

**LIBERTY, EQUALITY AND JUSTICE:
STRUGGLES FOR A NEW SOCIAL ORDER**
(ILS Law College Platinum Jubilee Commemoration Volume)

Edited by:

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2003

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In memory of

***Principal J.R. Gharpure
and
Principal G.V. Pandit***

FOREWORD

Dr S.P. Sathe has written an introduction to this commemorative volume, which is being published on the occasion of the Platinum Jubilee of the ILS Law College, Pune. Dr Sathe's Introduction is so lucid and expressive that it will give to the readers more than an adequate view of the rich and diverse contents of this volume. My foreword is in the spirit of thankfulness to the eminent writers who have enriched and enhanced the value of this volume by their learned articles.

My 'Supreme' friend Justice V.R. Krishna Iyer has reminded us of our 'Promises to Keep' enshrined in the 'Noble Preamble' to our Constitution. Justice Krishna Iyer is irreplaceable but he does not have a mint for coining words. His words have a meaning and content which are unique. It is no secret that those who have attempted to emulate him have burnt their fingers. Prof Upendra Baxi has shown how, in the working of the Constitution, it is difficult to maintain the nuances and niceties of the kernel of the Constitution. The other learned writers have brought to bear upon their discourses, their wide and varied experience of law and life.

The discerning reader will find in this volume the exposition of a wide spectrum of views, marked by their amazing erudition and versatility. Gender justice, child labour, a worn out manifesto qua the rights of the disabled, the plight of senior citizens, the dynamics of the Directive Principles, Freedom of Information, the role of the Supreme Court of India as the 'World's Most Powerful Court', the social evils emanating from hostile discrimination, the relevance of the classical Hindu Law in the context of challenges emerging from the new social order, the failure of the executive to protect and preserve the environment which Nature has conferred upon Man as its priceless bounty, the need, today more than ever, to appreciate the significance of Asian Concerns and Perspectives regarding International Human Rights Crimes – all these are a veritable treasure house of a precious heritage.

As the President of the Indian Law Society, I express my sincere sense of thankfulness to the writers who have spent their precious time and talent in enabling us to appreciate and understand our Constitution in its true perspective. It is of interest and significance that, Constitutional Offices like those of the Governor, the Legislature and the Judiciary may also come under the Citizen's Right to Information, if a draft legislation pending at the Centre is passed in its current form. One cannot, of course, have the right to be informed as to how the Governor of a state or the Chief Justice of a court arrived at a particular decision but, the right to information must, at the least, give to the citizen the right to know as to how many

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representations were made to the Governor on any particular issue or what is the state of the backing in the court.

At the end of it at all, the question of questions is : Who has failed whom? Has the Constitution failed us or, have We the People failed to carry out the meaningful message of the Constitution regarding equality, liberty and justice?

Thanks indeed, my dear scholars of law and literature, for your magnificent contribution to this volume.

—Y.V. CHANDRACHUD
(President, Indian Law Society, Pune
Former Chief Justice, India)

PRINCIPAL'S PAGE

It is my proud privilege to present the volume "Liberty, Equality and Justice: Struggles for a New Social Order" edited by Prof S.P. Sathe and Ms Sathya Narayan to mark the Platinum Jubilee Celebrations of the ILS Law College. The volume is dedicated to former principals, Principal J.R. Gharpure and Principal G.V. Pandit who devoted their lives to the cause of legal education. This is a humble effort to express our gratitude and everlasting indebtedness to both of them.

ILS has strived to promote legal education of a high quality and we are proud that several of its alumne have occupied positions of leadership in diverse spheres of law and governance. Legal education must lay emphasis on the role of the law as an instrument of social change.

The Indian Law Society, the parent body of the ILS Law College was established in 1923 by a group of eminent lawyers who were inspired by national spirit. The very association of persons like Sir Chandavarkar, Shri H.C. Coyajee, Shri P.B. Shingane and Shri J.R. Gharpure assured a commitment to excellence. The Society established its Law College at Poona in 1924, with a view to imparting legal education on scientific basis. This college, which was known as 'Law College' was rechristened as 'ILS Law College' in 1980 to distinguish it from the other law colleges established in the city. It has completed 75 years of its existence.

Nearly 80 years ago, when legal education received scant attention of the educational planners, the Indian Law Society envisioned its dynamic role as a catalyst of social harmony, political stability and development. Soon the College came to be known as a premier institute of legal education. It attracted students from all over the country and acquired a cosmopolitan, national character.

Several scholars like the late Prof A.T. Markose, Prof Duncan Derrett, Prof Gunther Sontheimer, and many Fulbright scholars chose the ILS Law College as a place for their research. The College has a very good library, perhaps one of the best Law Libraries of India. (Today the library has a collection of 43,000 books and periodicals and it subscribes to 110 Indian and foreign journals).

Principal Gharpure was an erudite scholar of Hindu Law and was known for his scholarly contributions on shastric Hindu Law. He had the honour of being a member of the Hindu Law Committee under the Chairmanship of Sir B.N. Rau. Principal Gharpure's approach to education was holistic which is evidenced by the varied facilities he took care to provide. Besides a rich library, the College has a scenic campus and very good facilities such as a gymnasium and a swimming pool.

Principal G.V. Pandit who inspired generations of students by his scholarship and humane disposition, guided the destiny of the College during its most critical period when its survival was at stake. He stood up like a mountain and saved the institution from total eclipse.

Legal education at the ILS took a new shape when a social dimension was added to the classroom teaching. Law education crossed the four walls of the classrooms and became community responsive. Clinical legal education, moot courts and various activities such as seminars provided practical training and critiquing ability to the students. These activities were started during the tenure of Principal S.P. Sathe. Over the last ten years, legal education has witnessed a rapid change. Unprecedented challenges are thrown in view of new economic policies and technological advances. There is a great need to be with the times. The ILS Law College is responding to the needs of the day by evolving special programmes in Human Rights, Cyber Laws, Environmental laws, Corporate Laws, etc. The Woman and Law Centre of the College researches in the women's issues. The Ford Foundation gave grants for modernizing and improving the faculty. It is now establishing a Chair in Public Interest Law in celebration of the golden jubilee of its activities in India. This is indeed a recognition of the excellence of the College.

I take this opportunity to thank Prof S.P. Sathe for agreeing to edit the volume. I will be failing in my duties if I do not make a special mention of Ms Sathya Narayan who worked relentlessly to see the volume through. I am thankful to all the authors for their enriching contributions.

On the occasion of the Platinum Jubilee of the ILS Law College, I assure that the ILS Law College will continue to impart socially relevant legal education to young students who have the responsibility "To Create Just Social Order".

—VAIJAYANTI JOSHI

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The World's Most Powerful Court: Finding the Roots of India's Public Interest Litigation Revolution in the *Hussainara Khatoon Prisoners Case*

—Clark D. Cunningham¹

On May 6, 1996 one of America's leading national newspapers, *The Wall Street Journal*, carried a front page story on the Indian Supreme Court entitled, 'India's Supreme Court Makes Rule of Law a Way of Governing'. The article began with these words:

Indian elections began in late April, but power has already shifted in the world's largest democracy — to the 23 justices of the Indian Supreme Court. ... [I]t almost doesn't matter how the elections turn out, because the real work of cleaning up India proved too much for the politicians years ago. The Supreme Court has stepped into the breach. In a constitutional coup of sorts, the High Court has issued some extraordinary rulings in the past year... Court action in such matters as cleansing the nation's air, rivers and blood supply to commandeering a bribery investigation of high public officials underscore India's singular advantage over rival countries in the global-development race: its rule of law.²

Many other commentators around the world have marvelled at the transformation of the Indian Supreme Court into what has been called 'The World's Most Powerful Court'.³ This transformation is largely attributable to the development of a remarkable jurisprudence of judicial activism under article 32 of the Indian Constitution, which gives the Supreme Court original jurisdiction 'to issue directions, orders or writs' for the enforcement of any of the fundamental rights guaranteed by the Constitution. This jurisprudence, developed over the past twenty years, is typically referred to in India as 'public interest litigation'.⁴ This distinguished volume that celebrates the Platinum

1. Communications to the author can be sent by email to cdcunningham@gsu.edu.

2. Waldman Peter, "Jurists' Prudence: India's Supreme Court Makes Rule of Law a Way of Governing," *The Wall Street Journal*, p. 1 (May 6, 1996).

3. See, for example, Baar Carl, "Social Action Litigation in India: The Operation and Limits of the World's Most Active Judiciary," in Jackson Donald & Tate Neal (Eds.), *Comparative Judicial Review and Public Policy* (1992); Cassels Jamie, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" *37 American Journal of Comparative Law*, p. 495 (1989); Craig P.P. & Deshpande S.L., "Rights, Autonomy and Process: Public Interest Litigation in India," *9 Oxford Journal of Legal Studies*, p. 356 (1989); Cunningham Clark D., "Public Interest Litigation in the Supreme Court of India: A Study in Light of the American Experience," *29 Journal of the Indian Law Institute (JILI)*, p. 494 (1987). See also, Jackson Vicki C. & Tushnet Mark, *Comparative Constitutional Law*, p. 641-62 (1999) (discussing Indian Supreme Court as the leading example of judicial activism in the world).

4. The distinguished legal scholar Upendra Baxi prefers to refer to this jurisprudence as 'Social Action Litigation', which is probably a more accurate term, less likely to be confused with the much more general type of litigation called 'public interest' in the United States and other countries. See, Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme

Jubilee of one of India's most influential law schools provides a valuable opportunity for retrospection and reflection about this notable success in the struggle for justice and a new social order in India.⁵

If the rapid and stupendous growth of public interest litigation in India's Supreme Court is considered as a kind of organic development, examination of its roots seems a valuable method. The life of any tree, no matter how huge, is always hidden in its roots. There we find its origin. At the center of the root system we can locate where the tree was born, often out of a tiny seed. The roots contain the genetic pattern that is revealed as the plant grows. Indeed a tree may seem to wither and die, it yet will flower again as the weather shifts, as long as the roots remain vital. The roots nourish the tree and support it. A surprisingly small root system can anchor a tree of stupendous girth and height, but no tree can grow beyond the scale its roots can support.

Tracing the roots of public interest litigation takes us back to 1979 to the case of *Hussainara Khatoon v. Home Secretary, State of Bihar*⁶, often called simply *the undertrials case*. This case is not only very early in the history of the public interest litigation revolution,⁷ but it displays in a most dramatic and compelling way so many of the key features of Indian public interest litigation.

In 1977, the National Police Commission began a three year investigation into a variety of issues affecting the criminal justice system, including the large number of persons detained pending trial; such persons are frequently referred to as 'undertrial prisoners' or simply 'undertrials'. Toward the end of 1978 R. F. Rustamji, a member of the National Police Commission, made a visit to the District Jail at Patna and the Central Jail in Muzaffarpur, both in the state of Bihar.⁸ On 8th and 9th January, 1979, a national daily newspaper, *The Indian Express*, published two articles by Rustamji about conditions in these two jails. According to these articles, in December 1978, the Patna Jail had 137 convicts and 945 undertrials and Muzaffarpur had 1037 inmates, of whom 722 were undertrials. Rustamji gave actual case histories of some of these undertrials

Court of India," 29 *Review (International Commission of Jurists)*, p. 37 (1982). However, the phrase 'public interest litigation' (frequently abbreviated simply as PIL) has come to be the more widely used term, particularly by the Supreme Court itself.

5. There are of course, already, many excellent studies of public interest litigation in India, beginning with Baxi's influential early essay "Taking Suffering Seriously," *supra* note 4 and S.K. Agrawalla's balanced assessment, *Public Interest Litigation in India: A Critique* (Indian Law Institute, 1985). The most comprehensive study to date no doubt is found in Sathe S.P., *Judicial Activism in India : Transcending Borders and Enforcing Limits* (Oxford University Press, New Delhi, 2002).
6. (1980) 1 SCC 81: AIR 1979 SC 1360.
7. Indeed many would consider *Hussainara Khatoon* the 'first' PIL case in the Indian Supreme Court. Judicial activism on behalf of prisoners did precede *Hussainara Khatoon*, however, notably by Justice Krishna Iyer. See *Sunil Batra v. Delhi Administration*, AIR 1978 SC 1675 (taking action on a handwritten letter sent by a prisoner to the Court).
8. "The jail at Patna had been condemned for its dilapidated conditions and lack of sanitation facilities and no effort was made to make it habitable for the reason that the funds were to be utilised for a new construction. The jail in Muzaffarpur seems to have been constructed during the days of the old indigo planters of Champaran, where the people rose against the British Raj under Mahatma Gandhiji's leadership, and were placed in custody in tiled hutments, which were still in use in 1978." Kapila Hingorani's Account of *Hussainara Khatoon* case (on file with author).

which indicated they had been in jail awaiting trial for periods longer than those if they had been charged, tried, convicted and given maximum punishment.

Nirmal Hingorani and Kapila Hingorani, husband and wife, had been practising advocates before the Supreme Court of India since many years. Kapila Hingorani was one of the first women to appear as an advocate before the Supreme Court. In the mid 1980s she prepared a written account of the *Hussainara Khatoon case* in which she provided the following description of how the case began:

On the morning of 9th January, 1979, [my husband] read this article [by Rustamji]. It is a habit with us to read the newspaper after the children leave for school. I said to him, "You take so long with the newspaper, we are getting late for court." He quietly passed on the newspaper to me and said, "Have you read this"? I said, "No." He said, "you always miss the important." I started reading the article while sipping my tea. I felt choked [and exclaimed], "How can such a situation exist in our country? We must do something about it!" Restlessly, I telephoned the organisers of the National Legal Aid Conference held in Delhi in December, 1978. One suggestion was that I write to the Chief Justice of the Patna High Court to direct his attention to the articles; another suggested that a Jail Reform Committee might be formed. [My husband] suggested that I file a *habeas corpus* petition, which I said I would do immediately, if I could.

Two days later, on January 11, 1979, Kapila Hingorani filed a *habeas corpus* petition in the Supreme Court of India on behalf of nineteen undertrial prisoners mentioned in the two articles by Rustamji. The first named petitioner was Hussainara Khatoon, a young woman who had fled with her family from Bangladesh some time in 1975. She was arrested and held in 'protective custody' in jail for four years, even though the Indian government had issued instructions that all those who were arrested under the Foreigners Act coming from Bangladesh should be released on bond.

From its moment of inception, the *Hussainara Khatoon case* helped establish four of the most important features of PIL: (1) A petition need not be filed by a person whose own legal rights are at issue but can be brought by any public-spirited citizen, (2) A petition need not be based on personal knowledge but can be supported by such material as newspaper articles, (3) Both important legal principles and substantial relief can be created at a preliminary stage of litigation, and (4) The scope of litigation can expand rapidly beyond the initial petition as the very process of the case exposes greater and greater injustice.

A major impediment to public interest litigation in the United States has been the continued insistence of the U.S. Supreme Court that the traditional doctrine of standing or *locus standi* — requiring that litigation can only be initiated by a person whose own legal rights are at issue — should not be relaxed or modified.⁹ However, a limited exception to the standing requirement has always existed in relation to the 'great writ' of *habeas corpus*, famously

9. See, Cunningham, *supra* note 2; Chayes Abram, "Foreword: Public Law Litigation and the Burger Court," 96 *Harvard Law Review*, p. 4 (1982); Sathe S.P., *supra* note 5, Chapter VI, pp. 195-248.

guaranteed in the Magna Carta signed by King John in 1215.¹⁰ Because the purpose of *habeas corpus* is to prevent unlawful imprisonment, by ordering the person having custody of the prisoner to justify that custody, it could be requested by someone other than the prisoner himself, on the theory that the very unlawful imprisonment might prevent the prisoner from seeking relief for himself.¹¹ However, as pointed out in Kapila Hingorani's own account of the case, in India (as elsewhere in the common law world): "Normally a *Habeas Corpus* petition could not be filed without a Power of Attorney or an affidavit, typically from a close relation or the 'next friend' of the prisoner." Contrary to this usual practice, Kapila Hingorani did not attempt to contact any of the prisoners named in Rustamji's article nor to locate their relatives before taking action. Instead she simply filed the *habeas corpus* petition herself. To make clear that she was filing the petition as a public spirited citizen, rather than as a lawyer retained by the prisoners, she appeared personally before the Supreme Court without the official robe of an advocate.¹²

The petition was irregular not only because it lacked a power of attorney but because its factual allegations were supported, not by affidavit, but by attachment of the newspaper articles. The Registrar's Office took objection to the filing of the petition due to these irregularities but due to Kapila Hingorani's insistence, listed the petition before a three judge panel consisting of Justice P.N. Bhagwati (as he was then), Justice R.S Pathak (as he was then), and Justice A.D. Khoshal.¹³ The panel set the petition for preliminary hearing on February 5, 1979 and issued notice to the State of Bihar to respond.¹⁴

No one appeared before the court for the State of Bihar on February 5 and therefore the court decided 'at this stage [to] proceed on the basis that the allegations contained in the issues of the Indian Express dated January 8 and 9, 1979 which are incorporated in the writ petition are correct'.¹⁵ The court then took the bold step of ordering the release of all the prisoners named in Rustamji's newspaper article on a non-monetary personal bond. Writing for himself and Justice Koshal, Justice Bhagwati justified this order by interpreting the 'reasonable, fair or just' procedures required by article 21 to include the

10. See, Blackstone William, 3 *Commentaries on the Laws of England*, pp. 131-38 (1770) (calling *habeas corpus* "the most celebrated writ in the English law"); LaFave Wayne, Israel Jerold H., & King Nancy J., 6 *Criminal Procedure*, pp. 6-8 (1999) (*habeas corpus* has been called "the Great Writ of Liberty" since the 16th century).

11. The English Habeas Corpus Act of 1679 provided that the writ may issue "on complaint and request in writing by or on behalf of any person committed and charged with any crime." Blackstone *Commentaries*, Vol. 3, p. 136 (emphasis added).

12. Personal communication from Kapila Hingorani to the author.

13. Five subsequent hearings were held in 1979 before a two-judge panel that always included Justice Bhagwati, who was the identified author of the Court's decisions on February 19, March 9, and April 19. The other two court orders, issued on February 26 and May 4, were not published with an identified author.

14. "It was not possible to comply with these procedural requirements as this petition was based on newspaper articles. The Registrar's Office took objections but on request listed the petitions before the Court with an office report. The Supreme Court issued notice to the State of Bihar which triggered off a series of events." Kapila Hingorani's Account.

15. (1980) 1 SCC 81 at 84: AIR 1979 SC 1360.

right to speedy trial; he also laid down general guidelines for release on non-monetary personal bond.¹⁶

In retrospect it is easy to see the dominant structural features of the PIL displayed in the *Hussainara Khatoon case* as it unfolded, but it is important to realise that, at the time, this structure was created in response to an evident and urgent injustice—which makes the *Hussainara Khatoon case* a powerful exemplar of public interest litigation. Kapila Hingorani did not use herself as a petitioner and newspaper articles instead of affidavits in order to create a 'test case' to challenge doctrines of standing or rules of pleading but because she could not stand the thought of Hussainara Khatoon and her fellow undertrials spending one more day in prison. The many days it would have taken to obtain representation agreements and affidavits were all days of illegal imprisonment that could never have been recovered.¹⁷ The same concern apparently motivated the court:

We should have ordinarily said that personal bond to be executed by them should be with monetary obligation but we directed as an exceptional measure that there need be no monetary obligation in the personal bond because we found that all these persons have been in jail without trial for several years, and in some cases for offences for which the punishment would in all probability be less than the period of their detention and, moreover, the order we were making was merely an interim order. The peculiar facts and circumstances of the case dictated such an unusual course.¹⁸

Combined with the court's evident concern for the individuals named by Kapila Hingorani in her petition was also an equally urgent attention to the plight of other prisoners who might also be unjustly confined. Thus in its very first order, on February 5, the court dramatically expanded the scope of the litigation by directing the state to furnish a list of all undertrial prisoners who had been confined over 18 months.¹⁹

The State of Bihar did appear at the next hearing of the case, on February 19, 1979, but did not object to the irregularity of the petition, neither as to

16. (1980) 1 SCC 81 at pp. 87-89; AIR 1979 SC 1360. Justice Pathak, writing separately, concurred in the order but would not have reached the article 21 issue at such a preliminary stage in the litigation. (1980) 1 SCC 81 at p. 90.

17. Following traditional procedures would also have been a daunting task. Almost certainly Kapila Hingorani would have needed to travel personally to the two jails in Bihar and it is unclear whether the jail authorities would have allowed her to meet Hussainara Khatoon and the other undertrials on her own initiative. It is also possible that such actions on her part might have been interpreted by the Bar Council as improper solicitation.

18. (1980) 1 SCC p. 88. Writing separately, Justice Pathak also emphasised the compelling particular facts of the case: "After carefully considering what has been said in respect of each individual undertrial, we have considered it appropriate, in the interests of justice, to make the order of February 5, 1979 directing the release of the persons mentioned in that order on their executing a personal bond. The order is somewhat unusual in that it directs that the personal bond to be taken in each case should not be based on any monetary obligation. The condition has been included as an exceptional measure under the persuasive pressure of the particular facts and circumstances of the case." (1980) 1 SCC 81 at p. 90 (emphasis added).

19. This aspect of the order is not reported in the Court's first decision, dated February 12, 1979, but is referenced in the Court's second decision dated February 26, 1979. (1980) 1 SCC p. 93.

Kapila Hingorani's standing nor as to the reliance on newspaper; indeed the State did not challenge the factual allegations contained in Rustamji's articles. Rather, the advocate for the state focused on systemic actions the state had already initiated to address the undisputed problem of excessive pre-trial detention. Although the court's order of February 5, 1979 did not reach the relevant state officials until February 13 (a fact which the court noted with dissatisfaction),²⁰ on February 9 the state issued a letter to all District Officers regarding release of undertrial prisoners, apparently in response to the court's original notice to reply to the petition issued in January. In general terms, the letter indicated that all pending criminal cases should be withdrawn in which the accused had been confined for a period exceeding the maximum period of imprisonment, and specifically mentioned various categories of cases that should be dismissed, if the accused had already been confined for more than six months.²¹ The letter also addressed the problem of imprisonment pending police investigation and directed withdrawal of all such cases where the accused had been confined for more than two years unless the District Magistrate, after detailed review, concluded that there was good reason for the delay in investigation or that withdrawal was not 'in the public interest'. The letter finally directed release of all lepers and other prisoners suffering from dangerous infectious diseases who had been confined for six months or more.²²

The court indicated satisfaction that the State of Bihar had already taken initiative to address the undertrial problem but made clear that the court was going to continue to take an active role, setting another hearing date for a week later at which time it expected to receive the comprehensive list of prisoners who had been confined for over 18 months and issuing notice requesting participation in the case by the Attorney General of India and the Supreme Court Bar Association.²³

At the third hearing in the case, on February 26, 1979, the court for the first time had before it detailed information provided by the State of Bihar, both about the specifically named petitioners and about all undertrials confined over 18 months. At this point, the scope of the litigation widened significantly in response to the very troubling facts revealed by the state's affidavits. As to the named petitioners, the court learned that a number of women and children who were not even charged with a crime but were being held in what the state termed 'protective custody' because they were refugees, homeless, witnesses to crimes, or even worse *victims* of crime.²⁴ Declaring that such 'protective custody' was a

20. (1980) 1 SCC 81 at pp. 92-93.

21. (1980) 1 SCC 81 at pp. 91-92. (Presumably the cases to be dismissed where the accused had been confined at least six months, were petty offenses.)

22. It is not clear whether this last provision was primarily intended to benefit the diseased prisoner or to protect the rest of the inmate population. If the latter, it is puzzling that the state would want persons with dangerous infectious diseases confined with a general jail population for even as long as six months.

23. (1980) 1 SCC 81 at p. 93. The Attorney General did indeed appear personally at the next hearing, on February 26, 1979. (1980) 1 SCC 81 at p. 95, but as of March 9, 1979 the Supreme Court Bar Association had still not responded (1980) 1 SCC 81 at p. 108 and there is no indication in the published decisions of the case that it ever did appear to assist the court or the petitioner.

24. According to Kapila Hingorani's account, Hussainara Khatoun was herself being held in

clear violation of article 21 of the Constitution,²⁵ the court ordered that they be released immediately and that the state offer them accommodation in welfare or rescue homes.²⁶ The court also noted some astonishing delays in bringing some of the other named petitioners to trial: one had been an undertrial prisoner for seven years and another for more than eight years. Doubting whether such prisoners had been brought before a magistrate on a regular basis, as required by the Code of Criminal Procedure, the court ordered the state to supplement its report on the named petitioners to indicate whether each had been 'periodically produced' before a magistrate.

As of the February 26 hearing the state had provided a list of undertrials confined over 18 months in 17 out of the 48 jails in Bihar. Even on the partial list the court found 'many' cases of persons confined for a period that exceeded the maximum potential punishment. It cited one example of a man who had been confined over eight years for an offense punishable by a maximum term of two years. Apparently overwhelmed by even this incomplete set of data provided by the state,²⁷ the court directed that the list be resubmitted in one week in a format broken down by category of crime and total years of confinement.

The state had already committed itself to the withdrawal of all cases where an undertrial prisoner had been confined in excess of the maximum sentence,²⁸ but at the February 26, 1979 hearing, the court continued to press forward to expand the categories of persons eligible for immediate release, based upon existing statutory provisions. Implementing a six month statute of limitation for petty offences, it ordered the release of all undertrials charged more than six months ago with a crime punishable by one year or less. Implementing a provision regarding cases triable by a magistrate 'as a summons case', the court ordered release in all such cases pending more than six months from the date of arrest unless within the next month the state obtained a magistrate's order authorising further police investigation.

'protective custody' as a refugee from Bangladesh. Another named petitioner was Itwaria Ahir, who was so mentally disoriented that she could not explain why she was in jail; she apparently was being held as a witness because she had failed to pay a bond to guarantee her appearance in court. Reena Kumari was a young woman who had been sent to a 'protection home', perhaps because she had been engaged in prostitution, and then sent to jail when the home closed. Another young woman named Poonam was apparently a kidnapped victim of a prostitution ring; she had been in jail for five years for 'protective custody'. Kapila Hingorani's Account.

25. "No person shall be deprived of his life or personal liberty except according to procedure established by law."
26. At the February 19 hearing, Kapila Hingorani had pointed out to the court that some of the petitioners who had been released on personal bond had no place to go after leaving prison and at that time the court had ordered Bihar's Social Welfare Department to contact these petitioners and arrange for their care pending the final resolution of the writ petition. (1980) 1 SCC 81 at p. 93.
27. According to Kapila Hingorani's account, more than 6000 names appeared on the list of undertrials confined for more than 18 months.
28. Presumably such withdrawal meant that there would be no finding of guilt for such defendants and no subsequent prosecution for the same offence.

At the next hearing, on March 5, 1979, the state supplemented its prior list to provide information on undertrials confined for more than 18 months in all 48 jails in Bihar. Working from the data provided in the state's affidavits, Kapila Hingorani identified to the court 70 undertrial prisoners who had been confined for a longer period than the maximum possible sentence.²⁹ The court said that this revelation 'discloses a shocking state of affairs and betrays complete lack of concern for human values', ordering the immediate release of the 70 prisoners.³⁰ The court also identified 45 other prisoners who had been undertrials for six or more years, and directed the state to report within three weeks for each prisoner every date on which a magistrate had reviewed the case.³¹

Once again the court did not content itself with work on implementation of its prior orders but moved into new territory: in this decision, the provision of free legal aid. Article 39-A of the Constitution, added in 1976, provides that the state 'shall ... provide free legal aid ... to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities'. However, article 39-A is placed among the Directive Principles of State Policy which are not 'enforceable by any court', according to article 37. Writing for himself and Justice D.A. Desai, Justice Bhagwati, a long-time advocate of legal aid schemes,³² succeeded in converting the legal aid principle into an enforceable right by seizing upon the compelling facts of the *Hussainara Khatoon* case. When, writing for himself and Justice Koshal, Justice Bhagwati declared, in the decision of February 12, 1979, that the right to speedy trial was a constitutional right under article 21, he carefully declined to say at that time what should be the remedy for failure to provide a speedy trial:

The question which would, however, arise is as to what would be the consequence if a person accused of an offense is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial ... Would he be entitled to be released unconditionally ...? That is a question we shall have to consider when we hear the writ petition on merits on the adjourned date.³³

Now, on March 9, 1979, with evidence before the court that the tragic stories from Rustamji's newspaper articles that moved it to grant extraordinary, immediate relief to the named petitioners were typical of a vast number of prisoners, Justice Bhagwati turned to free legal aid as a necessary method for remedying the denial of a timely trial to a number too large to be relieved by individualised scrutiny at the level of the Supreme Court. Declaring that free

29. The actual number of '70' undertrials is not mentioned in the March 9, 1979 decision but in the following decision dated April 19, 1979. (1980) 1 SCC 81 at p. 110.

30. (1980) 1 SCC 81 at pp. 102-3.

31. The state had responded at the March 5, 1979 hearing to the court's February 26 order to indicate whether previously identified long-term undertrials had been 'periodically produced' before a magistrate by producing a conclusory affidavit that the prisoners had been regularly produced 'as and when required by the courts', (1980) 1 SCC p. 102. The Court apparently learned from this experience the need to be explicit in ordering the production of information in cases like this.

32. Justice Bhagwati chaired the Legal Aid Committee appointed by the Government of Gujarat in 1971 [as mentioned in *Hussainara Khatoon I*, (1980) 1 SCC 81 at p. 85].

33. (1980) 1 SCC 81 at p. 89.

legal aid is a necessary component of 'fair and just procedures' under article 21 'if the circumstances of the case and the needs of justice so requires', the court ordered the State of Bihar to provide at its own cost lawyers to make applications for bail at the next appearance before a magistrate for all prisoners charged with bailable offenses. Thus meaningful access to bail became at least a partial remedy for delayed trial by reducing the period of pre-trial incarceration. However, the court went a step further in the case of prisoners who had been confined more than half of the period of the maximum sentence, ordering that the state pay for legal assistance before the magistrate not only to seek bail but also to oppose remand of the case for further proceeding (presumably on speedy trial grounds).

The court published two more decisions on the *Hussainara Khatoon case* in 1979: on April 19 and May 4. As with the court's earlier decisions, on these dates the court both attended to implementation of prior orders and expanded further the legal and remedial scope of the litigation. The April 19 decision particularly re-emphasised the issue of legal aid in language that seemed to go beyond the decision of March 9, 1979:

[A]ccording to the law as laid down by us in our judgment dated March 9, 1979, it is the constitutional right of every accused person who is unable to engage a lawyer ... to have free legal services provided to him by the State ... Legal aid is really nothing else but equal justice in action. Legal aid is in fact the delivery system of social justice. If free legal services are not provided to ... [an indigent] accused, the trial itself may run the risk of being vitiated as contravening article 21...³⁴

The April 19, 1979 decision also expanded the litigation further by directing the state to report on all undertrial prisoners suffering from mental illness and strongly suggesting that the state should make alternative arrangements for them.³⁵

The May 4, 1979 decision addressed the problem of prisoners charged with multiple offenses. The court ordered the immediate and unconditional release of all prisoners confined for a period in excess of the maximum period, if the sentences for each offense ran consecutively and ordered that prisoners who had already served the maximum period, if all potential sentences ran concurrently, should be released on personal bond in the amount of Rs 50.³⁶ The court also seemed to be poised to order sweeping reforms to the court system of Bihar, directing the state to provide it detailed information so that it could decide 'what directions are necessary for setting up more courts, appointing additional judges and providing more facilities by way of staff and equipment, so as to ensure fulfillment of the fundamental right of the accused to speedy trial under article 21 of the Constitution'.³⁷

34. (1980) 1 SCC 81 at p. 113. The March 9, 1979 decision more narrowly addressed the need for legal aid to prevent or remedy denial of the right to speedy trial.

35. (1980) 1 SCC 81 at p. 110.

36. (1980) 1 SCC 81 at pp. 115-16.

37. (1980) 1 SCC 81 at p. 116. This passage was foreshadowed in the court's March 9, 1979 decision in which the court referred to various court decisions in the United States ordering

In the May 4, 1979 decision the court indicated that the writ petition would come up for 'final hearing' on July 24, 1979. However, from May 4, 1979 on there were no further reported decisions in the *Hussainara Khatoon* case. According to Kapila Hingorani's account of the case, on August 6, 1979 the matter was adjourned to be listed before Justice Bhagwati on November 1, 1979. The case was repeatedly adjourned thereafter without further specific directions while the court waited for reports to be furnished by the state. During this period Kapila Hingorani worked to expand the case to cover all of India:

Although the court did not accede to our request that since there were a large number of undertrial prisoners in the country notice should go to all the states and a list of such prisoners be furnished to the court, they said that, if we could bring before the court even one undertrial prisoner from each state, they would ask for a list of all undertrial prisoners in that State. We collected further data. Mr Arun Shourie of *The Indian Express* helped us in this, and we brought seven other states before the court apart from individual petitions of persons who wrote to us and others.³⁸

It has been reported that between 30,000 and 40,000 undertrial prisoners were ultimately released as a result of the *Hussainara Khatoon case*³⁹. The case was finally disposed of by the court on August 4, 1995 with directions to each High Court to collect statistical information on undertrials in jails in their jurisdictions and to implement the guidelines laid down in the court's 1979 decisions.⁴⁰

It does seem appropriate to think of the *Hussainara Khatoon* case as the seed from which India's public interest litigation grew. In the next few years following 1979, there was a virtual explosion of litigations in the Supreme Court under article 32⁴¹ that displayed the same essential features as the *Hussainara Khatoon* case: waiver of the standing requirement and the requirement of personal knowledge for the petitioner, active involvement of the court itself in the investigation of facts, rapid issuance of decisions and remedial relief in the form of interim orders, and steady expansion of the scope of litigation beyond the allegations of the original petition. In 1982 the court itself observed in the famous *Judges Transfer case*: "Today a vast revolution is taking place in the judicial process; the theatre of the law is fast changing, and the problems of the

substantial improvements to jails and prisons and then said, "we do not see why this Court should not adopt a similar activist approach ..." (1980) 1 SCC 81 at p. 108.

38. Kapila Hingorani's Account.

39. Kapila Hingorani's Account; Hingorani Aman, "Indian Public Interest Litigation: Locating Justice in State Law," 17 *Delhi Law Review*, p. 164 (1995) (Aman Hingorani is the son of Nirmal and Kapila Hingorani and currently practises before the Supreme Court in association with his parents and his sister, Priya Hingorani.) The *Hussainara Khatoon* case apparently also prompted the 78th Report of the Law Commission of India, *Congestion of Undertrial Prisoners in Jails* (1979). See, Sharma Mool Chand, *Justice P.N. Bhagwati: Court, Constitution and Human Rights*, p.101 (Universal Book Traders, Delhi, 1995). According to Kapila Hingorani's account, "Questions were asked in Parliament [about the case and] a conference of State Home Ministers was called by the Minister of Home Affairs to discuss the issue."

40. Hingorani Aman, 17 *Delhi Law Review* at p. 174: The author has been unable to find a published copy of the Court's Order dated August 4, 1995.

41. Baxi, *supra* note 4, reported that more than 70 public interest petitions were filed in the Supreme Court in the period 1980-82, most of which were brought by public-spirited citizens.

poor are coming to the forefront.”⁴² In another 1982 case, the *Asiad* case, involving claims of labour exploitation in construction of facilities to host an international sports competition; the court said: “We wish to point out with all the emphasis at our command that public interest litigation is a totally different kind of litigation from the ordinary traditional litigation”.⁴³

The tree that has grown from the seed planted by Kapila Hingorani in 1979 has indeed now grown to an astounding size, covering a vast geography of legal issues and towering over the public life of India. What does our botanical metaphor suggest about how the *Hussainara Khatoon case* established a sound foundation for this phenomenon — and what might the metaphor suggest about the potential limits of healthy growth?

In the early 1980s some commentators suggested that public interest litigation was developed strategically by persons seeking to restore the power and legitimacy of the Supreme Court that had lost critical credibility by its failure to act against Indira Gandhi's abuse of the Emergency Rule provisions of the Constitution during the period of 1975-77.⁴⁴ Indeed, during the period of 1980-86 it seemed to many that the driving force might be one person, Justice P. N. Bhagwati, who authored most of the leading public interest litigation decisions during this period and, upon his appointment as Chief Justice in 1985, instituted a number of institutional measures to support public interest litigation, such as a special cell in the Registrar's Office to handle the huge volume of letters sent to the court. When the author conducted research in India in 1986 on public interest litigation, there was therefore considerable discussion whether this phenomenon would survive the impending retirement of Chief Justice Bhagwati. However, public interest litigation has only continued to grow in scale and importance in the past fifteen years — indicating that its vitality must transcend the historical context and the individual personalities that attended its birth.

The post-Emergency historical context may have created the fertile soil into which dropped the seed of the *Hussainara Khatoon case*, but the radiant energy that quickened that seed and brought public interest litigation to life was something more fundamental: the moral imperative to respond to overwhelming evidence of injustice.⁴⁵ The moment of birth may well have been that morning

42. *S.P. Gupta v Union of India*, AIR 1982 SC 149 at p. 192. In this case the court explicitly abandoned traditional standing requirements when “public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another ... [but] to prosecute and vindicate public interest which demands that violation of constitutional or legal rights of a large number of people, who are poor, ignorant or socially and economically in disadvantaged position, should not go unnoticed, unredressed — for that would be destructive of the rule of law.” *Id.* p. 190.

43. *People's Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473, 1476. Both, this decision and the opinion from S.P. Gupta, *supra* note 41, were authored by Justice Bhagwati.

44. *See*, in particular Baxi, *supra* note 4.

45. Upendra Baxi captured this idea well when he titled his influential essay on public interest litigation, “Taking Suffering Seriously,” *supra* note 4, footnote 65, a deliberate word play on the famous book by Dworkin Ronald, *Taking Rights Seriously*. “We here modify Professor Dworkin's felicitous title *Taking Rights Seriously* (1977). Perhaps, in a context like India's,

of January 9, 1979 when Nirmal Hingorani passed on to Kapila Hingorani the newspaper containing the article by Rustamji. Casting aside conventional suggestions to write a letter of protest or form a committee, at that moment Kapila Hingorani took personal responsibility to do what she could to end the injustice presented to her shocked eyes. In effect, she strode boldly into the Supreme Court, thrust the newspaper article in front of the judges sitting there, and said, "Do something!" And they did.

In retrospect, the *Hussainara Khatoon case* was an ideal vehicle for launching India's public interest litigation revolution. There was never any serious factual or legal dispute about the basic allegations of the petition: large numbers of people were being imprisoned in shocking violation of basic legal principles. As soon as the facts were brought before the court, they cried out for immediate action. Traditional methods for assuring that the power to imprison was not abused — such as legal representation of the accused, a bail system, and regular oversight of pre-trial detention by magistrates — had obviously failed, thus creating the powerful imperative to forge new methods of bringing injustice before the eyes of judges.

The *Hussainara Khatoon case* thus teaches an important lesson for legal systems around the world. Newly emerging democracies typically have no shortage of legal rights — their new constitutions frequently contain explicit and generous guarantees of human rights — but those rights often remain only theoretical as old forms of injustice, rooted in custom, colonialism or tyranny, continue to thrive. Countries with a well-developed rule of law system do not question their own procedures, procedures so complex and costly that only those with lawyers can obtain justice. The problem of justice for the poor in such countries is addressed by providing lawyers for the poor through free legal aid. Never considered is the possibility of opening the courts for direct citizen access as has happened in India. Complex and costly procedures are needed when determined adversaries contest issues of fact and law. But the *Hussainara Khatoon case* shows that often what is needed is simply to bring clear illegality to light. A recent example in the United States is the widespread police practice of using race as the basis for deciding whether to investigate a citizen for possible criminal activity. Although minority communities have been complaining for decades about the existence of this practice, there had been virtually no relief provided by the legal system until a few highly publicised abuses captured the public's attention and led to a series of highly successful lawsuits. It is no accident that much of the lead in India's public interest revolution has been taken by investigative journalists and citizen action groups.

The botanical metaphor also suggests that a tree cannot outgrow its root system. The *Hussainara Khatoon case* seems to teach a cautionary lesson. Another way in which the case was an ideal beginning was that dramatic relief could be easily provided by the court; it simply ordered the state to release

one may not take rights seriously if one is unable to take suffering seriously." Former Indian Supreme Court Justice Krishna Iyer told the 125 delegates assembled from all six continents for the inaugural conference of the Global Alliance for Justice Education, held in Tiruvananthapuram, Kerala in December 1999, that no one should be a judge unless he or she would weep at the sight of injustice. (Conference Report posted on the World Wide Web at www.gaje.org).

prisoners from jail. This relief cost no money and implementation was easily monitored. However, the court faltered when it ventured into well-intentioned remedies intended to reform the structure of criminal justice to prevent future abuses such as ordering provision of legal aid and regular case reviews by magistrates. These remedies would cost money and were not so easily monitored. The court's apparent fifteen year silence in the *Hussainara Khatoon case* after its decision of May 4, 1979 has thus an ominous quality. In 1996, only a year after the *Hussainara Khatoon case* reached its final disposition, Common Cause — a frequent public interest petitioner before the Supreme Court — filed a petition seeking the same relief for undertrial prisoners across India. Once again the court ordered prisoners' release who had been confined for years pending trial, stating: "It is a matter of common experience that in many cases where the persons are accused of minor offences punishable with not more than three years, or even less, with or without fine, the proceedings are kept pending for years together."⁴⁶ Yet despite this second round of court orders, on September 25, 2000 *The Times of India* published the following report under the headline, "Jails, Courts Remain Crowded as SC Ruling Gathers Dust":

Some time ago, the Supreme Court described the criminal prosecutions in the country as the 'engines of oppression'. Saying so it also ordered release on bail of all undertrials involved in certain petty offences and facing trials for over a year or more. Lakhs of undertrials would have benefitted and the jails would have shed a lot of extra crowd if the apex court's directives were implemented. The registrars of the High Courts were to hand over the copies of the order to all criminal courts under their control with a direction to comply with it. ... But, the directives seem to have been completely ignored if one goes by the state of affairs in the jails and also in the court rooms. Over three crore cases are awaiting disposal. ... Recently, Supreme Court Chief Justice A.S. Anand urged the chief justices of High Courts to issue instructions to subordinate courts to grant bail to the undertrials who could not arrange for bail, though they were entitled to freedom.... At least 73 per cent of the 9000 odd inmates in the Capital's Tihar jail are involved in petty offences.... Of the 270,000 prison population in India, almost 2 lakh [200,000] are undertrials who are anxiously awaiting justice.⁴⁷

Shortly after this discouraging report in *The Times of India*, more encouraging news appeared.

On October 19, 2000 it was announced by the National Legal Services Authority that "State Legal Services Authorities have begun providing legal aid and advice to prisoners in jails all over the country...[and] Legal Aid Counsel have been appointed in all the courts of Magistrates through the country to provide timely and free legal assistance to persons in custody who cannot

46. *Common Cause v. Union of India*, 1996 (4) SCALE 127. See also *R.D. Upadhyay v. State of Andhra Pradesh*, 1996(4) SCALE (SP) 11 (finding that 'a large number of undertrial prisoners have been languishing in Tihar Jail without trial for a very long period').

47. Rakesh Bhatnagar, "Jails, Courts Remain Crowded as SC Ruling Gathers Dust" (*The Times of India*, September 25, 2000).

engage an advocate.”⁴⁸ On December 2, 2000 it was announced that the central government would be making special grants totaling more than 2 billion rupees to state governments to set up over 1700 ‘fast track’ additional courts at the district level. “[A]ll undertrial cases from the existing 13,000 district and subordinate courts will be transferred from April 1, 2001 to the proposed fast track additional courts for their expeditious disposal.”⁴⁹

Although we need to study the roots to understand the plant, as Jesus said, “We judge a tree by its fruits.” What then have been the fruits of the *Hussainara Khatoon case*? Looking over the twenty years period following the filing of Kapila Hingorani’s petition, it appears that public interest litigation is a necessary but not sufficient condition for remedying the tragedy of undertrial imprisonment. The most recent reports of legal aid and expanded court resources seem to indicate that systemic change is finally taking place, thanks to legislative appropriations and executive initiative. Even the world’s most powerful court could not by itself guarantee the provision of legal aid and sufficient judicial resources at the trial level throughout India (or even perhaps in only one state, Bihar). What it could do was release individual, unjustly imprisoned people and bring the issue dramatically before the nation. It seems that public interest litigation is most effective when injustice is both immediate and can be immediately remedied.

The cases that successfully built upon the foundation laid by *Hussainara Khatoon* involved concrete examples of individuals suffering from terrible injustice: tortured prisoners,⁵⁰ enslaved labourers,⁵¹ inhabitants of shantytowns demolished in the midst of the monsoon.⁵² In each case, behind the public spirited petitioner the court could see the faces of particular people in urgent need of justice. However, in more recent years Indian public interest litigation has come to include cases involving matters of general public policy in which the petitioner stands for the entire citizenry of India rather than individual victims of injustice.⁵³ Although such cases have often accomplished important public service, they have raised problems of implementation and institutional capacity that far exceed the challenges of the undertrial problem. Consideration of the origins from which public interest litigation has sprung suggests caution as to the extent to which it can outgrow its roots in the imperatives of injustice with a human face.

48. Indlaw News, “Free Legal Aid Services in Jails” (October 19, 2000) (www.indlawnews.com)

49. Indlaw News, “Govt To Set Up Fast Track Courts for Undertrials” (December 2, 2000) (www.indlawnews.com)

50. *Khatri v. State of Bihar*, AIR 1981 SC 928.

51. *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

52. *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.

53. Examples would include the many cases of environmental litigation brought by M.C. Mehta, for example, the *Taj Mahal case*, *M.C. Mehta v. Union of India*, AIR 1997 SC 734, and the *Hawala Public Corruption case*, *Vineet Narain v. Union of India*, (1998) 1 SCC 226.