

## Can Courts Empower Civil Society? Public Interest Litigation and the Public Sphere in India \*

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*This essay assesses empirical cases of environmental litigation in Calcutta. It argues that the judiciary in India is giving non-governmental activists some leverage over an otherwise uncontrolled state apparatus - but that this has only limited results in terms of improving the living conditions of the people at large. The courts are inspiring HOPE for the alleviation of grievances, but - so far - do not inspire TRUST in institutions of democratic government. After a brief elaboration on the theory of governance, the first section of this essay will examine Calcutta's bleak ecological situation and link it to official agencies' malfunctioning. Sections two and three will provide case studies of public interest litigation before the local High Court and the Supreme Court of India. The conclusion in section four will then return to the general issue of governance, civil society, and public sphere.*

The terms "civil society" and "public sphere" are often used interchangeably (Chandhoke, 1995). They stand for the norms guiding the socio-political life of western style, pluralistic democracy. To understand certain aspects of mis-governance in India, it is, however, useful to make a distinction between these two terms.

The core meaning of "civil society" is the "criss-crossing network" (Dahrendorf, 1996: 237) of various, non-state institutions. These include families, religious groups, trade unions, clubs, market boards, schools and universities, etc. They all depend on constitutionally guaranteed civil liberties such as the freedoms of speech, of assembly, of association, of the press, of religious belief. These institutions are independent of the government and are not subordinate to the state. They are immediate expressions of people's needs, preferences, and choices.

Craig Calhoun (1993: 273) defines the "public sphere" as an "arena of deliberate exchange in which rational-critical arguments rather than mere inherited ideals or personal statuses could determine agreements and actions". This, of course, has to involve all branches of government. Official data must be available and reliable, there have to be ways to make those in office accountable. Without a minimum of governmental transparency and responsiveness, there can be no effective public sphere and civil society will remain politically thwarted.

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In the advanced nations, government agencies have long since been integrated in the bargaining and negotiating networks of civil society. This has happened to an extent that the distinction of public sphere and civil society has become conceptually blurred. Indeed, such networks have become the basis for corporatist decision-making in many countries, to a large extent reconciling state and society (Willke, 1997). This is particularly true of continental members of the European Union - but not exclusively so.

According to the World Bank (1997) the key elements of its "good governance"-concept are

- capacity and efficiency of the public sector,
- governmental accountability,
- rule of law,
- reliable information and transparency,
- macroeconomic stability,
- protection of poor people and of the environment,
- division of powers with an independent judiciary, and
- reliance on self-regulating systems such as markets.

These characteristics of good governance are all about making fruitful interaction of state and civil society not only possible but probable. They set the stage for an effective public sphere by empowering civil society.

By these standards, India's democracy is deeply troubled. This is reflected in scholarly complaints over governmental lawlessness (Baxi, 1994, 1996; Béteille, 1997). There even is a predominant sense of "state erosion" in much academic writing (Rudolph and Rudolph, 1988; Kothari, 1989, 1995; Kohli, 1990; Sudarshan, 1990). This notion refers to corruption, nepotism and intransparency. It highlights politicians' and bureaucrats' links to the criminal underworld and their general disrespect for people's rights and the rule of law. Even Atal Behari Vajpayee, as Prime Minister of India, has stated that democracy "appears to be moth-eaten from inside" (*Statesman*, 1.2.99).

According to the school of "Indian Communitarianism" such "state erosion" is the consequence of South Asia's multi-religious, multi-lingual, multi-caste and multi-cultural social fabric. Sarah Joseph (1997) lists Sudipta Kaviraj (1991), Partha Chatterjee (1995, 1997) and T.N. Madan (1997) as leading proponents of this theorem. Their argument is that notions of civil society and national citizenship are unlikely in such a diverse setting. Rather, senses of loyalty will be with one's immediate community which, in turn, will most likely see itself as being threatened by other communities in an all out struggle over hegemony and resources. This makes compromise as the result of reasoned deliberation seem almost impossible.

My empirical findings do not support this theorem. In the context of Calcutta's environmental polity, India's democracy seems to suffer less from communitarian rifts in civil society than from an almost total lack of trust in what should be the "public sphere". It is true that politicians, bureaucrats and, indeed, judges are normally perceived as persons wielding arbitrary power - most likely for their own benefit. But this is not immediately based on conflicts of caste or creed. Rather, the abuse of

public office reflects a (post)colonial institutional set-up which systematically insulates those in power from the people they supposedly serve.

Definitely, one does not trust state institutions as would be typical of modern democracy (Giddens, 1990). Indeed, the gap between official policies and regulations on the one hand and the ground floor reality on the other does not allow for much trust in state agents - and certainly not in state agencies. The next section will show this by elaborating on the particular ecological crisis of Calcutta.

## 1 Environmental Hazards and the Lack of Urban Planning

The environmental challenges facing the Calcutta Agglomeration are daunting. They concern air and water pollution, sewerage, drainage, noise, traffic congestion, and waste disposal. On all counts, West Bengal's State Capital is considered to be among the world's most troubled cities. This is evident from documents prepared by or on behalf of the State Government (CMDA, 1990, 1992, 1996; State Planning Board, 1990; A.K. Ghosh, 1991; CEMSAP, 1995).

The widely acknowledged core cause of the environmental problems has been unplanned urban growth over three centuries. According to the Calcutta Metropolitan Development Authority - CMDA - (1990: 9.1) the "chaotic sprawl that had plagued the metropolis during the last four decades will have to be checked with determination". Nonetheless, this very authority has done little to improve matters. It has even been called an "ideal environment for open corruption" in an essay on the feature page of the *Statesman* (1.5.98) by Chinmoy Mozumdar:

The Master Plan for the CMD area is still not charted even though the CMDA was statutorily established 27 years ago to do the same.

Systematic outline development plans are also required by the West Bengal Town and Country Planning Act of 1979. Nevertheless, this duty has not been carried out. This shortcoming of the CMDA is serious - all the more so, as it is a powerful and well equipped institution dealing with a vital administrative issue.

In the case of the CMDA, governmental mismanagement is a consequence of its detachment from its immediate constituency. It reports directly to the Chief Minister of West Bengal. It is not responsible to the democratically elected municipal bodies it is meant to plan for. Given that the majority of the State's population does not live in the metropolitan area, urban issues are less urgent for the Chief Minister than they are for locally elected officials - who, however, have little bearing on the CMDA.

On top of this, the CMDA is entrusted with both drafting and enforcing urban planning. This arrangement eliminates an important stage of control. Unsurprisingly, the CMDA is not doing well on either count. For the Calcutta real estate market, the CMDA is an important agency. In the eyes of the general public, it has become a focus for mafia-type real estate brokerage with a huge potential for illgotten gains, but little concern for the common good. It does not provide rational and transparent development plans along which market forces could then foster healthy urban growth. This is exacerbated by the fact that CMDA documents are normally written in a foreign language, English. Moreover, important documents are not publicly available and only leak out occasionally.

This is true of other government institutions as well. It becomes a personal favor if bureaucrats secretly pass on any particular document. It is not an inalienable, reliable right of the people to be informed - and even less to be heard - by the authorities. Even journalists and social scientists must rely on photocopies of photocopies that circulate among agents of civil society rather than having direct access to the sources.

Another government agency of crucial relevance for Calcutta's environmental situation is the West Bengal Pollution Control Board. It is neither designed nor equipped to do its job efficiently. It has a technical staff of only 25 to check pollution in a State which has the oldest industrial base in Asia and is home to almost 80 million people. It is clear that 25 engineers can not perform this duty well. Rather, environmental legislation on the national level (which demands pollution control measures from all major industries) has procured the basis for a vibrant black market where the respective certificates are for sale at the local level. This is not only so in Calcutta, but all over India (Khator, 1991).

The long standing "Left Front" Government of West Bengal, for that matter, does not have a bad reputation. Indeed, scholars have praised this communist-led coalition as a model case of what ought to be achieved in other Indian States (Kohli, 1990; Lieten, 1994, 1996). Even its most pronounced critic does not accuse the Left Front of being worse than other State Governments but rather of not performing above average (Mallick, 1992, 1993).

Generally speaking, local authorities in India have a reputation of being unaccountable and authoritarian (Bandyopadhyay, 1996). They are known to only rarely implement plans, programs and regulations diligently (Shaw, 1996). Legislation is passed not to be followed but to exert power by bending these very rules. Complaints are common of corruption abounding in self-serving bureaucracies (Wade, 1989; Gupta, 1992; Gadgil and Guha, 1995)

Of course, there is no point in denying that rifts of caste and creed play a role in the socio-political life of India. But the examples elaborated on so far make clear that systematic insulation of government bodies typical of (post)colonial regimes plays a central role for the explanation of "state erosion". Contrary to the theorem of "Indian Communitarians", there is a vibrant civil society in Calcutta. Urban India enjoys freedom of association and expression which result in lively open debate - but there is no public sphere worthy of the term as long as government agencies remain inaccessible and unaccountable.

That said, the remainder of this essay will examine to what extent the judiciary has been giving non-governmental organizations leverage over the authorities in the course of public interest litigation. In more theoretical terms, the question at stake is whether the courts are empowering civil society and thus giving rise to an effective public sphere.

The case studies presented in the following sections must be seen in the context of "judicial activism". Since the early 1980s, the higher echelons of the Indian judiciary have had a tendency of ruling in favor of social activists and against governments in the national and the state capitals. This phenomenon has, in the words of Upendra

Baxi (1994: 143) "transformed the Supreme Court OF INDIA into a Supreme Court FOR INDIANS".

Generally speaking, scholarship regards judicial activism as a positive trend (Iyer, 1985; Rudolph and Rudolph, 1987; Galanter, 1989; Jethmalani, 1995; Mahesh and Bhattacharyya, 1999). While there has so far been little empirical research on this issue, it is clear that it is having an impact on the Indian polity. Former heads of government as Narasimha Rao (India), Jayalalitha Jayaram (Tamil Nadu) and Laloo Prasad Yadav (Bihar) are well known politicians whose careers have been seriously

- A great variety of birds breed in the East Calcutta wetlands. Biodiversity depends on such precious biotopes (A.K. Ghosh, 1991). The multilateral "Ramsar Convention" (to which India adheres) and the Central Government's wetland policy call for their protection.
- There are massive waste recycling activities in the wetlands. Farmers have been fertilizing vegetable plots with composted garbage since the end of the last century. In the 1930s, local villagers began cultivating fish in urban waste waters. Together, these schemes constitute a giant biological treatment plant for organically contaminated garbage and waste water (Furedy, 1987; Dhr. Ghosh and Sen, 1987; A.K. Ghosh, 1991; Dhr. Ghosh, 1993, 1996). Experts consider this a model for other megacities in tropical countries, even though some problems of food contamination are acknowledged - for instance with heavy metals (CEMSAP, 1997). Garbage farms and sewage fisheries provide employment for ten thousands of villagers involved in agriculture and pisciculture (IWMED, 1995).
- Fish and vegetables from the elaborated waste recycling procedures are among the cheapest in Calcutta's markets. Production takes place on the city limits so that transport costs are minimal (Dhr. Ghosh, 1993; IWMED, 1995). This is an important factor in keeping the cost of living in Calcutta comparatively low.

For these reasons, government plans outruled eastern and south-eastern expansion of the metropolis for decades (CMDA, 1990; State Planning Board, 1990; Dasgupta et al., 1991). The State Government had only implemented one project that did not conform to this policy. The township "Salt Lake City" was built on reclaimed wetlands. Today, it is one of the agglomeration's fanciest neighborhoods - but also living proof that the above mentioned concerns are valid (Chattopadhyaya, 1990). There are problems of flooding. Provision of drinking water is difficult. Fish ponds and agricultural land had to be given up for the township. Displaced villagers were never adequately rehabilitated (Chattopadhyaya, 1990; Kundu, 1994).

With this prominent exception, the authorities in West Bengal had protected the wetlands up to the late 1980s. However, they were never sufficiently organized to carry out this task. In 1988, seven departments of the State Government, along with its Wasteland Development Board, and four bodies of the Central Government had stakes in these wetlands. Large sections, but not all, fell within the competence of the CMDA. This fragmentation of governmental jurisdiction led to serious problems of management and even of law and order. The wetlands have a reputation for violent crime, social tension and labor unrest (IWMED, 1988: 9).

By the late 1980s, urbanization pressure on Calcutta's eastern fringes was becoming more intense. The construction of the Eastern Metropolitan Bypass was to make the area easily accessible and more attractive for real estate speculation. By 1991, the list of newspaper reports about development projects on Calcutta's east side had become quite long - contrary to the well argued, official policies. Some environmentally concerned officials began to feel they were losing the struggle over wetland protection within the government. These bureaucrats briefed urban NGOs and urged them to campaign for this fragile landscape. After some agitation involving a

host of organizations, a pressure group called PUBLIC ("People United for Better Living in Calcutta") filed a writ petition in the High Court in early 1992.

### **2.1 Waste Recycling Region and World Trade Center**

PUBLIC based the petition on governmental documents leaked out from the bureaucracy and various newspaper clippings. The petition was in tune with the Central Government's wetland protection policy and the international Ramsar Convention. PUBLIC asked the High Court to order the authorities to protect the wetlands. PUBLIC wanted to have a new, specialized institution set up for this purpose.

The High Court accepted the case (PUBLIC vs. the State of West Bengal). Proceedings went on fast. It soon turned out that the State Government had not finalized the legally required development plans for the mooted projects, the most prominent of which was the proposal for a "World Trade Center". It was supposed to come up on the southern end of Salt Lake City.

The petition's annexes included a map of the "Waste Recycling Region" which had been prepared by the Institute of Wetland Management and Ecological Design (IWMED). Thus, the terms "East Calcutta Wetlands" and "Waste Recycling Region" were legally equated for the first time. This has led to some confusion because not all wetland areas east and south-east of Calcutta are covered by the Waste Recycling Region. Geographically, the wetlands extend far beyond its boundaries.

The High Court delivered the first major judgment in September 1992. Justice Umesh Chandra Banerjee ruled that the wetlands were "a gift of nature". He also emphasized that the CMDA, the urban planning authority, had outruled eastern urban expansion in 1990. The judge defined it as his job to "strike a balance between development and environment". This meant that wetlands could only be reclaimed for development projects that would benefit society at large. In principle, a World Trade Center would fall in this category as it would serve as motor for Eastern India's industrial and commercial development.

The ruling, nonetheless, did not permit the World Trade Center to be built. Rather it stressed that the authorities had not come up with the required detailed planning documents so that the proposal was seen in "a state of fluidity". The judgment doubted whether the World Trade Center would be financially viable. Justice Banerjee decided to give the State one year's time to appeal to him with detailed plans for the World Trade Center. However, no other development projects would be permitted in the entire Waste Recycling Region, an area of 5.500 hectares. This was maintained in several later High Court rulings.

For the petitioning NGO this was a major success. The State Government had tried to limit the dispute in court to the location of the proposed World Trade Center, but the High Court ruling protected the entire Waste Recycling Region. Proceedings concerning the World Trade Center have been dragging on since 1992. Its core facility is now coming up on the borders of the disputed area - with State-backed investors ready to expand into the Waste Recycling Region as soon as the High Court might grant permission. This issue still raises tempers in Calcutta. However, it

must be emphasized that only a few acres of the Waste Recycling Region would be affected, should the Court ever settle the matter in favor of the investors.

In retrospect, the judgment of 1992 was otherwise flawed for Calcutta's environmentalists. It did not provide any single authority with the encompassing powers needed to protect and manage the wetlands. The High Court did not tackle the issue of urban planning in general. It did not even attempt to apply the West Bengal Town and Country Planning Act (1979). Most importantly, the judgment opened all of the city's eastern fringes which are not part of the Waste Recycling Region to fast urban development even though they equally qualify as wetlands in geographical terms.

This is confusing for anybody unfamiliar with the legally valid equation of wetlands with Waste Recycling Region. Indeed, many environmentalists see the rapidly progressing construction activities along the bypass as evidence that the High Court achieved nothing at all in its attempt to protect the wetlands. Only those who understand that the judge's use of the more general term wetlands referred exclusively to the Waste Recycling Region can appreciate that this vast part of the wetlands has indeed to a very large extent been spared urbanization. Unfortunately, there is one noteworthy possible exception which will be the topic of the next subsection.

## **2.2 Waste Recycling Region and Calcutta Leather Complex**

In the mid 1990s, another case which was eventually to affect the East Calcutta wetlands in general and the Waste Recycling Region in particular was being dealt with in the Supreme Court. This was the "Ganga Matter", filed by Delhi-based environmental lawyer Mahesh Chandra Mehta in 1985 (M.C. Mehta vs. the Union of India). This case was an attempt to tackle industrial pollution of the River Ganges. Initially, it concerned the tanneries of Kanpur, but the scope of the case was later extended. For our purpose, it will suffice to focus exclusively on the proceedings over the Calcutta tanneries.

On December 12, 1996, the Supreme Court passed a comprehensive judgment on these businesses. They had been dealt with in the Supreme Court for a period of almost four years. It was clear from the beginning that the judges wanted the tanneries to either treat their effluents in their traditional neighborhoods of Tangra, Tapsia and Tiljala or relocate. In its final judgment, the Supreme Court ordered to set up a new "Leather Complex" at Karaidanga roughly 20 Kilometers east of the city center by September 1997. This was what the State Government had suggested early on in the proceedings. The new Leather Complex was to be equipped with a joint treatment plant for all businesses.

The Supreme Court was dealing with the issue of pollution. It did not delve into questions of urban planning or wetland protection. The result was that, according to PUBLIC and others, the Leather Complex location at Karaidanga is inside the Waste Recycling Region. This claim was expressed before the Supreme Court - but it was dismissed after the State Government promised that the protected area would not be touched upon.

Nonetheless, there is reason to believe that Leather Complex and Waste Recycling Region might - at least partially - overlap. This question has not been convincingly

resolved by the judiciary. The map included in the original PUBLIC petition and referred to in the High Court judgment is of inadequate scale to determine this. The Supreme Court had only dealt with the wetland question briefly and was apparently shown a different map rather than the one used in the High Court. Neither map was published along with any of the relevant judgments. Tellingly, none of the maps used in the court rooms are publicly available.

PUBLIC had approached the High Court in 1995 for a clarification. The NGO made the serious charge that State agents were guilty of contempt of court. One might expect the High Court to assert its powers by dealing with PUBLIC's accusations after having assumed the authority to protect a certain area of the wetlands. Nonetheless, the matter was kept pending. The issue remains intransparent. This, in itself, undermines the authority of both courts. The situation gives rise to rumors and speculations but does not inspire trust in any branch of government.

The Supreme Court's decision to set up the Leather Complex at Karaidanga was not implemented in time. All along, tannery owners and to a large extent also the State Government had been dragging their feet. The tanneries are an important factor of Calcutta's economy. They employ some 10.000 to 15.000 workers. At least another 100.000 jobs in the leather trades depend on them. Neither employers nor employed were in favor of moving.

By early 1999, only a handful of businesses had relocated. However, large scale construction works were underway and progressing fast. The road to Karaidanga was being widened. While some people in the leather industries believed relocation would take another ten years, the recent developments did suggest that the State Government was now eager to get ahead with the project.

With regard to the general wetland problem, this is quite disturbing. There has been no environmental impact assessment. It is clear that the Leather Complex will need water. It is unknown how this will affect the delicate ecological balance of the Waste Recycling Region. Additional traffic on the widened road through the protected area is, of course, also no blessing for such a fragile environment. On the other hand, tannery effluents are contaminated with toxic heavy metals. Their waste waters have always been channeled into the wetlands - affecting the safety of food production in the Waste Recycling Region. In this sense, the relocation of the tanneries seems desirable even if it should indeed conflict with the High Court ruling.

In any case, the High Court's protective judgment has not been futile. With the noteworthy possible exception of the Leather Complex, all other new construction projects in the Waste Recycling Region have been discontinued after 1992. In spite of rampant rumors about massive real estate speculation going on in the Waste Recycling Region, the area seemed fairly well protected in the winter of 1998/99. This had, however, required constant monitoring by PUBLIC. The NGO had brought several projects to the High Court's attention all of which were soon after abandoned.

### **2.3 The Science City Episode**

The first wetland judgment exclusively protected the Waste Recycling Region. Consequently, the other eastern fringes of the city have since been exposed to rapid, inadequately planned urbanization. This was at stake in a third case of public interest litigation (Surojit Srimani vs. the State of West Bengal), initiated by an informal group of 22 friends in May 1995.

In a letter to the Chief Justice of India, they asked the Supreme Court to control Calcutta's eastern sprawl. Their argument went along the same lines as the petition in the PUBLIC case had done and drew upon the same State Government documents. The Supreme Court soon transferred this case to the High Court. In the second half of 1992, a new "Green Bench" (the institution of which will be dealt with in the next section) began hearing the case.

The petitioners challenged the viability of several projects coming up near the Eastern Metropolitan Bypass. These included, among others, a convention center and exhibition hall ("Science City"), a hospital, a major hotel complex and new townships and industrial estates. The petitioners pointed out that the CMDA had not published a development plan as demanded by the West Bengal Town and Country Planning Act (1979). Moreover, it had explicitly ruled out the area around the Eastern Metropolitan Bypass for urban growth in its programmatic document of 1990.

The Green Bench did not heed these arguments. This is amazing as its senior member, Umesh Chandra Banerjee, had found this CMDA report to be legally binding in his 1992 judgment. Four years later, the Green Bench considered this only as a policy statement without official planning relevance. The petitioners wanted the CMDA to explain why the original assessment of the geographical conditions was no longer valid, but the Green Bench did not hear the matter anymore. Rather, it accepted a still unpublished CMDA paper as legally adequate plan. This paper had obviously been prepared in haste and most likely only after construction activities along the bypass had already begun.

Something else, however, had caught the judges' attention. The by now nearly completed convention and exhibition center "Science City" was located on a former landfill. This meant that accumulating methane might cause fire and explosions on the compound. On October 11, 1996, the Green Bench ruled that methane-concentration in the air of the compound would have to be measured every six months in order to check this risk.

Unfortunately, this judgment does not make sense from an engineering point of view. Methane is dangerous when accumulating underground but not when dispersed in the air. The Green Bench therefore only tackled the imminent danger of fires and explosions in an ineffective, symbolical way. It had paid less attention to Science City than its senior member, sitting alone, had paid to the environmentally probably less problematic World Trade Center.

Overall, positive results of public interest litigation concerning the wetlands of East Calcutta can not be denied. The Waste Recycling Region has been quite effectively protected. The tanneries are being forced to do something about their effluents. However, the geographically incorrect, legal equation of "wetlands" with the Waste

Recycling Region diverted attention from the issues of urban planning. The possible conflict between the judgments of the High Court and the Supreme Court remains irritatingly unresolved. The court decisions in the "Science City Case" were technically inadequate and not consistent with the first wetland ruling.

On a more theoretical level, it is noteworthy that the court proceedings - and the media coverage going along with it - challenged the absolutist attitudes of State Government agencies. The courts did strengthen civil society actors in confrontation with the authorities. However, confusion of terms, technical inadequacies and doubtful implementation of some court directives seriously limit the relevance of public interest litigation. A similarly mixed message will also result from the case study presented in the next section.

### 3 The Howrah Matter

Howrah is India's oldest industrial town, topping the official list of "critically polluted areas" (*Asian Age*, 17.3.1998). After 150 years of industrialization, life in Howrah is hardly different from what Friedrich Engels described in 1844 as the "Condition of the Working Class in England". Howrah has always been a town of gloomy workshops and desperate slums, quite unlike Calcutta, the colonial era's "city of palaces" on the opposite bank of the River Ganges.

Howrah's dismal condition is exacerbated by the lack of zoning for residential, commercial and industrial quarters. This city of at least one million people had only 25 km of underground sewerage in 1990 (State Planning Board, 1990). Domestic and industrial wastewaters are channeled through open drains which frequently clog and overflow. The streets are narrow, congested and full of potholes. Local bureaucrats complain that Howrah has less than five percent roadscape. This compares to six percent in Calcutta and an international standard of 20 percent. Garbage piles up along the roadsides. Howrah has very few public parks and hardly any open space.

In 1966, the Howrah Improvement Trust (xi) described the city as "a town planner's headache". The reasons were "acute congestion, lack of adequate drainage system, housing shortage, absence of proper road alignments and other deficiencies in the matter of water supply, sewerage and community facilities". 26 years later, the CMDA stated categorically that the city had "been deprived of the basic facilities and infrastructure from very early days". All measures taken so far had been "utterly inadequate" (CMDA, 1992: 9).

Accordingly, the CMDA called for stringent and enforced urban planning. Anything less would have a "very serious effect" on the environment:

Unplanned urban growth in future would also aggravate the present damages that are being created by unscrupulous promoters in permitting high rise development with consequential densification of already congested parts of the city.

It is noteworthy, that the CMDA as planning and implementation agency did not assume any responsibility for these "unscrupulous" ongoing.

However, the CMDA demanded massive infrastructure investment. Measures should include

- conservation of greenery, parks, open spaces and water fronts;
- tree plantations;
- nature and wetland conservation;
- ecologically balanced waste water disposal;
- safe and hygienic disposal of all solid wastes; and
- environmental impact assessments for all major projects.

These policy statements were not followed up by action. Rather, up to 1997, the "Land Use and Development Control Plan for the Howrah Municipal Corporation" was only an unpublished draft. It was up to civil society actors to raise the same demands again and again.

### **3.1 An NGO Moves the Courts**

Governmental shortcomings and the consequent urban malaise are therefore the setting of the "Howrah Matter", a legal case which resulted from a writ petition by an NGO called "Howrah Ganatantrik Nagarik Samity" (GNS). Undisputed leader of this "Democratic Citizens' Association" is founder-secretary Subhas Datta, a chartered accountant. From its very beginning in 1977, the GNS campaigned for better living conditions in Howrah. It also rallied against police atrocities, bad conditions in the local jail or poor postal services. It is a civil rights organization which has become involved in environmental issues because of immediate, every day grievances.

However, before the GNS turned to the Supreme Court in April 1995, its activities had achieved little else than an impressive collection of newspaper clippings and occasional police beatings. The writ petition in the Supreme Court was not the GNS's first attempt of public interest litigation. Earlier, it had filed several cases in the Calcutta High Court, most of which had been frustrating and fruitless. For example, an attempt to save Bellilious Park had failed, despite the High Court having stayed plans to build a commercial complex there and despite the investor eventually shying away from the project: The authorities had tolerated the informal conversion of the once beautiful park into an unplanned garbage dump during the extended proceedings.

Another important case in the High Court concerned the Howrah Maidan. The NGO had filed a petition against the construction of a massive auditorium in this central location in early 1989, arguing that this park served various social and environmental functions. The High Court took up this matter and immediately stayed the project. In 1991, it ruled that there would be no permission to build the auditorium as long as a civil defense camp occupied the Maidan's eastern side. This camp was to be removed and turned into a public park. This measure had been suggested by an expert report of the All India Institute of Hygiene and Public Health.

The local authorities did not obey this judgment. Construction work continued with the civil defense camp firmly in place. In early 1995, the High Court consequently found the Mayor and the District Magistrate of Howrah guilty of contempt of court.

However, the two officials immediately appealed to a division bench and the case did not come up for hearing anymore. Construction went on.

In 1995, GNS leader Subhas Datta turned to the Supreme Court. His petition stated that earlier GNS matters had been "delayed by the usual process of the High Court" and that the civic authorities had caused "permanent obstruction" in the meantime. The GNS now asked the Supreme Court to make sure that the authorities in Howrah would henceforth

- systematically monitor and prevent pollution,
- cancel illegal allotments of public property to private firms,
- restore all greenery,
- maintain all public parks (including the Maidan) properly,
- stop the felling of trees,
- discontinue the disposal of untreated sewage in the Hoogly River,
- provide wholesome drinking water,
- clear garbage in Howrah (particularly from the Fish Market),
- keep the police morgue in a clean and hygienic manner,
- stop the unplanned growth of high-rise buildings, and
- submit all documents relating to urban development.

The Supreme Court accepted the case. A bench of two judges soon passed another stay order concerning the auditorium on the Maidan the construction of which was almost finished by then. This time, the local authorities obeyed - apparently intimidated by the apex court.

The Supreme Court did not deal with the Howrah Matter for long. It transferred the case back to the High Court in a ruling of 4.4.1996 "because of the distance and various other problems". The Supreme Court ordered the High Court to establish a special bench which would "consider and deal with environmental and pollution control matters including the present petition". The judgment argued that the Supreme Court was overburdened with environmental issues which, however, were "to be given utmost priority by the courts" in India as specific legislation was hardly implemented on either Central or State levels.

### 3.2 The Green Bench Proceedings

The new High Court bench, generally referred to as "Green Bench", first sat two months later. Its two judges soon after paid an official visit to Howrah. On this occasion, they found most of the claims made by the GNS to be valid. Ever since, proceedings have been going on slowly but continuously. This has had some undeniable effects on the ground floor level.

The most striking example is that of the police morgue. It had been in an appalling condition. Dead bodies had simply been piling up in the back yard of a police station in central Howrah for years. Several hundred corpses could be found decomposing under the tropical sun. Vultures would sometimes carry limbs from the compound and even drop dead flesh on city streets. There had been protest rallies in the neighborhood. Several newspapers had reported. However, this scandal was only discontinued in the course of the Howrah Matter in 1997/1998.

On their excursion to Howrah, the two Green Bench judges had visited the morgue. In early 1997, they finally passed a comprehensive judgment: Dead bodies would have to be cremated at least weekly. Until being brought to the funeral pyres, they were to be stored in an air conditioned room. Ever since, cremations have taken place regularly. A new morgue building was finished by late 1997 and air conditioning devices were installed by the summer of 1998. In early 1999, the building was about to be commissioned.

While the pace of this development may seem depressingly slow, it is important to stress that this single aspect of the Howrah Matter has had consequences beyond the city limits. Soon, similarly terrible conditions of other morgues in West Bengal were brought to the attention of the Green Bench. Its Howrah decision had set a precedent on what was no longer to be considered acceptable. The new standard was now to be applied to some 50 public morgues in West Bengal. A committee involving the Secretaries of the Health, Home and Finance Departments of the State Government has been formed to take care of this issue.

In the context of the Howrah Matter, the Green Bench also settled the dispute over the Maidan. The judges decided the auditorium should be finished because of the amount of money already invested. They did not punish anyone for contempt of court even though they would have had perfect reason to do so. The authority of the judiciary was not asserted that clearly. Instead, the Green Bench legalized facts which had been accomplished against repeated, explicit orders of the High Court. However, the Green Bench did, successfully at last, insist on the removal of the civil defense camp.

The Green Bench also intervened with some effect in the incidents of Bellilious Park and another irregular garbage dump underneath the Second Hoogly Bridge. Both places had informally but systematically been abused as landfills for urban waste. This practice was discontinued after court orders in 1997, but the places were not turned into well maintained public parks as the Green Bench had also ruled.

A better example of undeniable progress is the matter of Howrah's Fish Market. The nation's biggest wholesale market for seafood had, for years, been held at a provisional site without any adequate system of garbage clearance or waste water disposal. An entire road had been blocked by accumulating waste. Recurring floods, caused by melting ice, added to the dirty mess. An earlier High Court order to reopen the blocked road had been of no avail.

The dismal setting was all the more depressing as a new market complex had been built years before. However, several cases of litigation over the allotment of stalls were still pending and the new buildings had never been made use of. The Green Bench assumed the authority to settle these disputes and in the winter of 1996/1997 ordered the Fish Market to relocate. The area was to be kept clean.

By early 1999, the vast majority of fish vendors had moved to the new complex. The formerly blocked street was open to traffic again. Only a small number of fish stalls and the adjacent Betel Market had yet to relocate to a completely new site. The drainage situation was still not entirely satisfying, but much better than before. It is worth emphasizing, that the intervention of the Green Bench was needed to enforce

the use of new market complex which had initially been set up by the authorities themselves.

Ever since the Howrah Matter has gained momentum, an increasing number of citizens have begun to approach the Green Bench. The mere threat of going to the High Court may now set the local administration in motion. In Howrah, where citizens had hardly ever seen the local government as anything but a corrupt network of self-serving thieves, the Green Bench had introduced the principle that the government has duties to perform. However, efforts to sue the government or polluting industries may still be in vain. Sometimes the Green Bench does not accept cases or discontinues the hearings without further notice. Even for regular observers, Green Bench proceedings remain surprise prone and erratic.

All this shows that the judiciary has enabled the GNS and other actors of civil society to achieve some visible success on the ground floor level. However, public interest litigation is no easy relief strategy. It involves repetitive, cumbersome and piecemeal activities. All locations in dispute need to be constantly monitored. Even if authorities may now be expected to adhere to Court orders at least symbolically, they rarely do so in a literal sense.

More frustratingly, the Green Bench did not pass orders concerning several very serious issues even in the model case "Howrah Matter" during its first two years. These included

- the uncontrolled growth of new high-rise houses in the city,
- all aspects related to waste water disposal through open drains,
- the doubtful safety of drinking water, and
- dust, air and noise pollution due to congested, ill-maintained roads.

This list indicates that the Green Bench did not tackle the complex challenge of urban planning. It had not taken up the acknowledged core reason for the agglomeration's environmental crisis (CMDA, 1990, 1992).

The relevance of the Green Bench goes far beyond the city of Howrah as exemplified by the case of the public morgues. This specialized judicial body sits at least once a week. Environmental matters, mostly concerning Greater Calcutta but sometimes also other areas of West Bengal, are debated here on a regular basis. As this is prone to repeated media coverage, the Green Bench has become an institution raising environmental awareness and providing a space to stake claims against government institutions.

This forum has also changed the activity pattern of the GNS. Subhas Datta, a charismatic leader to begin with, has been filing new cases ever since the Green Bench was first established. He has also repeatedly been approached by other NGOs to take their grievances to court. By mid 1999, he was representing matters from all over West Bengal before the Green Bench. The judiciary turned him from someone perceived as a rebel rouser into a respectable personality who achieves some of his goals. By taking on more issues, he has been enhancing his standing as a civic leader.

Taking into account all this, the Green Bench has given citizens and their organizations some initial leverage over the local government. It is providing a space were

officials may be forced to publicly elaborate on their bureaucracies' activities. In a very fundamental sense, it is thus giving rise to a rudimentary public sphere which grants the public access to the authorities. The final and concluding section will now look into the implications from a more theoretical angle.

#### **4 Conclusion: How Judges Might Enhance the Public Sphere**

Because environmental challenges are among the most difficult any polity faces they are good test cases to assess matters of governance. Environmental issues affect economics, politics, and culture in the encompassing sense of the word. Even in the most advanced nations, environmental policies have a tendency of being mere rhetorical accompanied by ineffective, symbolical measures.

However, the gap between official legislation and the ground floor reality seems to be particularly wide and disturbing in India. As was discussed in section one, this is linked to deficits of the public sphere. The case studies have shown that the judiciary is providing only limited relief.

The courts are unable to apply an overarching, consistent body of law. Instead, they have to muddle through. This is to be expected because environmental legislation is often unrealistic - and particularly so in India (Khator 1991; Gadgil and Guha, 1995). This leaves the judges who deal with cases of public interest litigation at limbo and to large extent explains why proceedings tend to be erratic and unpredictable.

This is exacerbated by changes of judges which may result in radical changes in the course of proceedings. It is beyond the scope of this essay to delve into this aspect of judicial activism. It must suffice to state that some judges are more interested in certain topics than others.

However, it will have become clear that neither judicial tier has behaved overactively. Nor for that matter, have the NGOs used the courts to merely obstruct well-meant governmental action. State officials regularly accuse them of being incompetent and only going to court for shortsighted (party)political motives. Chief Minister Jyoti Basu most prominently did so when he inaugurated a State sponsored conference on the environment at Science City in February 1999 (*Statesman*, 3.2.99). However, in the cases elaborated upon here, the NGOs petitions were well researched and more often than not based on or at least supported by governmental expertise and policy statements.

In this respect, the judges may have actually been underactive. They did not assert their authority by punishing holders of public office for contempt of court, in spite of having good reasons to do so. While both the Supreme Court and the High Court occasionally threatened to resort to this instrument, ultimately they shied away from actually sending anybody to prison.

Generally speaking, the enforcement of judgments remains just as erratic as the proceedings. This is all the more so as judgments are not always adequate from an engineering point of view. There are several factors contributing to this situation. For instance, the administrative bodies obliged to enact court rulings are the same

that have been found incapable of law implementation in the first place. Of course, the overall capacity of these State agencies is not enhanced by mere court rulings dealing with isolated issues of construction sites in the wetlands or garbage disposal in Howrah.

Indeed, the West Bengal Pollution Control Board - as argued above already overburdened - has been put under additional stress by the Green Bench. The judges now regularly turn to this agency for technical advice. Unsurprisingly, Pollution Control Board reports are often of a dubious quality, to say the least.

One should not blame individuals for this sorry state of affairs. The judges' task of setting administrative shortcomings straight is of a very tall order. They can neither rely on a consistent body of law, nor on an effectively operational administration, nor can they themselves be expected to possess any expert knowledge of scientific and technical matters. Therefore, they have little choice but to rely on their personal common sense.

One drawback of this is that, in the eyes of the people, the judiciary thus remains just another center of personally wielded power rather than of institutionally reliable responsibility. For the citizens of the Calcutta metropolis, the judiciary appears as a similarly intransparent, absolutist force as the administrative branch of government. Again, the commonly used language is English and important files are not accessible. Only the most innovative judgments are published in the law journals.

In this sense, my modest advice to individual judges would be to use their position to enhance transparency - both in the judiciary and in the other branches of government. Their considerable personal powers enable them to do so. They could make sure that more judgments are published in the law journals and that more of the relevant files become publicly available. It is in their scope to have government documents presented in court and make them available to the general public. Moreover, the judges can order officers to publicly elaborate on the doings of their agencies and then take them by their word.

As far as making these matters public, the local media have been playing an important role. The data from my case studies does not suffice to make a thorough assessment of newspapers' impact on judicial proceedings. However it is noticeable that the legal aspects dealt with in the wetlands cases lost momentum after the petitioners had begun to focus on court activities at the expense of attracting media attention. In the Howrah Matter, this was not so. The GNS kept supplying journalists constantly with new material and even photo opportunities. This has enhanced the profile of the Green Bench which, in turn, serves to constantly re-affirm the public standing of the GNS and its leader Subhas Datta.

There is no doubt that the judiciary can not solve all technical, economic, social and other questions related to environmental problems. It can not, on its own, set all governmental shortcomings straight. But it does have the scope to provide more transparency and more responsibility - in the very literal sense of making those respond who are in charge. This would strengthen the so far only rudimentary sense of the public sphere. If successful, this might over the long run not only inspire hope but also encourage trust in the democratic state.

This would very likely also strengthen civil society. So far, it is characterized by a serious lack of trust and co-operation among Calcutta's NGOs. Stereotypically, activist groups blame one another of incompetence, corruption and a illegitimate craving for foreign funds. Others are always eyed with suspicion. Closer co-operation would lessen the NGOs workload - for instance in order to monitor the implementation of court orders. Unfortunately, however, there is no transparent public sphere which would provide a stronger sense of solidarity among NGOs of similar social and ideological background.

Indeed, people involved in public interest litigation are almost exclusively upper caste, English speaking, educated, middle class Bengalis. Most judges and government officers share this background. Apparently, they face tremendous problems of co-operation WITHIN their own social stratum. This fact is the strongest argument against the theory of "Indian Communitarianism". If there is no effective public sphere for this relatively privileged segment of urban Indian population, it is pointless to try to explain the shortcomings of India's formal democracy by emphasizing the difficulties stemming from a segmented, multi-cultural social fabric.

Strengthening the public sphere would, in any case, enhance the political potential of civil society. The empirical evidence of Calcutta thus supports the programmatic approach of "Transparency International", a Berlin based network, which is attempting to tackle corruption following the example of "amnesty international" human rights campaigns. Similarly, the experience of public interest litigation in Calcutta lends credibility to the World Bank concept of "good governance" as expressed in the World Development Report of 1997. The indicators of "bad governance" - inefficiency, patronage, corruption etc. - are all too well known in West Bengal. It is not advisable to dismiss the argument as mere propaganda of the leading proponent of capitalism and globalization.

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