

With the introduction of the concept of Public Interest Litigation (PIL) in the late 1970s direct access for citizens was provided to the High Courts as well as the Supreme Court. Progressive judges such as Justice P.N.Bhagwati began to actively encourage social and political activists to bring instances of injustice to exploited groups and vulnerable individuals directly to the notice of the Supreme Court. The Supreme Court had even ruled that letters to it could be treated as petitions. Poor prisoners, inmates of Nariniketans, marginalised tribals, bonded labourers and similar groups whose voices had never reached the citadels of power began to get a hearing in the highest court of the land through social workers and political activists who brought their cases from remote regions to the country's apex court. For a brief period it appeared that one didn't need to hire expensive lawyers or follow long cumbersome procedures to get the voice of the poor heard in the Supreme Court. A few sympathetic judges even made allowances for the activists who tried to plead the cases directly without the mediation of lawyers. However, what was most encouraging was that there was no difficulty in getting some of the best lawyers to take on these cases *gratis* or for only a nominal fee.

However, if one were to review the various high profile Public Interest Litigation cases of the last decade and a half, one would find that, despite all the fanfare of media coverage, Public Interest Litigation has very rarely actually benefited those victims whose cases were brought to the Supreme Court. This is my impression not only from talking to various people and organisations who filed PIL cases, but also from **Manushi's** own experience with Public Interest Litigation.

# Public Interest Litigation

## One Step Forward, Two Steps Backwards

**Madhu Kishwar**

### Maki Bui's Ordeal

Our first experiment with PIL was in 1981, when **Manushi** filed a petition in the Supreme Court on behalf of Maki Bui and her daughter, Sonamuni, Ho tribal women of Lonjo Village in Singhbhum district, Bihar. The petition sought to overturn the denial of equal inheritance rights to women of the Ho tribe. Maki Bui died last year, but the Supreme Court has not yet delivered a judgement on the case, which has remained pending for the last 13 years.

I met Maki Bui in 1980 while I was travelling through Singhbhum gathering information on police atrocities against tribal women. During the course of police raids carried out

on a number of villages, the police had arrested and intimidated tribal women who were taking part in a movement to reclaim forest lands from the government. I went to Lonjo village to meet Pilar, a social worker based there at the time. Many village women would come to her with their family or health problems. Among the women Pilar told me about and introduced me to was Maki Bui.

When I first met her, Maki Bui was in her early fifties. She had recently been widowed. Her husband had been a retired police constable who had served for many years in other parts of Bihar, often getting transferred from one local post to another over



**Maki Bui and her daughter Sonamuni Kui**

his long career. Only after his retirement did he live in Lonjo village with his wife and daughter for a sustained period of time. Like most rural women with a husband who worked outside the village, Maki Bui stayed in the village, working on the land through most of the period he was employed elsewhere. The couple had no sons, just one daughter. Their daughter, Sonamuni, had been married off while her father was still alive. Many of Maki Bui's husband's relatives living in Lonjo village were among the most influential families in the village. This included his elder brother and the brothers' sons.

After her husband's death, Maki Bui continued working on the land inherited by him, using her usufructuary rights according to the customary law of her tribe. According to this customary practice, Maki Bui was entitled to occupy her husband's share of the family land during her lifetime. After his death, the land would revert to one of her husband's agnates (relatives in the male line) rather than her already married daughter, Sonamuni, if the contemporary Ho custom were followed. Sonamuni would have been allowed limited usufructuary rights in her natal family land only if she had remained unmarried.

As soon as she gets married, a Ho woman loses all rights to her natal family's land, even her limited usufructuary foothold. This loss of usufructuary rights is permanent; she never gets those rights back, even if her husband abandons her immediately after her wedding. An implicit assumption of the customary law is that the daughter's right has been transformed into a right to sustenance in her marital family. Since tribal marriages are not always stable and men often take a second or even a third wife, women's usufructuary rights in their marital household are



**Pilar (left) with a woman of Lonjo**

frequently violated both legally and customarily. In such situations they end up not being able to claim a maintenance right in either their parental or marital home. This is an important reason why a large number of Ho women stay unmarried. Census reports, since the early decades of this century have consistently recorded that about 11 percent of adult Ho women remain unmarried. This is a high figure for any society; for India it is astonishingly different from the almost universal rate of marriage in other communities.

A Ho woman's position as a wife is particularly vulnerable if she has no sons. A woman with an adult son is more likely to have her rights honoured since a son cannot legally be disinherited from coparcenary property by his father. In addition, a man is not likely to be able to beat his wife out of the house if she has the moral and physical support of her able bodied sons. However, a woman who is childless or only has daughters is hard put to enforce her rights if her marriage breaks down or her husband dies.

Maki Bui found herself in precisely such a situation. After her husband's death, his male relatives became impatient and began to put pressure on her to give them all rights to her land, threatening to take away even her limited usufructuary rights. Maki Bui faced a particularly difficult situation because she wanted to pass on the land to her daughter, Sonamuni, who had been married into a poor family. At first she tried to get her daughter and son-in-law to come and live in Lonjo so that they would have some claim customary to her land after her death. Customary law does have provisions for adopting a son-in-law for inheritance purposes. The strategy was resented by Maki Bui's husband's family, who began to threaten her with violence.

Worried that her attempts to pass the land on to her daughter and her daughter's husband were being thwarted, she tried surreptitiously to mortgage her land so that she could give the money thus raised to her daughter in lieu of the land itself. This strategy evoked great hostility amongst her husband's male relatives.

One of her husband's brothers was the village *mukhia* (headman). Their sense of their own dominance in the village made them feel they could get away with murdering Maki Bui if she seemed likely to be nearing success in finding a way to pass the land on to her daughter.

The first time I met Maki Bui she was living in constant fear for her life. She first approached Pilar for help, and through Pilar, me. In my naive, enthusiastic way, typical of many of our English educated elite who think of rights in terms of modern jurisprudence, something to be enforced by the state machinery, I suggested we challenge the constitutional validity of the discriminatory tribal law. The constitutional case seemed straight-forward and clearly in Maki Bui's favour. Non-discrimination on the basis of gender is a fundamental principle of the Constitution: it appeared that it would be simple to get the Supreme Court to rule that those aspects of tribal customary law that discriminate against a woman's inheritance rights were unconstitutional. I promised Maki Bui that I would return to Delhi, explore the possibility of obtaining legal help for her, and come back to Lonjo with some solution to recommend.

That was during the heyday of enthusiasm for public interest litigation in India. I consulted a number of lawyers and people in the judiciary. They all encouraged me to proceed with my petition, indicating that the Court was likely to look on it favourably.

### **Petition Admitted**

I then went back to Lonjo and told Maki Bui that we had found a solution to her difficulties. The Supreme Court itself would listen to her case. If her petition succeeded, and we were confident it would, then not only her

rights but the rights of millions of other tribal women would be granted. She seemed enthusiastic. A short while later, **Manushi** filed a public interest case in the Supreme Court on behalf of Maki Bui and her daughter. This case was admitted to Justice Bhagwati's court. We felt particularly elated since he was reputed to be sympathetic to the plight of the poor and vulnerable, especially women.

Public Interest Litigation cases attracted a lot of media attention in those days. The Maki Bui petition, received some coverage in the national press, but it received far more publicity in Bihar. Following Maki Bui's petition, which was published in **Manushi** No. 13, many other people showed an interest in joining this battle. People from different regions wrote to us say-ing that the situation was similar among several other communities and therefore, they wished to join us in challenging this discriminatory law. One of **Manushi's** subscribers, Mary Roy, who belonged to the Syrian Christian community, wrote to say she had filed a petition along the lines of the **Manushi** petition challenging similar discrimination against Syrian Christian women. From Maharashtra's Dhulia district, Sharad Patil, a prominent political activist working among the tribals, also filed an intervention petition because many tribal communities in that area practised similar denial of land rights to women. From within Bihar some activists working with the Jharkhand movement brought more intervention petitions involving other tribal communities. Maki Bui's case seemed to have a large ripple effect. Within a short time, we had succeeded in getting the issue of women's land rights debated and discussed among a whole range of social and political organisations. In Bombay, some

activists of Nivara Hakk Samiti, who were fighting for the housing rights of pavement dwellers, wrote to say that they had decided to demand house *pattas* in the name of women. Framing the petition was not simple, given the sensitive nature of the issues involved. Thus far we only knew the situation from the point of view described to us in discussions with Maki Bui and a few other village women. I knew next to nothing about inheritance procedures and land settlement patterns and precedents. The petition for relief had to give an accurate idea of what the customary law was at the operational level. Several lawyers who offered to fight the case for us knew even less than we did about these customary laws.

The solutions they suggested were, therefore, mostly simplistic and inappropriate. Most of them suggested we should ask the Supreme Court to apply the Hindu Succession Act (HSA) to resolve this problem in tribal law. We explained that doing this would be politically suicidal. The tribals had learned from a long history of exploitation at the hands of *dikus* (outsiders) to be hostile to attempts at Hinduisation. *Dikus* have snatched away most of the tribal lands by force or fraud with the active connivance of the colonial British government as well as of its successor regime, the Government of India. Many tribal difficulties stemmed from the period when the British government opened this area for outsiders to start business and mining ventures on land traditionally owned by tribals.

### **Officials Flout Court Orders**

Getting the case admitted into the Supreme Court was no problem. Getting the case heard was a far more difficult matter. The years that followed were full of unending petty harassment, slipshod court

procedures and interminable delays. After the case was admitted on August 20, 1981 the Supreme Court served notice to the Bihar government to send its response. They also ordered the Bihar government to ensure that during the period that the case remained before the court and until final orders were passed, they were to see to it that Maki Bui continued to enjoy her customary rights as a widow without fear or hindrance. We had expected that Maki Bui's relatives would have behaved in a more restrained fashion when they got to know that she had gained access to the Supreme Court and that if they tried any mischief, we could pressure the local administration to provide her protection through the orders of the Supreme Court. But this proved to be a naive hope.

The Bihar government took an exceptionally long time to file its reply. Finally, when it did reply, the Bihar counsel submitted that the "custom" we had challenged was in accordance with "natural justice, equity and good conscience." The Bihar counsel also denied that Maki Bui had been harassed by her husband's male agnates. Their basis for this denial was an affidavit submitted by the Block Development Officer (EDO) of Sonua, who claimed to have visited the village and found that Maki Bui was "living in the same house where she used to live during the time of her husband and appropriating all the lands inherited by her late husband, and enjoying the produces [sic] according to her own sweet will...." The BDO asserted that "through cross examinations among the 16 *annas raiyats* [sic] of the village, I came to the conclusion that the allegations against the respondents ... is totally baseless [sic] and false."

We pointed out to the court that the BDO never visited the village to talk to Maki Bui or to any other woman



in Lonjo. In fact, on a date prior to the date the BDO claimed that he visited the village, Maki Bui had left Lonjo out of fear for her life and was staying in her son-in-law's village. The very officer who was assigned the task of providing security to Maki Bui seemed to be lying in writing to the Supreme Court. He had probably summoned Maki Bui's male relatives, and enacted a drama of threatening them with a view to extracting a bribe in return for lying in their favour to the Supreme Court. The judges seemed also to suspect he was lying but seemed helpless to take any action.

The Bihar government further added that the said custom is "based on reasonable and sound principles of natural justice and economic stability of the tribes and as such it does not offend Articles 14 and 15 of the Constitution." This assertion clearly showed that the Bihar government identified the interests of the tribe with that of the men of the tribe. We argued that since women constituted half the tribe and were the primary workers on land, any custom which was detrimental to their

interests and to their economic stability could not be said to be beneficial to the economic stability of the tribe as a whole. The misery caused to the women by the denial to them of inheritance rights in land resulted in destabilisation of the tribal family and damaged the community as a whole.

### **Inappropriate Solutions**

At the end of their various and mutually contradictory submissions, the state of Bihar recommended the extension of the Hindu Succession Act (HSA) to the Ho tribals.

The judges also seemed in favour of this measure. But we argued against extending the Hindu Succession Act or, for that matter, even the Indian Succession Act, on the ground that it would be detrimental to the integrity and well being of the tribal community as a whole.

Applying the HSA would be problematic because all the tribals are not Hindus. A large proportion are animists and many have converted to Christianity. Yet, in matters of succession, the customary law applicable to them is the same for all, no matter what their religion. The tribal

identity is not defined by religion alone. Any extension of the HSA to tribal Hindus would mean that the Christian Succession Law would have to be extended to Christian tribals; tribal animists would need a separate set of laws. This would have the undesirable effect of splitting up the tribe on lines of religion and contribute to destroying their distinctive cultural identity.

We knew from our experience of providing legal aid for Hindu women that the HSA offered inadequate protection to Hindu women. Daughters could be equal inheritors in self-acquired property, but the provision allowing fathers to disinherit whomever they pleased invariably tended to be used against daughters. The distinction in the law between self-acquired and coparcenary property added further loopholes in the Hindu Succession laws. Sons had rights by birth equal to that of fathers, whereas daughters had a minuscule share in coparcenary property. Even this tiny share they could be made to sign away in favour of their brothers or other male members of the family. In this respect, the Hindu Succession Act was similar to the discriminatory aspects of tribal law which gave full rights by birth only to sons, and excluded daughters. Nevertheless, the exaggerated rhetoric about gender equality, supposedly incorporated in that Act according to its advocates, had mesmerised the educated elite, including most lawyers, into believing that the reformed Hindu law could be used as a model to show the way to other communities to shed gender discrimination. In actual fact, few Hindu women have benefitted from its provisions.

Extending the Indian Succession Act (ISA) to these tribals would be viewed by Hos and other tribals as a

conspiracy against them by the outsiders. The ISA has a provision allowing people to will away or sell their properties to whomsoever they please, including people outside their family. This would harm the overall interests of the tribals by facilitating the alienation of whatever land they had. The little foothold that these tribals have retained over parts of their traditional landholdings is only possible because of the restrictions incorporated in the Chhota Nagpur Tenancy Act, which does not allow tribal men to sell or will away their land to just anyone they please. The land has to pass on to a predetermined set of heirs. It can only be alienated under special conditions with the permission of the Deputy Commissioner, ostensibly for 'development' purposes. This provision has been frequently misused in takeovers of tribal lands by large industrial interests, as well as for exclusion of tribals from their own lands, and in the exploitation of tribal mineral and forest wealth by the government and its hangers on. There are many instances where industrial or other interest groups have used these provisions to defraud tribals of their lands, for example, getting them drunk and making them sign away their ancestral rights with the active connivance of the government officials. Bringing in the provision for willing away or freely selling landed property along with the Indian Succession Act would altogether nullify the pitifully small amount of protection the tribals had under the existing law. On the pretext of helping tribal women, if our petition facilitated and furthered land alienation, women would be as much the losers as men. Therefore, we asked for minimal changes in the Chhota Nagpur Tenancy Act and went no further than saying that the expression "he"

whenever it occurs should include "she" so that women are entitled to full inheritance rights equal to men. This interpretation would ensure that there was no vacuum in the legislation if the provision challenged were held *ultra vires*. We demanded that "in pursuance of the spirit of the Chhota Nagpur Tenancy Act which sought to prevent the alienation of tribal land to non-tribals, and to ensure that the rights granted to women were not rendered nugatory, the court direct that in the event of a marriage between a tribal and a non-tribal, the land of the tribal must not, on the death of the tribal, pass to the non-tribal but must revert to the natal family of the tribal."

Under customary law, if a tribal man marries a non-tribal woman, the children of the marriage do not inherit their father's land which reverts to his male agnates. We asked for the same principle to be extended to women.

### Findings From Lonjo

In order to learn for myself whether allowing full inheritance rights to daughters would indeed prove to be a poor policy, I decided to study Lonjo village with the help of Pilar and find out from detailed family histories whether Maki Bui's case was an exception. I also hoped to learn about women's relationship to land under the existing system. The results were a surprise, even to me. They showed that:

□ Maki Bui was far from atypical. A large proportion of women faced similar problems and were living precarious lives. A large number had been deserted by their husbands, who had remarried.

□ Women do not marry far off. In

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*\*For a detailed analysis see, Madhu Kishwar, Toiling Without Rights: Ho Women of Singhbhum, Economic and Political Weekly, Vol. XXII, Nos. 3,4,5, 1987*

most cases marriages come to be settled within walking distance of the woman's natal village. Therefore the argument that after marriage women could not exercise rights over the family land does not hold good.

□ Men migrate away to far off places much more often than women; the primary responsibility for both agricultural and household work rests with women. At least eighty percent of agricultural tasks are performed by women. Men's participation is confined to occasional tasks such as ploughing.

At this point the case was due for a preliminary hearing. For about a year, it kept appearing in the list for admissions rather than where it should have appeared, on the list for arguments. Every time our lawyers would draw the attention of the Supreme Court to this error, the judges would order that it be listed in the proper slot; but despite the order, somehow, the next time the lists were issued, the case would be back in the wrong list. Our lawyers attributed the error to a typist's mistake. However, if a typist can go on making the same error so many times in the face of repeated directions from the court to correct it, and not be called to account for causing such an immense amount of precious time to be lost in such cases, then there is something seriously wrong with the functioning of the simplest aspects of the court. It took about two years for the preliminary hearing and notices to be sent to the Bihar government.

Unofficially, we were told by the court registrar's office that they had lost all five copies of the case we had prepared and submitted to the court. We were advised to replace the files quietly without comment if we wanted the case to be heard. There was no point in kicking up a fuss. We did as we were told.

### Getting a Hearing

There were many more problems to come. Between 1983 and 1985, the



case was listed for a final hearing numerous times but was not heard because it was placed too low down on the list. Therefore, its turn would not come before the court adjourned for the day. During this period, the Bihar government kept on seeking adjournment after adjournment on the most flimsy grounds. The court continued granting those adjournments even though it was clear that they were resorting to blatant dilatory tactics.

However, on each of the days when the case was listed, even if it was on the wrong list or in a spot too low on the list to get heard, some of us from **Manushi** would be present all day. Several times when the court listed the case, I was out of Delhi and would cut my trip short before my work was finished and rush back to Delhi only to find that our turn never came.

In the meantime, Maki Bui was getting desperate. After the EDO's enquiry, her in-laws' family began to harass and intimidate her even more for having dared to take them to court. On one occasion, when it seemed that the case might actually be heard, we

arranged for Maki Bui to come to Delhi for the court hearing in the hope that:

□ she would see for herself that the case was being argued and would feel reassured that we were not lax;

□ we might somehow get the judges to notice her in court. If the lawyers told the court that this poor village woman had come all the way from a little village in south Bihar to seek justice, perhaps they might feel moved enough to expedite the case; and

□ we might be able to arrange some newspaper publicity regarding the case by requesting some sympathetic journalists to interview her and demand the case be heard and decided upon without further delay.

Maki Bui was indeed very impressed with the physical grandeur of the Supreme Court, and told me, "I am sure such a big court will give me big justice." However, her case never came up for hearing on that day. Seeing her sitting in a sort of daze in the court, I realised that even if the case had come up for a hearing, this woman could not possibly have understood what was being argued on her behalf. For the judges, she was

not a human being but a case number. Maki Bui's fate depended on people who neither knew her language nor considered her worth their notice.

Our attempts to organise newspaper publicity on her behalf were also a flop. She was neither glamorous nor colourful enough for any newspaper reporter or editor to pay attention to her. While several newspapers would willingly publish interviews with me on this case, no one found her worth a conversation. She, however, went back to Bihar under the illusion that we would soon have a solution for her.

We renewed our effort to get her case expedited. The Bihar government kept requesting postponement after postponement on one pretext or the other. In the meantime, we got news from Pilar in Bihar that Maki Bui had been even more aggressively threatened by her relatives and consequently had to leave Lonjo and go far away to her daughter's village. Maki Bui had started off by asking our help to enable her to pass on her piece of land to her daughter. Instead of assisting her to get more than the right which discriminatory customary law allowed, her coming to the Supreme Court had actually endangered her life even further.

### **Who Cares for Court Orders?**

We filed a petition alleging contempt of court against the Bihar government for violation of the court's interim orders that Maki Bui be offered protection. They had submitted an affidavit assuring the court that Maki Bui's traditional rights were not being tampered with in her village. We informed the court that she had in fact been forced to flee Lonjo and the Bihar government had done nothing to protect her and her rights in the land. I felt responsible for having suggested the legal route to her and thus helping bring her troubles to this

awful point. The then Chief Justice, Ranganath Mishra, himself heard our contempt application. I joined with our lawyers in pleading that there was danger to her life, that the Court should take action against the Bihar government for having flouted the Supreme Court's interim order. Even though by now our expectations of the Supreme Court had been scaled down considerably, we were still not prepared for what happened. Justice Mishra said openly in a packed court: "We can pass a contempt order if you insist. But what good will it do for the petitioner? The Bihar government or its police are not going to heed it any more than they did our original order. Better that you advise that old woman to continue staying with her daughter so at least she is more safe than in her own village. Or else bring her to Delhi and keep her with you so she is safe." (Justice Mishra's comments quoted above are from my notes. They were not included in the written record of the Court). Justice Mishra prevailed upon us not to press the contempt petition but reiterated the court's order that the superintendent of police, state of Bihar, should provide adequate protection to Maki Bui and her daughter and ensure their personal safety.

What was the point of fighting this case for so many years if the highest court of the land was admitting that its orders carried no weight whatsoever with the government of Bihar, that even a BDO does not have to pay any heed to it? What good would any final judgement be in such a situation? Even if the Supreme Court actually gave a judgement in Maki Bui's favour, there was no machinery which could be made to implement that judgement, even in such a simple case of one poor old woman in a tribal village in Bihar. We had approached the Supreme Court in the hope that

its judgement would help millions of women, not just Ho women but other tribals as well. Now the Supreme Court was itself admitting that it could not even provide this one woman with any protection.

In the course of the hearing, the judges also suggested to the Bihar government that it should consider amending the provisions in Sections 6 and 7 of the Chhota Nagpur Tenancy Act along the lines we had suggested with a view to conferring inheritance on the female heirs. The Bihar counsel agreed in February 1987 to consult the appropriate authority and come back with a proposal. Several adjournments later, in August 1987, the state of Bihar submitted an affidavit through a section officer. Revenue and Land Reforms Department of Bihar, saying that some of the deputy commissioners and divisional commissioners had not yet sent their comments on the matter. But the Regional Development Commissioner of Ranchi had given his view against the proposed amendment. "Since this amendment may have very far reaching consequences, affecting the age old customs of the tribal population, the matter has been referred to the Bihar State Tribal Advisory Council... which is likely to meet and consider the proposal in near future. Only on receipt of their recommendations state government would be able to finalise its views on the subject."

Years passed. The Bihar government showed no inclination to propose a solution and the Supreme Court insisted on forever waiting for the Bihar government's proposal. Even so, we had not yet given up. Over the years, I met with several bureaucrats connected with Bihar in order to find out if they could suggest ways that we could get the judgement from the Supreme Court to take effect if and when it was delivered. None of

them could make any workable suggestions, even though they were among the most senior and skilled of our civil servants.

### Maki Bui is Dead

Last year we got the news that both Maki Bui and her daughter, Sonamuni, were dead. We were unable to maintain touch with Maki Bui after Pilar moved out of Lonjo district to another district in Bihar. It is likely that Maki Bui gave up hope and did not think it worthwhile to maintain contact with us.

In September 1993 Pilar and I visited Lonjo to find out the causes of Maki Bui's and Sonamuni's death. It was easy to get information about Maki Bui from Lonjo village residents because Pilar knew several families very closely. But no one in Lonjo knew how Sonamuni died. We found that Maki Bui had left her daughter's village some years ago and had come to stay in a village within walking distance from Lonjo - probably fearing that if she stayed in a far away village then the chances of her claiming her land would become altogether dismal. While living in that village she fell ill and became very weak.

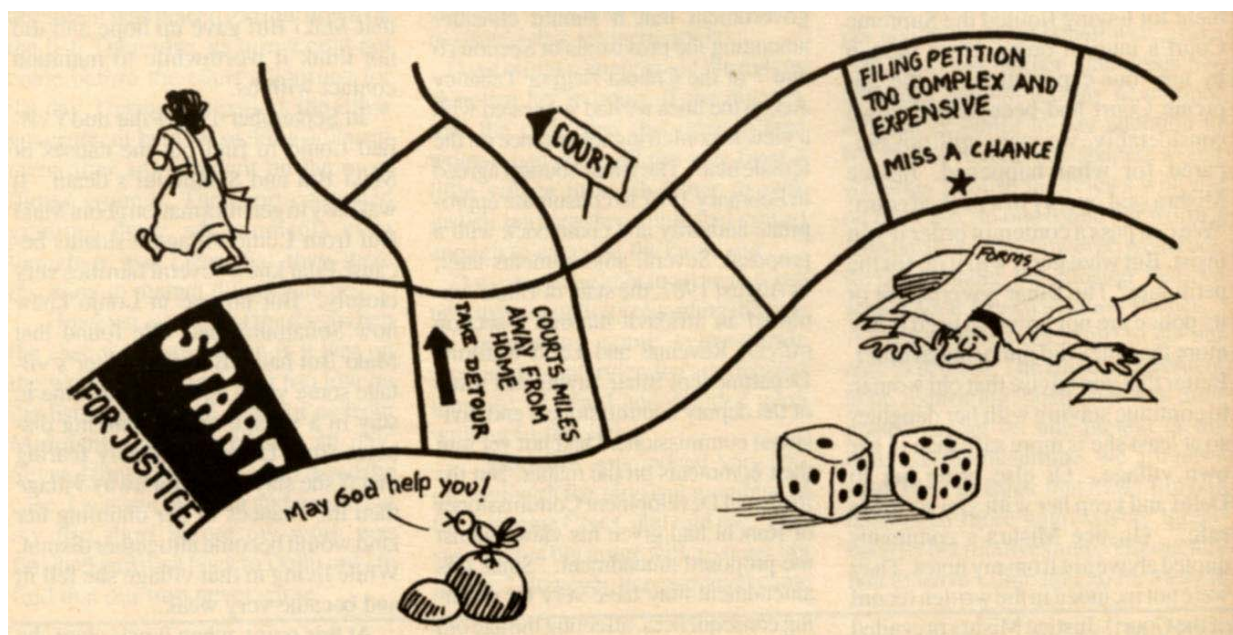
At this point, when it was clear she was going to die soon, her brother-in-law's family insisted on bringing her to their house in Lonjo. She was extremely unhappy staying with them because it was they who had initially driven her out of her home. She kept requesting some of her women friends in the village to take her to their home. But no one dared interfere for fear of annoying the *mukhia's* family. He was probably keen to have her die in his house to strengthen his claim to her land. Her daughter, who had been no more than 30 to 35 years old, was already dead. No one in Lonjo knew how she died. The case is still dragging on, even though the final hearing and arguments were completed in 1990. The Supreme Court continues to insist that the Bihar government must come up with proposals listing what they intend to do regarding the discriminatory provisions. And the Bihar government keeps on procrastinating on one ground or another, seeking adjournment after adjournment. Even though it was obvious that the Bihar government was deliberately dragging the case,

not once did the Supreme Court refuse to grant adjournment at the request of the Bihar counsel

This is not the only legal case we worked on that led to a mockery of justice. Among many others, I cite a few examples:

### The 1984 Riots Case

In early 1985 **Manushi** filed a petition in the Supreme Court demanding action against those in the Congress(I) who were alleged to have masterminded the 1984 massacre of the Sikhs. (For details see **Manushi** No. 25, 1984) Our petition was filed against the Indian State, the Home Minister and the Home Secretary as the officials who assume specific responsibility for the preservation of the safety of life of Indian citizens. Also included as respondents were the Delhi police through the police commissioner, the Congress (I) Party through its president and general secretaries, including the Congress (I) Lok Sabha members from Delhi. We stated that by organising a systematic massacre of the Sikhs, attacking their homes, businesses and religious institutions, the Congress (I) leaders, with the active help and connivance



of the city administration, especially the police, had violated the fundamental rights of the entire Sikh community. These included, right to life (article 21), right to move freely throughout the country (19(1)d), to practice any profession or carry out any occupation (19(1)i); to reside and settle in any part of the country (19(1)e); freedom of conscience and the right to freely profess and practice any religion. All these and other fundamental rights of the Sikh community were violated by the State, which entered into an illegal conspiracy with organised gangs of hoodlums.

We appealed to the court to:

- order an independent enquiry into all the heinous crimes committed, to uncover how the orders were given, and by whom;

- order an interim suspension from office of those who were leading the cover up operations;

- require that the enquiry result in the enunciation of basic principles that should govern the trials of these violators of constitutional rights;

- pending the court's decision, freeze all assets of these organisations and individuals under enquiry;

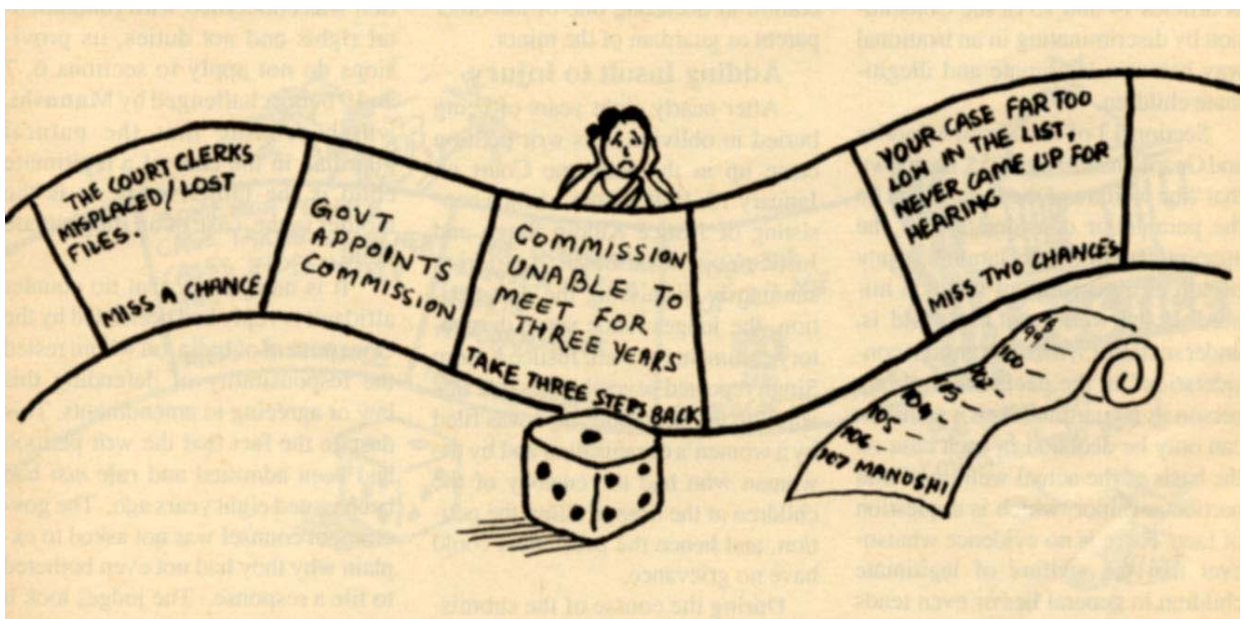
- offer institutional remedies to return the country to Constitutional rule;

- provide guidelines for the payment of punitive fines, reparations and compensations from the frozen assets of the extra governmental organisations and individuals who are convicted of having participated in the murderous attacks on the lives and Constitutional rights of Indian citizens belonging to the Sikh minority. This petition was unceremoniously dismissed by a bench presided over by Justice Ranganath Mishra without as much as a cursory hearing. Luckily, this issue has been taken up by a number of civil liberties and democratic rights organisations, who have succeeded in at least keeping the issue alive, though they have not yet succeeded in getting the guilty punished.

### Guardianship Act Challenged

In yet another case, in 1986 **Manushi** filed a Public Interest Litigation case on behalf of Neela Deshmukh challenging the discriminatory provisions of the Hindu Minority and Guardianship Act of 1955 which discriminate against women.

as a senior social welfare officer with Walchandnagar Industries. She and her husband D.S. Mukherjee had filed a petition for divorce by mutual consent under section 13(b) of the Hindu Marriage act. Their marriage had been dissolved by a decree of divorce by mutual consent on Sep. 12, 1983. In the mutual consent petition, the parties had agreed on the terms regarding the custody of their two minor children which were incorporated in the decree of divorce. Subsequently, her husband filed an application in the court for revoking the orders passed by the court with respect to the custody and education of the two minor children - a daughter aged 14 years and a son aged 8 years. At that time the two children were living with, and were supported by, Neela Deshmukh. Her husband challenged her custody rights simply to harass her. That is when Neela approached **Manushi** for help. We filed a Public Interest Litigation case challenging all those guardianship provisions (section 6,7 and 9) of the Hindu Minority and Guardianship Act of 1955 which discriminate against women.



The act provides that in the case of a minor boy or an unmarried girl, the father will be considered the “natural guardian”. However the custody of a minor child who has not completed the age of 5 years shall ordinarily be with the mother. Likewise the Act provides the mother’s right to have precedence in case of “illegitimate” children.

Our petition argued that there is nothing in “nature” to support a presumption in favour of the father in matters of guardianship. In fact, it could easily be argued that it is more “natural” and more advantageous for the welfare of the child to make a presumption in favour of the mother in matters of guardianship. This law does not uphold any “natural law” but rather bolsters an inegalitarian social structure which gives precedence to men over women. We argued that both parents should have an equal right to guardianship of their child. Given that men usually have more financial power and social sanction, in the event of a matrimonial dispute, the man is often in a better position to seize the children as well as control of the property, including the woman’s possessions.

In a number of custody cases the interests of children and their wishes are usually ignored. Many men use the threat of separating the wife from the children as a weapon to blackmail her into accepting maltreatment in marriage. By declaring the father the “natural” guardian, the law sets up a presumption in his favour. This means that whenever there is a dispute over guardianship, the mother has to sue. The father need not sue because if no suit is filed, he is presumed to be the natural guardian.

Section 6(b) makes the mother the natural guardian of an illegitimate child and after her the father. If there is indeed some “natural principle”, entitling the father to be the “natural”

guardian of his child, in preference to the mother, how and why should the “illegitimacy” of the child contravene this principle? “Legitimacy” is not a “natural” but a purely social category created by the social institution of marriage. The only purpose served by section 6(b) is to absolve the father of primary responsibility, financial and legal, for a child he wishes to disown. Sections 6(a) and 6(b) violate the spirit of articles 14 and 15 of the Constitution by discriminating in an irrational way between legitimate and illegitimate children.

Section 13 of the Hindu Minority and Guardianship Act, 1955, lays down that “the welfare of the minor shall be the paramount consideration in the appointment or the declaration of any person as a guardian of a Hindu minor.” If the welfare of the child is, under section 13, the “paramount consideration” in the declaration of any person as a guardian, then a guardian can only be declared in each case on the basis of the actual welfare of that particular minor, which is a question of fact. There is no evidence whatsoever that the welfare of legitimate children in general lies or even tends to lie in their having their father as guardian or that the welfare of illegitimate children lies or tends to lie in having their mother as the guardian, or that the welfare of married minor girls lies or tends to lie in having their husband as guardian. We asked that:

□ since sections 6, 7 and 9 of the Hindu Minority and Guardianship Act, 1955, are violative of the rights of Hindu women under articles 14 and 15 of the Constitution of India, they should be declared null and void;

□ the court should give a mandatory order directing the respondents, their officers, servants and agents, to refuse to give effect to the said sections of the Hindu

Minority and Guardianship Act;

□ the court should declare that henceforth both parents shall be considered natural guardians of their minor children, legitimate or illegitimate, in preference to others, including spouses of the said minors;

□ the court should declare that in the event of any dispute, either parent may sue under the Guardians and Wards Act, 1890, and that the welfare of the minor (not defined as material welfare alone), shall be the paramount consideration in declaring one or the other parent as guardian of the minor.

### **Adding Insult to Injury**

After nearly eight years of being buried in oblivion, this writ petition came up in the Supreme Court on January 12, 1994 before a bench consisting of Justice Kuldip Singh and Justice Yogeshwar Dayal. Apart from summarily dismissing the writ petition, the judges made some derogatory comments as well. Justice Kuldip Singh repeated several times that this was “luxury litigation” as it was filed by a women’s organisation and by the woman who had the custody of the children at the time of filing the petition, and hence the petitioners could have no grievance.

During the course of the submissions, the judges observed that the father was “rightly” the guardian of a minor child as he was the bread earner. This despite the fact that Neela Deshmukh had been the main breadwinner of the family. The court did not allow **Manushi** counsel Geeta Luthra to make any further submissions, stating that they were not interested in knowing the changes that had come about in English law on which the Hindu Guardianship Act was based since this case, in the judges’ view, was luxury litigation. They insisted that articles 14 and 15 promising gender equality were

inapplicable as there was no gender discrimination involved in this case. Justice Yogeshwar Dayal further commented that in England there is no concept of father or mother so they did not want to hear of English law. The judges declared that in practice they were sympathetic to women but if they persisted in coming to the court and asking for too many amendments, sympathy for women would go away. According to Justice Yogeshwar Dayal, being a mother or a father was a duty and not a right. Since the constitution was concerned with fundamental rights and not duties, its provisions do not apply to sections 6, 7 and 9 being challenged by **Manushi**, which provide that the natural guardian in the case of a legitimate child is the father, while it is the mother in the case of an illegitimate child.

It is noteworthy that no counter affidavit or reply had been filed by the Government of India, on whom rested the responsibility of defending this law or agreeing to amendments. This despite the fact that the writ petition had been admitted and rule nisi had been issued eight years ago. The government counsel was not

asked to explain why they had not even bothered to file a response. The judges took it upon themselves to argue on behalf of the respondent. Justice Yogeshwar Dayal went to the extent of declaring that the petition should not have been admitted in the first place.

This was not the only petition of this type pending in the court. Several other similar petitions have been filed over the years by aggrieved mothers. These particular sections of the Constitution have kept women agitated all over the country. Most important of all, the Law Commission of India, in its 133rd Report, submitted in 1989, looked into this issue and came to the conclusion that the said sections were violative of the Constitution and needed to be appropriately amended. The Supreme Court did not even give Manushi's lawyer a chance to present all these facts before them.

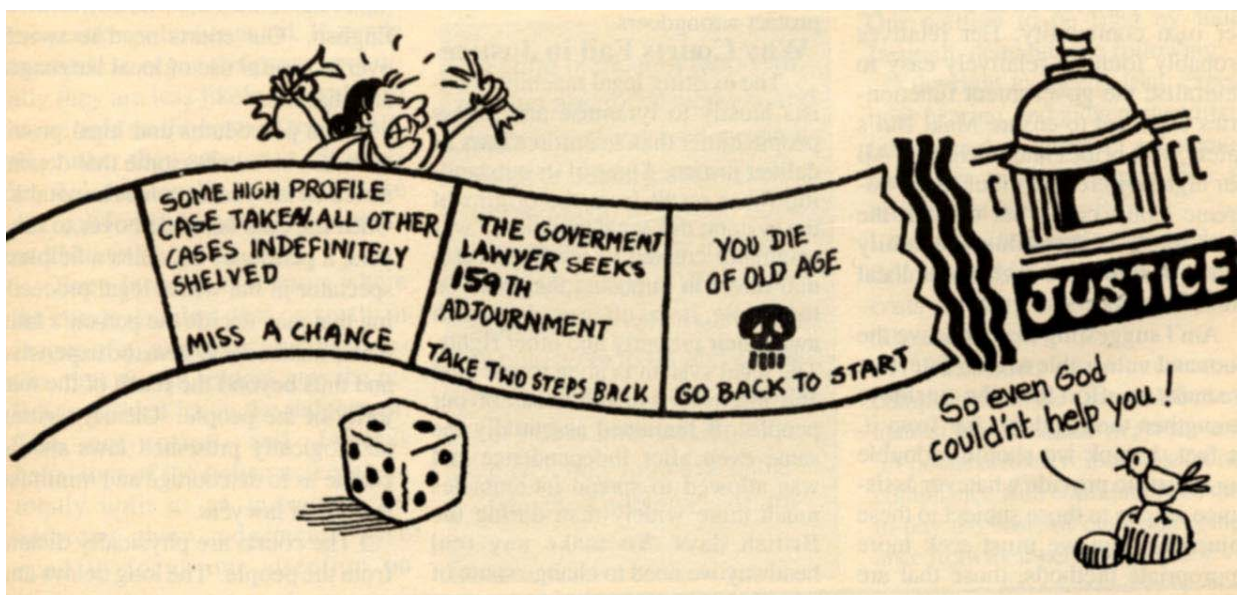
### Who Benefits From Courts?

Over the years, only in rare cases have we been able to provide a modicum of help to a few individual women through the law courts. By and large, our experiences in the courts have been frustrating and

demoralising, especially when the litigants are poor and vulnerable and come into the legal system via the Public Interest Litigation route.

We were not the only group to be so misled by the rhetoric of the proponents of public interest litigation. Scores of activists all over the country enthusiastically participated in the rush to enter Public Interest Litigation cases in the Supreme Court. It gave us all an exaggerated sense of our importance and potential influence in making changes on basic issues. Judges were going out of their way to encourage activists to bring such cases to them. Lawyers were more than willing to fight these cases free of charge. Activists like us only had to take the pleasant role of heroic interveners. My impression is that the outcome in the overwhelming majority of these Public Interest Litigation cases was not substantially different from that of the Maki Bui case.

The only "beneficiaries" of this wave of cases have been the progressive judges, lawyers and social activists. Many of us made a name for ourselves as defenders of the rights of the poor and the



powerless without going to too much trouble or expense. We read out reports of these cases at international conferences on human rights. We received a great deal of positive media publicity both within India and abroad. Despite all the praise the social activists received for initiating Public Interest Litigation, the actual victims on whose behalf we raised these issues have not often found their situation improved. Indeed, many of them found themselves in ever worsening circumstances as a result of agreeing to participate as complainants in these celebrated cases. The press publicity made them more vulnerable at the local level for they came to be big threats to the local vested interests. This has caused a great deal of resentment at the local level against high profile interventionists coming from Delhi and other big cities and state capitals.

For instance, there is no way I could have provided day to day protection to Maki Bui. By encouraging her to enter into a heightened confrontation with her own community and giving her the illusion that my privileged status as part of the urban elite with connections in Delhi could offer her a measure of protection, I was in effect endangering her life even more. For her, the goodwill of as many parts of her community as possible was her main source of protection in a dangerous situation. By going to court and seeking redress outside the community and hoping to use the government apparatus with its hypocritical rhetoric of equality and social justice in her favour, she came to be perceived as a threat by her own community. Her relatives probably found it relatively easy to neutralise the government functionaries expected to ensure Maki Bui's safety with bribes and intrigues. All our high powered petitions in the Supreme Court could not combat the local

forces of the influential family and a corrupt and inefficient local administration.

Am I suggesting that we leave the poor and vulnerable to their fate, that we make no effort from the outside to strengthen their rights? Far from it. In fact, I think we should redouble our efforts to provide whatever assistance we can to those subject to these injustices. But we must seek more appropriate methods, those that are more likely to be helpful and do not claim to accomplish more than they are capable of achieving. Outside intervention often heightens the confrontation level without ensuring adequate protection for the concerned individuals or groups especially if we are relying on the government to do the job. No matter what the official rhetoric, in actual practice the government functionaries invariably tend to protect the wrongdoers because that brings bribes. Yet we the urban activists continue to rely on the same government machinery simply because we ourselves are beneficiaries of this *sifarish raj* (getting our work done through influence at the top). But what may work for well connected people like us does not work for the poor and vulnerable. Thus while the high profile well connected activists themselves do not face much personal risk, those that we lead into a high pitched battle end up becoming even more vulnerable. We think we can neutralise local pressure by newspaper publicity. However, while this may help make us more known and famous, it rarely succeeds in making officials behave better. It is often counter productive - the more the newspaper publicity, the higher the bribes extracted by local officials to protect wrongdoers.

### **Why Courts Fail in Justice**

The existing legal machinery exists mostly to tyrannise and harass people rather than to enforce laws or

deliver justice. Some of its outstanding flaws result from the origins of the system; this legal machinery was originally created to facilitate colonial rulers in imposing their will on the people. It was of ten used to snatch away their property and other rights. The legal system is alien to our land and insensitive to the needs of our people. It remained essentially the same even after Independence and was allowed to spread its tentacles much more widely than during the British days. To make any real headway we need to change some of its basic flaws:

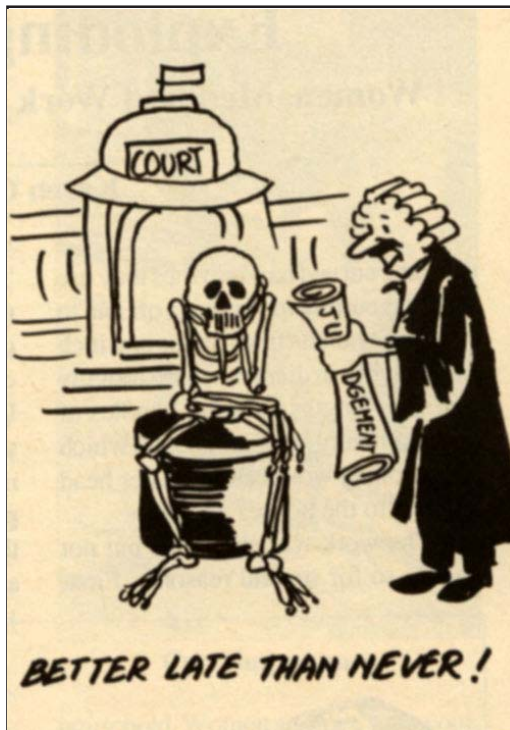
□ The laws are framed and administered by individuals who do not understand basic facts about the diverse life situations and customs of our people. The English educated administrators, parliamentarians, judges, lawyers, police officials and others who are part of this legal apparatus are often as ignorant about the actual ways of life of the people as were the English rulers after whom the present rulers modelled themselves. There seems very little relationship between this country's formal statutes and the actual social arrangements that govern economic and social relationships within various communities and occupations. The statutes are based on principles of British jurisprudence that have very little in common with the traditional dispute settlement methods that still maintain some of their legitimacy among many communities in India. Unless our laws reflect a measure of social consensus, they will continue to be breached.

□ Our laws are written in archaic English and are thus beyond the comprehension of even most of the English educated Indians, leave alone the hundreds of millions who do not know English. Our courts need to switch over to careful use of local languages and dialects.

□ The procedures and legal provisions are so cumbersome that dependence on lawyers becomes inevitable. Once the case is handed over to lawyers, a petitioner becomes a helpless spectator in the whole legal proceeding that may decide the person's fate. It also makes the system too expensive and thus beyond the reach of the majority of the people. Clearly written and logically presented laws should enable us to discourage and minimise the use of lawyers.

□ The courts are physically distant from the people. The long delays and erratic functioning of the courts act as another source of harassment against those least able to bear the burdens of frequent attendance at these locations. Travelling the long distances to court involves needless expenditure leading to economic ruin of those few among the poor who seek relief from the courts.

□ The judgements are delivered on the basis of what is proven to have happened according to the artificial and frequently petty rules and procedure dominated decision making processes. The system is run by poorly trained and meagerly endowed court officers and judges. The true account of what actually happened has little effect on the court. The burden of proof falls most often on the victim. In cases where the victim is helpless and poor and cannot hire smart, expensive lawyers the person can lose the case even though in the right. Crooks can often get away with fraud and even murder if they have lawyers smart enough to know how to find the multitude of technical loopholes in the law. The facts of the case come to matter far less than the minute procedural errors that astute lawyers know how to avoid. If people are made to argue



their case personally they are less likely to be able to argue only on the basis of technicalities rather than substance. If cases are decided locally it will be more difficult for the litigants to lie openly and blatantly.

Even in those rare cases where the courts decide a case correctly in favour of a poor and powerless victim, that person seldom gets the reliefs provided for in the judgement. The corruption and lawless behaviour of the police makes them totally unfit as an instrument for enforcing these judgements. We need to focus our attention on evolving a functioning enforcement machinery for court judgements.

There are no effective laws to ensure that the government apparatus, the judges, the police and the bureaucrats behave lawfully. There are no enforceable provisions for an aggrieved person to get a judge punished in those instances where he gives a blatantly false judgement for a bribe. There are few instances where a police officer is punished for

lawless, corrupt behaviour, or for sabotaging the court's verdict. There are few instances of punishments given for criminal delays in the law courts. Unless we overhaul our administrative machinery and enshrine principles of accountability in it we will not be able to alter the existing situation whereby judges keep getting their salaries and perks, lawyers keep making lots of money, and innumerable government functionaries - from court peons and clerks to magistrates - keep drawing secure salaries and extracting large bribes while the citizens end up getting more fleeced with every passing decade. The task of reforming the legal machinery in our country will require a

widespread effort. Several organisations are already involved in this work. **Manushi** is attempting a small step in this direction by approaching the Supreme Court asking that the right to a speedy trial, which the Court has declared is a fundamental right, be made actually operative. Our petition to be filed by Indira Jaisingh, demands the following:

□ the right to speedy trial, expeditious hearing, and judgement within a time bound program - no adjournments are to be permitted after the schedule of hearings is fixed;

□ the party found responsible for delays should be made to pay heavy costs for harassment caused to the other side; if the orders of the court are not complied with, the case shall be heard against the other side *ex pane*; and

□ public officers responsible for non-compliance with court orders be made to pay the costs of their non-compliance from their personal salaries. □