

Article

Visions of Social Transformation and the Invocation of Human Rights in Mumbai: The Struggle for the Right to Housing

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The struggle for access to and control over a space in which to live has made housing a central issue for the city of Mumbai. The city's history is one in which human rights and, in particular, the right to housing have played an important role. This article examines the Indian Supreme Court's development of the right to housing as an aspect of the right to life, placing this unique jurisprudence within the complex reality of life for Mumbai's inhabitants. The article traces the growth of this expansive human right through the Indian jurisprudence and then contrasts the housing rights case law with more recent litigation on the environment, urban growth, and rural development, in which the housing rights of marginalized communities have been radically refigured. The analysis reveals competing visions of how human rights should be interpreted and whose interests these norms should protect. In fact, as the article exposes, the contested interpretation of the right to housing is caught up in competing visions of India's social transformation into a new, "modern" state and the place of its marginalized citizens within that state. In this context, the right to housing emerges as a site of struggle through which the meaning of urban citizenship, participation, and the future of the city

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itself are contested. The article closes by offering some conclusions on the factors underlying the shift in popular and judicial human rights discourse, showing that competing visions of social transformation have had concrete impacts on the human rights of India's most marginalized citizens.

I. INTRODUCTION

Like many cities across the world, Mumbai shares in the pressures, pains, and pleasures of rapid urban growth. Mumbai's role as India's financial capital makes it an attractive destination for migrants who seek both to escape rural poverty and to remake their lives in a city of opportunities. As its growing population has overwhelmed its infrastructure, fifty to seventy-five percent of the city's inhabitants now live in informal settlements or slums, where they are subject to dire physical conditions and lack crucial legal protections. This struggle for access to, and control over, a space in which to live has made housing a central issue in Mumbai. Both despite and because of the city's housing inadequacies, a strong housing rights movement¹ has developed in which claims to the human right to housing have played a central part. The resulting body of jurisprudence on the right to housing is analytically distinct from other legal responses at the domestic, regional, and international level, and the movement has fostered a strong rights consciousness throughout society and a high level of activism around housing and the social goods related to its enjoyment.

However, the struggle for housing in Mumbai is one in which changing interpretations of human rights have played a major role. Focusing on the Indian jurisprudence on the right to housing, this article reveals how efforts to control physical space are caught up with divergent visions of the future of Mumbai, and of India itself. In one vision, Mumbai is cast in the image of a city in a socialist state, in which substantive equality and social justice are achieved through the promotion of pro-poor policies and the careful provision of basic goods to the marginalized. The other, quite different, vision of Mumbai is as a "world class" city, the city of the elite, participating freely in the global economy through private

1. This article refers to housing rights awareness, legal efforts to establish the right to housing or shelter, and political mobilization on these and related issues as a "housing rights movement." Though many observers would not recognize the situation as involving a coherent or coordinated "movement," the cumulative effect of the political, legal and social struggles can be best explained in this way. When analytically useful, the article will discard the term "movement" in favor of more precise terminology. Likewise, the article does not use the term "social movement" in a particular theoretical sense, but instead as a descriptive umbrella term to refer to groups engaged in political, legal, or social action, thought, or discourse, most often in opposition to the state. For a theoretical treatment of the concept of a social movement, see Asef Bayat, *Un-Civil Society: The Politics of the "Informal People"*, 18 *THIRD WORLD QUARTERLY* 53, 57 (1997).

initiative and entrepreneurialism, thus spurring economic growth and development across India.

The role of housing in these contrasting futures emerges as conspicuous and conflicting. On the one hand, housing is presented both as a matter of basic physical need and as a right of urban citizenship. On the other hand, planned housing development is envisaged as a tool of social design for an aspirant society. As such, the struggles over housing in Mumbai emerge not merely as matters of survival or material comfort, but are invested with issues of belonging, entitlement, worth, and citizenship.

The article traces this complex web of competing visions, illustrating the tensions between and among them, through the changing interpretations of the right to housing in the Indian courts. First, the article examines the cases on the right to housing, examining the development of the distinctive human right to housing in India. Next, the article contrasts the housing rights jurisprudence with more recent case law on the environment, and urban and rural development. These more recent cases re-characterize informal settlers as encroachers and polluters, and represent a diminution in human rights protections for these citizens. Third, the article critiques judicial participation in the State's changing vision of its own role and the future of Mumbai in a modernizing India, locating reasons for the changing discourse of human rights.

The article shows that, while human rights offer a powerful discursive and political tool for the marginalized, these rights are subject to radical reinterpretation in ways that can disempower, as well as empower. The meaning of human rights is never finally settled, and these rights must be claimed and reclaimed in any battle for just social change. The struggle to control the right to housing in India illustrates the practical implications of social, political, and legal conflicts for the control of human rights, and thus contributes to an understanding of the role of contested human rights in social change beyond, as well as within, India.

In Part II, the article outlines the housing conditions extant in the city of Mumbai, drawing a complex picture of the political, social, and physical terrain onto which the struggle for housing and space is mapped. In Part III, the article situates the struggle for housing within the growth of a housing rights movement in the city. Part IV then examines the judicial protection of the right to housing through Indian Supreme Court jurisprudence. Part V explores the legislative responses to this line of cases, which include the concept of rehabilitation and compensation and the "cut-off date." In Part VI, the article analyzes how the legal protections guaranteed in the housing rights cases are being challenged by new applications of human rights to the environmental movement, including cases in which informal settlers and the poor are being re-characterized as encroachers and polluters. VI.A examines the impact of the right to a clean environment, VI.B focuses the analysis on rural development cases, and VI.C considers the influence of the discourses on remaking Mumbai as a "world class" city. Having traced these changing discourses, Part VII sets out two reasons behind the radical shift in human rights discourse. The

concluding Part VIII offers some analysis of the impact of this changing terrain for the realization of human rights in Mumbai.

II. MUMBAI: A CITY DEFINED BY HOUSING

In this section, the article contextualizes the housing situation in Mumbai, elucidating the physical conditions which characterize life in the city. This unique contextual background is crucial to an understanding of the struggle for the right to housing in Mumbai, as this is the complex physical, social, and political landscape on which the struggle for control of human rights is played out.

Originally, the land on which the city of Mumbai now sits did not exist. Several low-lying islands, the site of small fishing villages, reached out from the mainland towards the sea.² Under the control of colonial powers, however, Mumbai began to grow as a metropolis,³ taking in Bombay and Salsette Islands, and then spreading out into a suburban area on the mainland, simultaneously reclaiming land from the mangroves and the sea.⁴

As an important port and India's financial and trade capital,⁵ Mumbai has long been a lure for migrants. They are drawn to the city by its glitter and possibility,⁶ while crushing rural poverty pushes many to seek a new life in the metropolis.⁷ As a result, the "pace and sheer scale"⁸ of urbanization has overwhelmed Mumbai's infrastructure and its political organs. The city,⁹ which occupies just over 400 square kilometers of land,¹⁰

2. See Arjun Appadurai, *Spectral Housing and Urban Cleansing: Notes on Millennial Mumbai*, 12 *PUB. CULTURE* 627, 628 (2000).

3. Sujata Patel, *Bombay/Mumbai: Globalization, Inequalities, and Politics*, in *WORLD CITIES BEYOND THE WEST: GLOBALIZATION, DEVELOPMENT AND INEQUALITY* 238, 333 (Josef Gugler ed., 2004).

4. See Greg O'Hare et al., *A Review of Slum Housing Policies in Mumbai*, 15 *CITIES* 269, 270 (1998).

5. Patel, *supra* note 3 at 328.

6. Here, as Sandeep Pendse writes, there is hope for "freedom to become an individuated person and escape into a world of personal accomplishments and strivings," a freedom which is represented by a modern India, where people are freed from the constraints of caste, community, and duty. Sandeep Pendse, *Toil, Sweat and the City*, in *BOMBAY: METAPHOR FOR MODERN INDIA*, 3, 12 (Sujata Patel & Alice Thorner eds., 1996).

7. See MIKE DAVIS, *PLANET OF SLUMS* 171-72 (2006). In 1985, then Supreme Court Chief Justice Chandrachud wrote of India's rural poor that "[t]he motive force which propels their desertion of their hearths and homes in the village is the struggle for survival . . ." *Olga Tellis v. Bombay Mun. Corp.* A.I.R. 1986 S.C. 180 at 194.

8. CENTER ON HOUSING RIGHTS AND EVICTIONS, *WOMEN, SLUMS AND URBANIZATION: EXAMINING THE CAUSES AND CONSEQUENCES* 10 (2008).

9. When referring to Mumbai, distinctions are often drawn between the city (Bombay Island), Greater Mumbai (Salsette and Bombay Islands), and the Bombay Metropolitan Region (which extends to the mainland areas). Jim Masselos notes the insufficiency of these definitional boundaries and invokes the concept of the "effective city," which "is not necessarily . . . that area delineated by finely calculated precise boundaries but that defined by movement of . . . people . . ." Jim Masselos, *Defining Moments/Defining Events: Commonalities of Urban Life*, in *BOMBAY AND MUMBAI: THE CITY IN TRANSITION* 31, 34 (Sujata Patel & Jim Masselos eds., 2003). This self-identifying city is more accurate than officially established boundaries, because it takes account of those who are literally marginalized through eviction,

has a population of some 18 million.¹¹ Over half of the residents live in informal settlements of one kind or another, including slum settlements, run down and crumbling *chawls*,¹² or the pavements themselves.¹³ There are around 2500 individual slum settlements, which sit on just 6 percent of the city's land but housed 5.5 to 6 million of its inhabitants in 2003.¹⁴ Almost 80 percent of the city's population live in substandard, inadequate and unsafe housing,¹⁵ subject to an "ever-present threat of displacement."¹⁶

It is tempting to say Mumbai is a city defined by its slums, but the word slum is misleading in two ways. First, as discussed in greater detail below, not all of those who lack adequate housing in Mumbai live in slums – there are other forms of informal or illegal settlement, and other gradations of homelessness, that define the lives of Mumbai's inhabitants. Second, the word slum connotes physical squalor, social dysfunction and economic stagnation.¹⁷ These stereotypes are often inappropriate to describe the homes and neighborhoods of informal settlers in the city. Mumbai's informal settlements are instead highly organized and energetic communities. They are not only integral to the functioning of the city, but contribute cultural, economic, and social vibrancy to it.¹⁸

The largest group of the informally housed are generally referred to as "slum dwellers." In common Mumbai usage, the word slum refers to a settled area, inhabited by people who do not have formal ownership of the land on which they live, and who have, without legal title, moved onto this land and built their dwellings there.¹⁹ However, the legal definition of a Mumbai slum is not tied to tenure or ownership, but instead to quality. According to the Maharashtra Slum Areas (Improvement, Clearance and

resettlement, or lack of available land or housing, who are pushed beyond definitional boundaries, but who are by their very nature emblematic of Mumbai's population. This article's use of the term Mumbai should be understood in this way.

10. Greater Mumbai covers 429.89 square kilometers. Patel, *supra* note 3, at 338.

11. U.N. DEPT. OF ECON. & SOC. AFF., POPULATION DIVISION, WORLD URBANIZATION PROSPECTS: THE 2005 REVISION 20, U.N. Doc ESA/P/WP/200 (October 2006).

12. Built to house mill workers in the 1920-1940s, chawls are one-room tenements that are now increasingly overcrowded and dilapidated. O'Hare et al., *supra* note 4, at 279-80 (1998).

13. P.K. Das, *Slums: The Continuing Struggle for Housing*, in BOMBAY AND MUMBAI: THE CITY IN TRANSITION 207, 210 (Sujata Patel & Jim Masselos eds., 2003).

14. *Id.* at 210.

15. Jan Nijman, *Against the Odds: Slum Rehabilitation in Neoliberal Mumbai*, 25 CITIES 73, 76 (2008).

16. Das, *supra* note 13, at 210.

17. The Oxford English Dictionary defines a slum as a "street, alley, court, etc., situated in a crowded district of a town or city and inhabited by people of a low class or by the very poor," as "a thickly populated neighborhood or district where the houses and the conditions of life are of a squalid and wretched character," or as a "house materially unfit for human habitation." OXFORD ENGLISH DICTIONARY 2009, <http://www.oed.com/> (last visited Feb. 13, 2010). The Merriam-Webster Dictionary, meanwhile, describes a slum as "a densely populated usually urban area marked by crowding, dirty run-down housing, poverty, and social disorganization." MERRIAM-WEBSTER DICTIONARY 2003, <http://www.merriam-webster.com/> (last visited Feb. 13, 2010).

18. See, e.g., Vyjayanthi Rao, *Slum as Theory: The South/Asian City and Globalization*, 30 INT'L. J. OF URB. & REGIONAL RES. 225, 230 n.11 (2006); See also Dan McDougall, *Waste Not Want Not in the £700m Slum*, THE OBSERVER, Mar. 4, 2007, at 38.

19. Usha Ramanathan, *Demolition Drive*, 32 ECON. & POL. WKLY. 2908, 2908 (2005).

Redevelopment) Act,²⁰ any building which is inadequately serviced, unhygienic, dangerous, unfit for human habitation, overcrowded or unsafe can be declared a slum.²¹ The act provides for “regularization” of various slum areas, through “slum rehabilitation scheme[s]”.²² None of these measures amount to the full legal protection provided to an owner,²³ and the appellation slum is still applied.

The conditions among slum settlements vary widely depending on a myriad of factors. These include the religious, socio-economic, and caste composition of the slum’s population;²⁴ the presence of powerful political – or organized criminal²⁶ – support; the existence of well-established activist and NGO networks;²⁷ the physical and geographical location;²⁸ and the length of continuous inhabitation or its “established” nature.²⁹ These factors, along with the identity of the landowner,³⁰ often determine the level of services and utilities provided, and the relative security and stability of the settlement.

However, even in the most prosperous and long-standing slums, where the dwellings can consist of well-built concrete structures several stories high,³¹ the living conditions are frequently appalling. This is due, in part, to geographical location. Most of Mumbai’s slums are built on the most marginal lands: mangrove swamps, garbage hills, cemeteries, flood-prone tidal flats, under high-tension power wires and on other lands “not suitable for human habitation.”³² Lack of services, infrastructure and facilities also contribute to the dire conditions in slum settlements.³³ Most inhabitants do not have access to toilets, clean water,³⁴ or safe disposal of

20. Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971, No. 28, Government of Maharashtra, *amended by* Act, 2005, No. 24 [hereinafter *Slum Areas Act*].

21. *Id.* § 4.

22. *Id.* § 3B(1).

23. Minar Pimple & Lysa John, *Security of Tenure: Mumbai’s Experience*, in HOLDING THEIR GROUND: SECURE LAND TENURE FOR THE URBAN POOR IN DEVELOPING COUNTRIES 75, 75-83 (Alain Durand-Lasserve & Lauren Royston eds., 2002).

24. The marginalized castes and tribal peoples live in poorer conditions than the rest of Mumbai’s population. O’Hare et al., *supra* note 4, at 271-72.

25. Nijman, *supra* note 15, at 78; *see also* Mumbai Demolitions get Sonia’s Nod, BUS.STANDARD (Feb. 18, 2005), *available at* <http://www.business-standard.com/india/news/mumbai-demolitions-get-sonia%60s-nod/203094/>.

26. Appadurai writes that “very often, control over these insecure spaces is in the hands of semiorganized crime, where rent and extortion shade into one another.” *Supra* note 2, at 637. In the context of water provision, Gandy notes that “water provision has . . . been increasingly linked with criminalized networks as part of an intensification of political corruption in Mumbai.” Matthew Gandy, *Landscapes of Disaster: Water, Modernity and Urban Fragmentation in Mumbai*, 40 ENV. & PLAN. 108, 117 (2008).

27. Nijman, *supra* note 15, at 80.

28. *Id.*

29. *Id.*

30. In particular, whether the land is government owned or in private hands. O’Hare et al., *supra* note 4 at 275, 278.

31. Nijman, *supra* note 15, at 80.

32. Madhura Swaminathan, *Aspects of Poverty and Living Standards*, in BOMBAY AND MUMBAI: THE CITY IN TRANSITION 81, 92 (Sujata Patel & Jim Masselos eds., 2003).

33. Patel, *supra* note 3, at 340.

34. *Id.*; Gandy, *supra* note 26, at 115, 118.

wastes.³⁵ The “rudimentary” sewer system often fails to cope with the monsoon rains, resulting in flooding and devastation of slum areas.³⁶ Dwellings are crammed together with little ventilation or common space to allow fumes from cooking and home industries to escape.³⁷

Pavement dwellers are the second group of the informally-housed in Mumbai. If the conditions in slums are bad, the conditions of pavement dwellings are immeasurably worse.³⁸ While pavement dwellers are often recent migrants to the city, they can also include families that have lived in their dwellings for generations.³⁹ Subject to successive waves of eviction,⁴⁰ pavement dwellers have colonized the city’s highway verges, footpaths, roofs, railway easements, and other “interstitial spaces.”⁴¹ Here, they set up homes that provide the barest shelter:

typically a small space enclosed on two sides by gunny sacks or old saris and covered on top by sack-cloth, old sheets of plastic or, occasionally, tarpaulin and held up by a few of wooden rods . . . The space available, around four feet by five feet, is just enough to seat the four or five members of the household.⁴²

Other pavement dwellers sleep in the open.⁴³ These pavement dwellers face significant challenges in carving a space of privacy: the street, the “public space *par excellence*,”⁴⁴ must also serve as home. These communities have minimal, if any, facilities⁴⁵ and constitute the city’s most marginalized and vulnerable citizens. Yet, in many cases, pavement dwelling communities are stable,⁴⁶ incorporating shops, small industries, and other commercial enterprises.⁴⁷

Tenants represent the final category of Mumbai’s inadequately-housed. Some of these tenants live within the formal sector, but in housing which is so rundown and neglected that it amounts to life in slum conditions.⁴⁸ Mumbai’s stifling rent control legislation⁴⁹ is one powerful cause of the

35. Patel, *supra* note 3, at 340.

36. Gandy, *supra* note 26, at 108.

37. *Id.*

38. Madhura Swaminathan, *Aspects of Urban Poverty in Bombay*, 7 ENV’T & URBANIZATION 133, 134 (1995).

39. *Id.*

40. Anne-Marie Sanvig Knudsen, *The Right to the City: Spaces of Insurgent Citizenship Among Pavement Dwellers in Mumbai, India*, 12 (Univ. Coll. London Dev. Planning Unit Working Paper No. 132, 2007).

41. Appadurai, *supra* note 2, at 636.

42. Swaminathan, *supra* note 38, at 136.

43. Appadurai, *supra* note 2, at 636.

44. Bayat, *supra* note 1, at 66.

45. Meera Bapat & Indu Agarwal, *Our Needs, Our Priorities: Women and Men from the Slums in Mumbai and Pune Talk about their Needs for Water and Sanitation*, 15 ENV’T & URBANIZATION 71 (2003).

46. Sanvig Knudsen, *supra* note 40, at 13.

47. Appadurai, *supra* note 2, at 637.

48. O’Hare et al., *supra* note 4, at 279-80.

49. *See, e.g.*, The Maharashtra Rent Control Act, 1999, No. 18, Acts of Parliament, 2000,

dilapidation in rental accommodation in the city, as the law hampers the ability – and the will – of owners to maintain their buildings.⁵⁰ Other tenancies are insecure because of fraud or corruption between the landlord and landowner,⁵¹ or the involvement of local criminals.⁵² In these cases, although the tenancy appears regular, families may be subject to threats and extortion in order to retain their homes. Finally, there are high numbers of individuals and families who rent accommodation in already informal settlements. These “invisible renters”⁵³ are doubly disadvantaged. Not only are the houses or hutments in which they live subject to demolition since they fall outside the formal sector, but they are also generally unable to avail themselves of laws which protect tenants in the formal sector.⁵⁴

As this description illustrates, a clear line demarcating slums from pavement dwellings and *chawls* or other tenements is difficult to establish: Appadurai writes that “the insecurely housed poor are everywhere.”⁵⁵ All informal settlers lack the security, stability and safety that is inherent in the concept “home” – a fact represented by the scale of evictions taking place in Mumbai. The India People’s Tribunal reported in June 2005 that “more than 80,000 houses have been demolished by the state government since 8th December 2004.”⁵⁶ While the rate of demolitions and evictions waxes and wanes with changing government policy,⁵⁷ large-scale demolitions – involving thousands of dwellings at a time – are not uncommon.⁵⁸

These various types of informal settlements⁵⁹ are placed in a position of contradiction. Their inhabitants are numerically dominant in the city, yet at the same time inferior. They are un-ignorable but disregarded. Their labor

(incorporating the Bombay Rents, Hotel and Lodging House Rates Control Act of 1947).

50. Gandy, *supra* note 26, at 118-19.

51. See, e.g., *Tenants of Old Buildings Resist Developers, 'Plot'* TIMES OF INDIA, Apr. 10 2003, available at <http://timesofindia.indiatimes.com/news/city/mumbai/Tenants-of-old-buildings-resist-developers-plot-/articleshow/42904267.cms>.

52. Jaideep Gupte, *Linking Urban Vulnerability, Infra-power and “Communal” Violence: Extralegal Security and Policing in South Central Mumbai*, Paper presented at the 9th Annual Global Development Network Conference, Brisbane, Australia 8 Jan. 29–31(2008), available at http://depot.gdnet.org/gdnshare/pdf2/gdn_library/annual_conferences/Ninth_annual_conference/Gupte_paper_parallel_session2.3.pdf.

53. Davis, *supra* note 7, at 42.

54. *Id.* at 42-45.

55. Appadurai, *supra* note 2, at 637.

56. INDIAN PEOPLE’S TRIBUNAL ON ENVIRONMENT AND HUMAN RIGHTS, *BULLDOZING RIGHTS: A REPORT ON FORCED EVICTIONS AND HOUSING POLICIES FOR THE POOR IN MUMBAI 45* (2005).

57. Gandy, *supra* note 26, at 125.

58. See, e.g., Kalpana Sharma, *Mumbai’s Demolition Marathon*, THE HINDU, Jan. 22, 2005, available at <http://www.hindu.com/2005/01/22/stories/2005012202221000.htm>; P. Sainath, *The Unbearable Lightness of Seeing*, THE HINDU, Feb. 5 2005, available at <http://www.hindu.com/2005/02/05/stories/2005020500611000.htm>.

59. All these communities constitute irregular, extra-legal, or informal settlements and this paper shall refer to them as informal settlements, in line with Mumbai NGO practice, when to do so does not cause confusion as to which type of settlement is under discussion. However, despite the pejorative connotations of the word “slum” it is at times necessary to use this word to more accurately reflect the local legal, political, and regulatory conditions of housing.

is essential, yet their presence is marginalized. Nevertheless, the informal settlers are integral to the functioning of the city, filling the ranks of the “well-dressed clerks, nurses, postmen, bank tellers and secretaries” that make up the working classes.⁶⁰ Mumbai’s informal settlements do not constitute backwaters of economic stagnation. For example, the Dharavi settlement, which is Asia’s largest with over one million residents, generates an estimated £700 million economic output yearly.⁶¹ Pavement dwellers are also employed in great numbers. Despite the fact that their wages at times fall well below subsistence levels,⁶² they are major contributors to Mumbai’s work force.⁶³ Moreover, the question of livelihood cannot be easily separated from that of housing. The home is often the site of employment and income generation. Moreover there is a desire to situate the home close to any outside economic opportunities, whether these are domestic work in the formal sector or office jobs in the city’s core.⁶⁴

Informal dwellers do not neatly fit into any one demographic. Some may eke out an existence by begging or through menial, yet long-established jobs as sweepers or manual scavengers.⁶⁵ However, many can be considered middle class themselves,⁶⁶ have children enrolled in secondary and tertiary education,⁶⁷ and are vigorously engaged in activism and local political action.⁶⁸

60. Appadurai, *supra* note 2, at 636. In the words of a prominent housing rights advocate, “the city of Mumbai can’t survive without the slum dwellers. Your drivers of all the cars stay in slums. Your maidservants that come to your houses stay in slums, the police constables stay in slums, bus drivers stay in slums, a whole range of people – the clerks in the offices stay in slums. You remove all the slums and your city will come to a halt.” Interview with Housing Rights Advocate, Mumbai (Oct. 17, 2007).

61. See McDougall, *supra* note 18, at 38.

62. See Swaminathan, *supra* note 38, at 134. Swaminathan concludes that “the official poverty lines represent conditions of abject poverty or destitution.” *Id.* at 136.

63. Men work as dock and construction workers, food vendors, and traders, or are self-employed as tailors or handcart pushers, while women are employed as domestic help by those living in nearby formal settlements, or take in piece-work during the day. Sundar Burra & Liz Riley, *Electricity to Pavement Dwellers in Mumbai 1* (Society for the Promotion of Area Resource Centres [SPARC] Working Paper No. 97, 1999).

64. See O’Hare et al., *supra* note 4, at 275.

65. Manual scavenging is the practice of cleaning “dry” toilets by hand. It is employment normally reserved for the most marginalized castes. Sachin Kumar, *The Curse of Manual Scavenging*, INDIA TOGETHER, Feb. 26, 2005, available at <http://www.indiatogether.org/2005/feb/dlt-scavenger.htm>.

66. Appadurai, *supra* note 2, at 636.

67. During a visit to the Bandra East Slum in 2007, the residents with whom the author met stressed the importance of formal schooling. One family, whose four children – including their daughter – had completed secondary school had a son who, his mother told the author with evident pride, was completing a Bachelor of Commerce, taught and tested in English. Author Field notes, Oct. 17, 2007 (on file with Author).

68. The engagement of grassroots campaigners in the slums and pavement settlements has “allowed some of the poorest communities in the city to become visible for the first time, not just as objects of strategic intervention on behalf of the state but as legitimate social and political entities in their own right.” Gandy, *supra* note 26, at 119. The activists with whom this author met while researching in Mumbai lived or had families living in the informal settlements. At the end of one long day spent meeting women active in community organizations in the slum area around Bandra East, one activist took the author to the

Identifying an “average” inhabitant of an informal settlement in Mumbai is thus virtually impossible. Even when one separates the informal settlements into types, the communities are too rich in their infinite variety to fit neatly into the categories desirable for study or analysis. What is clear, even impressionistically, is that the city of Mumbai cannot function without its informal sector. The informal sector is *itself* more than half the city. But at the same time a full life is not afforded to these citizens and they are pushed to the margins, both literally and metaphorically.

Through the political, geographical and social complexity of Mumbai’s informal housing, “the slum” emerges as a legal, territorial and demographic, rather than merely spatial, construct.⁶⁹ The presence of the informal settlers, those commonly known as “slum dwellers,” must be understood as a defining social, political, legal, and cultural characteristic of the city. The complex relationship between the slum dwellers and the formal city is under constant negotiation in the laws and politics of Mumbai, and plays out between the citizens, and between citizens and the state. The struggle is strongly informed by the important tradition of housing rights protection in the city, examined in the next section.

III. THE GROWTH OF THE HOUSING RIGHTS MOVEMENT IN MUMBAI

Having set out the physical and social realities of life in Mumbai, thus providing the context in which legal struggles over and around the right must be seen, this section briefly discusses the growth of the distinctive housing rights movement in the city.

India has a long history of internally-born activism and social movements.⁷⁰ An independent and activist judiciary⁷¹ applies and interprets a constitution which plays a significant role in the structure and development of the Indian state.⁷² The Constitution includes both a bill of judicially enforceable rights⁷³ and social and economic guarantees in the form of “Directive Principles of State Policy” (DPSP).⁷⁴

A western style rights consciousness permeated the Indian struggle for

settlement at Bandra Terminus. There, off a small alley and up a ladder-like stair case, the activist proudly showed off her Aunt’s spotless house, where her young cousin served a tin plate of rice and curry and demonstrated how to work her ipod nano, as the sun slanted warmly through the window. Author Field notes, Oct. 17, 2007 (on file with Author).

69. Rao, *supra* note 18, at 229.

70. See generally Sandip Hazareesingh, *The Quest for Urban Citizenship: Civic Rights, Public Opinion, and Colonial Resistance in Early Twentieth-Century Bombay*, 34 MOD. ASIAN STUD. 797 (2000).

71. See G.B. Reddy, *Supreme Court and Judicial Activism: An Overview of its Impact on Constitutionalism*, 3 SUP. CT. J. 19, 19 (2001).

72. Granville Austin, *A Historian’s Reflections on the Indian Constitution*, in HUMAN RIGHTS, JUSTICE & CONSTITUTIONAL EMPOWERMENT, xxii, xxii (C. R. Kumar & K. Chockalingam eds., 2007).

73. INDIA CONST. arts. 12-35.

74. INDIA CONST. arts. 36-51.

independence from British rule,⁷⁵ and the western tradition's most influential and powerful declarations of rights and liberties are reflected in the constitutional text.⁷⁶ However, despite this deep influence, the role of the Indian state in the protection of the peoples' fundamental rights is different from the role a western liberal state would be assumed to take. Indeed, as Singh argues, the Constitutional structure requires that:

Whether the individual asks for his rights or not, the state must secure them to him. The state must know that the people have rights irrespective of their demand for them and that not only has it to honour them by non-interference but has also to secure them to each and every person by positive action.⁷⁷

As such, the Constitution envisions an interventionist role for the state in the realm of human rights protection in India.

In Mumbai, activism around decent and adequate housing as an entitlement can be found as early as the first decades of the twentieth century, by which point, as Hazareesingh notes, "Bombay had emerged as the centrepiece of public pressure . . . on the issue of rights."⁷⁸ Struggles for housing as a right were linked, even during colonial times, with the issues of livelihood, working conditions, civic participation, and rights to citizenship itself.⁷⁹

Mumbai's urban population is highly formally educated, but is also schooled in the brutal process of eviction and relocation. The convergence of these "educations" would seem the perfect breeding ground for a culture of rights, rights consciousness, or rights awareness. As de Feyter states: "[t]he communities which go through a human rights crisis build up knowledge – a usage of human rights linked to concrete living conditions."⁸⁰ Indeed, in Mumbai human rights campaigns and struggles have become common, and many of these struggles revolve around issues of housing.

In the 1980s, following the government's attempt to evict many thousands of pavement dwellers living along the verges of Mumbai's highways,⁸¹ a wave of protest grew and NGOs and grassroots organizations campaigned for a constitutional amendment to enshrine a

75. Mahendra P. Singh, *Constitutionalization and Realization of Human Rights in India*, in HUMAN RIGHTS, JUSTICE & CONSTITUTIONAL EMPOWERMENT 26, 29-30 (C. R. Kumar & K. Chockalingam eds., 2007); Leela Simon & Chiranjivi J. Nirmal, *Fundamental Rights: The Constitutional Context of Human Rights*, in HUMAN RIGHTS IN INDIA: HISTORICAL, SOCIAL AND POLITICAL PERSPECTIVES 40, 40-42 (Chiranjivi J. Nirmal ed., 2000).

76. Simon & Nirmal, *supra* note 75, at 44.

77. Singh, *supra* note 75, at 40.

78. Hazareesingh, *supra* note 70, at 812.

79. *Id.* at 804.

80. Koen de Feyter, *Localising Human Rights*, in ECONOMIC GLOBALISATION AND HUMAN RIGHTS 76 (W. Benedek et al. eds., 2007).

81. *Olga Tellis v. Bombay Mun. Corp.* A.I.R. 1986 S.C. 180 at 183-84.

fundamental right to housing.⁸² These campaigns saw the role of the state as crucial in the provision of the right to housing.⁸³ While the attempt to amend the constitution failed,⁸⁴ the impact of the campaign was significant: “the housing issue became part of the national public and political discourse.”⁸⁵ Meanwhile, in large part through petitions brought by individuals and organizations involved in these street level protests, another rights-based approach to housing was emerging in the Indian Supreme Court jurisprudence on Article 21 – the right to life.

The picture that emerges from this description of the housing situation in Mumbai is one in which the right to housing and the political mobilization around it play a significant role. Mumbai’s long history of housing rights activism is linked to issues of citizenship and social change, political struggle and the forces of urbanization and modernization. The role of law in these struggles is complex, and it is this aspect of Mumbai’s housing rights situation which this article now addresses.

IV. JUDICIAL PROTECTION OF THE RIGHT TO HOUSING: THE JURISPRUDENCE

This Part provides a concrete example of the legal response to the political and social housing rights movement in India, describing and analyzing the housing rights jurisprudence crafted by the Supreme Court under Article 21 of the Indian Constitution. It sets out the leading cases on the right to housing, detailing the reasoning of the Court and scrutinizing the philosophical and social vision of Indian society revealed in the case law. It thus provides a picture of the right to housing in Indian constitutional law.

The Indian judiciary is the guardian of Constitutional rights.⁸⁶ It has played an activist role in interpreting the fundamental rights and freedoms,⁸⁷ extending their content to include the socio-economic goals underlying the directive principles of state policy.⁸⁸ In addition, the Supreme Court has “pioneered” novel forms of litigation to achieve this integration of socio-economic goals through fundamental rights.⁸⁹ Although in the early years of Independence the Court employed a “literal” interpretation of the Constitution,⁹⁰ by the end of the 1970s it

82. JOY DESHMUKH-RANADIVE, HOUSING THE POOR: HOW RELEVANT ARE HUMAN RIGHTS? 20, (date unknown) available at www.isst-india.org/PDF/Housing%20the%20poor.pdf.

83. *Id.*

84. *Id.*

85. *Id.*

86. INDIA CONST. art. 32.

87. *Id.* arts. 12-35.

88. Reddy, *supra* note 71, at 22.

89. Jayna Kothari, *Social Rights Litigation in India: Developments of the Last Decade*, in EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE 171 (D. Barak-Erez & A. Gross eds., 2007).

90. Arun Thiruvengadam, *The Global Dialogue Among Courts: Social Rights Jurisprudence of the Supreme Court of India from a Comparative Perspective*, in HUMAN RIGHTS, JUSTICE, AND CONSTITUTIONAL EMPOWERMENT 277 (C. Raj Kumar & K. Chockalingam eds., 2007).

began to develop procedural and substantive techniques to ensure fulfillment of these social justice policies.⁹¹ The housing rights jurisprudence is a prominent example of this judicial activism.

Although the Indian Supreme Court has widely employed international norms to inform its understanding of the Indian human rights system,⁹² the Indian Jurisprudence on the right to housing is analytically separate from the right to housing as codified and interpreted in the international human rights covenants.⁹³ Rather, the Indian judiciary has created a distinct jurisprudence on the right to housing under the right to life in Article 21 of the Indian Constitution.⁹⁴

This approach can be read as a judicial refusal to see the Indian Constitution as lacking in or inferior to any international norm of human rights protection: Mani notes that it appears that the judiciary interprets Article 21 as “adequately all-pervasive of all human rights, both present and evolving.”⁹⁵ Nevertheless, as a matter of statutory interpretation, the rights now encompassed by Article 21 remain a radical expansion of the right to life. India’s Supreme Court has been characterized as fearlessly activist,⁹⁶ and it has been argued that the “contribution of the Supreme Court in respect of widening the scope of the right to life and personal liberty under Article 21, is the most valuable contribution, the judicial activism has made, in any part of the world.”⁹⁷

This expansion of the right to life and personal liberty did not first arise in socio-economic rights cases, but out of the jurisprudence on the rights of detainees: in the breakthrough case *Maneka Gandhi v. Union of India*,⁹⁸ the Court took control of Article 21 and began its rapid extension beyond the

91. *Id.* at 279.

92. K.G. Balakrishnan, *Good Governance in International Law: An Indian Perspective*, 32 SOUTH AFR. Y.B. INT’L L. 25, 37 (2007).

93. Specifically, International Covenant on Economic, Social and Cultural Rights, Art 11(1) states as follows: “The States Parties to the Present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and *housing*, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right . . .” G.A. Res. 2200A (XXI), U.N. Doc A/6316 (Dec. 16, 1966) (emphasis added). *See also* International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families G.A. Res. 45/158 (1990) art 43(1)(d); Convention on the Rights of the Child G.A. Res 44/25 (1989) art 27(3); Convention on the Elimination of All forms of Discrimination Against Women G.A. Res. 34/180 (1979) art 14(2)(h); International Covenant on the Elimination of All forms of Racial Discrimination G.A. Res. 2106A (XX) UN DOC (1965) art. 5(e)(iii); Convention Relating to the Status of Refugees G.A. Res. 529V (1951) art. 21; Universal Declaration of Human Rights G.A. Res. 217A (III), U.N. Doc/ A/810 (Dec. 10, 1948); European Social Charter (Revised) CETS No.: 163 (1999). The leading interpretation of the right to housing in international law can be found in Comm. on Econ., Soc., & Cultural Rights, General Comment 4: The Right to Adequate Housing, U.N. Doc E/1992/23, annex III (1991).

94. “No person shall be deprived of his life or personal liberty except according to procedure established by law.” INDIA CONST. art. 21.

95. V. S. MANI, *Human Rights in India: A Survey*, in HUMAN RIGHTS: FIFTY YEARS OF INDIA’S INDEPENDENCE 173 (K.P. Sakensa ed., 1999).

96. Shehnaz Meer, *Litigating Fundamental Rights: Rights Litigation and Social Action Litigation in India: A Lesson for South Africa*, 9 S. AFR. J. HUM. RTS. 358, 372 (1993).

97. Reddy, *supra* note 71, at 20.

98. A.I.R. 1978 S.C. 597.

procedural guarantee suggested by the text.⁹⁹ It was at this point that, as Ramanathan writes, the Court began to make the Constitution relevant to the “marginalized masses,”¹⁰⁰ fleshing out concepts of the right to life with human dignity, which underpin the developments of law in this area.

Francis Coralie Mullin v. The Administrator, Union Territory of Delhi,¹⁰¹ which was handed down in 1981, did not, on its face, involve housing or shelter. The plaintiff was concerned with challenging the legality of her detention. However, the case provided an opportunity for the Court to develop the meaning of Article 21; as such, it represents the well-spring of a line of reasoning from which the housing rights cases flow. Justice Bhagwati, writing for the Court, noted that the right to life “is the most precious human right” which “forms the arc of all other rights.”¹⁰² For that reason, the right to life must “be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person.”¹⁰³ The Court hereby signaled the philosophical basis upon which to found its expansion of the right. Accordingly, Justice Bhagwati continued:

We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation *pro tanto* of this right to live¹⁰⁴

The Court thus invested the right to life with the basic material goods necessary for human dignity.

99. See Kothari, *supra* note 89, at 175.

100. Usha Ramanathan, *Of Judicial Power*, FRONTLINE MAG., Mar. 16, 2002, available at <http://www.hinduonnet.com/fline/fl1906/19060300.htm>.

101. A.I.R. 1981 S.C. 746.

102. *Id.* at 752.

103. *Id.*

104. *Id.* at 753.

*Olga Tellis v. Bombay Municipal Corporation*¹⁰⁵ brought the question of housing and shelter squarely before the court in a petition on behalf of Mumbai's slum and pavement dwellers.¹⁰⁶ The Municipal Corporation had sought to evict a large community of informal dwellers without notice or compensation, forcibly relocating them to the fringes of the city by bus.¹⁰⁷ The petitioners argued that eviction from their homes would deprive them of their livelihoods, and hence, their right to life under Article 21. They alleged that the government should provide alternative accommodation to them to guarantee their rights to life.¹⁰⁸

The Court followed Justice Bhagwati's line of reasoning in *Mullin*. Recalling the Directive Principles of State Policy,¹⁰⁹ Chief Justice Chandrachud wrote for the Court that given the Indian state's obligation "to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life."¹¹⁰ While he noted that the state could not be compelled to provide work to the citizen through affirmative action,¹¹¹ he nevertheless maintained that "any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21."¹¹²

Having determined that the right to life includes the right to livelihood, the Court stated that it would "assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihoods."¹¹³ In coming to this conclusion, the Court exhibited a keen awareness of the structural causes of rural poverty and the link with urban informality. Justice Chandrachud stated that:

One of the major causes of the persistent rural poverty . . . is the extremely narrow base of production available to the majority of the rural population. The average agricultural holding of a farmer is 0.4 [sic] hectares, which is hardly adequate to enable him to make both ends meet. Landless labourers have no resource base at all and they constitute the hard core of poverty. Due to economic pressures and lack of employment opportunities, the rural population is forced to migrate to urban areas in search of employment.¹¹⁴

As a result of the close connection between life and livelihood, the

105. *Olga Tellis v. Bombay Mun. Corp.* A.I.R. 1986 S.C. 180.

106. *Id.* at 183.

107. Ramanathan, *supra* note 19, at 2909.

108. *Olga Tellis v. Bombay Mun. Corp.* A.I.R. 1986 S.C. 180 at 183-84.

109. *Id.* at 194.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 193.

114. *Id.* at 190.

Court held that evictions could only take place "according to procedure established by law," as mandated by Article 21.¹¹⁵ The case thus provided an important procedural guarantee that evictions, at least in circumstances in which the inhabitants would be deprived of their livelihoods, must take place in accordance with lawful process or stand in violation of the constitutional right to life.

However, the Court denied the petitioners' substantive claim that they have a right to the pavement itself. Thus:

There is no substance in the argument advanced on behalf of the petitioners that the claim of the pavement dwellers to put up constructions on pavements and that of the pedestrians to make use of the pavements for passing and repassing, are competing claims and that, the former should be preferred to the latter [I]t is erroneous to contend that the pavement dwellers have the right to encroach upon pavement by constructing dwellings thereon.¹¹⁶

In consequence, even while the Court recognized that the encroachments made by the petitioners were "involuntary acts in the sense that those acts are compelled by inevitable circumstances and . . . not guided by choice,"¹¹⁷ it held that the municipality had been justified in ordering the removal of the petitioners' homes.¹¹⁸ The petitioners did not have a right to make their homes on the pavements, as "[n]o one has the right to make use of public property for private purpose without the requisite authorization."¹¹⁹

The Court took the initiative in setting out what would constitute fair procedure in this case. It ordered the authorities to delay any evictions until the end of the monsoon season and further, required the Municipal Corporation to provide alternative accommodation for those pavement dwellers whose hutments had been recorded by census or through the grant of identity cards, which proved the individuals' longstanding settlement in the area.¹²⁰

Olga Tellis was followed by subsequent cases implying a right to housing and shelter into the right to life. In *Shantistar Builders v. Narayan Khimalal Totame*,¹²¹ handed down in 1990, another group of pavement dwellers approached the Court seeking enforcement of legislation that sought to prevent land accumulation by powerful interests, and at the same time provide flats to house the economically "weaker sections of

115. *Id.* at 196.

116. *Id.* at 198.

117. *Id.* at 201.

118. *Id.* at 197.

119. *Id.* at 198.

120. *Id.* at 202. The order in *Olga Tellis* has had far-reaching impacts on the rights and entitlements of Mumbai's informal settlers. See the discussion in Part V.

121. *Shantistar Builders v. Narayan Khimalal Totame* (1990) 1 S.C.C. 520.

society.”¹²² Here, in the process of revising and expanding the guidelines for the construction and provision of the subsidized flats, the Court reaffirmed that “[t]he right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in.”¹²³ Moreover, the Court noted that a human being requires not only “the bare protection of the body [but] suitable accommodation which would allow him to grow in every aspect – physical, mental and intellectual.”¹²⁴ The reasoning thus encompasses not only a right to life with dignity, but appears to accept a constitutional right to a life of intellectual and material flourishing.

The Court’s concern to protect the “weaker sections” of society is an important theme expressed in the judicial reasoning on the right to housing. *Chameli Singh v. State of Uttar Pradesh*, handed down in 1996, is particularly notable in this respect.¹²⁵ The case was brought by landowners whose properties were subject to compulsory acquisition by the state government. The government desired to acquire the lands to provide housing for “Scheduled Castes,”¹²⁶ for whom the Constitution mandates governmental affirmative action.¹²⁷ The owners argued that the acquisition of their lands would violate their right to life under Article 21, because the lands were their source of livelihood.¹²⁸

The Court was not convinced by the landowners’ case. In fact, the judgment does not even address the arguments raised by the landowners on the link between their property and livelihood, appearing to reject it out of hand.¹²⁹ Instead, Justice Ramaswamy (writing for the Court) invokes the Preamble’s principles of economic justice and material distribution for the benefit of the marginalized.¹³⁰ The Court’s reasoning is built around the judicial assumption that laws created to benefit the worst off cannot be invoked by the powerful, and is clearly animated by the concept of equality and economic and social justice revealed in the judgment.¹³¹

The judgment thus represents a remarkable willingness to uphold the government’s public policy legislation, despite the impact on individual property rights.¹³² Taking judicial notice of the “appalling housing

122. Urban Land (Ceiling and Regulation) Act, No. 33 of 1976; India Code (1976), 20(2)(1).

123. *Shantistar*, (1990) 1 S.C.C. at 527.

124. *Id.*

125. *Chameli Singh v. State of Uttar Pradesh* (1996) 2 S.C.C. 549, 553.

126. *Id.* at 552.

127. Schedules to the Indian Constitution set out various historically marginalized castes and tribes for affirmative action measures. See INDIA CONST. scheds 5-6.

128. *Chameli Singh*, (1996) 2 S.C.C. at 552.

129. *Id.* at 552-53. The Court deals with the entire argument of the petitioners in a few short paragraphs.

130. *Id.* at 553.

131. *Id.* at 553-57. See, for example, the discussion of India’s international human rights obligations under the Universal Declaration of Human Rights Art. 25(1) and International Covenant on Economic, Social and Cultural Rights Art. 11(1) at 553 and the discussion of balancing competing aims for social justice under the Constitution, *id.* at 556.

132. This can be contrasted with the court’s earlier “pre-activist” period. Balakrishnan Rajagopal, *Judicial Governance and the Ideology of Human Rights: Reflections from a Social*

condition" of the Scheduled Castes and Tribes,¹³³ the Court then argued that it was clear that the state had undertaken the provision of housing to Dalits and Tribes as an economic policy "on a war footing,"¹³⁴ in order to comply with its constitutional and international obligations.¹³⁵ Thus, it concluded, the individual right of the owners must "yield to the larger public purpose."¹³⁶

The Court's characterization of housing and shelter is a second compelling strand in the reasoning. On this point, the Court stressed the fundamental importance of housing and shelter to a full human life, noting that "[w]ant of decent residence . . . frustrates the very object of the constitutional animation of right to equality, economic justice, fundamental right to residence, dignity of person and right to live itself."¹³⁷ It continued, describing the state's duty to provide opportunities and facilities to the oppressed sections of Indian society as "fundamental."¹³⁸

Chameli Singh presents housing as having a public purpose with an impact on community and social inclusion. As the Court stated:

In a democratic society . . . one should have permanent shelter so as to physically, mentally and intellectually equip oneself to improve his excellence as a useful citizen as enjoined in the Fundamental Duties and to be a useful citizen and equal participant in democracy. The ultimate object of making a man equipped with a right to dignity of person and equality of status is to enable him to develop himself into a cultured being.¹³⁹

In other words, the animation behind the Indian Constitution's right to housing and shelter is one that recognizes both the importance of the private right to housing, and the public need for the conditions of life that enable individuals to contribute and flourish as citizens.

In 1997, the Court handed down its third major housing rights case, *Ahmedabad Municipal Corp. v. Nawab Khan Gulab Khan*,¹⁴⁰ again addressing the rights of the State of Maharashtra's pavement dwellers. In this case, the

Movement Perspective, in HUMAN RIGHTS, JUSTICE, AND CONSTITUTIONAL EMPOWERMENT 206 (C. Raj Kumar & K. Chockalingam eds., 2007). The Court's struggle to control the right to property is a striking example of this pre-activist phase. As originally drafted, the Fundamental Rights included a right to private property. The judiciary upheld this right in the face of State attempts at land nationalization for the fulfillment of the Constitution's Directive Principles of economic and social equality. The state responded by repealing property as a fundamental right, replacing it in a part of the Constitution (Art. 300A) where it cannot be enforced by the courts. CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 84 (1998).

133. *Chameli Singh*, (1996) 2 S.C.C. at 559.

134. *Id.* at 560.

135. *Id.*

136. *Id.* at 562.

137. *Id.* at 556.

138. *Id.*

139. *Id.*

140. *Ahmedabad Mun. Corp. v. Nawab Khan Gulab Khan*, A.I.R. 1997 S.C. 152.

Court invoked precedent from *Olga Tellis* and *Chameli Singh*, to state that the right to life clearly included a right to life with dignity¹⁴¹ and to lay out the constitutional obligations of the state in securing this dignified life.¹⁴²

The *Nawab Khan Gulab Khan* judgment is an attempt to apply the guidelines for the eviction of pavement dwellers that were developed in *Olga Tellis*. In its effort to standardize the *Olga Tellis* requirements for evictions within the limits of the Constitution, the case is the first illustration of the competing interests and principles at play in the determination of housing rights, which the Court struggles to balance in the judgment.

Justice Ramaswamy, again writing for the Court, invoked the relevance of Article 25(1) of the Universal Declaration of Human rights, and Article 11(1) of the International Covenant on Economic, Social and Cultural Rights to the question before the Court.¹⁴³ He made reference to the duty of the state to “provide” a right to shelter for the poor and indigent.¹⁴⁴ Moreover, he took note of the fact that one did not need to look far to find the reasons why municipalities allow pavement dwellings to be built,¹⁴⁵ thus illustrating a sympathy with the plight of those who dwell on the roadsides but also with those who seek to control such unauthorized homes. He argued that it would be unconstitutional to attempt to prevent Indians from migrating and settling in areas where greater livelihood and life chances are available.¹⁴⁶ Justice Ramaswamy noted that the poor agricultural laborers, middle, and upper classes, flock to the cities where there are greater opportunities.¹⁴⁷ He found it “unfortunate” that half a century after India’s independence, little infrastructure exists in rural India and little comprehensive planning has been undertaken to remedy the deficiency.¹⁴⁸

A considerable part of the judgment is devoted to outlining and assessing the adequacy of the government’s scheme to re-house these and other pavement dwellers.¹⁴⁹ The scheme echoes back to the order in *Olga Tellis* in that it requires notice, and, in some instances, the provision of alternate dwellings to those affected by the eviction. However, in *Nawab Khan Gulab Khan* the Court is concerned with elucidating how the protections offered to informal dwellers in *Olga Tellis* can be narrowed.

For example, Justice Ramaswamy stressed that the sooner the “encroachments” of the pavement dwellers’ houses were removed the better. He noted that quick action on the part of the government prevents the dwellers from claiming the “semblance of right to obstruct removal of

141. *Id.* at 163.

142. *Id.* at 158.

143. *Id.* at 157-58.

144. *Id.* at 159.

145. *Id.* at 157.

146. *Id.* at 163.

147. *Id.* at 162-63.

148. *Id.* at 162.

149. *Id.* at 159-64.

the encroachment."¹⁵⁰ The judgment recommends that the authorities "ensure constant vigil on encroachment of the public places."¹⁵¹ It further suggests that, if encroachments can be dealt with as soon as they arise, "the need to follow the procedure of principle of natural justice could be obviated."¹⁵² In this case, Justice Ramaswamy proposes only a short notice period of "say two weeks or 10 days,"¹⁵³ and, given the implementation of such a fair notice period, "the right to hearing before taking action for ejectment is not necessary in the fact-situation."¹⁵⁴ The judicial statement that a hearing may not be necessary before eviction is a reduction in the legal protections available to informal dwellers subject to eviction.

Justice Ramaswamy also determined that pavement dwellers do not have transferrable property rights in their dwellings.¹⁵⁵ As such, any transfer by rent or sale of the hutment was void *ab initio*,¹⁵⁶ and any pavement dweller who had acquired his hut from another informal pavement dweller was ineligible for re-housing.¹⁵⁷ Moreover, the Court stressed the state's duty to remove the pavement dwellers so as to make the pavements accessible for pedestrians.¹⁵⁸ Justice Ramaswamy thus recalled *Olga Tellis* as authority for the proposition that pavement dwellers have no right to make private use of public space.¹⁵⁹ He also reinforced the principle that pedestrians have a right to the pavement in order that they "are able to go about their daily affairs with a reasonable measure of safety and security"¹⁶⁰ while pavement dwellers do not.¹⁶¹ This illustrates that, as Ramanathan points out with respect to the housing rights jurisprudence, on the issue of the contest between pedestrians and pavement dwellers, "the latter definitively lost."¹⁶² The competing interests evident in the *Nawab Khan* case prefigure more recent cases discussed in Parts VI.A, VI.B, and VI.C, in which informal dwellers have been characterized in radically different – and less sympathetic ways. Nevertheless, the *Olga Tellis* line of cases remains good law, and has had a significant impact on human rights theory, practice, and activism.

On the whole, Indian Supreme Court cases on the right to housing and shelter¹⁶³ have been welcomed across the world as revealing a perceptive, profound and contextualized view of human life and the interconnected

150. *Id.* at 157.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 162.

155. *Id.* at 164-65.

156. *Id.* at 165.

157. *Id.* at 166.

158. *Id.* at 157.

159. *Id.*

160. *Id.*

161. *Id.*

162. Ramanathan, *supra* note 19, at 2910.

163. It should be pointed out that the Indian cases do not reveal a meaningful distinction between housing and shelter, perhaps given the Court's rich conception of shelter and recognition that the purpose of shelter is greater than to merely provide physical protection of the person.

nature of all human rights – from equality to livelihood, from social inclusion to education.¹⁶⁴ However, as Kothari argues, the cases are relatively few in number, the order granted in each is situation specific, and the remedies are ad hoc.¹⁶⁵ She notes that “in none of the major judgments on housing rights has the Supreme Court given concrete positive orders for the enforcement of this right.”¹⁶⁶ Yet, in many ways, the judgments reveal a coherent interpretation of the right to life and its relationship with adequate housing and shelter. The cases spell out a multifaceted interpretation of the right to life that includes attention to issues of material needs, structural equality, dignity, opportunity, and even intellectual flourishing. And they have provided a discourse through which to understand the interconnections among the various facets of a decent human life.

The existence of such powerful discourses can provide an important space in which to negotiate with the state regarding its human rights obligations to citizens.¹⁶⁷ Moreover, it is significant that this conceptual space exists within the law, rather than as a moral, religious, or political argument about need,¹⁶⁸ as law grounds a powerful claim to inclusion and visibility.¹⁶⁹ The discourse challenges the perception that the codification of human rights in legal texts freezes the content of the rights and prevents the redress of emerging harms and changing recognitions of human injustice, a concern that has plagued some written constitutions¹⁷⁰ and an argument that has been used against the introduction of bills of rights in some states.¹⁷¹ It also profoundly undermines the argument that economic, social and cultural rights such as the right to housing are somehow philosophically or qualitatively separate from civil and political rights such as the right to life, given the holistic and indivisible view of all human rights reflected in the Indian Supreme Court’s approach.

The impact of this discourse extends beyond the borders of the state. As Ghai argues, the Indian Supreme Court has “opened a public, and worldwide, dialogue on rights that would scarcely have been possible without its own discourse on rights and the social and economic condition

164. See, e.g., Meer, *supra* note 96, at 359; Special Rapporteur on the right to food, REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, JEAN ZEIGLER, MISSION TO INDIA 24 U.N. Doc. E/CN.4/2006/44/Add.2 (Mar. 20, 2006); Claire L’Heureux-Dube, *Human Rights: A Worldwide Dialogue*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA 214 (B.N. Kirpal et al. eds., 2000).

165. Kothari, *supra* note 89, at 183.

166. *Id.*

167. For example, in the context of the right to housing of indigenous peoples in Canada, see Jessie Hohmann, *Igloo as Icon: A Human Rights Approach to Climate Change for the Inuit?*, 18 TRANSNAT’L LAW & CONTEMP. PROB. 295, 308-09 (2009).

168. Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 412-13 (1987).

169. See *infra* Part VI.A.

170. In the United States, for example, see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1093 (1989).

171. See GEORGE WILLIAMS, A BILL OF RIGHTS FOR AUSTRALIA 36 (2001) (cataloguing the reasons against the introduction of a bill of rights, including that “to define a right is to limit it.”).

of India.”¹⁷² For example, the South African Constitutional Court, which is constitutionally mandated to consider violations of the right to housing,¹⁷³ uses concepts of dignity in considering what constitutes a reasonable legislative response to situations of profoundly inadequate housing,¹⁷⁴ and the Inter-American Court on Human Rights has developed a body of jurisprudence on the right to a dignified life.¹⁷⁵ Academics beyond India have also taken hold of the concept of the right to life with dignity, and the necessary recognition of socio-economic elements within this right. For example, Gearty and Griffin have both made the idea of dignity a central plank in their recent theoretical contributions to human rights.¹⁷⁶ Finally, international NGOs have also embraced the concept of the right to life with human dignity, and its vital connection to economic and social goods. For example, Amnesty International – which until recently maintained a steadfast focus on civil and political rights¹⁷⁷ – has launched its “Global Campaign for Human Dignity,” in which the organization recognizes that:

Poverty is not just a lack of income; it is the denial of access to the resources, capability, security and power that people need in order to realize their human right to live with dignity. Universal human dignity can only become a reality through respect for the full range of human rights—from adequate housing and physical integrity to access to information.¹⁷⁸

These examples illustrate that although the Indian jurisprudence on the right to life represents a unique judicial response to the deprivation of adequate housing, the reasoning of the Court has contributed to the international development of human rights, both theoretically and practically.

V. IMPLICATIONS OF THE INDIAN JURISPRUDENCE: LEGISLATIVE RESPONSES TO JUDICIAL ACTIVISM

The conceptual impact of the jurisprudence on the right to life with

172. See Gash Yhai, *Foreword*, in HUMAN RIGHTS, JUSTICE AND CONSTITUTIONAL EMPOWERMENT x, xi (C. Raj Kumar & K. Chockalingam eds., 2007).

173. S. AFR. CONST. 1996. § 26 (right to housing), § 38 (enforcement of rights).

174. See DAVID BILCHITZ, POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS 137-38 (2007).

175. See, e.g., Yakyé Axa Indigenous Cmty. & Paraguay Case, 2005 Inter-Am. Ct. H.R. (Ser. C) No. 125 (June 17, 2005); Jo Pasqualucci, *The Right to a Dignified Life (Vida Digna): The Integration of Economic, Social and Cultural Rights with Civil and Political Rights in the Inter-American Human Rights System*, 31 HASTINGS INT’L & COMP. L. REV. 1 (2008).

176. CONOR GEARTY, CAN HUMAN RIGHTS SURVIVE? (2006); JAMES GRIFFIN, ON HUMAN RIGHTS (2008).

177. The mandate was expanded in 2001. The History of Amnesty International, <http://www.amnesty.org/en/who-we-are/history> (last visited Dec. 8, 2009).

178. AMNESTY INTERNATIONAL, GLOBAL CAMPAIGN FOR HUMAN DIGNITY, ACT 35/0032007 (2007), available at <http://asiapacific.amnesty.org/library/Index/ENGACT350032007?open&of=ENG-200>.

dignity and its encompassing of the right to housing or shelter are important. However, it is the effect on the individual slum or pavement dwellers and other marginalized or homeless individuals in Mumbai which is more direct and pressing. How, then, has this jurisprudence transformed their lives? What improvements has it rendered in their daily existence? And what are the implications of these results for the judicial protection of the right to housing in Mumbai? In this Part, the article will examine two examples of concrete, practical effects of the judgments. The first is the requirement for rehabilitation and compensation in the case of slum and pavement demolition or eviction. The second concerns the protections provided through the concept of the "cut-off date."

Not all the effects and implications arising from these policies have been positive. However, the results must not only be considered in contrast to the ideal housing rights situation in Mumbai, but also to the situation that would likely prevail absent the judgments. Thus, the picture revealed is complex, and provides no easy conclusions on the role of the right to housing in the transformation of the social environment of Mumbai.

The order granted by the Court in *Olga Tellis* is far-reaching, with implications beyond the specific petitioners that address the condition of informal dwellers everywhere in the city. The Court required, in part, that:

[P]avement dwellers who were censused or who happened to be censused in 1976 should be given, though not as a condition precedent to their removal, alternate pitches at Malavani or, at such other convenient place as the Government considers reasonable but not farther away in terms of distance; slum dwellers who were given identity cards and whose dwellings were numbered in the 1976 census must be given alternate sites for their resettlement; slums which have been in existence for a long time, say for twenty years or more, and which have been improved and developed will not be removed unless the land on which they stand or the appurtenant land, is required for a public purpose, in which case, alternate sites of accommodation will be provided to them¹⁷⁹

The order is an example of the judiciary's development of innovative remedies in fundamental rights cases. The remedies, which are "unorthodox and unconventional," are "intended to initiate positive action on the part of the state and its authorities."¹⁸⁰ Despite some controversy and doubt as to the efficacy and appropriateness of such remedies,¹⁸¹ they have been largely accepted as legitimate. Indeed, the legislature and executive at state, national, and local levels do engage with the judicial orders, which

179. *Olga Tellis v. Bombay Mun. Corp.* A.I.R. 1986 S.C. 180 at 204.

180. Kothari, *supra* note 89, at 175.

181. See, e.g., Reddy, *supra* note 71, 24-27; Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, in *THE STATE OF INDIA'S DEMOCRACY* (Sumit Ganguly et al. eds., 2007).

often require the government to put new policies in place, take active steps to create certain social conditions, and take on many other judicially mandated tasks.¹⁸²

This has been the case with the order arising from the *Olga Tellis* litigation. In the wake of the judgment, several judicial conditions stipulated in the case were picked up by the government and turned into broader legislation. These conditions included the concept of a “cut-off date” for protection of informal settlements and the concept of rehabilitation and compensation in the case of eviction. Accordingly, a legislative framework based around the key requirements of the *Olga Tellis* judgment has emerged.

This scheme is now largely contained in the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act.¹⁸³ The Act is based around two main principles. The first is that certain informal settlements become subject to a modicum of legal protection under the Act: those dwelling in these structures are entitled to “rehabilitation and compensation” in the case of eviction. The second, related, protection is the concept of the “cut-off date.” Informal dwellings built before the cut-off date are “protected structures” under the Act, and their residents are thus entitled to rehabilitation and compensation.

A. Rehabilitation and Compensation

The Slum Areas Act contains the legislative scheme covering protection, improvement, clearance, and redevelopment of informal settlements in Mumbai. It provides a large measure of protection for informal dwellers. Importantly, as an instrument for advocacy, it can be relied upon as a codification of principles which activists and residents can point to when the government deviates from them. It also provides a point of political negotiation, most importantly at election time.¹⁸⁴ However, the scheme is controversial. Significant problems, addressed below, range from issues of practical implementation and political will, to dissatisfaction with the principles informing the legislation itself.

The Act refers to informal settlements as slums throughout, although communities of pavement dwellers could also fall within its protections if

182. The *Vishaka v. State of Rajasthan* case on workplace sexual harassment is a striking example where the Court order included a set of mandatory guidelines for employers. The Court included in its guidelines preventative steps, compliance mechanisms, and disciplinary action. Drawing heavily on The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Moreover, it declared the judicial guidelines as having the force of law. These guidelines have formed the basis of a slate of binding requirements on employers, both in the public and private sectors, with Parliament only now beginning to consider a legislative scheme. *Vishaka v. State of Rajasthan* 1997 A.I.R. S.C. 3011 as explained by ICHRL Women’s Rights Activist, Author Field notes (on file with Author).

183. *Slum Areas Act*, *supra* note 20.

184. Gandy, *supra* note 26, at 123 (explaining the importance of electoral promises to provide free housing to the political success of the Shiv Sena Party in Maharashtra).

notified under Chapter II.¹⁸⁵ The Act divides informal dwellers into two distinct categories. The first are “protected occupiers.”¹⁸⁶ Protected occupiers are those in possession of a “photo-pass:”¹⁸⁷ a government-issued document that acts as proof of residence in the settlement over a certain number of years.¹⁸⁸ Those dwellers classed as protected occupiers benefit from legislative safeguards and in the case of eviction or demolition are covered by various provisions of the Act.¹⁸⁹ Those who fall outside the definition of protected occupier are not able to access these legislative protections, and thus their dwellings remain outside the law.

The safeguards afforded to protected occupiers by the Slum Areas Act are not equal to ownership of the land or the house constructed on it; rather, they are substantive and procedural safeguards to be fulfilled by the government during slum clearance.¹⁹⁰ They do not equal full security of tenure.¹⁹¹ However, under the Act the government can only demolish a slum or pavement dwelling of a protected occupier “in the larger public interest.”¹⁹² Moreover, the potential evictee must be offered relocation and rehabilitation.¹⁹³ Rehabilitation, in which each family is to be given a replacement apartment to compensate for the loss of its original dwelling, takes the form of re-housing, most often in a purpose-built, multistory building.¹⁹⁴ While the legislation suggests that the replacement dwelling should be offered “free of cost,”¹⁹⁵ in reality informal dwellers are often subjected to significant charges for their new flats.¹⁹⁶ If the family has been running a commercial enterprise from their dwelling, it may be entitled to an alternative shop space.¹⁹⁷ The Slum Areas Act thus recognizes that slum and pavement dwellings represent more than shelter, as they are also the base for economic activity and community.

In some cases, if the dweller declines such rehabilitation or an alternate site is unavailable, he or she is entitled to compensation in the form of a monetary payment, designed to enable the purchase of other

185. *Slum Areas Act*, *supra* note 20, at § 4.

186. *Id.* § 3Z-1.

187. *Id.* § 3Y-1.

188. Kalpana Sharma, *Mumbai, Monsoon and the Many Makeovers*, THE HINDU, June 4, 2005, available at <http://www.thehindu.com/2005/06/04/stories/2005060402151000.htm>.

189. *Slum Areas Act*, *supra* note 20 Chapter I-B §§ 3X-3Z-2.

190. *Id.* § 3B-4 (a)-(g).

191. Pimple & John, *supra* note 23, at 75-83.

192. *Slum Areas Act*, *supra* note 20, § 3Z-2.

193. *Id.*

194. O'Hare et al., *supra* note 4, at 280.

195. *Slum Areas Act*, *supra* note 20, § 3B-4(d).

196. See *Bombay Env'tl. Action Group & Another v. A.R. Bharati, Deputy Conservator of Forest, Sanjay Gandhi Nat'l Park, Borivili & Others* (2004) (5) LJSOFT 95¶ 26 Bombay H. C. of Judicature (Writ Petition No. 305 of 1995) (ordering that those slum dwellers eligible for rehabilitation pay Rs7000 per family to take up their new homes).

197. This will depend on the specifics of the rehabilitation scheme set up under Chapter 1A of the Act. See, for example, the rehabilitation provisions under the Dharavi Redevelopment Project. Maharashtra Slum Rehabilitation Authority, Dharavi Redevelopment Project FAQs, <http://www.sra.gov.in/htmlpages/faqs.htm>, (last visited Dec. 8, 2009).

accommodation.¹⁹⁸ However, the price of land in Mumbai is exorbitant.¹⁹⁹ In the current market, it is impossible for any but the rich to buy an alternate dwelling within the city itself: even a small, tent-sized, plot of land in an established slum area costs twice Mumbai's average annual household income.²⁰⁰ Vacant land appears non-existent,²⁰¹ and defunct mill lands and industrial sites are being transformed, into commercial complexes such as air-conditioned shopping malls or financial services and technology industry enclaves.²⁰² Thus, even when compensation is paid, a family often ends up pushed into a poorer quality, less stable, and more remotely located home.²⁰³

Rehabilitation means re-housing a slum or pavement dweller family within the formal housing sector. Normally, it involves relocation to a "transit camp"²⁰⁴ – a one room temporary accommodation where the inhabitants are housed while a more permanent dwelling is built.²⁰⁵ The problems documented with respect to relocation in Mumbai are legion (although for some informal settlements the process has proved to be a positive one.)²⁰⁶ First, while transit camps are designed to house people only temporarily,²⁰⁷ they often remain inhabited for years due to delays in readying the permanent accommodation.²⁰⁸ Transit camps are made necessary by the fact that informal settlements are razed long before alternative permanent housing is made available.²⁰⁹ Moreover, a transit camp itself does not constitute adequate housing.²¹⁰

Second, even the permanent rehabilitation buildings are often poorly constructed (with violation of building codes and standards being

198. *Slum Areas Act*, *supra* note 20 § 16.

199. Appadurai, *supra* note 2, at 638 (explaining that in the late 1990s, despite a "dramatic" drop in real estate prices, the cost of a flat in a desirable area of Mumbai would be \$300,000-\$350,000 USD). Likewise, Suketu Metha writes that "Coming from New York, I am a pauper in Bombay" where a south Bombay apartment will cost "\$3000 a month, plus \$200,000 for a deposit." SUKETU METHA, MAXIMUM CITY: BOMBAY LOST AND FOUND 19 (2007).

200. Nijman, *supra* note 15, at 76.

201. O'Hare et al., *supra* note 4, at 276.

202. Marie-Hélène Zérah, *Conflict between Green Space Preservation and Housing Needs: The Case of the Sanjay Gandhi National Park in Mumbai*, 24 CITIES 122, 130 (2007).

203. *Id.* at 130-131; Nijman, *supra* note 15, at 78.

204. *Slum Areas Act*, *supra* note 20, § 3A-4(d), 11(1).

205. Swaminathan, *supra* note 38, at 142 n.52.

206. *See, e.g.*, Nijman, *supra* note 15, at 78 (documenting one such positive relocation experience for the inhabitants of Ganesh Nagar D).

207. Mandakini Gahlot, *Mumbai Plays Role Model for Delhi Slum Rehabilitation Scheme*, EXPRESS INDIA, Oct. 20 2009, available at <http://www.expressindia.com/latest-news/mumbai-plays-role-model-for-delhi-slum-rehabilitation-scheme/530773/>.

208. *See, e.g.*, *Slum Dwellers Happy to Stay*, THE STANDARD, Sept. 12, 2005, available at http://www.thestandard.com.hk/news_detail.asp?we_cat=9&art_id=1077&sid=4494089&con_type=3&d_str=20050912; Interview with Anonymous, COHRE Women's Housing Rights Officer, in Mumbai (Oct. 18, 2007).

209. Praveen Swami, *Pie in the Sky*, FRONTLINE MAG., Sept. 29, 2001, available at <http://www.hinduonnet.com/fline/fl1820/18200500.htm>.

210. Swaminathan, *supra* note 38, at 142 n.52. One activist describes these houses as "built in a jiffy." *Id.* The quality of construction is substandard and they are un-insulated, so "boiling in the summer and freezing in the winter." *Interview with COHRE Officer*, *supra* note 208.

“routine”²¹¹) and inappropriate to the economic needs of the inhabitants, as many informal dwellers make their livings from their homes, whether through small business or industry.²¹² The unsuitability of the rehabilitation buildings as sites of employment is compounded by their cramped and inorganic nature. The space allotted per family is small: in most of the rehabilitation schemes created under the Slum Areas Act, it is set at 225 square feet (21 square meters).²¹³ While informal dwellings often begin as one room, their construction is an organic process able to accommodate a growing family and even a shop-front or business.²¹⁴ Rehabilitation buildings do not have this flexibility,²¹⁵ and given the often large sizes of extended families living together in one dwelling, the rehabilitation buildings do little to ease the chronic overcrowding of the city’s dwellings.²¹⁶

The negative effect on livelihood is compounded by the fact that the rehabilitation sites are often situated significant distances from the previous dwellings.²¹⁷ The problems of moving communities from their traditional location have been widely studied in many cultural contexts, and a wealth of literature has been produced highlighting the human rights violations which often result from even the most well-intentioned or carefully planned relocations.²¹⁸ Slum rehabilitation schemes result in the relocation of thousands of informal dwellers in Mumbai on a constant basis, yet little government recognition is given to the dislocation imposed on the communities. In a city where work and home are so closely tied, relocation often results in the very deprivation of livelihood the *Olga Tellis* judgment sought to prevent. Though levels of employment in pavement settlements and slums are high, both among men and women, family income is often at subsistence levels²¹⁹ such that the cost of transportation to and from work is prohibitive.²²⁰

Finally, the Slum Areas Act protects only those informal dwellers who have lived in their dwellings continuously since before the legislatively stipulated cut-off date.²²¹ More recent immigrants, builders, or purchasers will not be protected. The cut-off date is itself a highly controversial

211. Swami, *supra* note 209.

212. Nijman, *supra* note 15 at 80.

213. O’Hare et al., *supra* note 4, at 281.

214. McDougall, *supra* note 18 at 38-39.

215. The scheme does not take account of the size of the slum-dwelling in the provision of the new apartment. O’Hare et al., *supra* note 4, at 281.

216. Nijman writes that the average number of dwellers per Mumbai’s (one room) *chawl* is 6.3, with at times up to 20 people living in one dwelling. Nijman, *supra* note 15, at 75.

217. O’Hare et al., *supra* note 4, at 280.

218. Dana Clark, *The World Bank and Development-Induced Displacement in South Asia*, 4 BROWN J. OF WORLD AFF. 215, 216 (1997); Michael Cernea, *Understanding and Preventing Impoverishment from Displacement: Reflections on the State of Knowledge*, in UNDERSTANDING IMPOVERISHMENT: THE CONSEQUENCES OF DEVELOPMENT-INDUCED DISPLACEMENT 13, 21-22 (C. McDowell, ed., 1996); Sue Emmott, “Dislocation,” *Shelter, and Crisis: Afghanistan’s Refugees and Notions of Home*, 4 GENDER & DEV. 31, 34 (1996).

219. Swaminathan, *supra* note 38, at 134-35.

220. Appadurai, *supra* note 2, at 636; O’Hare et al., *supra* note 4, at 275-76.

221. *Slum Areas Act*, *supra* note 20, § 3-Y(1).

judicial and legislative creation to which the analysis now turns.

B. The Cut-off Date

The cut-off date is a legislatively established date, codified in Section 3Y(1) of the Slum Areas Act,²²² and represents an important watershed for informal settlers. Those who can establish continuous residence in their dwelling since prior to the cut-off date are entitled to both substantive and procedural protection. Most importantly, they are entitled to rehabilitation and compensation in the case of eviction or demolition.²²³

Nevertheless, the cut-off date is a controversial and much contested concept. The first problem with employing the cut-off date is one of proof. In order to prove residence before the cut-off date, the informal settler must have the relevant government documentation identifying address and length of continuous residence, proved by an identity card, which is identified in the Slum Areas Act as a "photo pass."²²⁴ However, due to their very informality, slum and pavement colonies often exist outside the structures of official government recognition.²²⁵ Not all informal settlers are able to gain access to the necessary documentation.²²⁶ Many settlers who have built on private rather than government land have never been issued photo-passes,²²⁷ making it impossible for them to take advantage of the protections of the Slum Areas Act. At times, the government has acted to demolish slums even where residents possess the relevant documentation, claiming that the residents obtained the photo-passes by fraudulent means.²²⁸ Schemes relying on standardized documentation are difficult to operate in an informal sector.

Second, many argue that cut-off dates unavoidably breach human rights because they grant protection on a discriminatory basis.²²⁹ The dates are arbitrarily set by the state, normally in the run-up to an election.²³⁰ In addition, it has been argued that the concept of a cut-off date may be open to constitutional challenge, for, as Justice Ramaswamy pointed out in *Nawab Khan*, "the Constitution provides to all citizens fundamental rights to travel, settle down and reside in any part of Bharat [India] and none have right to prevent their settlement."²³¹ The cut-off date can also be

222. Currently, the date stands at January 1, 1995. *Id.* § 3-Y(1).

223. *Id.* Chapter I-B; *Infra* Part V.A.

224. *Id.* § 3-X(b).

225. DAVIS, *supra* note 7, at 181.

226. Ramanathan, *supra* note 19, at 2911.

227. Anupama Katakam, *Ground Realities*, FRONTLINE MAG., June 16-29, 2007, 2.

228. See, e.g., "Yeh Hamara Bambai Hai" Is the Cry at Azad Maidan, TIMES OF INDIA, Feb. 2, 2005, available at <http://timesofindia.indiatimes.com/articleshow/1009736.cms>; Dilip D'Souza, *Cut-off by the Date*, INDIA TOGETHER, Feb. 11, 2005, available at <http://www.indiatogether.org/2005/feb/ddz-demolish.htm>.

229. See D'Souza, *supra* note 228 ("[T]his peculiar notion of a cut-off date . . . applies only to slums. Middle-class blocks of flats can flout building codes and FSI rules and be built on the back of serious bribery, but they never have cut-off dates applied to them.").

230. See generally *id.*

231. Ahmedabad Mun. Copr. v. Nawab Khan Gulab Khan, A.I.R. 1997 S.C. 152, 163. See

argued to criminalize people, rather than dwellings.²³² In sum, although the cut-off date represents a repressive tool of social control, it also provides concrete legal entitlements to the city's informal dwellers, and forms a point of political action around which informal settlers regularly mobilize.

As the preceding points suggest, the cut-off date is far from neutral, but is widely used as a political device. Political parties, for whom informal settlements represent important "vote banks,"²³³ regularly manipulate the cut-off date in election campaigns, during which time political concessions for later cut-off dates are a powerful vote buyer.²³⁴ More sinisterly, during a recent election campaign, one political party promised to move the cut-off date forward from 1995 to 2000.²³⁵ This promise generated high support for the party in informal settlements, and the party was duly elected. However, once elected, the party denied its election promise and went ahead with a demolition drive in the informal settlements.²³⁶ Nevertheless, the issue of moving the cut-off date forward will not go quietly. The government has agreed to later cut-off dates in some "special" projects such as the Mumbai airport resettlement project.²³⁷ Meanwhile, based on government promises, the press now reports Maharashtra's cut-off date as 2000,²³⁸ and government practice currently appears to be "careful not to touch" those slums erected between 1995 and 2000.²³⁹ The codified cut-off date remains January 1, 1995,²⁴⁰ and thus the protections currently afforded to informal dwellings built between 1995 and 2000 are subject to the changing moods of Mumbai's politicians, rather than protected by a legal entitlement. Moreover, legal impediments to the extension of the cut-off date exist, given that in 2001, the State Government filed an affidavit with the Bombay High Court stating that "it would not extend the cut-off date

also Balakrishnan, *supra* note 92, at 31.

232. D'Souza, *supra* note 228.

233. Nijman, *supra* note 15, at 78.

234. Parag Rabade writes that the Congress-NCP government "which till then never got much support in Mumbai – decided to extend the cut off date to the year 2000 for more votes." Parag Rabade, *Mumbai Wilts Under Vote Bank Politics*, DECCAN HERALD, Nov. 2, 2008, available at <http://archive.deccanherald.com/Content/Nov22008/panorama2008110198309.asp>.

235. D'Souza, *supra* note 228; Rabade, *supra* note 234.

236. The government attempted to pass off the promise of a date change as a printing mistake in its campaign materials, despite having campaigned on the issue. Interview with Anonymous NAPM Activist in Mumbai (Oct. 16, 2007) (notes on file with Author). See also D'Souza, *supra* note 228. Similarly, in 1995, the Shiv Sena used the promise of free housing to 4 million slum dwellers to see itself elected in the city, but fewer than eighty apartment blocks had been built by 1999. Gandy, *supra* note 26, at 123.

237. SUNDAR BURRA, *SLUM TURBULENCE AT MUMBAI AIRPORT, SHACK/SLUM DWELLERS INTERNATIONAL*, REPORT No: 104 (May, 11 2007) available at <http://www.sdinet.org/reports2/rep104.htm>.

238. Clara Lewis, *Slum Rehab Cut-Off Now 2000*, TIMES OF INDIA, June 18, 2009, available at <http://timesofindia.indiatimes.com/city/mumbai/Slum-rehab-cut-off-now2000/articleshow/4669036.cms>.

239. Clara Lewis, *State in Bind over Cut-Off Date for Slums*, TIMES OF INDIA, Jan. 20 2005, available at <http://timesofindia.indiatimes.com/news/city/mumbai/State-in-bind-over-cut-off-date-for-slums/articleshow/997184.cms>.

240. *Slum Areas Act*, *supra* note 20, § 3-Y(1).

of January 1, 1995 and would remove all encroachers expeditiously."²⁴¹

Despite the problems inherent in the Slum Areas Act, and those brought about by lack of political will or by corruption and fraud in its implementation, the importance of the Act should not be discounted. It has provided protection for millions of Mumbai's informally housed. One example of the protection it has offered emerges from the Dharavi area, currently the subject of a massive redevelopment project.²⁴² The informal residents of Dharavi have used a combination of political and legal strategies based around the Slum Areas Act to improve their bargaining power and protect themselves from powerful opposing interests. The residents have been able to use the courts to enforce a cut-off date five years later than that applied elsewhere in Mumbai,²⁴³ and have also forced the government to consider increasing the size of the rehabilitation properties from 225 to 400 square feet.²⁴⁴

The example of Dharavi represents the strangely contradictory position of the informal settlers in Mumbai. Popular democracy gives them, at times, great power, but they remain intensely vulnerable and socially marginalized. Among these vulnerabilities is the risk that the protections afforded by the courts may be stripped away. This risk is considered in the next Part, in the context of the emerging environmental jurisprudence of the Indian Supreme Court.

VI. SHIFTING DISCOURSES OF THE HUMAN RIGHTS OF THE INFORMAL SETTLER: ENVIRONMENT, DEVELOPMENT, MODERNITY

The jurisprudence crafting a right to shelter and housing from the right to life represents a powerful judicial statement on a right to life with dignity. It has also resulted in important procedural guarantees being granted to the informal settlements through legislative action and through the ability to move the court for relief, thus delaying evictions. However, the protections offered through this line of cases may not be as stable as they at first appear. More recent judgments handed down from the Supreme Court have moved away from the expression of Constitutional norms ensuring a life of dignity for the very poor, towards the protection of the interests of other sectors of society.

The most severe challenge to the judicial protections afforded to informal dwellers under the right to life emerges not from a retreat from judicial activism, or a change of heart about protecting a multitude of human goods and needs within the right to life in Article 21. Rather, the rights to housing and shelter gained under Article 21 are being tested in the face of competing social interests. This Part provides an analysis of this

241. Lewis, *supra* note 239.

242. SLUM REHABILITATION AUTHORITY, DHARAVI REDEVELOPMENT PROJECT, *available at* <http://www.sra.gov.in/htmlpages/Dharavi.htm>.

243. Meena Menon, *Supreme Court Order Cheers Dharavi Residents*, THE HINDU, Apr. 6, 2008, *available at* <http://www.thehindu.com/2008/04/06/stories/2008040659271100.htm>

244. *Id.*

shifting discourse in three particular contexts. The first is the emerging discourse of the right to a clean environment within the right to life, discussed in Part VI.A. Part VI.B then examines the discourses of modernity and urbanization surfacing in the cases on rural development projects, specifically the controversial Narmada River dams. In Part VI.C, the article considers the discourse of Mumbai as a “world class city” as reflected in recent cases and manifestations of government policy on the place and visibility of informal settlers in the city itself.

A. The Right to A Clean Environment: A “Green” Agenda Human Rights Discourse

One striking example of the changing judicial approach to the housing rights of informal settlers is the movement for the right to a clean environment as a facet of the right to life. In the emerging environmental cases, informal settlers are characterized unsympathetically, at times, as wholly unworthy of constitutional protection.

The broad judicial conception of the right to life has opened up space for “civil society groups”²⁴⁵ to make claims under the right to life. These civil society groups are normally formed by members of India’s burgeoning urban middle classes,²⁴⁶ and represent powerful interest groups with significant lobbying skills, often supported by international agencies or by the state itself.²⁴⁷ Several of these groups have recently undertaken court-based activism to argue that the right to a clean environment falls within a right to life,²⁴⁸ pursuing what has been characterized as a “green agenda” of environmental sustainability, as opposed to a “brown agenda” focused on the immediate needs of the poor.²⁴⁹

In Mumbai, much of this activism has centered on the Borivili, or Sanjay Gandhi, National Park, which lies within the city. The park covers an area of 103 square kilometers,²⁵⁰ and is an important wild space and habitat for leopards and other fauna, as well as a source of fresh water for Mumbai.²⁵¹ However, tens of thousands of people have settled and built informal neighborhoods within the park. In fact, the park is now home

245. Activists in Mumbai working on behalf of the poor rejected the application of the term “civil society” to their organizations, preferring “pro-poor people’s movement” or “grassroots organization.” The term “civil society” in Mumbai normally refers to groups arising from the middle classes, pursuing agendas which often contradict the interests of grassroots NGOs or the poor. Interview with Anonymous Youth for Unity and Voluntary Action Activist in Mumbai (Oct. 18, 2007) (notes on file with Author).

246. Gandy, *supra* note 26, at 116.

247. *Id.*

248. The Bombay Environmental Action Group [BEAG] is an example of such an organization. See *Bombay Evtl. Action Group & Another v. A.R. Bharati, Deputy Conservator of Forest, Sanjay Gandhi Nat’l Park, Borivili & Others* (2004) (5) LJSOFT 95¶ 26 Bombay H. C. of Judicature (Writ Petition No. 305 of 1995).

249. Zérah, *supra* note 202, at 122.

250. *Id.*

251. *Id.* at 123.

both to private dwellings and to industrial and commercial enterprises, including a government run bacon factory, and several quarries.²⁵² Environmental groups have responded by petitioning the courts to remove the residents, who they have characterized as illegal “encroachers,” responsible for polluting open spaces and damaging the ecology.²⁵³

The litigation over the “encroachments” on Borivili National Park stretched from the mid 1990s to 2003.²⁵⁴ Finally, in *Bombay Environmental Action Group and Another v. A.R. Bharati and Others*,²⁵⁵ the High Court of Bombay made a joint determination of the many writ petitions before the Court, in a unanimous judgment written by Justice Thakker. The Court stressed that the Bombay Environmental Action Group was “acting in aid of a purpose high on the national agenda” and that their “concern for environment, ecology, and the wild should, therefore, be shared by the Government and authorities.”²⁵⁶ Accordingly, the Court ordered the relocation of the 33,000 “protected occupiers”²⁵⁷ who could prove their residence in the National Park before the cut-off date,²⁵⁸ and the eviction of the inhabitants who could not prove their residence before this date.²⁵⁹

Protected occupiers were to be provided with alternate dwellings, albeit at significant distances from their present residences,²⁶⁰ and at significant cost to themselves.²⁶¹ Occupiers without photo-passes, on the other hand, were characterized as trespassers. In a sharp divergence from *Olga Tellis*, the Court held that the authorities were not required to act in accordance with “procedure known as law” when dealing with these residents.²⁶² They held that:

[A] person who has no right whatsoever, or who is unable to show any authority on the basis of which he is in possession or is found to be on property illegally or is a rank trespasser, cannot invoke the principle [of “settled possession”] and argue that he cannot be dispossessed.²⁶³

The characterization of these occupiers as trespassers, and thus as falling outside the procedural protections of the Constitution’s Article 21,

252. *Id.* at 125-26.

253. Lyla Bavadam, *Encroaching on a Lifeline*, FRONTLINE, Feb., 15-28, 2003, available at <http://www.hinduonnet.com/fline/fl2004/stories/20030228002609200.htm>.

254. Zérah, *supra* note 202, at 126. But some issues remain pending, indicating the ongoing nature of the contestation of these rights. *Id.* at 127.

255. *Bombay Env'tl. Action Group & Another v. A.R. Bharati*, Deputy Conservator of Forest, Sanjay Gandhi Nat'l Park, Borivili & Others (2004) (5) LJSOFT 95¶ 26 Bombay H. C. of Judicature (Writ Petition No. 305 of 1995).

256. *Id.* para. 146.

257. *Id.* para. 39.

258. *Id.* para. 10(o).

259. *Id.* para. 10(k), 10(m).

260. *Id.* para. 19(10)(o).

261. *Id.* para. 26(8).

262. *Id.* para. 199.

263. *Id.* para. 200.

represents a significant diminution in the rights of informal dwellers in Mumbai, as well as a considerable shift in judicial rhetoric on the place and worth of slum and pavement dwellers in the city.

The role of the Court in this case, although important, should not be overestimated. The judicial pronouncements represent only one aspect of this political, legal, and social struggle, which involves various levels of government, as well as the competing interests of government departments.²⁶⁴ In fact, although the relocation and eviction of the “encroachers” was eventually sanctioned by the Court, many of the evictions were carried out before the final Court order, and well in advance of the implementation of the relocation scheme.²⁶⁵

The efforts of civil society groups have extended beyond challenges to the legality of informal settlements. These groups have, in some instances, made explicit attacks on the citizenship rights of informal dwellers. For example, in 2004, a group of “prominent”²⁶⁶ citizens of Mumbai petitioned the courts to deny slum dwellers the right to vote, arguing that it was “necessary” to update the electoral list, “deleting all names of encroachers on railway compounds, footpaths, playgrounds and other places reserved for public purposes.”²⁶⁷ In 2005, the city’s Municipal Corporation approached the Chief Electoral Officer to have the residents of demolished slums struck from the voting register.²⁶⁸

While these civil society environmental efforts may appear to be forms of social engagement, they can in fact be described as a form of social severance, what Ellison and Burrows identify as “a proactive politics, but a form of politics that has the key objective of disengagement.”²⁶⁹ That is, the city elites and middle classes seek to retreat from the trouble of the poor; they reject the reality that these problems are problems of the city as a whole. In so doing, they not only reject the social citizenship of the poor, but also manifest their own diminished role as social citizens.

These civil society endeavors, based on the “perception that the poor are illegal anyway, [and] so have no rights,”²⁷⁰ hint at the deep role of rights in social belonging and membership. That is, human rights are not only instrumental, but also constitutive of our full social and legal personhood.²⁷¹ Human rights are the contemporary language through

264. Zérah, *supra* note 202, at 127.

265. *Id.* at 130 (explaining that while demolitions were supposed to be undertaken only after relocation had been achieved, demolition drives began in the early 1990s, and in 1998 alone, 22,000 homes were demolished).

266. Sainath, *supra* note 58.

267. Darryl D’Monte, *Banning the Majority from Voting*, INFOCHANGE, Oct. 2004, <http://infochangeindia.org/200410205457/Governance/Analysis/Banning-the-majority-from-voting.html> (quoting counsel in the case).

268. Sainath, *supra* note 58.

269. Nick Ellison & Rogers Burrows, *New Spaces of (Dis)engagement? Social Politics, Urban Technologies and the Rezoning of the City*, 22 HOUSING STUD. 295, 306 (2007).

270. Ramanathan, *supra* note 19, at 2912.

271. See Costas Douzinas, *Justice and Human Rights in Postmodernity*, in UNDERSTANDING HUMAN RIGHTS 115, 121 (Conor Gearty & Adam Tomkins eds., 1996).

which claims to one's membership within humanity are made.²⁷² Moreover, their recognition by others, including the state, is the recognition of the humanity of the person.²⁷³ Holding human rights is, thus, "synonymous with being human."²⁷⁴

In Mumbai, when civil society groups campaign to deny not only the rights of informal settlers to occupy particular plots of land, but also to be acknowledged as citizens of Mumbai, they attempt to erase the informal dwellers' existence as part of Mumbai itself. These maneuvers are an explicit example of the denial of humanity which can be wrought through the refusal to grant or recognize rights,²⁷⁵ as well as a manifestation of the desire, as Ellison and Burrows evocatively suggest, to seal the poor off from mainstream society.²⁷⁶ For, if the rights of informal settlers in Mumbai are denied, it is both a symptom of, and a permission for, their compatriots to cease to value them – in fact, to cease to see them as human beings at all. As Williams writes, "[f]or the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity: rights imply a respect which places one within the referential range of self and others, which elevates one's status from human body to social being."²⁷⁷ The corollary of this inclusion in the referential range of the social being is the denial of the humanity of informal dwellers, what Baxi identifies as the production of "rightlessness" by "the acts of bare sovereignty that simply refuses to accept certain claims to being human and having human rights in the first place."²⁷⁸

Although the Supreme Court has so far resisted the desires of wealthy Mumbaikers to disenfranchise informal settlers, as the Borivili National Park litigation illustrates, the justices have found environmental arguments persuasive and, in recognizing a right to a clean and healthy environment, have ordered eviction of thousands of informal dwellers, not just in Mumbai but in rapidly growing cities across India.²⁷⁹

While it is clear that the right to live in a clean and healthy environment can come within such an expansive interpretation of the right to life as that recognized in the Indian jurisprudence,²⁸⁰ what is startling is the way the environmental cases that fall under the right to life have been accompanied by a profound change in the judicial discourse regarding informal dwellers. It is to this aspect of the cases that the article now turns.

The cases deriving from *Olga Tellis* have not been formally overruled,

272. *Id.* at 123.

273. WILLIAMS, *supra* note 171, at 416; See Douzinas, *supra* note 271, at 127-28.

274. Douzinas, *supra* note 271, at 123.

275. Williams, *supra* note 171, at 416.

276. Ellison & Burrows, *supra* note 269, at 306-07.

277. Williams, *supra* note 171, at 416.

278. Upendra Baxi, *The Protection of Human Rights and the Production of Human Rightlessness*, in HUMAN RIGHTS IN ASIA: A COMPARATIVE STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA 384, 386 (Randall Peerenboom et al. eds., 2006).

279. See *Almitra Patel v. Union of India* A.I.R. 2000 S.C. 1256, discussed *infra* this Part.

280. As Reddy writes, "Article 21 is pregnant with many kinds of individual and social rights of various attributes." G.B. Reddy, *Supreme Court and Judicial Activism: An Overview of its Impact on Constitutionalism*, 3 Sup. Ct. J. 19, 20 (2001).

but the judicial protections accorded in the cases have been gradually narrowed. For example, while *Olga Tellis* dealt with broad principles, *Ahmedabad v. Nawab Khan Gulab Khan* qualified the protections, moving away from the focus on the rights of informal dwellers towards the duties of the government to keep the pavements clear and provide for orderly management of slum clearance.²⁸¹

The housing rights cases are thus not immune to the trend in public interest litigation that sees judges struggling to balance the competing interests of the middle classes, the poor, and the state.²⁸² In many of these cases, the poor are receiving less judicial sympathy, accompanied by the narrowing of their rights. For example in *Olga Tellis*, then Chief Justice Chandrachud's characterization of pavement dwellers, though tinged with disgust,²⁸³ is also filled with pity and at times with respect. He describes many of the informal dwellers as pursuing "occupations which are humble but honorable,"²⁸⁴ and stresses that they "do not claim the right to dwell on pavements or in slums for the purpose of pursuing any activity which is illegal, immoral or contrary to public interest."²⁸⁵

The judgment also takes into consideration the structural causes of inequality and poverty underlying the living situation of the pavement dwellers, noting that:

Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities. They migrate because they have no means of livelihood in the villages. The motive force which propels their desertion of their hearths and homes in the village is the struggle for survival, that is, the struggle for life.²⁸⁶

Moreover, the Chief Justice described the drive to live on the pavements as one of compulsion, writing that

"[i]t is a notorious fact of contemporary life in metropolitan cities, that no person in his senses would opt to live on a pavement or in a slum, if any other choice, were available to him. Anyone who cares to have even a fleeting glance at the pavement or slum

281. See *supra* Part IV. The most recent ruling, *Chameli Singh*, represents a "pro-poor" interpretation of the housing rights issue. *Chameli Singh v. State of Uttar Pradesh*. (1996) 2 S.C.C. 549, 553.

282. Kothari, *supra* note 89; Reddy, *supra* note 71, at 21.

283. For example, see Justice Chandrachud's description of the pavement dwellers as those who "exist in the midst of filth and squalor, which has to be seen to be believed." *Olga Tellis v. Bombay Mun. Corp.* A.I.R. 1986 S.C. 180 at 183.

284. *Id.* at 194.

285. *Id.*

286. *Id.*

dwellings will see that they are the very hell on earth."²⁸⁷

However, this is no longer the leading judicial perception of slum and pavement dwellers. *Almitra Patel v. Union of India*,²⁸⁸ an environmental case brought as public interest litigation to force the Delhi authorities to conceive and implement a solid waste management plan,²⁸⁹ presents a salient example. In this case, Justice Kirpal, whose influence on the changing judicial discourse on informal settlers has been striking,²⁹⁰ delivered the judgment of the Court. He placed the blame for Delhi's pollution problems on the shoulders of the slum dwellers, who, he wrote, have "no care for hygiene"²⁹¹ and whose "unauthorised colonies"²⁹² complicate the process of dealing with the city's waste.²⁹³ He stated that:

The number of slums has multiplied in the last few years by geometrical proportion. Large areas of public land, in this way, are usurped for private use free of cost The promise of free land, at the taxpayers cost . . . is a proposal which attracts more land grabbers. Rewarding an encroacher on public land with [a] free alternate site is like giving a reward to a pickpocket. . . . [M]ore and more slums are coming into existence. Instead of 'Slum Clearance' there is 'Slum Creation' in Delhi. This in turn gives rise to domestic waste being strewn on open land in and around the slums. This can best be controlled at least, in the first instance, by preventing the growth of slums.²⁹⁴

The Court accordingly ordered that the landholders remove the informal settlers²⁹⁵ and release the land free of charge to the Delhi authorities to be used as land-fill and compost sites.²⁹⁶ As Ramanathan notes, the "cynicism immanent in the attribution of criminality to the slum-dwellers because they had not paid the price of [the] land, while directing that land be released free of cost for garbage dumping, was not lost on many."²⁹⁷ The case illustrates a radical re-characterization of the informal dwellers. Whilst *Olga Tellis* portrayed informal dwellers as struggling

287. *Id.* at 199.

288. *Almitra Patel v. Union of India* A.I.R. 2000 S.C. 1256.

289. Lavanya Rajamani, *Public Interest Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, 19 J. ENVTL. L. 293, 296-97 (2007).

290. See *infra* Section VI.B.

291. *Almitra Patel v. Union of India*, A.I.R. 2000 S.C. 1256.

292. *Id.*

293. *Id.*

294. *Id.* at 1258-59.

295. The sites were to be handed to the authorities "free from all encumbrances." *Id.* at 1261.

296. *Id.*

297. Ramanathan, *supra* note 100.

citizens eking out a living in the most abominable circumstances,²⁹⁸ the cases now depict slum and pavement dwellers as opportunists. They are seen as “economic migrants” at best, criminals at worst, and in either case as both more troublesome and less valuable than garbage.

B. Rural Development: Discourses of Urbanization and Modernization

While the *Almitra Patel* judgment, discussed in the previous Part, represents only one judicial statement in ongoing public interest litigation,²⁹⁹ it illustrates the tensions between urban and rural development, which emerge as an underlying theme in many of these cases. This theme can be illustrated by a discussion of the most contentious of India’s rural development cases, the litigation surrounding the building of the Sardar Sarovar dam on the Narmada River.

The damming of the Narmada was “[c]onceived in the spirit of post-independence nation-building,”³⁰⁰ in which dams have played a crucial symbolic role in India’s industrialization, modernization, and development.³⁰¹ The system of dams, built across three state borders,³⁰² promised power, water, and irrigation, but the project quickly became embroiled in a sustained wave of environmental and social protests, focusing in part on the fact that 25 to 40 million people would be displaced by the Sardar Sarovar dam alone.³⁰³

The litigation and political struggle surrounding the building of the dam is torturously complex.³⁰⁴ However, the situation is important because the judicial approach in the most recent Supreme Court judgment illustrates the underlying, though at times obscured, link between rural development, forced displacement, and the rhetoric of modernization.

Narmada Bachao Andolan v. Union of India and Others,³⁰⁵ handed down by the Supreme Court in 2000, has caused dismay from both

298. *Olga Tellis v. Bombay Mun. Corp.* A.I.R. 1986 S.C. 180 at 183-84.

299. The Municipal Solid Waste Management litigation has been before the courts for 11 years, and has resulted in 50 related court orders. The case is a prime example of the judicial governance function of the Indian courts. See generally Rajamani, *supra* note 289.

300. BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE* 123 (2003).

301. Balakrishnan Rajagopal, *The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India*, 18 LEIDEN J. INT’L. L. 345, 355 (2005); Gandy, *supra* note 26, at 114.

302. Paul Routledge, *Voices of the Dammed: Discursive Resistance Amidst Erasure in the Narmada Valley, India*, 22 POL. GEOGRAPHY 243, 244 (2003); Rajagopal, *supra* note 301, at 355, 358.

303. RAJAGOPAL, *supra* note 300, at 123.

304. See generally Komala Ramachandra, *Sardar Sarovar: An Experience Retained?*, 19 HARV. HUM. RTS. J. 275 (2006), and Philippe Cullet, *Human Rights and Displacement: The Indian Supreme Court Decision on Sardar Sarovar in International Perspective*, 50 INT’L & COMP. L.Q. 973 (2001); RAJAGOPAL, *supra* note 300.

305. A.I.R. 2000 S.C. 3751.

environmentalists and social rights activists.³⁰⁶ In this high profile litigation, the Supreme Court rejected the contention that the relocation and resettlement of thousands of Indians – many of whom are tribal and marginalized by poverty or social status³⁰⁷ – would amount to a violation of Article 21 of the Indian Constitution.³⁰⁸ Justice Kirpal, writing for the majority,³⁰⁹ noted that “displacement of the tribals and other persons would not per se result in the violation of their fundamental or other rights.”³¹⁰ This statement is in direct contravention of clear international legal standards which hold forced displacement to be a prima facie violation of the right to housing.³¹¹ Justice Kirpal further suggested that the displacement of rural or tribal peoples by the construction of the dam and their relocation to rehabilitation sites would have a beneficial effect. He argued that due to rehabilitation “they are better off than what they were. At the rehabilitation sites they will have more and better amenities than which they enjoyed in their tribal hamlets. The gradual assimilation in the main stream of the society will lead to betterment and progress.”³¹² In fact, Roy notes, the argument that displacement is actually a “positive intervention, a way of relieving acute deprivation” is repeatedly asserted.³¹³ In this way, she argues, the costs of modernization are portrayed as benefits.³¹⁴

Employing the rhetoric of modernization and progress, the statement appears divorced from any recognition of the established causal links between the displacement of India’s rural poor and the growth of urban slum settlements.³¹⁵ Thus the *Narmada* litigation sits uncomfortably with housing rights cases such as *Olga Tellis* and *Chameli Singh*. More troublingly, it also sits uncomfortably with Justice Kirpal’s own judgment in *Almitra Patel*.³¹⁶ In *Almitra Patel*, the judgment clearly fails to take account of the fact that pushing millions of people from their rural lands and livelihoods is inextricably linked to the movement of people to the cities, where they are forced to seek housing in the informal sector while struggling to recreate a livelihood.³¹⁷ This is despite the fact that in the

306. Routledge, *supra* note 302, at 254-56.

307. *Id.* at 250-52.

308. *Narmada Bachao Andolan v. Union of India and Others*, A.I.R. 2000 S.C. 3751 at 3787.

309. The majority of the court was composed of Justice Kirpal and Chief Justice A.S. Anand. Justice Bharucha dissented, contending that an adequate environmental impact assessment had not been completed. *Id.* at 3752.

310. *Id.* at 3787.

311. *Comm. on Econ. Soc. & Cult. Rights, General Comment 7: The Right to Adequate Housing (Art 11(1): Forced Evictions*, U.N. Doc. E/1998/22, annex IV (May 20, 1997).

312. A.I.R. 2000 S.C. 3751 at 3787.

313. Arundhati Roy, *The Cost of Living: The Narmada Dam and the Indian State*, in *EXPERIENCING THE STATE* 53, 64 (L.I. Rudolph & J. K. Jacobsen eds., 2006).

314. *Id.*

315. Gandy writes that “the rural water crisis and escalating rural-urban tensions over access to water resources is a significant spur to new waves of migration to the city.” Gandy, *supra* note 26, at 118.

316. *Almitra Patel v. Union of India*, A.I.R. 2000 S.C. 1256.

317. See generally Prafulla C. Mishra, *Right to Shelter: A Human Right Perspective*, 40 J.

Narmada case, such dislocation is envisaged as socially beneficial.

The *Narmada* judgment brought together environmentalists, impoverished farmers, NGO groups protesting displacement, and tribal populations.³¹⁸ However, in many cases involving the violation of the right to housing such as *Chameli Singh*,³¹⁹ and in many environmental rights cases such as the Borivili National Park litigation, the environment is pitted against the lives and rights of informal settlers.³²⁰ In these cases, a clear class dimension emerges: the middle classes are aligned with the protection of the environment, while the poor are characterized as the generators of public waste.³²¹

This is despite the fact that the waste output of the high and middle-income groups in Indian cities is far in excess of the waste output of the informal dwellers. One study found that "per capita waste generation per day in Delhi is 420g for those in the high income group, 240g for those in the middle income group, 150g for those in the lower middle income group, and only 80g for those in the JJ clusters [slums]."³²² Despite their high population density, informal settlers in fact have "lighter ecological footprints" than formal settlements.³²³ Those who have the least, though they may be the most visible of the city's citizens, in fact have the smallest physical impact on its environment. Yet in *Almitra Patel* it was the "garbage and solid waste generated by these slums" that the court required "to be dealt with most expeditiously and on the basis of priority."³²⁴

It is also worthy of note that the middle classes and the elites have "encroached" on various areas of the India's cities, including Mumbai's Borivili National Park, without being subjected to similar rhetoric or legal removal strategies.³²⁵ Thus as Mahadevia and Narayanan note, "the argument about violation of law by the slum-dwellers is just an expression of intolerance towards the poor, not intolerance towards the violation of law."³²⁶ Moreover, the categorization of informal dwellers as "polluters" has objectionable overtones given India's history of a discriminatory caste system in which the "lowest" castes are considered "polluted" and thus

INDIAN L. INST. 230, 238 (1998).

318. Routledge, *supra* note 302, at 254-56.

319. (1996) 2 S.C.C. 549.

320. *See, e.g.*, Writ Petition for Respondent, Bombay Env'tl. Action Group, (1995) (Bombay H.C.) (No. 305); *see also* the Delhi Vehicular Pollution Case M.C. Metha v. Union of India Writ Petition No. 13029 of 1985; *Almitra Patel v. Union of India* A.I.R. 2000 S.C. 1256.

321. Ramanathan, *supra* note 19, at 2910.

322. Rajamani, *supra* note 289, at 302 (citing COWI & KADAM ENVIRONMENTAL CONSULTANTS, FEASIBILITY STUDY AND MASTER PLAN FOR OPTIMAL WASTE TREATMENT AND DISPOSAL FOR THE ENTIRE STATE OF DELHI BASED ON PUBLIC PRIVATE PARTNERSHIP SOLUTIONS (Apr. 2004)).

323. *Id.* citing COWI & Kadam Environmental Consultants, FEASIBILITY STUDY AND MASTER PLAN FOR OPTIMAL WASTE TREATMENT AND DISPOSAL FOR THE ENTIRE STATE OF DELHI BASED ON PUBLIC PRIVATE PARTNERSHIP SOLUTIONS (2004).

324. *Almitra Patel v. Union of India* A.I.R. 2000 S.C. 1256, 1259.

325. Zérah, *supra* note 202, at 129-30.

326. Darshini Mahadevia & Harini Narayanan, *Shanghaiing Mumbai—Politics of Evictions and Resistance in Slum Settlements* 32-33 (Ctr. for Dev. Alternatives, Working Paper No. 7, 1999).

excluded from many aspects of society.³²⁷

C. Competing Visions of Mumbai: The Discourse of a “World Class” City

India’s cities play a particular role in the development of a “modern” India. According to Blank, the city “has come to represent modernity, and urbanization is often understood as the symbol of the departure of human societies from traditional ways of living.”³²⁸ Cities signify “the frontier of human civilization.”³²⁹ The tension in the cases pitting a right to clean environment against a right to housing and shelter reveals competing visions of the role of urban development in India’s future. On the one hand, India’s cities are invoked as places in which every person – no matter how poor and marginalized – can seek a new life. On the other, cities are called upon to fulfill a vision in which efficiency, cleanliness, and planned modernization are the signs of the way forward to a new India.

Delhi is reinventing itself as the capital city of an emerging superpower and, as Roy writes, must be “dressed up to look the part.”³³⁰ Bangalore is India’s silicon city, consciously remodeling itself as the center of a high technology global service industry.³³¹ But Mumbai has always worn the mantle of India’s most modern and urbanized city.³³² It is the “gateway” to India,³³³ and as its financial hub, it represents India to the forces of capital and global trade.³³⁴ Mumbai is the face India turns toward the world.

Mumbai is positioning itself within a tradition of a rationalist vision of urbanity, where efficiency is placed foremost, planning triumphs over nature, and administration, accountancy, and the cash economy render a valuable life objectively measurable.³³⁵ But this ideal is in striking opposition to the current reality and projected future of cities,³³⁶ which (especially in the global south) are characterized by “extreme forms of social polarization and spatial fragmentation.”³³⁷

327. Smita Narula, *Equal by Law, Unequal by Caste: The “Untouchable” Condition in Critical Race Perspective*, 26 WIS. INT’L L.J. 255, 272 (2008-2009).

328. Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT’L L. 875, 886 (2006).

329. *Id.*

330. Arundhati Roy, *Scandal in the Palace*, OUTLOOK INDIA MAG., Oct. 1, 2007, available at <http://www.outlookindia.com/full.asp?fodname=20071001&fname=Sabharwal+%28F%29&sid=1>. As Justice Kirpal opined in *Almitra Patel*, Delhi is India’s capital, and “should be its showpiece.” A.I.R. 2000 S.C. 1256, 1258.

331. DAVIS, *supra* note 7, at 172.

332. Patel, *supra* note 3, at 328.

333. Richard Grant & Jan Nijman, *Globalization and the Corporate Geography of Cities in the Less-Developed World*, 92.2 ANNALS OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS 320, 320 (2002).

334. *See Id.*

335. *See* John Friedmann, *Cities in Social Transformation*, 4 COMP. STUD. SOC’Y & HIST. 86, 88-89 (1961).

336. *See* DAVIS, *supra* note 7, at 2-11 (detailing rapid urbanisation and cataloguing its effects worldwide).

337. Gandy, *supra* note 26, at 126.

Nowhere is the shift towards a liberal, market-friendly, modern India clearer than in the state's vision for a new Mumbai. In 2003 McKinsey, the international consultancy firm, was commissioned to produce a new plan for the city.³³⁸ Their report, *Vision Mumbai: Transforming Mumbai into a World-Class City*, embodies a plan to create a gleaming new city by 2013.³³⁹ Through this vision, Mumbai will be "transformed" into another Shanghai, Sydney, or New York.³⁴⁰ *Vision Mumbai* proposes to boost economic growth,³⁴¹ improve and expand mass and private transport infrastructure,³⁴² "dramatically increase" low-income housing availability and affordability,³⁴³ upgrade pollution controls as well as basic and essential services,³⁴⁴ streamline building approvals,³⁴⁵ and make government more efficient by making key departments operate like corporations.³⁴⁶ While some of these improvements may appear uncontroversial, the vision remains highly contested, both for the city it imagines and the processes it advocates.

The most direct impacts on the poor and marginalized will result from the plan's objective of reducing the number of slum dwellers from the current fifty to sixty percent to ten to twenty percent of the city's overall population.³⁴⁷ *Vision Mumbai* contemplates achieving this objective through increase of land availability by fifty to seventy percent,³⁴⁸ the construction of 800,000 new low cost housing units to rehabilitate existing slum dwellers,³⁴⁹ and the provision of three hundred thousand new low cost units to meet other demand.³⁵⁰ With more than six million Mumbaikers living in informal settlements, the numbers suggest that *Vision Mumbai's* targets for rehabilitation fall far short of existing need if their objective is to be met.

The reduction in informal dwellings and their replacement with formal sector housing is to be achieved mainly through market incentives and by encouraging private enterprise.³⁵¹ This is perhaps not surprising, given that

338. The Report was commissioned by Bombay First, with the "active participation" of the Municipal Corporation of Greater Mumbai, the Mumbai Metropolitan Region Development Authority and the Government of Maharashtra. MCKINSEY INTERNATIONAL CONSULTANTS, *VISION MUMBAI: TRANSFORMING MUMBAI INTO A WORLD-CLASS CITY, SUMMARY OF RECOMMENDATIONS iv* (2003) [hereinafter *VISION MUMBAI*].

339. *Id.*

340. *Id.*

341. *Id.* at 13.

342. *Id.* at 16.

343. *Id.* at 19.

344. *Id.* at 23.

345. *Id.* at 27.

346. *Id.* at 1-2. See also the summary of the key recommendations at McKinsey and Company India Office Website, McKinsey and Co., *Vision Mumbai*, <http://www.mckinsey.com/locations/india/communityservice/visionmumbai/> (last visited Dec. 8, 2008).

347. *VISION MUMBAI*, *supra* note 338, at 20.

348. *Id.*

349. *Id.* at 21.

350. *Id.* at 22.

351. *See id.* at 20-22.

the Report itself represents the privatization of public policy,³⁵² and is therefore a manifestation of the shift to the predominance of “market logic” in India’s governance. In the meantime, however, the government has asserted its public role and taken more immediate steps to reduce the number of informal dwellers, undertaking an unprecedented demolition drive in even the powerful and well established slums, which has resulted in the eviction of over three hundred thousand people.³⁵³ Perhaps the authorities are acting in the knowledge that the redevelopment of one of the *Vision Mumbai* Report’s “model” cities, Shanghai, involved the forced relocation of one and a half million people.³⁵⁴

But the demolition of informal housing and the planned reconstruction of Mumbai as a “formal” city is only the physical signifier of *Vision Mumbai*’s deeper impact on the informal dwellers. Such city regeneration projects, as Davis notes, entail fundamental reorganizations of the city’s spatial characteristics, “involving a drastic diminution of the intersections between the lives of the rich and the poor, which transcends traditional social segregation and urban fragmentation.”³⁵⁵ They are also the manifestations of a tradition that claims that the “underdeveloped” or “folk” regions of a city are “in the city but not a part of it” thus envisaging the city as the natural and exclusive preserve of the elite.³⁵⁶

And in fact, *Vision Mumbai* represents an idealization of the city in which the informally housed are rendered largely invisible. Reading the report, and examining related plans such as the Slum Rehabilitation Authority’s Dharavi Redevelopment Project,³⁵⁷ it is not difficult to see the authors’ imagined city of shining office towers housing Asia’s pre-eminent multinational corporations, free-flowing super highways, and ordered parks and avenues. *Vision Mumbai*’s front and back covers portray Mumbai’s foreshore at twilight.³⁵⁸ Neon signs dot the skyline, while people stroll on the boulevard and sit on the sea wall. A few classic Mumbai taxis pass by on the esplanade, which is separated from the sea by an orderly row of palms.³⁵⁹ The Slum Rehabilitation Authority’s website proclaims that the new Dharavi will have “many amenities in it; viz. wider roads, electricity, ample water supply, playgrounds, schools, colleges, medical centers, socio-cultural centers etc.”³⁶⁰ Photographs of the choked alleyways of today’s slum are contrasted with the orderly, white-clad high rises of the future.³⁶¹ *Vision Mumbai* offers no hint of the bustle, chaos, and noise of the

352. With thanks to Dr. Daniel Joyce for drawing my attention to this interesting paradox.

353. Judy Whitehead & Nitin More, *Revanchism in Mumbai? Political Economy of Rent Gaps and Urban Restructuring in a Global City*, 45 *ECON. & POL. WKLY* 2428, 2433 (2007).

354. Davis, *supra* note 7, at 103. These facts are unmentioned in *Vision Mumbai*, despite the reliance on Shanghai as a prototype.

355. *Id.* at 119.

356. Friedmann, *supra* note 335, at 89.

357. Dharavi Redevelopment Project, *supra* note 242.

358. *VISION MUMBAI*, *supra* note 338.

359. *Id.*

360. Dharavi Redevelopment Project, *supra* note 242.

361. *Id.*; Slum Rehabilitation Authority, Dharavi Redevelopment Project, <http://www.sra.gov.in/htmlpages/Dharavi.htm> (showing choked alleyways) (last visited

informal settlements. The pictures avoid showing the thronging crowds who jostle for a few precious feet of space on the pavements in order to build their houses, hawk their wares, or make their ways to the hubs of business and transport.

Vision Mumbai closes with a plea to the reader: "Mumbai is a jewel in the crown of not only Maharashtra but also India. The jewel has, however, completely lost its lustre."³⁶² Only the implementation of *Vision Mumbai's* recommendations "will restore that lustre."³⁶³ This assertion is oddly reminiscent of pre-Independence Bombay, a city in which participation in civil society was strictly limited to the ruling class whose rights of property, trade, and land ownership were protected by colonial military force.³⁶⁴ The exclusive colonial city, characterized by the indifference of the city's elites to the social problems of the city as a whole,³⁶⁵ is revived by the government's aggressive demolition drives, its desire to control the use of space, and the impulse to disenfranchise the informal dwellers for whom Mumbai is currently home.

Legal cases emerging from the state of Maharashtra show that the judiciary is not immune to this elitist vision of Mumbai. For instance, in *Malpe Vishwanath Acharya v. State of Maharashtra*,³⁶⁶ the Supreme Court of India held that Mumbai's Rent Control Act,³⁶⁷ which freezes rents at 1940s levels,³⁶⁸ is arbitrary and unreasonable.³⁶⁹ Although it is widely recognized that overly severe rent control has been detrimental to the maintenance and creation of rental housing in Mumbai's formal sector,³⁷⁰ the law has symbolic value to Mumbaikers. It represents the culmination of a pre-Independence history of social struggles in which civic rights, including the right to housing, were viewed as the "fundamental building blocks of sustainable urban renewal."³⁷¹ The judicial repudiation of the Rent Control Act can thus be read as a repudiation of the value of that struggle.

Even when such rent control legislation is not rejected outright, the Supreme Court's interpretation of its purpose has shifted. In *Joginder Pal v. Naval Kishore Behal*,³⁷² Justice Lahoti stated that, in spite of the fact that Mumbai's rent control legislation was constructed to benefit the tenant:

May 31, 2010); Slum Rehabilitation Authority, FAQs, <http://www.sra.gov.in/htmlpages/faqs.htm> (showing slums with white high-rises in background) (last visited May 31, 2010).

362. VISION MUMBAI, *supra* note 338, at 32.

363. *Id.*

364. Hazareesingh, *supra* note 70, at 798-99.

365. Gandy, *supra* note 26, at 114.

366. A.I.R. 1998 S.C. 602.

367. The Maharashtra Rent Control Act, 1999, No. 18, Acts of Parliament, 2000.

368. *Id.*

369. *Malpe Vishwanath Acharya* A.I.R. 1998 S.C. 602, at 617. Despite this ruling, rent control legislation remains in force in the city. Its repeal is politically unfeasible given that "the tenants are powerfully organized, (though relatively small in number)." *See* Appadurai, *supra* note 2, at 638-39.

370. Appadurai, *supra* note 2, at 638-39.

371. Hazareesingh, *supra* note 70, at 811.

372. (2002) 5 S.C.C. 397.

[W]hile interpreting such of the provisions as take care of the interest of the landlord the court should not hesitate in leaning in favour of the landlords. Such provisions are grafted in rent control legislations to take care of those situations where the landlords too are weak and feeble and feel humble.³⁷³

In reality, urban land holdings in Mumbai are tremendously concentrated in the hands of a small number of powerful landlords.³⁷⁴ This is widely recognized in Mumbai,³⁷⁵ and in light of this fact, the Court's preference for landlords over tenants is a further illustration of jurisprudence that turns away from the needs of the poor.

Finally, the cases discussed in Parts VI.A and VI.B cannot be excluded from an analysis of the judiciary's role in the changing discourse on informal settlers and their place in India's future cities. The rhetoric of slum and pavement dwellers as encroachers and polluters has been reinforced and given legal weight in judgments such as *Almitra Patel*, *Nawab Khan*, and the Borivili National Park litigation.

The cases analyzed here show that the judicial attitude to informal settlers, from *Olga Tellis* and *Chameli Singh* to *Almitra Patel* and the *Narmada Judgment*, is open to radical revision. Such judicial re-imaginings of human rights norms can, and in this instance have, led to the reinterpretation of rights protections and guarantees in a way that disempowers and excludes – rather than empowers and protects – the poorest and most marginalized. For this reason, the jurisprudence developed under the right to life may be a shaky foundation upon which to build a house in Mumbai. Litigation for the protection of housing rights is now recognized as a risky strategy, to be undertaken only as a last resort.³⁷⁶

But the risk lies not so much in any lack of clarity in the principles themselves, or in a retreat from judicial activism on the right to life guaranteed by Article 21. The risk lies in the changed judicial and social emphasis on the interests that should be protected under the Constitution as fundamental to Indian society. The unifying theme in the recent housing rights cases such as *Nawab Khan*, the environmental rights cases such as the Borivili National Park litigation, and the rural development litigation over the Narmada dams is the desire to remove the informal elements of the city, and to clear the way for a planned, shining, efficient, and, most

373. *Id.* at 404.

374. Patel, *supra* note 3, at 340 (noting that fewer than 100 landlords own more than half the vacant land in the possession of private builders in Mumbai).

375. Legislation has been introduced to prevent further land concentration. See Urban Land (Ceiling and Regulation) Act, No. 33 of 1976.

376. In the words of a prominent housing rights advocate, the judicial protection of housing rights "is a double-edged sword, because you can file a litigation on behalf of slum dwellers, saying protect us. And in the 1980s they'd protect you. Now you file a petition on behalf of a so-called environmental group saying there are 100,000 slum dwellers which are encroaching please remove them, the environment is being polluted, and the Court will come down heavily on the slum dwellers." Interview with Anonymous, Housing Rights Advocate, *supra* note 60.

importantly, exclusive “world class” space.

VII. REMAKING INDIA, REMAKING HUMAN RIGHTS: FACTORS UNDERLYING THE RE-CHARACTERIZATION OF INFORMAL CITIZENS

The final Part of this paper seeks an explanation for the changing judicial and popular discourses revealed in Part VI. What motivates the striking change in the characterization of informal settlers, their value to the city, and their place in it? Two main reasons appear to lie behind the changing discourse. The first is the unstable composition of the Indian Supreme Court. The second is the specific role that India’s senior Judiciary plays in the Indian state, and consequently, the judicial place in the quest for a “modern” India.

The first, and most straightforward, factor behind the changing judicial discourse on informal settlers is the alteration in the Supreme Court bench between the earlier housing rights cases, including *Olga Tellis*, *Shantistar Builders*, and *Chameli Singh*, and the more recent cases such as *Nawab Khan* and *Almitra Patel*. *Olga Tellis* was decided in what can be described as the Court’s “golden period”³⁷⁷ of human rights protection. This was the time during which the Supreme Court took control of the Constitution after decades of judicial deference,³⁷⁸ and radically refigured its own role and the judicial approach to human rights in India, especially in terms of protections for the poor.

Yet even during this period, the influence of individual activist judges was significant,³⁷⁹ with a small handful of judges being instrumental to the development of human rights for the marginalized.³⁸⁰ This is evident in the cases discussed here. Justice Bhagwati and Justice Chandrachud figure prominently in the cases creating a right to housing and shelter as an aspect of a right to life with dignity.³⁸¹ Justice Ramaswamy was also responsible for significant judgments.³⁸² Justice Kirpal, on the other hand, has emerged as a key judicial figure in the re-characterization of informal settlers as encroachers and polluters.³⁸³

Meanwhile, internal debate over the appropriateness and legitimacy of the Court’s activism has remained intense.³⁸⁴ Moreover, a stable body of constitutional jurisprudence is difficult to locate, given that constitutional cases may be decided by benches of only a few judges,³⁸⁵ and the total

377. Yash Ghai, Foreword to HUMAN RIGHTS, JUSTICE AND CONSTITUTIONAL EMPOWERMENT x (C. Raj Kumar & K. Chockalingam eds., 2007).

378. Austin, *supra* note 72, at xxiv.

379. Upendra Baxi, *The Promise and Peril of Transcendental Jurisprudence: Justice Krishna Iyer’s Combat with the Production of Rightlessness in India*, in HUMAN RIGHTS, JUSTICE, AND CONSTITUTIONAL EMPOWERMENT 3, 4-5 (C. Raj Kumar & K. Chockalingam eds., 2007).

380. *Id.* at 4.

381. See generally *Olga Tellis v. Bombay Mun. Corp.* A.I.R. 1986 S.C. 180.

382. *Id.*

383. See *supra* Part VI.

384. See Thiruvengadam, *supra* note 90, at 285.

385. EPP, *supra* note 132, at 83.

number of judges on the Supreme Court has increased from an original eight to the current number of twenty six,³⁸⁶ leading to the possibility of divergent jurisprudential principles emerging concurrently from the appointed Bench.³⁸⁷ Thus, the housing rights jurisprudence developed by the Supreme Court during the 1980s and 1990s can be seen as the product of a specific moment in the Court's history, though the cases do remain good law and, in some instances, are leading cases.

All court benches evolve, and this change does not necessarily lead to the rejection of an earlier court's human rights jurisprudence. Thus, other causes must be sought to explain the shift in discourse from the social justice focused jurisprudence of the earlier housing rights cases, towards case law that seeks to protect strikingly different human rights interests. One such reason is found in the governance role of the Indian Supreme Court within the broader Indian constitutional structure, to which the analysis now turns.

The Indian Constitution is "more than a mere text defining the parameters of the state . . . [but is] a repository of certain values, ideals, meaning and tradition, going beyond its instrumental use."³⁸⁸ Thus, the Constitution supplies the underlying societal goals and the principles of justice for the state. As Sudarshan argues, the framers "drafted a set of ideological norms which all parties were expected to acknowledge as fundamental in the governance of India."³⁸⁹ The Constitution was to remove these matters from the internal strife of party politics, and to spell out a role for the state "as an integrating and legitimizing concept that identifies the basic values of the political community with reference to which power and authority are expected to be exercised."³⁹⁰ The Indian Constitution thus "envisages a state with the requisite 'steering' capacity over society to fulfill its programmatic goals."³⁹¹ This requires a government that is able to act authoritatively and decisively on broad economic, social, and political policies.

Brass characterizes this mode of governing as "governance,"³⁹² invoked in the Indian context as the need to "rule, control, direct, steer, regulate, determine, and/or restrain"³⁹³ coupled with the underlying apprehension that the issues facing India may mean it is "impossible to govern effectively at all" ³⁹⁴ This authoritarian definition of governance, and the anxiety that underlies it, means that "governance" in India is often employed in a

386. *Id.*

387. *Id.* Cf. Meer, *supra* note 96, at 370 (on the issue of "judge shopping" in public interest litigation).

388. R. Sudarshan, *The Political Consequences of Constitutional Discourse*, in 2 STATE AND NATION IN THE CONTEXT OF SOCIAL CHANGE, 55, 55-56 (T.V. Sathyamurthy ed., 1997).

389. *Id.* at 63.

390. *Id.* at 65.

391. *Id.* at 69.

392. Paul Brass, *How Political Scientists Experienced India's Development State*, in EXPERIENCING THE STATE 110, 121 (L.I Rudolph & J.K. Jacobsen eds., 2006).

393. *Id.*

394. *Id.* at 122.

heavy handed manner in which it is assumed that some casualties are to be expected in the pursuit of development.³⁹⁵

The Supreme Court plays a noteworthy role in the governance of the Indian State. It functions as more than a judicial review organ, and its governance role is widely acknowledged by commentators³⁹⁶ and by the justices themselves.³⁹⁷ Writing extra-judicially, Supreme Court Chief Justice Balakrishnan describes the Court's "significant"³⁹⁸ contribution to good governance in India, which he defines as "the task of running the government effectively."³⁹⁹ The way the Court has embraced this role can be seen throughout the cases analyzed in this article, in which the Court takes on responsibilities for fulfilling legislative schemes from land acquisition to waste management and from environmental policy to slum rehabilitation. The Court's governance function thus provides an opportunity for creative and activist social policy to emanate legitimately from the Court.

The implications of this governance role are particularly notable when the Court's strength as an institution is contrasted with the weakness of the legislative and executive branches. That is, the Supreme Court has been described as an institution whose "Delphic pronouncements carry almost mythical power,"⁴⁰⁰ in marked contrast to the "decay" of the executive and legislative branches of government as political institutions.⁴⁰¹ Rajagopal, for example, describes the executive and legislature as "a failing or failed state apparatus that proves unwilling or is incapable of carrying out its mandate under the law and the constitution."⁴⁰² Thus, the Supreme Court's governance task places a heavy burden on the Court to act in place of the vacuum left by the legislature and executive, even while such a role creates a powerful and influential position for the Court.

In light of this relationship, the Supreme Court has often worked to uphold the central, though unfulfilled, aims and initiatives of the legislature and executive. In this way, the Court acts in accordance with the "logic of the state."⁴⁰³ It is this relationship between the judiciary and the other branches of government that best explains the changing judicial characterization of Mumbai's informal settlers, as the Indian State repositions itself in the global market as a "modern" power, with its policies based on the liberalization, privatization, and commercialization of Indian society.

Since the early 1990s, India's modernization and urbanization has been based on the "market logic"⁴⁰⁴ of structural adjustment policies,

395. Roy, *supra* note 313, at 61.

396. Mehta, *supra* note 181, at 110.

397. See, e.g., Balakrishnan, *supra* note 92, at 31.

398. *Id.*

399. *Id.* at 25.

400. Rajagopal, *supra* note 301, at 301.

401. Brass, *supra* note 392, at 122-23.

402. Rajagopal, *supra* note 132, at 212.

403. *Id.* at 203.

404. Banashree Banerjee, *Security of Tenure in Indian Cities*, in HOLDING THEIR GROUND:

accompanied by “deregulation, denationalization, disinvestment and digitalization.”⁴⁰⁵ This logic marks a serious departure from India’s formerly tightly regulated and highly nationalized economy.⁴⁰⁶ Many of the planned economic reforms have not been realized.⁴⁰⁷ However, as Nayar notes, it is the irreversibility⁴⁰⁸ of the measures, coupled with their foundation in a wholly new set of philosophical assumptions about the Indian state and the economy, which marks the changing basis of economic and social relations most strikingly.⁴⁰⁹

The changing discourse on informal settlements, in which slum and pavement dwellers are considered encroachers with no legitimate right to a place in the city, illustrates India’s enthusiasm for the new, “modern” State. Such enthusiasm challenges the assertion that globalization is being forced onto “an unwilling world.”⁴¹⁰ On the contrary, for many Indians, equal participation in a global economy represents the ultimate goal towards which India ought to strive.⁴¹¹ Even the marginalized classes, Appadurai argues, seek to “enter the world of consumption – a world deeply influenced by real or imagined foreign objects.”⁴¹² Nevertheless, as *Vision Mumbai* shows, the imagined future of the city is one in which the pavement dweller, the slum citizen, and the poor tenant have no visible place. Like colonial Bombay, the new plans for Mumbai cater to the needs and desires of the elite.⁴¹³

The cases analyzed in this article illustrate the push factors behind this marketization of society. Streets need to be cleared to enable more efficient traffic flows while public space must be freed from “encumbrances” to make way for private investments and formal infrastructural projects. Public services, including housing, must move from a paradigm dominated by rent controls and publically provided worker’s *chawls* to privately constructed, market value apartments. Meanwhile, inherent in the drive for privatization is the assumption that markets should be left to do their work, and consequently, the judiciary should not redistribute land and housing to the poor through an interpretation of human rights that

SECURE LAND TENURE FOR THE URBAN POOR IN DEVELOPING COUNTRIES 43 (A. Durand-Lasserve & L. Royston eds., 2002).

405. Surya Deva, *Globalization and Its Impact on the Realization of Human Rights: Indian Perspective on a Global Canvas*, in HUMAN RIGHTS, JUSTICE, AND CONSTITUTIONAL EMPOWERMENT 240 (C. Raj Kumar & K. Chockalingam eds., 2007); see also Brass, *supra* note 392, at 128.

406. Patel, *supra* note 3, at 331-32.

407. Baldev Raj Nayar, *Political Structure and India’s Economic Reforms of the 1990s*, 71 PAC. AFF. 335, 337 (1998).

408. *Id.*

409. *Id.*

410. Padraic Kenna, *Globalization and Housing Rights*, 15 IND. J. GLOBAL LEGAL STUDIES 397, 400 (2008).

411. As Patel notes, “it is not the external economy that has oriented the city [of Mumbai] to globalization but the national policy of the government.” Patel, *supra* note 3, at 331.

412. Appadurai, *supra* note 2, at 643.

413. Even though in reality it is the informal dwellers that cater to the needs of the elite, driving their cars, cleaning their apartments, and clearing and recycling their waste. See, e.g., Housing Rights Activist, *supra* note 60.

includes a pro-poor right to housing. As an institution of good governance, the Court continues to take on the unfinished business of the legislative and executive branches. However, in the State's plan for India as a new, liberalized, market friendly, global power, the Court's decisions now favor the business interests of landlords, the spatial reorganizations required by global firms, the privatization of public services, and the beautification of the city. It is the changing visions of India's transformation that underpin the new human rights discourses, and which result in the stripping away of the human rights protections once guaranteed to the informal settlers.

VIII. CONCLUSION

The role of human rights in the struggle for social transformation in India illustrates how human rights can be exploited in service of radically divergent and competing visions of society. The contrast between the housing rights cases, from which emerge a human rights jurisprudence based on equal and inclusive citizenship, and the recent cases on environment and development – with their elitist and exclusivist trends – illustrates that “narratives of human rights are inadequate, even misleading, without companion narratives of the production of human rightlessness.”⁴¹⁴ Human rights emerge as a deeply unstable and contested discourse, given that those responsible for their interpretation “can redeploy these norms in ways which fundamentally disempower precisely those groups the norms are intended to benefit.”⁴¹⁵

Nevertheless, the struggles to control space, housing, and access to the goods and rights of citizenship now being played out in Mumbai are testament to the power of human rights. The discourse of human rights and the practice of human rights claims are potent in a country where the Constitution's enshrinement of human rights is looked on with pride. The discourse provides a conceptual and political space in which to lobby, while legal cases can generate a body of jurisprudence with tangible effects. But the gains made under human rights can slip away. The Court's retreat from a pro-poor interpretation of the right to housing and shelter, and the emergence of newer, more attractive ideals such as the right to environment and the appeal of the exclusive, “world-class” city illustrate that battles over the interpretation and control of human rights norms in the courts are “of necessity . . . episodic (one step forward two steps backwards).”⁴¹⁶ However, for the slum and pavement dwellers to abandon their human rights claims, whether these are pursued through political, legal or discursive means, is to capitulate to a vision of Mumbai in which they have become invisible. It is to give in to their erasure and their disenfranchisement.

Happily, the informal settlers in Mumbai do not represent a backward,

414. Baxi, *supra* note 278, at 385-88.

415. Rajagopal, *supra* note 301, at 347.

416. Baxi, *supra* note 278, at 392.

passive or victimized mass. They are active in the struggle to transform their communities, and their use of human rights is creative and dynamic. Their claim to human rights holds up “powerful images of a cosmopolitan, secular, multicultural” city in which “the extraordinary courage of ordinary people” offers the promise for equity and social justice.⁴¹⁷ These citizens can also “redeploy” human rights in new and creative ways that can lead to more just and equitable outcomes, even in the face of an unsympathetic state and judiciary.

The struggle for human rights is never truly won, nor – so long as human rights are invoked – will it be lost. The housing rights situation in Mumbai is a striking illustration of the contestation of human rights norms, and the process of claiming, giving ground, and reclaiming, that constitutes all social struggles in the name of rights everywhere. Although human rights can be interpreted in ways that go against just social transformation, by continuing to engage just discourses of human rights against unjust and disempowering interpretations, incremental possibilities for justice, inclusion, social citizenship, and even social transformation, remain possible.

417. Appadurai, *supra* note 2, at 650.