded the improvement of the civic infrastructure in India's oldest industrial town. Among other things, this case led to public morgues being improved all over West Bengal after the High Court had found the state of the

Police Morgue in Howrah unacceptable in the mid-1990s. The socio-legal dynamics were similar on both sides of the Hoogly. The petitioning NGOs achieved considerable results. The impact on the ground reality was more than merely symbolic, though many problems remained unsolved.

Basically, my book does two things. It examines how inadequate urban planning (and poor governance in general) caused dramatic environmental problems in the Kolkata agglomeration; and it discusses to what extent the High Court and the Supreme Court of India have been able to alleviate citizens' grievances. My conclusion was – and remains – that the judiciary is providing an additional, important space for public discourse, literally making government institutions responsible, in the sense of making them respond to public queries.

To give an example of non-transparent governance: Only after Google Earth updated its Kolkata files in 2006 was I able to confirm that the High Court order to protect the Waste Recycling Region in the wetlands had been obeyed to a very large extent. It is easy to compare the satellite images with map the High Court based its decision on. In 1999, when I concluded my case studies, however, it had been impossible to tell whether these boundaries had been complied with. Official data on the matter were not to be obtained. It does seem a bit ironic, to say the least, that a California-based multinational is now shedding light on a matter of public interest that agencies of the West Bengal government long kept in the dark.

In sociological terms, I believe my book came up with a theory-relevant distinction between the normally blurred concepts of “public sphere” and “civil society”. In this view, the public sphere emerges once state agencies become included in the debate and bargaining that is permanently going on among the various interest groups that form civil society. In this sense, a true public sphere did not exist in Kolkata in the 1990s. Government agencies tended to stay beyond public reach, for instance by using a foreign language (English), denying access to relevant documents and not finalising urban planning for the hot spots of urban development.

My view deviated from much scholarly writing, according to which the complexity of India's social fabric is the root cause of troubled governance. The immense variety of religions, castes, languages et cetera was said to prevent civil society from placing checks on the state. That notion is misleading, at least in the megacity I became familiar with. In my experience, Kolkata's civil society is quite vibrant and in many ways similar to what I know in Germany,

but government bodies in West Bengal display repressive characteristics more reminiscent of colonial power structures than of representative democracy. Therefore, I considered civil society the victim, rather than the cause of poor governance. Accordingly, I believe academic debate should focus on the state apparatus rather than the social fabric.

Of course, it is beyond the scope of the courts to tidy up all facets of governance. The complex problems of megacity planning cannot to be solved by judicial order. In many cases, grievances mentioned by NGOs were not resolved; and it seemed obvious that neither High Court nor Supreme Court were prepared to tackle the underlying issue of inadequate town planning and implementation thereof. On the other hand, my book did point out that it is beyond the realistic scope of judges to effectively perform the duties of town planners. That, after all, is a demanding profession in its own right.

I concluded in the book: “Public Interest Litigation has, several times, made a difference in people’s immediate surroundings. While it does not provide an easy road to official accountability and democratic deliberation, it does raise hope for change.”

So why were some judges obviously unhappy with the book? The answer probably lies in chapter 7, which moves on from “hard” case-study facts derived from court orders, government plans and other written documents. Chapter 7 examines day-to-day life in the High Court and in civil society, including rumours of corruption. The image that emerges of the High Court is one of an institution that does not enjoy undivided popular trust. While this image may not be favourable, I would still insist that it was true at the time and that my description would hardly seem unfair to critical readers without personal stakes in the matter.

Let me emphasise once more: I neither raised any legal charges against anybody, nor did I intend to scandalise the judiciary in any way. I have always stated that chapter 7 deals with gossip and hear say. However, such rumours were widely believed and seemed, to a large extent, to reflect the conventional wisdom of Kolkatans.

What people think (and say off the record) matters, at very least in sociological terms. It is impossible to accurately assess the socio-political role of the courts without taking this reality into account. Moreover, chapter 7 cited articles on corruption in respectable media such as the *Asian Age* or *India Today*, which, as far as I know, did not trigger any judicial intervention.

I have consulted lawyers and social scientists, including Indian ones, and no one doubted that what I have written is basically true. However, my empirically-founded views may apparently not be published in an academic book. It seems ironic that judicial action, in my case, contradicted the optimism expressed in my book of the judiciary deepening democracy by providing more transparency. Instead, what happened raises other, more fundamental questions: Is it permissible in humankind's most populous democracy to discuss the role of the courts? And who sets what limits to such discourse, thus restricting the fundamental freedoms of press, expression and academia?

It took me five years and the support of Heinrich Böll Foundation to regain the copyright, get the manuscript typed and proof-read once more and find an appropriate webhost, the Essen-based NGO Asienhaus. Today, the web-version of my book is internationally accessible at www.asienhaus.de/taking-state-to-court, and I sincerely hope that Indian justices will not regard this site as contemptuous of their work (which it is not) but rather as a contribution to the universal debate on the rule of law, democracy and good governance.

Good governance depends on reliable systems of law enforcement; and an independent judiciary is crucially relevant. On the other hand, in a democracy no branch of government should remain unchecked. Scholars, including those from the World Bank and the United Nations Development Programme, normally point to public discourse in the media and civil society as the means for monitoring judicial powers; and of course, academic publications are of particular importance in this context. Relevant essays, I believe, should be readily available to everyone interested, and not only to those with access to the world wide web.

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