

STEALTH CENSORSHIP

How the Calcutta High Court is suppressing a sociological book on Public Interest Litigation

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Ten years ago, Oxford University Press published Hans Dembowski's book "Taking the State to Court – Public Interest Litigation and the Public Sphere". Shortly afterwards, OUP discontinued international distribution, because the Calcutta High Court initiated contempt-of-court proceedings against author and publisher. The case has regrettably been kept pending; no judgment was passed. A sociological study that deals with highly relevant issues, including urban planning, governance and the role of the judiciary, the author argues that it is of central importance to academic discussion. In this comment, the author and his academic supervisor develop on this argument, and speak of why it does not amount to contempt of court.

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An enduring legacy of British colonialism appears to have been the use of legal instruments as a means to limit public discourse, as was done in Singapore, Malaysia and India. Trials for contempt of court are of particular relevance in this context. It is ironic that this judicial weapon is used in pre-democratic ways that are no longer applied or even considered acceptable in Britain and other advanced nations.¹ In India, this colonial heritage oddly coincides with the advent of public interest litigation [hereinafter, "PIL"], a phenomenon that marks a trend of court intervention in public affairs in favour of democratic rights.²

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¹ See A.G. Noorani, *Courts and Contempt Powers*, 17(15) *FRONTLINE* (2000), <http://www.frontlineonnet.com/fl1708/17081010.htm>; S.P. Sathe, *NBA Contempt of Court Case*, 36(46) *ECON. & POL. WKLY* 4338 (2001).

² See S.K. AGRAWAL, *PUBLIC INTEREST LITIGATION IN INDIA: A CRITIQUE* (1985); V.R. KRISHNA IYER, *JUDICIAL JUSTICE. A NEW FOCUS TOWARDS SOCIAL JUSTICE* (1985); UPENDRA BAXI, *INHUMAN WRONGS AND HUMAN RIGHTS: UNCONVENTIONAL ESSAYS* (1994); SANGEETA AHUJA, *PEOPLE, LAW AND JUSTICE: A CASEBOOK OF PUBLIC INTEREST LITIGATION* (1997).

The case of Arundhati Roy stirred up debate in South Asia and elsewhere after she spent a day in prison on being found guilty of contempt of court by the Supreme Court of India. Many legal specialists are of the opinion that contempt of court should be used only in a very limited sense as an ultimate means to protect the authority of the institutions of justice.³

Of course, it is a delicate domestic issue, when contempt of court proceedings appear to be used in public controversies because that may imply infringement upon the fundamental freedom of speech. However, it is an altogether different and even more serious issue when judges decide to interfere in academic discussions. Politics is linked to power. The objective of law is to define frameworks for political struggles. In contrast, scientific disputes are about truth. They are not political and cannot be decided upon by means of the legal system. The decision on whether an academic study is sound or not can and should only be made by the scientific community. It is neither the business of the judges nor of the politicians.

Nonetheless, contempt proceedings were initiated against a doctoral thesis that one of us wrote and the other supervised. The thesis dealt with conflicts related to urban development in Calcutta. Its high academic quality is evidenced by its acceptance at the University of Bielefeld and the appreciation received by the highly qualified referees for Oxford University Press (“O.U.P.”).

In early 2001, O.U.P. launched the book *Taking the State to Court – Public Interest Litigation and the Public Sphere in Metropolitan India* by Hans Dembowski at the Calcutta Book Fair. This essay in political sociology incorporates the aforementioned thesis, scrutinizing major cases of environmental litigation before the Calcutta High Court and the Supreme Court of India and places the findings in the theoretical context of good governance.

Shortly after the book launch in early 2001, a contempt of court petition was filed before the Calcutta High Court. The case was admitted, with the author, the publisher and several others being impleaded as defendants. O.U.P. have since stopped domestic and international distribution

³ See Justice H.R. Khanna, *The Role of the Judiciary*, in JUDGING THE JUDGES 25 (K. Mahesh and Bishwajit Bhattacharyya eds., 1999); V.N. Narayanan, *Law as Contempt of Justice*, in JUDGING, 81; N.R. Madhava Menon, *Scandalous in Effect*, THE TELEGRAPH, March 22, 2002, available at [http://www.cscsarchive.org:8081/MediaArchive/audience.nsf/\(docid\)/EB7850CBB5D620FBE5256B8400219F82](http://www.cscsarchive.org:8081/MediaArchive/audience.nsf/(docid)/EB7850CBB5D620FBE5256B8400219F82); Noorani, *supra* note 1; Sathe, *supra* note 1.

of (as well as promotion for) the book. The publisher has also unconditionally apologized to the High Court. However, the case is still pending against the Frankfurt-based author who has not yet been officially notified. Although the book has been documented online,⁴ except for the few copies O.U.P. distributed immediately after publication, the content is not available in libraries – whether in universities or elsewhere. Thus it is not fully accessible, either to the academic world or to the Indian public in general.

We do not believe that *Taking the State to Court* is an unfair polemic against the Indian judiciary. Instead, it aspires to be a well-balanced assessment of highly complex issues which involve urban development, the quality of governance, the role of civil society and the rule of law.

The innovative quality of the book was emphasized by a review in the Cambridge Law Journal, in which Camena Guneratne states:⁵

“There is a great deal of literature on PIL in India, most of which analyses the developments of procedural and substantive law in its context. This book by Hans Dembowski, a sociologist, is different as it does not deal with the law per se. It is rather an analysis of governance and the balance of power among the executive, the judiciary and civil society.”

Guneratne concludes with the following remarks:

*“This book provides interesting insights to the realities of PIL and its dynamics in India and complements the body of legal literature on this subject. 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 activist, legal practitioners and researchers.”*⁶

Such favourable feedback makes it hard to comprehend that *Taking the State to Court* is no longer for sale. For us, the author, and the supervisor – who has to assume at least some of the responsibility, it came as a big surprise that the book was charged with contempt of court. As far as we are aware, the case is still pending in the High Court. There is no indication as to whether this

⁴ The relevant documentation may be accessed at www.asienhaus.de/taking-state-to-court.

⁵ Camena Guneratne, *Book Review*, 60(3) CAMBRIDGE L.J. 635 (2001).

⁶ *Id.*, 636.

situation will change. The Lord Justices have not ruled on whether (and if so, why) they find the book objectionable. Without resolving the case, the judiciary has stalled academic discussion.

It is worth noting that the High Court has thus also interfered in the ongoing domestic debate in India on the merits of PIL. *Taking the State to Court* provided an analysis, based on diligently documented data of the environmental situation in the mid-1990s of the mega city Kolkata, which was then officially still called Calcutta. In this essay, we will stick to the old name, as many official institutions carried it when the research was carried out – and the Calcutta High Court still does.

According to various non-governmental organisations (“N.G.O.s”), the environment is an issue that has not received adequate attention in the Calcutta agglomeration. Some of them regard *Taking the State to Court* as valuable.⁷ Their positive feedback is astonishing because the book is quite critical of civil society actors and finds their lack of co-operation and tendency of competing with one another counter-productive.

Nonetheless, a contingent of N.G.O.s and several concerned individuals in the Calcutta region have launched a common appeal asking all parties involved in the matter “to take necessary steps so that the book can again be accessible to readers”.⁸ Reports on this event were carried in the regional editions of newspapers like *The Times of India*.⁹ (8.12.2001)

In the context of this essay, such political considerations are of minor relevance. Instead, we are dealing with the general quest for truth on which social sciences exclusively may set out. Ten years after the thwarted book publication, we believe that it makes sense to revisit the issue. The goal of this essay is to present the core arguments of *Taking the State to Court*. To do so, it will first be necessary to briefly explain the general outline of *Taking the State to Court*. Section Two will

⁷ See *Report of the Consultation Meeting of 6th December 2001*, Vasundhara Concern for Environmental Rights, at <http://vasundhara.webnode.com/news/report-of-consultation-meeting-of-concerned-environmental-and-h-r-organisations-and-individuals/>.

⁸ *Id.*

⁹ Correspondent, *Support Grows for 'Banned' Book*, THE TIMES OF INDIA, December 7, 2011, available at http://articles.timesofindia.indiatimes.com/2011-12-07/kolkata/27229368_1_book-circulation-indian-judiciary.

discuss the academic relevance of the particularly controversial ethnographic chapter of the book. In the Third section, this essay will present a more general assessment of censorship by stealth.

I. DEMOCRACY, CIVIL SOCIETY AND PUBLIC SPHERE

The book's frame of reference is the theorem of "state erosion" in India,¹⁰ which bemoans the phenomena of disintegrating and dysfunctional institutions. The juxtaposition of such ideas with the concept of good governance – as defined by the World Bank¹¹ – was logical, as this concept deals with the preconditions of a democratic state and successful socio-economic development. The book's stated goal is to discover "how the polity of an Indian mega-city deals with conflicting interests in the pursuit of the common good".¹²

As environmental matters tend to affect various aspects of societal life (politics, business, employment, cultural values, health, recreation, etc.), this field seems promising for such an endeavour. *Taking the State to Court* delves deeply into two long-standing, but separate disputes in which civil-society activists eventually turned to the courts. These concerned the eastern fringes of the agglomeration and the industrial centre of Howrah on the western bank of the River Hoogly. As journals have published rather detailed summaries of the case-studies¹³ elaborated upon in the book, it will not be necessary to deal with details of the East Calcutta wetlands and Calcutta's industrial twin-city here.

Both case studies conclude that inadequate urban planning has led to a host of complex interwoven problems. Some of these were, in the 1990s, articulated before the High Court and the Supreme Court. Eventually, they led to the establishment of India's first "Green Bench" in the higher judiciary in 1996, a judicial institution exclusively concerned with environmental matters.

¹⁰ See LLOYD I. RUDOLPH & SUZANNE H. RUDOLPH, *IN PURSUIT OF LAKSHMI: THE POLITICAL ECONOMY OF THE INDIAN STATE* (1988); RAJNI KOTHARI, *STATE AGAINST DEMOCRACY: IN SEARCH OF HUMANE GOVERNANCE* (1989); RAJNI KOTHARI, *POVERTY: HUMAN CONSCIOUSNESS AND THE AMNESIA OF DEVELOPMENT* (1995); ATUL KOHLI, *DEMOCRACY AND DISCONTENT: INDIA'S GROWING CRISIS OF GOVERNABILITY* (1990); R. Sudarshan, *In Quest of the State: Politics and Judiciary in India*, 28(1) J. COMMONWEALTH & COMP. POL. 44 (1990).

¹¹ THE WORLD BANK, *THE STATE IN A CHANGING WORLD: WORLD DEVELOPMENT REPORT* (1997).

¹² HANS DEMBOWSKI, *TAKING THE STATE TO COURT: PUBLIC INTEREST LITIGATION AND THE PUBLIC SPHERE IN METROPOLITAN INDIA* 181 (2001).

¹³ Hans Dembowski, *Courts, Civil Society and Public Sphere: Environmental Litigation in Calcutta*, 34(1-2) ECON. & POL. WKLY 49 (1999); Hans Dembowski, *Can Courts Empower Civil Society? Public Interest Litigation and the Public Sphere in India*, 20(77) ASIEN 71 (2000).

These developments are assessed on the basis of official governmental reports and planning documents, interviews with people involved in the cases, legal texts such as petitions and court orders and various media sources. In the end, the author of *Taking the State to Court* found civil society to be quite active in the sense of making use of fundamental democratic rights such as the freedoms of speech and association. In this sense, the urban society of Calcutta is not considered inherently different from what would be normal in Western Europe. However, the book does take note of a sense of mutual suspicion among the activists and argues this might be linked to a volatile and arbitrary sense of governance which does not necessarily reflect the rule of law.

On the other hand, the book considers state institutions such as the Calcutta Metropolitan Development Authority far more secretive and inaccessible than what would be considered normal in London, Copenhagen or Frankfurt. For instance, most relevant documents are not publicly available. Moreover, they are written in English rather than Bengali, the language of Calcutta's majority population. Overall, government institutions were found to be non-transparent and inaccessible to the sociological researcher who, of course, must be considered a member of the interested public.

In a theoretically innovative move, *Taking the State to Court* makes a distinction between the terms "public sphere" and "civil society". In social sciences, the two tend to blur.¹⁴ In the empirical context of PILs in Calcutta, however, *Taking the State to Court* elaborates that the core meaning of civil society focuses on the interaction of various non-state institutions such as interest groups, clubs, trade unions, lobbies, religious associations and even extended families. These form a "criss-crossing network"¹⁵ which exists independently of the government. Communication and social activities – from religious festivities to sports clubs and community nursery schools – thrive on democratic freedoms, but are not, *per se*, involved in politics.

On the other hand, the public sphere includes state institutions. It emerges where civil society and government engage in an open debate over desirable goals, societal development and

¹⁴ See NEERA CHANDHOKE, STATE AND CIVIL SOCIETY EXPLORATIONS IN POLITICAL THEORY (1995); Suzanne H. Rudolph, *Civil Society and the Realm of Freedom*, 35 ECON. & POL. WKLY 1762 (2000).

¹⁵ Dembowski, 1999, *supra* note 13, 49; Dembowski, 2000, *supra* note 13, 71.

values and all other aspects of the common good. If this process functions well, the result will be social inclusion and democratic legitimacy. In this sense, the social reality of South Asia seems quite different from what would be expected in the European Union or North America. While civil society and state are strongly interwoven in the advanced OECD nations giving rise to a vibrant public sphere, such a common societal space was not found in Calcutta.

Empirically based, this analysis is of high academic relevance. Unlike much social science writing on policy and polity in India,¹⁶ *Taking the State to Court* does not explain governance problems with aspects of civil society, but relates them to the dysfunctional and pre-democratic set-up of administrative institutions. Government institutions seem to reflect the reality of the British Raj more than the normal conditions of representative democracy. Needless to say, this argument is relevant in a much larger context than only that of the Calcutta Metropolitan Area and is therefore worthy of international debate.

In this delicate situation, *Taking the State to Court* ascribes an important modernizing role to the judiciary. The judges are said to be fostering the emergence of Calcutta's "rudimentary" public sphere in the sense of providing valuable forums by forcing government agencies into an open, non-hierarchical discourse with civil society organizations. In such a discourse, officials are made responsible in the literal sense of having to respond. In this perspective, the judges are enhancing democracy. The judges help in improving ground realities at the locations disputed in court. They also help redefine the role of government institutions as service agencies for the public rather than as wielders of arbitrary power.

In line with Galanter,¹⁷ *Taking the State to Court* emphasizes the relevance of institutional autonomy. The judiciary, the book states, occupies a unique position of acting as a modernizing and democratizing agency in the setup of the Indian state: "The leading people in the Supreme Court and the High Courts do not directly depend on the bureaucracy, nor on central or state

¹⁶ See Sudipta Kaviraj, *On State, Society and Discourse in India*, in RETHINKING THIRD WORLD POLITICS 72 (James Manor ed., 1991); PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS (1995); Partha Chatterjee, *Beyond the Nation? Or Within?*, 32(1-2) ECON. & POL. WKLY 30 (1997); T.N. MADAN, MODERN MYTHS, LOCKED MINDS (1997).

¹⁷ MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA (1984).

Cabinets, nor on the various elected legislative bodies. Judicial autonomy grants the courts some scope to clean up government performance in India.”¹⁸

We believe that this argument is theoretically stringent. It is, moreover, empirically based and fits in with contemporary literature on the Indian judiciary. The book supports a historical shift in the general perception of Indian courts, which, in colonial times, were considered an instrument of oppression but have since turned into battlegrounds for more substantive democracy.¹⁹ *Taking the State to Court* argues that the judiciary has become “a centre of activism to clean up the State apparatus”.²⁰ It is said to be “inspiring hope for better governance”, though it “does not yet warrant trust in the administration”.²¹ Accordingly, PIL is claimed to “raise hope for change” in spite of not providing “an easy road to official accountability and democratic deliberation”.²²

It is, of course, inconceivable that such a predominantly favourable view of the judiciary should have seriously irritated the High Court. Therefore, the core argument of the book does not seem to be relevant in the contempt of court case. Rather, the legal matter arose over a chapter dealing with life-worldly aspects of societal activity in the court-context. Here, *Taking the State to Court* provides empirical data which are indicative of governance problems within the judiciary, concluding that the courts are “still being affected by some malfunctions”.²³ This patently reduces the Judiciary’s ability to tackle similar problems in other branches of the government.

These points are important for any balanced assessment and therefore deserve to be discussed in public. In the following section, we will endeavour to explain what the book was about and why we do not believe that this work in any way undermines the authority of the Indian judiciary.

II. ASSESSING LIFE WORLD ASPECTS

Chapter 7 of the book (with the title “*Ethnographic Observations: An Overarching Lack of Trust?*”) goes beyond the scrutiny of individual decisions and orders. Instead, this chapter is based on

¹⁸ DEMBOWSKI, *supra* note 12, 207.

¹⁹ Sudarashan, *supra* note 10; BAXI, *supra* note 2.

²⁰ DEMBOWSKI, *supra* note 12, 61.

²¹ DEMBOWSKI, *supra* note 12, 3.

²² DEMBOWSKI, *supra* note 12, 208.

²³ DEMBOWSKI, *supra* note 12.

personal observations. Ethnographic methodology is discussed, and the goal is explicitly to present a “thick description”²⁴ of the day-to-day operations of the Calcutta High Court.

Chapter 7 makes sense in the context of the book. After all, it is well understood that legal concepts cannot – and thus never do – precisely describe ground reality.²⁵ Moreover, it has been found that even in rigidly formal social settings such as ministerial bureaucracies, informal communication will shape social perception of reality (and thus social reality) in ways not necessarily conforming with official regulations.²⁶ In order to grapple with this fundamental challenge of sociological inquiry, Chapter 7 necessarily had to become somewhat more subjective. This, however, is generally known to be true of ethnographic work.²⁷

The book acknowledges these challenges and emphasizes that we are now dealing with facts of a “softer’ nature”²⁸ than official documents such as court rulings, government reports or even media coverage thereof. In Chapter 7, personal observations as well as statements made in private by involved individuals are reported. The reason for doing so is given as follows:²⁹

“Ethnographic research is based on the assumption that members of any particular culture or society are constantly explaining their social reality to one another in everyday interaction. This is directly linked to the various constructivist approaches in sociology that emphasize that this reality is created in the permanent flow of everyday communication (...). For the researcher, anecdotes, rumours, shop talk and gossip of the communities observed therefore serve as valid guides to understand their particular culture.”

In this context, several sources for constructivist theories³⁰ are indicated.

In short, Chapter 7 attempts to portray day-to-day interaction. The social reality of the High Court does not merely consist of formal rules and regulations, but rather includes a host of

²⁴ CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973).

²⁵ JURGEN HABERMAS, *FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS* (1994).

²⁶ J.G. March & J.P. Olsen, *The New Institutionalism. Organizational Factors in Political Life*, 78 AMER. POL. SCI. REV. 734-49 (1994).

²⁷ J. CLIFFORD & G.E. MARCUS, *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* (1990).

²⁸ DEMBOWSKI, *supra* note 12, 180.

²⁹ DEMBOWSKI, *supra* note 12, 182.

³⁰ E. GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); P.L. BERGER, & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966); N. LUHMANN, *ÖKOLOGISCHE KOMMUNIKATION. KANN DIE MODERNE GESELLSCHAFT SICH AUF ÖKOLOGISCHE SELBSTGEFÄHRDUNGEN EINSTELLEN?* (1986); N. LUHMANN, *DIE GESELLSCHAFT DER GESELLSCHAFT* (1997).

different views and perceptions. The resulting picture of the judicial institution in *Taking the State to Court* is indeed less than flattering. Certainly, this view is open to critique as Euro-centric, and in fact in our discussions it has been pointed out that in Western Europe and Germany, the judiciary does not represent the ideal type, as recent cases of corruption indicate. For the purpose of this essay, however, only the elaborations in *Taking the State to Court* matter. With respect to the High Court, four core points are made:

- Not only do judgments remain unpredictable, but the very procedures from which they derive appear non-transparent and even erratic.
- This is exacerbated by rampant suspicions of corruption and collusion.
- In scientific, engineering and sometimes even legal terms, decisions sometimes seem technically flawed.
- Attitudes displayed by judges in the court room appear to be expressions of personal whims and impulses. They do not always reflect professional attitudes suitable for a highly developed functional division of labour.

None of these points will seem particularly surprising to anyone studying the sociology of law – or for that matter, the sociology of any other profession. In fact, most of what *Taking the State to Court* includes was stated about Indian Courts in both academic literature and general media before. The assessment stems from a realist perspective and reflects a classic finding by Marc Galanter:³¹ “Courts in India are viewed with a curious ambivalence; they are simultaneously fountains of justice and cesspools of manipulation. Litigation is widely regarded as infested with dishonesty and corruption. But courts, especially the High Courts... are among the most respected and trusted institutions”.

That the Indian judiciary is not beyond reproach and that problems of accountability arise for its upper echelons, has also been noted by several other scholars.³² Its esteem is relatively high compared to other state institutions; this however does not place it beyond doubts in general.

³¹ GALANTER, *supra* note 17, 500.

³² K.L. Bhatia and Gurdeep Singh, *Accountability of the Judges: Some Socio-Legal Issues on Disciplining the Disciplined*, in LAW, JUDICIARY AND JUSTICE IN INDIA (B.P.S. Segal ed., 1993); Chandra Pal, *Indian Higher Judiciary: Need for an Effective Accountability*, in LAW, JUDICIARY; Ram Jethmalani, *Judging the Judges*, in JUDGING THE JUDGES, *supra* note 3, 21.

The difference between such general statements and Chapter 7 of *Taking the State to Court* is that the judiciary is not considered in an abstract sense. Rather, statements are made about particular individuals active in a particular place at a particular time. The book describes an overcrowded court room, in which several persons are trying to deliver their arguments simultaneously. The rowdy atmosphere makes it hard for observers to follow the procedures. The resulting sense of non-transparency is exacerbated by the fact that important orders and rulings are not publicly available so that even the researcher had to rely on photo copies handed out by lawyers involved in the various cases.

The book quotes advocates who express frustration and alienation because of the judges' emotional behaviour. It also notes that many judgments hardly refer to codified law as articulated in binding acts or precedent rulings. Moreover, some orders appeared incompetent in engineering terms, for example when the Green Bench ruled that buses and taxis emitting "black or white smoke" were to be banned from Calcutta's streets. Such factors, we believe, are essential for assessing the public image of the court.

The most controversial point of Chapter 7 is the discussion of rumours of corruption and collusion. To highly (and perhaps overly) sensitive readers, this might imply legally relevant allegations of criminal wrongdoing. However, this was clearly not intended. At one point, the book even stresses:³³ "To be very clear, this is gossip. The main evidence was reasoning along the lines of conspiracy theories." In sociological and other terms, these data do not present factual, irrefutable proof of judicial misbehaviour. They serve as ethnographic data for the sociological (and thus neither legal, nor political or whatever) description of the court. The aim is to illustrate the social reality of how the High Court is perceived by the public in Calcutta as well as by individuals professionally involved. In other words: Chapter 7 is about second-order observations, re-stating what appears obvious in Calcutta's life world.

In the Indian legal practice, allegations of corruption and even references to non-legal interests of the judges are not permitted. *Taking the State to Court* even quotes such allegations in the public media, but lawyers have pointed out that quoting national media on such matters does not prove factual allegations. In the context of *Taking the State to Court*, however, such citations do not

³³ DEMBOWSKI, *supra* note 12, 188.

even aspire to be factual allegations or even legal proof of manifest wrongdoing. The point is – and we believe the book argues it well – that a certain perception is widespread. Of course, a sociological study of this nature cannot serve as legal evidence against any judge or court official.

To some extent, *Taking the State to Court* is conceptually blurred, because – against ethnographic convention – names are named. This was inevitable because the case studies obviously had to be based on hard facts. In a book dealing with particular cases, some of which had been reported in national law publications, it would be impossible to keep judges' names secret. On the other hand, the book refers to allegations of corruption made in journalistic publications like *India Today* or the *Asian Age* which serve as compelling evidence for a predominant public perception of legal institutions – even if they do not prove any infringements of the law by any individual person concerned. In any case, it seems strange that quoting from publicly available media should be considered an illegal activity.

All summed up, the book's "thick description" is meant to deliver a vivid picture of court life as it presents itself to the curious, foreign observer – and, of course, to the Indian public. It presents what must very likely be seen as the conventional wisdom predominant in Indian urban life with respect to judicial matters. Ethnographic methodology is used to convey this public image, which should be taken into account as valid description of social reality irrespective of whether one is comfortable with the findings or not.

Such an assessment was necessary in a book tackling the trustworthiness of state institutions, and ethnographic methods are the adequate approach to handle such delicate matters. In essence, this second-order description of social perceptions serves the academically balanced argument. We believe it is self-evident from the context of the book that there is no intention at all to belittle the High Court. Rather, the emphasis is consistently on the court system being conducive to improving governance in spite of its own shortcomings.

The notion of the "accountability" of government agencies, and even branches in this context, is again a sociological one, not to be understood in a strict legal sense. The sociological term is roughly equivalent with the credibility such institutions enjoy in society, whereas the legal one is about jurisdictions and duties to report to superiors.

In academic terms, there can be no doubt that *Taking the State to Court* is a valid contribution to the ongoing, international development debate and that scholarly dispute would, over the medium run, iron out all possible inaccuracies. For that to happen, however, the book would have to be made available for public debate.

III. THE CONTEMPT-CONTEXT

The World Bank has emphasized the importance of a strong, credible and trustworthy judiciary for successful socio-economic development. It stresses that judges need to be politically independent and difficult to intimidate, but that checks and balances are necessary too:³⁴ “The channels for such accountability can be the free media and civil society organisations or can be built into the judicial system itself.”

In the Indian context, Arundhati Roy’s case re-triggered the long standing debate on judicial accountability. Many expressed the concern that the Supreme Court went too far by finding the Booker Prize Winner guilty of contempt of court. “The Supreme Court of India is way behind the times in balancing freedom of speech and contempt of court,” wrote S.P. Sathe,³⁵ arguing that “criticism of judicial decisions and of the judicial system is necessary to reinforce its accountability to the people”.

Similar arguments have been put forward by a host of authors including A.G. Noorani,³⁶ Sumanta Banerjee,³⁷ and more cautiously, by N.R. Madhavan Menon. In his capacity as Vice Chancellor of the West Bengal University of Judicial Sciences, the latter warned that criticism can bring down “the esteem and credibility of an institution on which the future of freedom and democracy is heavily dependent”. He therefore considers it reasonable to “disallow attributing motives to judges for their decisions or characterizing the institution as irresponsible, corrupt and intolerance”.³⁸ In Indian legal practice, this has been done repeatedly.

³⁴ THE WORLD BANK, BUILDING INSTITUTIONS FOR MARKETS: WORLD DEVELOPMENT REPORT 129 (2001).

³⁵ S.P. Sathe, *Accountability of the Supreme Court*, 35(14) ECON. & POL. WKLY 1383 (2002).

³⁶ Noorani, *supra* note 1.

³⁷ Sumanta Banerjee, *Judging the Judges*, 37(10) ECON. & POL. WKLY 919 (2002).

³⁸ Menon, *supra* note 3.

While it is perhaps possible to read Chapter 7 as an attack on the judges, that would be a misunderstanding. The book is an academic study, not a polemical exercise. The point is that *Taking the State to Court* had to consider the High Court's public image. Such dimensions of social reality can hardly be objectified by means other than cultural studies and their result will always be somewhat relative. However, conventional wisdom – whether shared by a population at large or only a particular professional community – is of real relevance to the social sciences even if it is based on – in legal terms – “unproven” assumptions.

There is ample evidence for the fact that doubts concerning the judiciary are wide spread in India. As Chief Justice of India, S.P. Bharucha admitted in 2001 that a minority of lower court judges was corrupt.³⁹ He later quantified their share as 20% (Financial Express, 20.2.2002).⁴⁰ Sumanta Banerjee⁴¹ welcomed this statement: “Justice S.P. Bharucha has at last come out with an admission which every Indian had known all these years through their own experiences, but had not dared to utter in public for fear of being thrown behind bars”. In his essay, Banerjee emphasized how corruption was neither confined to the lower courts only, nor was it a recent phenomenon.⁴² This fits in well with Rajeev Dhavan's earlier assessment:⁴³ “It is true that there is growing irresponsibility in the judiciary and allegations of corruption and intemperate behaviour by judges are on the increase”.

In terms of public relations, the matter therefore seems quite obvious: The High Court and the Indian judiciary in general are struggling with their own problems of legitimacy. Denial of this fact will hardly enhance their public standing. Suppression of debate and intimidation of potential critics do not lead to higher credibility. The logical implication is rather that the judges may have something to hide.

³⁹ Staff Reporter, *Dismiss Corrupt Judges: Bharucha*, THE HINDU, December 24, 2001, available at <http://www.hindu.com/thehindu/2001/12/24/stories/2001122401150600.htm>.

⁴⁰ See Editorial, *Judge for Thyself*, THE FINANCIAL EXPRESS, February 20, 2002, available at <http://www.financialexpress.com/news/judge-for-thyself/38086/3>.

⁴¹ Banerjee, *supra* note 37, 919.

⁴² Banerjee, *supra* note 37.

⁴³ Rajeev Dhavan, *Judges and Indian Democracy: The Lesser Evil*, in TRANSFORMING INDIA: SOCIAL AND POLITICAL DYNAMICS OF DEMOCRACY 314, 338 (Francine R. Frankel, Zoya Hasan, et. al. eds., 2000).

In the case of *Taking the State to Court*, the High Court took a book out of circulation even though it was a balanced and overall favourable assessment of its environmental bench. The Court's esteem would probably have benefited from open debate. It would most likely have been perceived as a self-confident institution, strong enough to withstand criticism in public. Instead, the Court appeared to be nervously asserting its arbitrary powers in order to suppress any potentially damaging writing.

It was a sorry state of affairs that O.U.P, a leading international publisher, was not more proactive in standing up against such an infringement of academic freedom and the freedom of the press. Correspondence with the author by the Head Office in Oxford and the Delhi Office was reduced to a minimum. The author had hoped that O.U.P. would have made use of its international reputation and standing to publish the book in another jurisdiction such as in the United Kingdom or in any Asian country. This would have served the twin purposes of protecting the India office from possible criminal sanction and affirming its commitment to academic discourse. Unfortunately, instead of responding with legal action or creating a stir in civil society, O.U.P. caved in to the High Court's demand to discontinue distribution internationally.

The Indian scholars who learned of the case generally expressed concern and solidarity, but felt their scope of action was limited. After all, the High Court had demanded apologies from various parties, so the threat of legal prosecution was real. Individuals like Upendra Baxi, S.P. Sathe or Rajeev Dhavan showed interest and gave the author legal advice, which was quite helpful to get the copyright back and re-publish the book on the internet.

What was surprising, however, was that international scholars remained mute. The leading academics who were contacted stated that, sadly, "nothing could be done". The International India Studies community did not make any effort to convey to O.U.P. that caving in to censorship was unacceptable, nor were there any attempts to help the author to re-publish a book that tackled a relevant issue. At the turn of millennium, apparently, there was not yet any thrust from university professors to establish and foster a global public arena for academic debate.

In retrospect, the irony of *Taking the State to Court* is that its history of being effectively banned without judgement goes against the grain of its core message. Whereas *Taking the State to*

Court argues that the judiciary is turning public issues into matters of public discourse and thus strengthening democracy, the High Court shied from the public debate the book might have triggered.

According to S.P. Sathe,⁴⁴ “the reputation of the Indian Judiciary is certainly high in comparison with the reputation of the other organs of government. But it can remain so only if it is constantly subjected to people’s ‘ombudsmanning’”. Obviously, this also applies to *Taking the State to Court*. India’s democracy and India’s judiciary will be stronger once the issues discussed in the book are allowed to be discussed in public.

⁴⁴ Sathe, *supra* note 1.