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## Judicial Constructions: Modernity, Economic Liberalization, and the Urban Poor in India

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# Judicial Constructions: Modernity, Economic Liberalization, and the Urban Poor in India

Priya S. Gupta

## Abstract

Comparative legal research in property and urban planning law has taken an increasing interest in the policy patterns and legal arguments that municipal bodies and courts employ in the implementation of often radical urban reconfiguration. Aided by geographers, sociologists, and political economists, comparative property law scholars have begun to unearth the justificatory frameworks that underlie and shape these changes in metropolitan urban landscapes and that reveal an interplay between tangible and immediate modes of political constituencies' interest navigation on the one hand, and deep-seated cultural-historical motivations as well as commitments to transnational strategic and political loyalties, on the other. These modes of research have worked to show how urban 'local' decisionmaking is embedded in complex and entangled policy considerations, which are expressed through the use of economically minded categories such as progress, modernization, growth, and development. The following Article focuses on the case of urban modernization policies pursued and implemented in one of the world's largest metropolitan centers—India's capital, Delhi—which is also one of the world's global cities currently undergoing a radical and breathtaking transformation. Embarking on a micro-analysis of the justifications offered in the pursuit of a 'cleaner,' more 'modern,' and 'competitive' metropolis, this Article examines a series of judgments regarding the rights of urban slum residents. Particularly, the Article applies two analytical and conceptual lenses in studying the regulatory policies and the courts' engagement with them, namely the political economy of development and the ideational and ideological concepts of 'modernity' and 'neoliberalism.' The role of the judiciary in the allocation of property and urban space functions hereby as the site of engagement, the place where the regulatory fiat is approved or rejected, reinterpreted and reshaped, endorsed and concretized. Through this analysis, the Article seeks to provide a richer context for the way in which a number of key Indian courts, including the Indian Supreme Court, have become actively involved in regulatory municipal policies. The Article highlights and analyzes the devastating effects of the recent judicial pronouncements for those constituencies who have long been at the margins and whose legal protection threatens to be further besieged and mitigated in a largescale shift towards economic liberalization in the name of urban modernization and the city's competitive enhancement.

**KEYWORDS:** India; modernity; urbanization; slum

# JUDICIAL CONSTRUCTIONS: MODERNITY, ECONOMIC LIBERALIZATION, AND THE URBAN POOR IN INDIA

*Priya S. Gupta\**

## ABSTRACT

Comparative legal research in property and urban planning law has taken an increasing interest in the policy patterns and legal arguments that municipal bodies and courts employ in the implementation of often radical urban reconfiguration. Aided by geographers, sociologists, and political economists, comparative property law scholars have begun to unearth the justificatory frameworks that underlie and shape these changes in metropolitan urban landscapes and that reveal an interplay between tangible and immediate modes of political constituencies' interest navigation on the one hand, and deep-seated cultural-historical motivations as well as commitments to transnational strategic and political loyalties, on the other. These modes of research have worked to show how urban 'local' decision-making is embedded in complex and entangled policy considerations, which are expressed through the use of economically minded categories such as progress, modernization, growth, and development.

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The following Article focuses on the case of urban modernization policies pursued and implemented in one of the world's largest metropolitan centers—India's capital, Delhi—which is also one of the world's global cities currently undergoing a radical and breathtaking transformation. Embarking on a micro-analysis of the justifications offered in the pursuit of a 'cleaner,' more 'modern,' and 'competitive' metropolis, this Article examines a series of judgments regarding the rights of urban slum residents. Particularly, the Article applies two analytical and conceptual lenses in studying the regulatory policies and the courts' engagement with them, namely the political economy of development and the ideational and ideological concepts of 'modernity' and 'neoliberalism.' The role of the judiciary in the allocation of property and urban space functions hereby as the site of engagement, the place where the regulatory fiat is approved or rejected, reinterpreted and reshaped, endorsed and concretized. Through this analysis, the Article seeks to provide a richer context for the way in which a number of key Indian courts, including the Indian Supreme Court, have become actively involved in regulatory municipal policies. The Article highlights and analyzes the devastating effects of the recent judicial pronouncements for those constituencies who have long been at the margins and whose legal protection threatens to be further besieged and mitigated in a large-scale shift towards economic liberalization in the name of urban modernization and the city's competitive enhancement.

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**INTRODUCTION**

*“O Beautifiers of the City, did you not see that what was beautiful in Bombay was that it belonged to nobody, and to all? Did you not see the everyday live-and-let-live miracles thronging its overcrowded streets?”*<sup>1</sup>

In India, in 2014, one can now access tuberculosis (TB) medicine from the government at no cost. In some of the poorer areas in the country's capital, Delhi, one can even get the complete and directly observed therapy (DOTS) treatment for TB from the local convenience store.<sup>2</sup> Children can attend school without fees. In Delhi, if one can afford it, one can avoid the traffic and flooding of

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1. SALMAN RUSHDIE, *THE MOOR'S LAST SIGH* 350–51 (1995).  
 2. *See Our Work*, OPERATION ASHA, <http://www.opasha.org/our-work/> (last visited Nov. 19, 2014).

roads during monsoon season by taking the metro. Polluted tap water can be filtered to near perfect cleanliness in home filters that are affordable for the middle class. Medical tourists now come to Indian cities for much less expensive and ‘world-class’ treatments. There are fewer cows and monkeys roaming in many parts of Delhi now.<sup>3</sup> There are also fewer peacocks. Karim’s, the famous Mughlai *dhaba* (restaurant) founded in 1913 near Jama Masjid in Old Delhi, has a video on its website that advertises (in English) its “state-of-the-art infrastructure,” “well maintained supply chain,” and “extensive range of products,” as well as a menu that is primarily in Urdu and Hindi.<sup>4</sup>

As is now trite to observe, urban areas in India defy neat classifications, both with regard to the activities that take place there, and the citizens living in them. And yet, as the examples above illustrate, there have been some marked changes since the much-discussed process of ‘economic liberalization’ began approximately three decades ago.<sup>5</sup> The cited examples, while anecdotal, hint at changes on the grander scale of things. While a complete picture of the massive political, economic, and societal transformations taking place is beyond encapsulation, studying the related phenomena of urbanization and capitalism can provide insights into the reconfigurations of everyday lives of citizens and therefore of society’s understandings of and engagements with larger undercurrents of change.

The power of these forces—the urban and the capitalistic—in the Indian imaginary is most clearly observed in the rise of the new ‘middle class’ in India. The new ‘middle class’<sup>6</sup> is both *imagined* in its

3. That said, there are still an abundance of monkeys in some parts of Delhi. See Sean McLain & Aditi Malhotra, *In Delhi, ‘Monkey Wallahs’ Ape Scary Simians to Spook Pesky Primates*, WALL ST. J., Aug. 3, 2014, <http://online.wsj.com/articles/for-indian-wallahs-monkey-business-has-literal-meaning-1407119401>.

4. *Company Video*, KARIM HOTELS PVT. LTD., <http://www.karimhoteldelhi.com/company-video.html> (last visited Nov. 19, 2014).

5. See *infra* Part II.

6. The term “middle class,” however, is a bit of a misnomer for the reasons Dasgupta and others have described—the population around whose interests the Indian economy is being restructured is less than ten percent of the overall population—making it more elite than the term “middle class” indicates. However, as he notes, “many of those who [think] of themselves as ‘middle class’ [do] so because they identif[y] with the hard-working, socially constructive overtones of the phrase, and because they wish[] to differentiate themselves from another, even smaller, elite—far richer and more powerful than they . . . .” RANA DASGUPTA, *CAPITAL: THE ERUPTION OF DELHI*, at xii (2014). Goldman Sachs, however, places the income threshold for “middle class” lower, and arrives at a figure closer to forty-four percent as of 2010. GOLDMAN SACHS, *INDIA REVISITED* 3–4 (2010),

conglomeration of lifestyles, wealth, and upward mobility, and *real* in its ascension as a demographic. As Goldman Sachs describes it, the middle class can be described as the emerging class of citizens, who drives “demand for personal items such as mobile phones, televisions, personal computers and autos, while also contributing to increased demand for infrastructure services such as electricity, transportation and banking.”<sup>7</sup> It is defined by this emphasis on consumption—and in the case of the middle class that resides in cities—consumption packaged with ideas of technological and urban sophistication.

With this turning of cities towards the middle class and their lifestyles, where are the urban poor in this sea of change? And, more literally, where are they in the cities in which they reside? As David Harvey and others have argued, the growth of urban slums<sup>8</sup> is

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[http://www.goldmansachs.com/gsam/docs/instgeneral/general\\_materials/whitepaper/india\\_revisited.pdf](http://www.goldmansachs.com/gsam/docs/instgeneral/general_materials/whitepaper/india_revisited.pdf).

7. See GOLDMAN SACHS, *supra* note 6, at 3–4; see also Vinay Lal, *Introduction to THE OXFORD ANTHOLOGY OF THE MODERN INDIAN CITY: THE CITY IN ITS PLENTITUDE*, at xxix (Vinay Lal ed., 2013) [hereinafter *THE OXFORD ANTHOLOGY*].

8. Regarding the word ‘slum,’ I would prefer a word with a less negative connotation, but as ‘slum’ is widely used in policy and law and amongst residences of such places, I will use it in this Article. As for its definition, I rely on Liza Weinstein who describes slums as:

[G]enerally substandard settlements in which large segments of the urban poor live and work throughout the global [S]outh. These settlements are typically informal, illegal, or quasi-legal and are supported by loose networks of residents, politicians, community leaders and crime bosses, social workers, police, and municipal officials.

LIZA WEINSTEIN, *THE DURABLE SLUM: DHARAVI AND THE RIGHT TO STAY PUT IN GLOBALIZING MUMBAI 10* (2014). She also notes that:

Although the details of their emergence and transformations differ across political, cultural, and institutional space, slums can be broadly attributed to failures or gaps in formal service provision. When markets and governments both fail to provide adequate housing to low-wage workers and their families, then slums proliferate.

*Id.* In relation to slums in Delhi, I sometimes refer to them or their units by their local name (and the name that is used in various court opinions), ‘jhuggi-jhopris,’ abbreviated to ‘jhuggis.’ As Kalyani Menon-Sen and Gautam Bhan describe, slums cut across different kinds of informal and formal housing. In their work documenting displacement in Delhi, they use the Government of Delhi typology that includes eight forms of settlements: jhuggi-jhopri clusters, slum designated areas, unauthorized colonies, jhuggi-jhopri resettlement clusters, rural villages, regularized colonies, urban villages, and planned colonies. They note that under the Slum Improvement and Clearance Act 1956, slums are defined as “areas that are unfit in any respect for human habitation; and are ‘by reason of dilapidation, overcrowding, faulty arrangements and design of such buildings, narrowness or faulty arrangements of streets, lack of ventilation, light or sanitation facilities, or any combination of these factors detrimental to safety, health, or morals.’” Under this definition, “[p]lanning and legality do not automatically imply the achievement of minimum standards.”

inseparable from urbanization and capitalism which bring increased employment opportunities but few spaces for low-wage workers to live.<sup>9</sup> In the case of India, the inhabitants of the slums are often rural residents who have moved to cities in search of work, which may include construction work in the growing real estate industry. The existence of employment, however, does not ensure health or shelter. As *The Hindu*, a leading Indian newspaper, recently reported, over half of Delhi lives in slums, without access to basic services.<sup>10</sup> The contradictions in their lives of increasing access to some human rights and yet increasing insecurity with respect to their residences represent yet another challenge to telling a cohesive story of economic liberalization and societal reconfiguration.

A central contention of this Article is that legal scholars, when faced with such large-scale constellations of socio-economic change and regulatory transformation, are prompted to widen their analytical and conceptual lenses in order to gain an adequate understanding of how different institutions, including governmental agencies and courts, operate in the midst of such change. In order to understand the motivations behind particular policy decisions as well as court judgments, it becomes necessary to analyze them against the background of the alluded-to regulatory and political changes. Such an analysis operates on two levels—the bottom-up study of court decisions on the one hand, and the encompassing discursive framework, which comprises official institutional announcements as well as rhetorical turns, on the other.

In the case of India's continuing economic and regulatory transformation<sup>11</sup> we find a challenging example of large scale political transformation that, rhetorically, occurs through recurring references to the country's (and its cities') commitment to seemingly uncontested 'values' of modernity, development, and economic prosperity and, institutionally, appears to translate into concrete outcomes and socio-economic redistribution. Studying, in particular, the way in which Indian courts have authorized the clearance of slum residences and other forms of precarious occupation, the goal of this Article becomes one of illuminating—but not overstating—the

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KALYANI MENON-SEN & GAUTAM BHAN, SWEEP OFF THE MAP: SURVIVING EVICTION AND RESETTLEMENT IN DELHI 4 (2008).

9. See *infra* Part II.

10. *52 Per Cent of Delhi Lives in Slums Without Basic Services*, THE HINDU, Dec. 17, 2009, <http://www.thehindu.com/news/52-per-cent-of-delhi-lives-in-slums-without-basic-services/article66507.ece>. For an account of these phenomena in Mumbai, see WEINSTEIN, *supra* note 8.

11. See *infra* Part II.



connections between these judicial endorsements to ‘clean’ city centers of slums and other forms of delegitimized occupation and the large-scale, political rhetoric of modernity. The challenge of embarking on such analysis lies in the method of placing the court decisions in question in this larger context without, at the same time, suggesting or resorting to simple causation patterns. In other words, the point to be made is not one of a direct causal relationship between development policy and law, but rather of how the decisive arguments accepted by the courts must be seen against the background of this broader context. And so when courts, in justifying slum clearance, make references to the importance of cities in India, for example, being ‘clean’ for tourists, or where courts give pride of place to the ‘need’ to build ‘modern’ cities, we will see how they are, in effect, pronouncing and endorsing the at-the-moment omnipresent rhetoric of economic modernization and progress.

By drawing closer together this often effusive realm of rhetorical policy clamor with the much more narrow scope of judicial reasoning, we will gain a clearer picture of how the marginalization of the urban poor has occurred through jurisprudence that draws its legitimacy, in part, from the pervasive discourse of neoliberalism, modernity, and development.<sup>12</sup>

The focal points of urban land and its associated laws against their political-economic background are of particular salience for several reasons, each of which is further explored in this Article. First, designations of appropriate urban uses of land are significant allocations of resources towards residents and users of land—in the cases explored here, this has meant allocations towards the middle class and their lifestyles. Second, the construction of cityscapes has played an important role in the projection of modernity as a foundational part of national identity, and so understanding Delhi’s changing landscape is a key part of understanding the wider values at play in these transformations. Lastly, through land use designations, the judiciary articulates priorities and values and operationalizes local governance objectives in ways that are seen to further or impede development. And so, urban land use is a significant area in which current development orthodoxy plays out, and the judiciary plays an important role in how that happens. The study of the forgoing concepts shows how, since economic liberalization, judgments of the Supreme Court of India and the Delhi High Court regarding slum residents have, though not by explicit political statement, furthered

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12. Each concept is more fully explained in Parts I and II.

forms of neoliberal urban development through the decisions that choose between competing claims to use urban land.

The judicial re-allocations of urban space towards the middle class in the name of cleanliness, pride, or economic development have direct impact on the legal status of all rights associated with this space. The narrow argument in this Article is that the disenfranchisement of certain populations from legitimate claims to cities and city centers is being operationalized *legally* through shifts in how urban space and its associated rights are being conceptualized and justified. Rather than having to justify the new interpretation of entitlements against legal precedent though, our analysis will show how rights are being (re-)conceptualized and (re-)configured with reference to an overarching value justification that exists in political economic discourses, namely modernity. The broader aim of the Article, therefore, is to show that legal scholars must engage with wider discourses—the political economy of development and the concepts of ‘modernity’ and ‘neoliberalism’—to understand what has informed the circumstances around which these shifts in judicial opinion take place. Only by seeing the complex relationships among these discourses and their global alter-egos can we understand how they mutually constitute each other and work to exclude the poor from urban space in an apparently legal manner.

This Article pursues this investigation in four steps. Part I, concretizes and justifies why the Article develops its analysis of the tenuous interplay between ‘modernity’ and residential claims from the perspective of the courts. Part II, in an attempt to sketch the historical-political context of the case law of interest here, offers a brief engagement with the concept of modernity in Indian political and economic thought. The analysis locates modernity’s influence in the Constitutional framing of property rights, as it has evolved from the time following Independence (1947) to the (continuing) period of so-called ‘economic liberalization.’ This loose periodization will suggest the rhetorically powerful juxtaposition of ‘socialism’<sup>13</sup> and (a neoliberal form of) ‘capitalism’<sup>14</sup> as respectively characterizing the

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13. There is some debate regarding how to adequately label the particular forms that socialism took in India. I rely on Pranab Bardhan’s formulation of socialism as “an economic system with a predominantly public (including co-operative) ownership of the main means of production and worker control over a large part of the social surplus.” Pranab Bardhan, *Some Reflections on Premature Obituaries of Socialism*, ECON. & POL. WKLY., Feb. 3, 1990, at 259.

14. As explained further in Part II, I argue that the particular form of capitalism that is in ascendancy in India embodies many of the facets of neoliberalism, as understood and referenced by the various policymakers and lawmakers in India.

past and present, as well as the much anticipated (successful) economic future of India.

Part III shifts our attention to the micro level of analysis and zeroes in on judicial decisions regarding slum clearances in order to provide a more detailed account of how courts have repeatedly been able to justify the eviction and removal of slum residents without, in fact, overturning any precedent that had associated their ability to stay in such places to their fundamental rights. The analysis begins with the seminal *Olga Tellis v. Bombay Municipal Corp.*<sup>15</sup> decision in 1985, in which the Supreme Court of India held that the slum and pavement residents facing displacement had been entitled to procedural due process under Article 21's Right to Life.<sup>16</sup> As discussed in detail in this Part, the Court gave significant recognition to the historical and personal circumstances of those who live in such precarious residences. Revisiting the decision more closely, the analysis shows how the Court's respectful account of the poor and their use of urban space was reflective of the judges' acknowledgement of the larger economic shifts that had occurred and the resulting socio-economic hardships for some populations. By taking a closer look at the aftermath and more recent case law, however, the analysis shows not only how this conception of rights to urban space eventually narrowed, but also how the language and framing used in the later cases leave out the sociological and political-economic contexts that had played a huge role in *Olga Tellis*.

Finally, Part IV deepens this scrutiny of the case law in question by revisiting the courts' language in these cases through the lens of neoliberal capitalistic development. It argues that the cases provide implicit and explicit signals to the interests of foreign investors through the rhetoric of strong property rights, disciplined cities and citizenry, and beautification of urban areas. This Part also attempts to draw attention to alternative narratives and judicial articulations of non-neoliberal ideals that are found in only a minority of case law. Subsequent courts could draw upon such narratives should they choose to turn away from the current dominant jurisprudence regarding urban space.

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Throughout this Article, I refer to these terms not assuming that they have precise meanings, but rather as referential points to the larger political-economic discourses and values referred to herein.

15. *Olga Tellis v. Bombay Mun. Corp.*, (1985) 3 S.C.C. 545 (India).

16. As explained in Part III, *infra*, it is not that the case protected their right to stay absolutely, but rather their right to procedural due process in the case of clearance.

### I. DEBATING PROPERTY RIGHTS IN URBAN DEVELOPMENT: COURTS AS SITES OF ENGAGEMENT

In this Part, we need to answer the question ‘why courts?’ In other words, this Part attempts to explain and justify how the close scrutiny of a number of seminal court decisions regarding slum clearance in Delhi may offer insights into the larger regulatory dynamics in India’s drive for modernity today. Accordingly, we must begin with the question, what has been the role of the judiciary in this period of transition? More accurately, what have been the *roles* of the various institutions in the judiciary in these transitions? The main contention here, however, is that there is no single narrative that could reasonably and adequately reconcile the different interacting forces that shape judicial decision-making in this context. Similarly, as we will see, there is no single narrative that offers a satisfactory explanation of the fact that India’s courts have, over the last three decades, provided a range of outcomes with respect to the poor.<sup>17</sup>

Despite our realization of the impossibility of conceptualizing an all-encompassing narrative of the role of the Indian judiciary vis-à-vis the urban poor, we focus on a number of seminal court decisions that deal with the contested residence claims of slum occupants in Indian metropolitan centers with attention to Delhi in particular. The analysis focuses on the situation of the poor in their residential occupation of urban space and situates it in the contexts of broader political economy transformations, marked by the pronounced commitment to the concepts and values of ‘development’ and ‘modernity.’ In doing so, this inquiry engages—through the lens of the judicial role in urban land use and governance—with two discourses, one of which revolves around the political economy of development in India, and the other being driven by concepts of modernity and neoliberalism in urban development.

This engagement with two complex discourses, each its own world of concepts, meanings, scholarship, and genealogies, through the lens of another (the judiciary) is full of risks and needs a particular justification. A promising answer might be gained when we consider

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17. There are seminal cases in the last decade which further the right to health and other rights for the poor, which stand in intriguing contrast to the cases explored in this Article, which narrow their rights and decrease their access to resources. *See, e.g.,* C.E.S.C. Ltd. v. Subhash Chandra Bose, A.I.R. 1992 S.C. 573 (India) (regarding the right to health). *See generally* YAMINI JAISHANKAR & JEAN DRÈZE, RIGHT TO FOOD CAMPAIGN, SUPREME COURT ORDERS ON THE RIGHT TO FOOD: A TOOL FOR ACTION, *available at* <http://www.righttofoodindia.org/data/scordersprimer.doc> (regarding the right to food).

that a legal analysis of case law—especially case law that is marked by such a high degree of variance as the area here under scrutiny—remains too internal to legal-institutional reasoning, too tied to claims of precedent, revision, or turn-around, as long as the context in which these cases are decided remains in the dark. In other words, an understanding of how and why courts have, in a growing number of cases, turned away from a previous recognition of the rights of slum occupants to reside in the specified urban areas, can only emerge from acknowledging the operation of courts. This acknowledgment occurs not only in a larger socio-economic and regulatory context, but—decisively—in a discursive one. As a consequence, a main concern of the following analysis is to show that only through a contextual reading of the cases against the background of an omnipresent official discourse around the need for the country to adapt, to move ahead, and to embrace the values of an encompassing commitment to modernization can we hope to gain a better understanding of the meanings embedded in judicial rulings that authorize the clearance of slums. In particular, when judges justify the (negative) effects on the homeless with references to a ‘modern’ India, or to the city being a ‘showpiece’ to foreigners,<sup>18</sup> the challenges of critically investigating the interaction between large-scale rhetorical, political discourse and judicial argument become even more apparent.

Each of these discourses has its own richness that both justifies and challenges engagement with it. The political economy of development offers an important analytical framework to study the significance of allocations of access to land and property in the Indian discourses of economic development, as well to the very idea of democracy in India.<sup>19</sup> The arcs that connect a liberal development of orthodoxy in India with global assertions of the alleged uncontestedness of the values of economic growth and development are essential to an appreciation of what has been prioritized and idealized with regard to the uses of land. India’s continued—if, varied—experience with and agency in the design of development policies and priorities must be seen in a relation of mutual enhancement with global trends in development, a theme touched on throughout the Article and widely ascertained in the academic

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18. *See infra* Part II.

19. *See* AKHIL GUPTA, *POSTCOLONIAL DEVELOPMENTS: AGRICULTURE IN THE MAKING OF MODERN INDIA* 36–37 (1998) (regarding the importance of modernity and development to the new post-colonial state).

literature.<sup>20</sup> But, while it should be unsurprising to find that judges—like other public actors—operate in a discursive context, it is much more difficult to adequately unpack the concrete ways in which societal and political discourse shapes or even influences judges' behavior. To be sure, part of the difficulty stems from the fact that any assessment of a 'discourse,' its main trajectories, and even its contentions, is itself an assertion of coherence and cohesiveness. As we discuss in far greater detail in Part II of this Article, nothing could be further from the truth in the context of modernity discourses. They are marked by a striking diversity of assumptions as well as implicit and explicit idea formations regarding the material and ideal quality, scope, and aspirations of the concept. Precisely because the idea of modernity escapes all attempts at a simple definition, it provides for an uncertain canvas on which to map the different stages of its development.

Modernity's transformation in India is entwined with the evolutions of development ideas and policies. Particularly striking is the use of a periodized history of economic development in the various scholarly accounts drawn upon here. Against the background of the preceding observations, it seems even obvious now how the histories of industrialization and economic liberalization can, at best, offer moving reference points, as they are told with constantly shifting reference points, 'key moments,' and variances in establishing a historical timeline. With this in mind, our analysis nevertheless remains interested in the question of what different and, arguably, contested accounts of historical-political and socio-economic change can, at least in part, tell us about concurring changes in urban development, economic and political redistribution, and urban transformation. In other words, we must remain interested in an analysis of urban change 'in context'—that is, in a study of the reconfiguration of ways of urban life, through a myriad of regulatory interventions, which in turn have to be studied against the background of spatialized domestic and global discourses of the means and ends of 'legitimate' development and global economic growth.

In an attempt to pick up the echoes and trace the reflections of these discourses in the intricacy of judicial holdings in cases that

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20. See, e.g., ATUL KOHLI, *POVERTY AMID PLENTY IN THE NEW INDIA* (2012); LLOYD I. RUDOLPH & SUSANNE HOEBER RUDOLPH, *IN PURSUIT OF LAKSHMI: THE POLITICAL ECONOMY OF THE INDIAN STATE* (1987); *UNDERSTANDING INDIA'S NEW POLITICAL ECONOMY: A GREAT TRANSFORMATION?* (Sanjay Ruparelia et al. eds., 2011).

involve slum clearance, our analysis focuses on references to ‘modernity’ as potential reflections or utterances of an emerging embrace of neoliberalism on the part of the deciding judges. Both ‘modernity’ and ‘neoliberalism’ are notoriously capacious and represent shifting amalgams of meanings, and yet both are essential in any attempt to understand the drive behind India’s official commitment to development. In the discussion that follows below, no effort is made to offer neat definitions of these concepts, but rather, the aim is to illuminate their discursive appearance both in official governmental language as well as the case law under investigation. In doing so, the challenge here exists in adequately showing the rich heterogeneity and multi-disciplinary configurations of these ideas and how they have impacted the direction of judicial argument in the context of urban development. What we are interested in, in other words, is drawing together the government’s often-polemical references to modernity and neoliberalism, and the engagement of these terms through the framework of rights, claims, and regulatory competence in judicial arguments.

Finally, our immediate engagement here with these two discourses occurs through the lens of the judiciary’s role in urban land use, zoning, and the regulation of city space. In the discussion of the cases below, this Article draws attention to the significant urban constituency living in precarious conditions and offer evidence as to how a range of different courts have in recent years narrowed the access of urban poor to space in city centers by ordering the clearance of slums and the scaling back of rehabilitation for slum residents. However, the argument is not simply that these courts adopt a deliberately detrimental position against the poor—rather, it seeks to understand how the narrowing of these constituencies’ rights and their increasing marginalization is accomplished and justified. It is therefore through the very detailed engagement with the case law in question that we can see the relationships between judicial reasoning and the discursive dynamics constituted—in part—by the political economy of development and the argumentative-rhetorical pull of modernity and neoliberalism. Learning from ‘law in context’ and ‘law and society’ scholars,<sup>21</sup> we are sensitized to the fact that courts operate in a rich discursive realm of competing interests and pressures, and our task becomes one of how to unpack and illustrate these relationships. More specifically, as the Indian courts seek to

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21. *E.g.*, STEWART MACAULAY ET AL., *LAW IN ACTION: A SOCIO-LEGAL READER* (2007); *see also* Stewart Macaulay, *The New Versus the Old Legal Realism: “Things Ain’t What They Used to Be”*, 2005 WIS. L. REV. 365 (2005).

find a legitimate basis for their decisions in the context of contemporary urban modernization, this project seeks to further understand and articulate the dynamics that shape judicial argument, choices, and outcomes in these processes.

The challenges here are also opportunities to offer a complexified account: to avoid constructing a conspiracy against the ‘court’ and instead recognize the multitudes of benches and judges,<sup>22</sup> and times and places, that exist in the judiciary; and, to avoid attempting to define a direct causal relationship between court action and ideas in development, and instead articulate how the courts have contributed to and operated within the development project discursively and through material allocations of resources.

## II. SITUATING MODERNITY AND PROPERTY IN POSTCOLONIAL URBAN INDIA, BRIEFLY

This Part engages with concepts of modernity in order to sketch the background against which development discourses in India have unfolded from the early days of a socialist economy to the more recent turn towards capitalism. The aim here is not to offer a neatly periodicized account of distinct stages in India’s economic development, but rather to see how varyingly implicit or explicit references *to* and underlying understandings *of* modernity can be traced to have informed and influenced successive discursive stages in development policy. The insights which we should hope to gain in the following section concern the employment and appearance of ‘modernity’ as an argumentative and rhetorical device, because it is here where we might then be able to more clearly discern the influence of such discourses on the courts’ reasoning.

### A. What is Meant by Modernity?

Within the capacious, overarching concept of ‘modernity,’ there is a particular conception that comes to our attention when Indian courts use phrases like “building modern India” as a justification for slum clearance. It is not the ‘modernity’ of modernization theory, although it links with development discourse and technology; nor is it some variant of aesthetic modernism,<sup>23</sup> though it is at times

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22. For more on the structure and diversity of the bench system, see Anjana Agarwal et al., *Interpreting the Constitution: Supreme Court Constitution Benches Since Independence*, *ECON. & POL. WKLY.*, Feb. 26, 2011, at 27.

23. See Jürgen Habermas, *Modernity: An Unfinished Project*, in *HABERMAS AND THE UNFINISHED PROJECT OF MODERNITY: CRITICAL ESSAYS ON THE PHILOSOPHICAL*



overdetermined by notions of ‘beautification’ and then appears to engage space as surface more than as form and function. Modernity, when used by courts, suggests a folk sense, unexamined in its provincialism because it does not need to be questioned, and, at the same time, aspiring to have a global sense, unexamined in its, again, obvious and self-explanatory universality, or, more critically, hegemony. Modernity, employed as a justification device, embodies the sense of a cleaner (Schumpeterian) creative destruction: it can clear the ground and make room for the new as well as rescue (selected) parts of the old.<sup>24</sup> But it also hangs in the air and yet dissipates when we try to grasp it: as the Indian economic historian and social theorist Dipesh Chakrabarty notes, though it might have “outlived its utility as a rigorous concept and is mostly of rhetorical value,” it is ubiquitous in everyday discussions of democracy and development.<sup>25</sup> It is a discursive habit as much as a normative goal, perhaps at times an unthinking mantra, and adaptable to every aspiration of Indian society, policy, economics, or law. Put another way, modernity is like what the post-colonial studies scholar, Gayatri Spivak, said of liberalism, “that which we cannot not want.”<sup>26</sup>

Insofar as reference to ‘modernity’ or ‘modernization’ can be used to justify a wide range of policy orientations and societal fantasies, it is important to begin to at least acknowledge the rhetoric. Such an acknowledgement has to shy away from an attempt to take on modernity in all its historical connotations and normative claims. Instead, we must try to examine its use, and the consequences of its use, in the language of the judgments that are under investigation here, especially where the material implications of this rhetoric on the lives of urban populaces, namely the justification of the removal of the poor through judicial opinion and urban development, are so palpable.

The references to the value and significance of ‘modernity’ in India are reflective of multiple geographies, times, and encounters. In particular, the *Subaltern Studies* historians such as Chakrabarty were instrumental in furthering a deeper understanding of the construction

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DISCOURSE OF MODERNITY 38–55 (Maurizio Passerin d’Entrèves & Seyla Benhabib eds., 1996).

24. See generally JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (3d ed. 1950).

25. DIPESH CHAKRABARTY, HABITATIONS OF MODERNITY: ESSAYS IN THE WAKE OF SUBALTERN STUDIES, at xx (2002).

26. For the quote and an insightful discussion and application of it, see Wendy Brown, *Suffering the Paradoxes of Rights*, in LEFT LEGALISM / LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2002) at 420–21.

of the term ‘modern’ against the perceived pre-modern.<sup>27</sup> While recognizing the early roots of ‘modernity’ in Enlightenment and the faith in rationality and institutions,<sup>28</sup> they seek to understand its formulations and uses in India during colonial times and after Independence. In particular, Chakrabarty, with reference to the Indian historian Ramachandra Guha, discusses how one primary difference between the uses of the term in India (as opposed to in the West) is that modernity in the Indian sense “was not founded on an assumed death of the peasant.”<sup>29</sup> It is this engagement with the peasant that *Subaltern Studies* seek to complicate; accordingly, Guha, Chakrabarty, and others worked to overturn the construction of the Indian peasant as non- or pre-modern (as contrasted with the purportedly modern elite nationalist leaders and leading classes). They highlighted the contradiction that existed at Independence between the propagation of a modernity that included rights of citizenship, a market economy, freedom of press, and rule of law, but that existed, at the same time, alongside domination and subordination—phenomena which clearly cut against the liberal principles meant to constitute modernity in the new India.<sup>30</sup> This is the dark side of deeming some populations and some processes ‘modern’—because it rests on the immediate constitution, therefore, of others as not so. (The very term ‘modern’ necessitates that division—between new and old, desirable and not—as the term arguably first came into being for precisely the purpose of making such divisions.<sup>31</sup>) The act of making that designation is a clear “gesture of the powerful”<sup>32</sup> and has impacts on the daily lives of citizens when it is done in a legal setting, whether implicitly or explicitly.

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27. See, e.g., CHAKRABARTY, *supra* note 25, at xix.

28. See MAX HORKHEIMER & THEODOR W. ADORNO, DIALECTIC OF ENLIGHTENMENT 3–42 (John Cumming trans., Herder & Herder 1972) (a critical account).

29. CHAKRABARTY, *supra* note 25, at 19 (noting that a peasant did not have to undergo a “historical mutation” into an industrial worker to become a political citizen-subject of the nation; the formal granting of rights of citizenship to the Indian peasant simply recognized the peasant’s already-political nature).

30. See, e.g., *id.*

31. See Habermas, *supra* note 23, at 39 (discussing the early history of the word ‘modern’ as used to distinguish between the Christian present and the pagan and Roman past).

32. See CHAKRABARTY, *supra* note 25, at xix.

Others have described more pluralistic or alternative versions of modernity<sup>33</sup> or tried to preserve it as a less unilateral, more value-neutral term, arguing that that it was originally meant that way—in other words, as a ‘way of being,’ which in turn ostensibly could mean different things to different societies.<sup>34</sup> For the purposes of this Article, our interest in ‘modernity’ emerges from the rhetorical-strategic place that references to modernity occupy in the court decisions upholding slum clearances. Our interest, then, is both analytical and normative. When courts justify actions by claiming that they are in furtherance of ‘beautifying’ cities, or promoting certain middle-class ways of life, or when opinions highlight purported hygiene and morality of poor populations as justifications for their removal (as opposed to their assistance), the notions of ‘modernity’ are everywhere.<sup>35</sup>

## **B. The Right to Property, Modernity, and the Indian Economy in the Socialist Constitutional Moment and the Decades that Followed**

The goals of economic development and its methods have varied considerably through the decades: some focus on GDP, others on poverty, still others on rights, and while some seek to uplift classes of the population, others focus on enabling the individual to rise. At the time of Indian Independence, the notion of development that prevailed was closely entwined with the larger political concept of modernity and a commitment to socialism. In the Indian sense of modernity, democracy and development were essential—meaning that growth itself would have to include the poor. The following section articulates these ideas further by focusing, in particular, on the role of property rights.

### *1. Modernity in the New Indian Economy*

In Sunil Khilnani’s framing of “the idea of India,” he notes that India as a “creation of the modern world” has been shaped by “fundamental agencies and ideas of modernity” which he defines as

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33. See, e.g., ARJUN APPADURAI, *MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION* (1996).

34. See generally JEAN COMAROFF & JOHN L. COMAROFF, *THEORY FROM THE SOUTH: OR, HOW EURO-AMERICA IS EVOLVING TOWARD AFRICA* (2011).

35. See CHAKRABARTY, *supra* note 25, at xx (discussing how modernity comes into speech as an expression of moral value, that the rhetoric of the term may be a sign that it is never far from our thoughts, and arguing that “[w]e must, therefore, engage and reengage our ideas about modernity in a spirit of constant vigilance”).

“European colonial expansion, the state, nationalism, democracy, [and] economic development . . . .”<sup>36</sup> And so, modernity as a way of being for India at Independence, can be seen as a product of many histories, outlooks, and visions—the political ones being of particular salience. As Khilnani explains, the bringing together of the vast diversity of the Indian population and communities into a “single political community was the wager of India’s modern, educated, urban elite”—a wager that was based on “the idea of India” that “had no single, clear definition” but rather accepted pluralistic and diverse versions of itself.<sup>37</sup> Therefore, as both Mahatma Gandhi and Jawaharlal Nehru had seen, *politics* was at the heart of India’s passage to and experience of modernity because the creation of new India was a creation of a new *democracy* that would continue that diversity.<sup>38</sup>

The new democracy was an unlikely one and against the grain because of its inequality of caste, its size, and the imperial state from which it had freed itself.<sup>39</sup> The orientation of the ‘nationalist elite’ is significant—the universal suffrage and the debates in the Constituent Assembly (responsible for drafting the Constitution) demonstrate the commitment of the new leaders to bringing the entire population into the fold of the benefits of Independence.<sup>40</sup> The intent was not to create a domestic version of the colonial structure of elite and exploitation, but to build an inclusive society, government, and economy.<sup>41</sup>

With this mindset at Independence in mind, the close entwining of modernity with a commitment to an egalitarian form of economic development becomes more apparent. As Francine Frankel notes, modernity in India was seen by political leaders from the time of Independence to include economic development but also a sense of

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36. SUNIL KHILNANI, *THE IDEA OF INDIA* 5 (1997). One can also see how closely ‘modernity’ and ‘modernization’ could be here—the version of modernity that includes politics and economic development, in part informed by European experiences. That said, in the experience of colonialism and then post-colonial formation of these ideas, both Europe and India imagined and informed each other’s outlooks. *See generally* DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2000).

37. *See* KHILNANI, *supra* note 36, at 5–6.

38. *See id.* at 9.

39. *See id.* at 9–10.

40. *See generally* GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE* (2003).

41. *See infra* note 44 and accompanying text.

morality.<sup>42</sup> Morality meant, in part, an awareness of the normatively undesirable effects of a ‘modern’ society and economy.<sup>43</sup> Economic development, therefore, was conceived as growth *with* social welfare.<sup>44</sup> This idea, woven into the unique democratic experiment, meant that growth in and of itself was not the single primary goal of development, but that elimination of inequality through social participation in the economy and distribution of its gains were prioritized.<sup>45</sup> Development policies therefore included “ideological preferences for the establishment of an egalitarian, decentralized, and cooperative pattern in agriculture and the rapid expansion of public ownership in the basic industrial sector.”<sup>46</sup>

That said, these ideas manifested themselves in vague policies that did not succeed in achieving egalitarian distribution. Evidence of this failure of political will can be found in agricultural and industrial reforms, inadequate social welfare expenditure, and the paucity of poverty alleviation measures.<sup>47</sup> The contrast of the ideals of inclusion and social welfare with the reality of the implementation of redistributive policies is important, as seen in its influence in the formulation of property rights in the Constitution described below.<sup>48</sup>

In official discourse, the agrarian portions of society were seen as an important part of achieving and governing the process of development. The rural village, which had played a key part in the national imagination during the Independence struggle as the site of Indian identity<sup>49</sup> was to become “the primary unit of social organization.”<sup>50</sup> As such, development policies, in theory, were meant to enable the Indian population to remain committed to agriculture and small scale (publicly owned) industry, but in a new way that conceived of villages as the “primary focus of economic and political development programs” and as part of an entire “social organism” and “political framework” as opposed to their previous

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42. See FRANCINE FRANKEL, *INDIA’S POLITICAL ECONOMY, 1947–2004: THE GRADUAL REVOLUTION* 13 (2005).

43. In Frankel’s telling, as an indirect result of Gandhi’s continuing focus on what he saw to be the perils of modern civilization—including excessive consumption, exploitation of the lower classes, and a profit-driven nature—political leaders were influenced to see modernity as including a ‘normative dimension.’ See *id.* at 10–13.

44. See *id.* at 8; see also KOHLI, *supra* note 20, at 65; RUDOLPH & RUDOLPH, *supra* note 20, at 62.

45. See FRANKEL, *supra* note 42, at 8.

46. See *id.* at 18.

47. See KOHLI, *supra* note 20, at 82–85.

48. See discussion *infra* Part II.B.2.

49. See FRANKEL, *supra* note 42, at 9–11.

50. See *id.* at 17. See generally, KHILNANI, *supra* note 36.

conception as autonomous units.<sup>51</sup> Unfortunately, the government's support of agriculture during that time was more rhetoric than reality, and these conceptions of prosperous villages and productive agriculture were not to materialize in any significant way.<sup>52</sup>

One major obstacle on the way to achieve a more egalitarian, modern Indian agrarian society was that this vision was in direct tension with existing patterns of ownership. At the time of Independence, ownership of rural land was heavily concentrated, and much of the rural population was landless and impoverished. The newly independent state, then, had to find a way to enable equitable access to land ownership if it was to fulfill the Constitutional commitment to "equality of status and of opportunity."<sup>53</sup> However, this need for more egalitarian ownership conflicted with another social value at that time—the avoidance of further, violent revolutionary change. Modernity and development were meant to be achieved without massive social upheaval.<sup>54</sup> Preserving the existing landholdings of elites had been part of political compromises agreed on in order to ensure a broad base of support of the Independence movement and post-Independence policies.<sup>55</sup> New leaders could not attack the entire social hierarchy at once, as it included many of their supporters who had been necessary during the struggle for Independence and would continue to be necessary in the midst of the establishment of a new government. This meant political compromises—in particular with regard to property rights—so that landowners would not feel threatened by the new project of India.<sup>56</sup>

## 2. *Modern Property Rights and Land Reform*

When the Indian Constitution was written in 1950, the right to property was formulated similarly to how it is found in other liberal common law Constitutions, including the Fifth Amendment to the United States Constitution, in that it ensured that property would not be taken except for a public purpose and with just compensation.<sup>57</sup>

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51. See FRANKEL, *supra* note 42, at 17.

52. See KOHLI, *supra* note 20, at 82–83.

53. See INDIA CONST. pmb.; see also AUSTIN, *supra* note 40, at 69, 71 (indicating that many Indian leaders at the time of Independence shared a vision of social equality and justice).

54. See FRANKEL, *supra* note 42, at 20.

55. See discussion *infra* Part II.B.2.

56. See discussion *infra* Part II.B.2.

57. The original protection for property was found in two articles in the Constitution, Article 19(1)(f) and Article 31. Article 19(1)(f) provided that all citizens have the right "to acquire, hold and dispose of property." INDIA CONST. art.

This right was included in the “fundamental rights” section of the Constitution. Not only did this constitutional endorsement add moral and rhetorical force to the legal protection of property rights, but the placement in the fundamental rights section of the Indian Constitution meant that claimants could now bring direct suit in the Supreme Court (without exhausting lower court remedies), having standing to claim compensation for denial of such rights by the government.

However, the clash between those in pursuit of egalitarian land reform and the owning elite’s interests was seemingly unavoidable. This clash emerged as a tug-of-war between the Supreme Court and Parliament that lasted for nearly three decades, and manifested itself in a number of cases involving property.<sup>58</sup> Throughout the 1950s, 60s, and 70s, various land reform laws were passed in state legislatures to redistribute land towards the landless.<sup>59</sup> Elite landowners challenged these acts before the Supreme Court,<sup>60</sup> but judicial review of these cases was complicated by Parliament’s passage of the First Amendment in 1951, which limited the scope of judicial review of certain land reform acts.<sup>61</sup> Nevertheless, the land reform acts were

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19(1)(f), *amended by* The Constitution (Forty-Fourth Amendment) Act 1978. Article 31 stated that:

(1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable . . . , shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

*See* INDIA CONST. art. 31, *amended by* The Constitution (Forty-Fourth Amendment) Act 1978. For a longer discussion of the debates surrounding the constitutionalization of the right to property in India, see Priya S. Gupta, *The Peculiar Circumstances of Eminent Domain in India*, 49 OSGOODE HALL L.J. 445 (2012).

58. *E.g.*, *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461 (India); *His Highness Maharajadhiraja Madhav Rao Jiwaji Raoscindia Bahadur v. Union of India*, A.I.R. 1971 S.C. 530 (India); *I.C. Golak Nath v. State of Punjab*, (1967) 2 S.C.R. 762 (India); *Rustom Cavasjee Cooper v. Union of India*, A.I.R. 1970 S.C. 654 (India); *Shankari Prasad v. Union of India*, A.I.R. 1951 S.C. 458 (India). For more on this lineage of cases, see generally Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1 (2009); *see also* Mayur Suresh & Siddharth Narrain, *Introduction to THE SHIFTING SCALES OF JUSTICE: THE SUPREME COURT IN NEO-LIBERAL INDIA* 5–8 (Mayur Suresh & Siddharth Narrain eds., 2014).

59. *See* AUSTIN, *supra* note 40, at 67–122.

60. *See id.* at 90–92.

61. Parliament had amended the property provisions in the Constitution by inserting Articles 31A and 31B to limit judiciary review of land reform. Article 31A

repeatedly brought before the Supreme Court, who in 1967 finally ruled in *Golak Nath v. State of Punjab* that Parliament could not amend the Constitution to take away or abridge fundamental rights (which included the amended version of property at that time).<sup>62</sup> In response, Parliament passed the Twenty-Fourth and Twenty-Fifth Constitutional Amendments, which restored its ability to amend any part of the Constitution and restricted the right to property.<sup>63</sup> When those amendments came before the Supreme Court in 1973 in *Kesavananda Bharati v. State of Kerala*, the Court grappled with how Parliament could empower itself to change the Constitution in an unhindered way if it was no longer empowered to change the fundamental rights section per *Golak Nath*. It ruled that while Parliament could amend the Constitution, it could not destroy its “basic structure,” which included judicial review, democracy, federalism, secularism, and many of the fundamental rights.<sup>64</sup>

This battle between the branches was interrupted by Prime Minister Indira Gandhi’s Emergency—the suspension of civil liberties and general elections from June 1975 to March 1977: an event that would be a turning point for Indian politics and the role of the judiciary.<sup>65</sup> As Nick Robinson has described, the Emergency “undercut the political legitimacy of Parliament and the executive, as well as their claims to constitutional supremacy.”<sup>66</sup> As a result, the Supreme Court was able to “increase its governance role relatively unchallenged.”<sup>67</sup> In apparent atonement for the dictatorial episode

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provided that acquisitions of property by the state through law could not be called into question under the rights to property, equality, freedom of speech, or freedom to practice one’s profession. INDIA CONST. art. 31A. Article 31B established the Ninth Schedule, a list of laws outside of judicial review, even under fundamental rights claims. INDIA CONST. art. 31B. For more on this, see Robinson, *supra* note 58, at 29; Suresh & Narrain, *supra* note 58, at 5.

62. *Golak Nath v. State of Punjab*, (1967) 2 S.C.R. 762 (India). For an insightful discussion of this case, see Robinson, *supra* note 58, at 30 (stating “[t]he Court’s decision in *Golak Nath* led to widespread outcry from both Parliament and the public. By placing all of the fundamental rights beyond amendment, the Court had also placed its more conservative interpretation of the right to property beyond amendment”).

63. See The Constitution (Twenty-Fourth Amendment) Act, 1971; The Constitution (Twenty-Fifth Amendment) Act, 1971; see also Suresh & Narrain, *supra* note 58, at 6.

64. Robinson, *supra* note 58, at 30–31 (citing *Indira Nehru Gandhi v. Raj Narain*, A.I.R. 1975 S.C. 2299 (India)).

65. While a full engagement with Emergency is unfortunately outside the scope of this paper, readers are directed to see AUSTIN, *supra* note 40; EMMA TARLO, UNSETTLING MEMORIES: NARRATIVES OF THE EMERGENCY IN DELHI (2003).

66. Robinson, *supra* note 58, at 16.

67. *Id.*



that the Indian government had imposed on its people, the Indian judiciary moved towards a rights-based discourse in the 1980s emblemized in *Olga Tellis* and its reliance on an expanded interpretation of the right to life found in Article 21 of the Indian Constitution.<sup>68</sup>

Robinson frames the Court's activism and expansion of the right to life after the Emergency as follows:

[T]he Court largely justified these interventions [regarding alleviating poverty] on two grounds. First, it interpreted an active role for itself under the Constitution's vision for controlled social and economic revolution. Second, the Court appealed to principles of civilization or good governance that necessitated and explained its interventions.

Through the Court's right to life jurisprudence, it took on many details of governance, like ordering more stringent enforcement of traffic regulations or banning smoking in public places. Indeed, the Court took on so many functions that its right to life jurisprudence came to encompass more than just protecting life, but also promoting good governance more broadly.<sup>69</sup>

The expansive role of the Court in governance is an important undercurrent in the slum clearance cases, as we will see. In effect, the Court has continued its activism and role in governance in many ways, though now with different sets of values than those embodied in the post Emergency moment described by Robinson.

After the Emergency, in 1978, a newly elected populist-oriented Parliament weakened the right to property in order to facilitate these land reforms.<sup>70</sup> The right to property was taken out of the fundamental rights section of the Constitution and amended to state merely that "[n]o person shall be deprived of his property save by authority of law."<sup>71</sup> As a result of the amendment, compensation for takings was no longer guaranteed, and claimants seeking compensation for government infringement of their property rights were now forced to base their suits on statutory law<sup>72</sup> from 1978 onward.

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68. See Suresh & Narrain, *supra* note 58, at 9–10.

69. Robinson, *supra* note 58, at 41.

70. This new Parliament had been elected in a move that ousted Indira Gandhi from office, though she and her party would return less than three years later in 1980. See AUSTIN, *supra* note 40, at 483–551.

71. INDIA CONST. art. 300A.

72. Namely, the Land Acquisition Act. See The Land Acquisition Act, No. 1 of 1894, INDIA CODE (1894). This was replaced in 2013 by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and

It is worth noting at this point that the primary motivation to weaken the Constitutional right to property—the facilitation of land reform—was driven by the need to benefit the poor.<sup>73</sup> Given the centrality of agriculture in the Indian economy, the importance of land reform as a potential method of including the poor in the economy cannot be underestimated. The political salience of agriculture was manifested in these reforms as well as other policy endeavors. Throughout the 1970s, Indian policymakers supported the ‘Green Revolution,’ the new agricultural strategy that included high yielding seeds, fertilizers, pesticides, electric power, equipment and irrigation techniques.<sup>74</sup>

The Constitutional formulation of property rights, the decades of judicial review of land reforms, and the primacy of development in national discourse, entwined the politics of the Court with the governance of resource allocation in ways that continue today. The next section explores the shifts in the economy towards the form of neoliberal capitalism that would underlie the shifting jurisprudence explored in Part III.

### 3. *Modernity Shifts from Socialism to Capitalism*

Unfortunately, the land reforms of the 1970s and 80s failed to produce the agriculture-led economic growth for which policy makers had hoped.<sup>75</sup> Between 1970 and 1980, the economy grew at an

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Resettlement Act, No. 30 of 2013, INDIA CODE (2013). Though the land acquisition process was amended in 2013 to include ideas of consent and increased rehabilitation for the landless, the new government that took power in 2014 is seeking its amendment to draw back some of those provisions. See *Highways, Tax, Land Acquisition: A Glance at Narendra Modi's To-do List on Reforms*, HINDUSTAN TIMES, May 19, 2014, <http://www.hindustantimes.com/elections2014/the-big-story/a-to-do-list-for-india-s-new-government/article1-1220685.aspx>; see also Ketki Angre, *Government Looks to Relax Some Provisions of Land Acquisition Act*, NDTV (July 16, 2014), <http://www.ndtv.com/article/india/government-looks-to-relax-some-provisions-of-land-acquisition-act-559254>.

73. Unfortunately, currently the lack of provision of property in the fundamental rights section has arguably enabled the government to again redistribute land more recently—this time from rural citizen to corporation—in the name of ‘development.’ For a more detailed account of this phenomenon, see generally Usha Ramanathan, *A Word on Eminent Domain*, in *DISPLACED BY DEVELOPMENT: CONFRONTING MARGINALISATION AND GENDER INJUSTICE* 133 (Lyla Mehta ed., 2009); Priya S. Gupta, *The Peculiar Circumstances of Eminent Domain in India*, 49 *OSGOODE HALL L.J.* 445 (2012); Namita Wahi, *Land Acquisition, Development, and the Constitution*, *SEMINAR MAG.*, Feb. 2013, at 49; Suresh & Narrain, *supra* note 58, at 5.

74. FRANKEL, *supra* note 42, at 581–83.

75. *Id.* at 581–83.

average of three percent per year.<sup>76</sup> The economy was primarily based on agriculture and state-led industry in electricity, railways, communication, machinery, and steel.<sup>77</sup> The fruits of this meager growth were not redistributed effectively through land or other reforms. The land that was redistributed more often than not went to the “lower gentry” rather than the daily tiller who remained landless.<sup>78</sup> Without land, much of the population remained below poverty—in the 1970s “approximately 40 to 50 percent of the rural population, a minimum of 220 million people, were believed to be subsisting below the low poverty line,” determined the Indian Planning Commission.<sup>79</sup>

With the frustration of failed *dirigiste*<sup>80</sup> policies of the early decades of Independence and the overwhelming poverty, and the blot of Emergency behind, policymakers moved India away from socialism and state-led economic policy gave way to capitalistic policies throughout the 1980s.<sup>81</sup> As Atul Kohli argues, the pro-business turn began with Indira Gandhi focusing on private industrialists in an effort to spur growth in the 1980s—a point that is often missed by scholars.<sup>82</sup> She supported business not through extensive Washington Consensus-type deregulation,<sup>83</sup> but rather through an active government, which included the reform of economic administration and the orientation of the government towards spending, control of labor,<sup>84</sup> and support of capital.<sup>85</sup> This support included the removing of license restrictions; allowing big business into previously privatized areas, such as power generation, and offering tax relief.<sup>86</sup>

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76. SADIQ AHMED & ASHUTOSH VARSHNEY, COMM’N ON GROWTH & DEV., BATTLES HALF WON: THE POLITICAL ECONOMY OF INDIA’S GROWTH AND ECONOMIC POLICY SINCE INDEPENDENCE 3 (2008).

77. See KOHLI, *supra* note 20, at 83.

78. See *id.* at 85.

79. FRANKEL, *supra* note 42, at 4.

80. State-led development policies.

81. See FRANKEL, *supra* note 42, at 586–89 (discussing how the turn to market-based policies was a transition throughout the decade, and not merely the result of the 1991 reforms); KOHLI, *supra* note 20, at 92; RUDOLPH & RUDOLPH, *supra* note 20, at 25–33.

82. See KOHLI, *supra* note 20, at 31–34.

83. See John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN READJUSTMENT: HOW MUCH HAS HAPPENED?* 5 (John Williamson ed., 1990).

84. Control of labor through legislation meant to discourage strikes and to encourage cooperation between labor and business. See KOHLI, *supra* note 20, at 103.

85. See *id.* at 31–34.

86. See *id.* at 101–03.

After Indira Gandhi's assassination, under her son Rajiv Gandhi, reforms increased in the second half of the 1980s. Certain industries were de-licensed, corporate tax rates were lowered, and incentives were given to the development of technology, in particular the computer industry.<sup>87</sup> State controls on the entry, expansion, and production of private business were eased.<sup>88</sup> Gandhi strove to create a technocratic image of Congress (his political party) that would be distanced from the corruption and inefficiency of earlier eras as well as from socialism.<sup>89</sup> According to Kohli, Gandhi had wanted to open India to trade and investment as part of this "liberalization" but was unable to do so in a significant way in the face of politically strengthened domestic business groups.<sup>90</sup>

This momentum culminated in the 1991 reforms lead by then Finance Minister Manmohan Singh, who implemented significant reforms of economic liberalization.<sup>91</sup> The reforms included a continuing and increase of the reforms under Rajiv Gandhi, including increased privatization of state-owned industries, tax concessions, and deregulation.<sup>92</sup> However, the later reforms also included a significant move towards opening the economy to more international trade and capital—the currency was devalued, import quotas were dropped, tariffs came down, and a variety of restrictions on financial transactions were eased.<sup>93</sup> The reforms throughout the 1990s also included—as Kohli phrases it—"a sharply pro-business" re-orientation of industrial policy by further elimination of licensing requirements, relaxation of antitrust restrictions, and "some efforts to defang India's well entrenched and activist labor movement."<sup>94</sup> As

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87. See AHMED & VARSHNEY, *supra* note 76, at 29; see also KOHLI, *supra* note 20, at 108.

88. See KOHLI, *supra* note 20, at 106.

89. See *id.* at 33–35, 107.

90. See *id.* at 33–35. Starting the narrative of liberalization earlier than the 1991 reforms places them in a slower, more deliberate context. Manmohan Singh was able, in part, to implement the vast range of reforms that he did because Gandhi had already moved the country a bit away from the rhetoric of socialism.

91. See AHMED & VARSHNEY, *supra* note 76, at 30. It is interesting to note that during the 1991–1992 budget speech where Manmohan Singh announced these changes, he referred to 'modern,' 'modernization,' or some form of the word a total of eight times. See Shri Manmohan Singh, Minister of Fin., Budget 1991–92 Speech (July 24, 1991), available at <http://indiabudget.nic.in/bspeech/bs199192.pdf>.

92. See Singh, *supra* note 91. He had been calling for these reforms well before the balance of payments crisis that precipitated them. See KOHLI, *supra* note 20, at 112. The system he implemented had been "developing in his mind since the 1960s, when he wrote his PhD thesis about foreign trade." DASGUPTA, *supra* note 6, at 57.

93. See KOHLI, *supra* note 20, at 12, 112.

94. *Id.* at 39.

Kohli goes on to note, these changes were interpreted by the private sector as “highly favorable to them.”<sup>95</sup>

As a result of the market-based focus of the reforms described above, the engines of the economy moved from agriculture and industry to finance and service. In 1980 agriculture was 38.6% of the GDP, industry was 24.2%, and service was 37.2%.<sup>96</sup> The transition to capitalism and service is evidenced in the current GDP. While agriculture and industry still form a considerable bulk of the GDP (17.4% and 25.8% respectively), service now accounts for 56.9% of the economy and is growing at a faster rate than both agriculture and industry.<sup>97</sup> The service industry is largely dominated by the production of urban financial centers and service-oriented corporations (such as call centers).<sup>98</sup>

The shift in economic policy and the messages it signaled has resulted in the rise of private capital as a powerful interest group and the gradual decrease in power of other interests that were against the initial reforms.<sup>99</sup> After the unfolding of the capitalistic economy over the past few decades, the change of relationship between the state and private capital is apparent. The state, as Kohli notes, cannot “afford to go against the interests of private capital” if they want to promote economic growth and now “needs to ensure the conditions

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95. *Id.*

96. ARVIND PANAGARIYA, *INDIA IN THE 1980S AND 1990S: A TRIUMPH OF REFORMS* tbl.8 (2003), available at <https://www.imf.org/external/np/apd/seminars/2003/newdelhi/pana.pdf>.

97. These are 2013 sector totals from the CIA. *The World Factbook: India*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html> (last updated June 22, 2104) (noting the 2013 sector totals); WORLD BANK, *INDIA AT A GLANCE* (2014), available at [http://devdata.worldbank.org/AAG/ind\\_aag.pdf](http://devdata.worldbank.org/AAG/ind_aag.pdf) (stating the rate of growth). From 2002–2012, the rate of growth for agriculture and industry were 3.8% and 8.3% respectively. *The World Factbook: India*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html> (last updated June 22, 2104). For service, it was 9.5%. *Id.* However, in 2012, agriculture and industry grew at 1.4% and 1%, respectively, and service grew at 7%. *Id.*

98. See generally JAIDIT BRAR ET AL., MCKINSEY & CO., *INDIA’S ECONOMIC GEOGRAPHY IN 2025: STATES, CLUSTERS AND CITIES* 49 tbl.B2 (2014), <http://www.governancenow.com/files/Indias%20economic%20geography%20in%202025%20States%20clusters%20and%20cities.pdf>; RREEF RESEARCH, *BUILDING UP INDIA: OUTLOOK FOR INDIA’S REAL ESTATE MARKETS* 14–15 (2006); SHIRISH SANKHE ET AL., MCKINSEY GLOBAL INST., *INDIA’S URBAN AWAKENING: BUILDING INCLUSIVE CITIES, SUSTAINING ECONOMIC GROWTH* (2010); Uma Kapila, *Services in the Indian Growth Process*, in *INDIA’S ECONOMIC DEVELOPMENT SINCE 1947*, at 529 (Uma Kapila ed., 3d ed., 2008); *The World Factbook: India*, *supra* note 97.

99. See KOHLI, *supra* note 20, at 46. For a discussion of the various interest groups—including within the agricultural and industrial sectors—and their shifting political and economic powers, see *id.* at 38–46.

of the smooth functioning of the private sector” as it is the “main motor of capital accumulation.”<sup>100</sup> A recent publication by the Ministry of External Affairs illustrates Kohli’s characterization of the role of government towards capital well. In 2014, the Ministry, in cooperation with the worldwide consulting firm KPMG, released a report called *India in Business: Preferred Investment Destination* that highlighted not only the growing Indian economy, but the explicit support of the government in enabling private capital to invest and the relevant policy changes that have taken place to that effect.<sup>101</sup> In particular, the report notes that the “objective” of India’s foreign direct investment (FDI) policy is “to invite and encourage FI [foreign investment] in India.”<sup>102</sup> This explicit support can be seen in sharp contrast to the relatively closed borders just several decades ago. The issuance of this report, its detailed information, accessible language, and sophisticated design speak volumes of a government oriented towards pleasing a global audience of investors. This theme—the ways in which government has been implicitly and explicitly supportive of private capital through its policies and its articulation of values—is picked up again in the analysis of the judiciary in Part IV.

The current form of capitalism that characterizes the Indian economy can be described as embodying a variety of the features of “neoliberalism.” While the definition of “neoliberalism” might appear to be in the eye of the beholder, it is generally accepted that it is driven by various ideas that favor a focus on the so-called “free market” over the state in economic growth, free trade, the individual, strong property rights, and the non-interventionist state, and that it has been in ascendancy in development policies since the 1970s.<sup>103</sup> David Harvey highlights the insidious aspects of this “class project” by noting that “[m]asked by a lot of rhetoric about individual freedom, liberty, personal responsibility and the virtues of privatisation, the free market and free trade,” the project “legitimised

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100. *Id.* at 46.

101. MINISTRY OF EXTERNAL AFFAIRS, GOV’T OF INDIA, *INDIA IN BUSINESS: PREFERRED INVESTMENT DESTINATION* (2014). In the introductory letter to the document, Minister of External Affairs Salman Khurshid states that “[t]he economic reforms carried out by the government has emphasized on creating an investor friendly environment which includes opening up foreign direct investment in most sectors. India is committed to carry forward the economic reforms to ensure the fulfillment of developmental aspirations of its people.” *Id.* at e.

102. *Id.* at 9.

103. See generally Neil Brenner & Nik Theodore, *Preface* to SPACES OF NEOLIBERALISM: URBAN RESTRUCTURING IN NORTH AMERICA AND WESTERN EUROPE, at vi (Neil Brenner & Nik Theodore eds., 2002); DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005).

draconian policies designed to restore and consolidate capitalist class power.”<sup>104</sup> While the form of neoliberalism found in India differs in some degree from other forms of neoliberalism found elsewhere (for example, in the fact that the State has not entirely receded and that deregulation has occurred in some but not all areas of the finance and the economy), the decades following economic liberalization nevertheless demonstrate significant moves towards many of its tenets as described above. The salient results of these moves for the purpose of this project—inequality, urbanization, and the growth of slums—are discussed below. Another feature, the increase of strong property rights, is discussed in Part IV.

Unfortunately, while the reforms of economic liberalization have had a profound effect on the Indian economy in increasing the rates of growth, they have also increased inequality, as other literature has discussed at length.<sup>105</sup> This has led to a perception that there are “two Indias, one shining and the other bleak . . . .”<sup>106</sup> The dichotomy is meant to reflect the differences in living standards between the rich (or, as I would rephrase—middle class) and the poor.<sup>107</sup> The existence of and dynamic between these two Indias plays out in particularly stark terms in urban settings, where spaces that used to accommodate a range of Indias are now being designated for the shining one, as explored in the next Part.

The rise of this “shining” India is, of course, closely aligned with private capital and urbanization.<sup>108</sup> As of 2012, sixty percent of economic activity was a result of urban residents.<sup>109</sup> This has several implications. First, places of residence have changed from rural to

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104. DAVID HARVEY, *THE ENIGMA OF CAPITAL AND THE CRISES OF CAPITALISM* 10 (Oxford Univ. Press 2010).

105. *See, e.g.*, FRANKEL, *supra* note 42, at 598–608, KOHLI, *supra* note 20, at 13–14. According to Manmohan Singh, who perhaps hoped for too much, the poor would not be left behind during liberalization. During his 1991–92 budget speech, he declared that during the period of “transition,” the government would “endeavour to minimise the burden of adjustment on the poor” and that they were “committed to adjustment with a human face.” Singh, *supra* note 91, ¶ 8. *But see* KOHLI, *supra* note 20, at 69 (arguing that inclusionary rhetoric decelerated after 1980).

106. AHMED & VARSHNEY, *supra* note 76, at 2, 36. Note that the word “shining” was found in the political campaigns of the BJP, the Hindu political party, in 2004 to capture economic hope. *See The Man Behind ‘India Shining’ Slogan*, REDIFF.COM (Apr. 2, 2004), <http://www.rediff.com/money/2004/apr/02shining.htm>; *see also* KOHLI, *supra* note 20, at 13–14, 64.

107. *See* AHMED & VARSHNEY, *supra* note 76, at 2.

108. Regarding the complexities of the relationship between capitalism and urbanization, *see generally* David Harvey, *The Right to the City*, 53 *NEW LEFT REV.* 23 (2008).

109. KOHLI, *supra* note 20, at 43.

urban. Second, places of residence, consumption, and work have to be built, and real estate has become a significant outlet for domestic and international capital.<sup>110</sup> Third, the middle class is now more closely associated with business, and has come to see their success as part of the pro-business story.<sup>111</sup>

Moreover, the rise of slums is not separate from that of capitalism and urbanization.<sup>112</sup> Tayyab Mahmud has eloquently discussed the various forces that render slums a product and facilitator of neoliberal global capitalism. He notes that “urban slums are produced by three inter-linked and enduring features of capitalism that have been accentuated by neoliberalism . . . .”<sup>113</sup> The first of these is “accumulation by dispossession,” David Harvey’s concept of how “markets always rely on non-market forces, particularly legal orders and extra-legality, to disproportionately allocate power and resources to owners of capital.”<sup>114</sup> This concept, in particular the recognition of legal orders and the allocation of resources, is important for the discussion that follows in Parts III and IV. “Accumulation by dispossession” is strengthened by and produces the second and third of the features to which Mahmud refers: the existence of a “reserve army of labor”—the presence of “populations separated from their non-capitalist means of subsistence but not integrated into the productive circuits of wage labor on a stable basis”<sup>115</sup>—and the “informal sector of the economy”—the places these populations go to live and work.<sup>116</sup> The presence of these factors is massive. As of 2013, as Credit Suisse has calculated, over half of the GDP and ninety

110. *See infra* Part IV.

111. KOHLI, *supra* note 20, at 51.

112. *See generally* DAVID HARVEY, *THE NEW IMPERIALISM* (2003); Tayyab Mahmud, “*Surplus Humanity*” and the Margins of Legality: Slums, Slumdogs, and Accumulation by Dispossession, 14 *CHAP. L. REV.* 1 (2010).

113. Mahmud, *supra* note 112, at 4–5.

114. *Id.* at 11 (internal citation omitted).

115. Tayyab Mahmud, *Cheaper Than A Slave: Indentured Labor, Colonialism, and Capitalism*, 34 *WHITTIER L. REV.* 215, 219 (2013). In India, as we will see in the next Part, such populations consist of displaced rural farmers looking for work who end up living in urban slums and informal housing.

116. *See* Mahmud, *supra* note 112, at 4–5, 17, 24; Sharit K. Bhowmik, *A Raw Deal?*, *SEMINAR MAG.*, July 2000, available at <http://www.india-seminar.com/2000/491/491%20s.k.%20bhowmik.htm> (citing HEATHER JOSHI & VIJAY JOSHI, *SURPLUS LABOUR AND THE CITY: A STUDY OF BOMBAY* (1974); *MUMBAI METRO. REGION DEV. AUTH., DRAFT PLAN FOR 1995–2005* (1997)); *see also* Arvind Rajagopal, *Violence of Commodity Aesthetics: Hawkers, Demolition Raids and a New Regime of Consumption*, *ECON. & POL. WKLY.*, Jan. 5, 2002, at 65.



percent of the total workforce is in the informal sector.<sup>117</sup> Focusing on this inter-dependency of slums and neoliberal capitalism, it becomes clearer how the existences of “bleak India” within urban centers are constitutive the story of growth after economic liberalization.

The first two Parts of this Article have discussed the theoretical engagements of the judiciary with economic forces (Part I), and then the transformation of the economy to a capitalistic, urbanized one (Part II). We can now return to the judiciary—this time to study it as the specific site of articulation of values that reflect and reshape city spaces through the analysis of slum clearance cases, before exploring the neoliberal development of cities around these values.

### III. URBANISM, THE EMERGENT MIDDLE CLASS, AND THE SLUM RESIDENT IN CASE LAW

With the transitions described above—towards capitalism, an increasingly service-based economy, and cities as the places of economic productivity—the setting of popular imaginaries of India seems to have moved as well from the rural to the urban.<sup>118</sup> This can be observed in fiction,<sup>119</sup> narrative nonfiction,<sup>120</sup> and film<sup>121</sup> in their attempts to capture the spectacle of the urban with increasing fascination and detail. Cities are revealing places to locate the current ways of being, the current versions of modernity in India. They are the places where the varied activities in any particular space are negotiated, accommodated, claimed, and re-claimed not just daily, but moment by moment. A sidewalk may simultaneously serve as a

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117. NEELKANTH MISHRA & RAVI SHANKAR, CREDIT SUISSE, INDIA’S BETTER HALF: THE INFORMAL ECONOMY 1 (2013), *available at* [https://www.credit-suisse.com/newsletter/doc/apac/aic2013/20130712\\_indiamkt.pdf](https://www.credit-suisse.com/newsletter/doc/apac/aic2013/20130712_indiamkt.pdf); *cf.* Bhowmik, *supra* note 116 (citing JOSHI & JOSHI, *supra* note 116) (reporting that in 1961, sixty-five percent of Mumbai’s economy was employed in the formal sector and the remainder in the informal, with those proportions being reversed thirty years later).

118. SANKHE ET AL., *supra* note 98, at 37 (noting that urbanization is occurring at a stunning pace in India—as much as thirty percent of the population resided in cities as of 2010, and forty percent is expected to by 2030).

119. For example, see the 2008 Booker Prize-winning novel, ARAVIND ADIGA, *THE WHITE TIGER* (2008).

120. *E.g.*, KATHERINE BOO, *BEHIND THE BEAUTIFUL FOREVERS* (2012); DASGUPTA, *supra* note 6; SONIA FALEIRO, *BEAUTIFUL THING: INSIDE THE SECRET WORLD OF BOMBAY’S DANCE BARS* (2010); SUKETU MEHTA, *MAXIMUM CITY: BOMBAY LOST AND FOUND* (2004); AMAN SETHI, *A FREE MAN* (2011).

121. *E.g.*, *SLUMDOG MILLIONAIRE* (Warner Brothers 2008). A variety of recent Bollywood films relish scenes of a gritty urban life. *E.g.*, *DEV D.* (Anurag Kashyap Films 2009). *But see* *PEEPLI LIVE* (Aamir Khan Productions 2010) (a widely seen depiction of rural life).

place to work, a place to sell things, a place to walk, a place to eat, or a place to rest. This multiplicity of users and uses is exactly what is at risk when values such as certainty and formality become more powerful than those forces that previously tempered it—diversity and accommodation—and are sought to be codified in spatial structures, lifestyles, and the law. In short, city spaces are where Indian democracy most dramatically plays out in ways that stretch and test the Indian versions of modernity and inclusion, and force it to prioritize the sharing of resources or the certainty of formality. They are “dramatic scenes of Indian democracy: places where the idea of India is being disputed and defined anew.”<sup>122</sup>

In these scenes of democracy, the judiciary plays various leading roles. Through the history of development, the formulation of property rights by the judiciary has worked to allocate resources towards certain groups. In the cases that follow, once again disputes as to the rights of citizens to use space come before the courts. In these cases, the judiciary has to decide between competing claims of use and entitlement. These claims are brought by a variety of claimants: NGOs and activists on behalf of slum residents,<sup>123</sup> an environmental activist for waste management in Delhi, and residents nearby a slum. In the courts’ implicit and explicit valuation of these claims, they redefine who has a legitimate claim to which space, and they show us how the judiciary continues to have a powerful influence on resources and the economy.

This exploration reveals support for lifestyles of the new middle class as an underlying motif in these cases. The ways of life alluded to in them are significant facets of the new modernity which, as we explore in the next Part, is characterized by disciplined and clean citizens and cities welcoming international capital and real estate investment. Such investment directly sustains these lifestyles through the construction of high-end residences, corporate office towers, and new malls and shopping centers.<sup>124</sup>

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122. KHILNANI, *supra* note 36, at 109.

123. These claims are brought through a process called “Public Interest Litigation” (PIL) where the *locus standi* requirements are reduced for cases involving right to life claims under Article 21. With this softening of standing, “any public spirited citizen [can] move the courts on behalf of a person or persons who may not have the social or financial capacity to move the courts themselves.” Prashant Bhushan, *Supreme Court and PIL: Changing Perspectives Under Liberalisation*, ECON. & POL. WKLY., May 1, 2004, at 1770 [hereinafter Bhushan, *Supreme Court*]; see also Prashant Bhushan, *Misplaced Priorities and Class Bias of the Judiciary*, ECON. & POL. WKLY., Apr. 4, 2009, at 32 [hereinafter Bhushan, *Misplaced Priorities*].

124. See SANKHE ET AL., *supra* note 98, *passim*.

Through their decisions, courts do more than apply law and decide cases, or even choose between claimants, rights, and their perceived interests. Through their use of language, their framing of rights and narratives, holdings, and rulings, they can be seen as aiding in the construction of particularly legalized, but also—through the normative reference to the values of modernity which are portrayed as being at stake in these concrete cases—legitimized, urban uses of space. But, the courts' agency in constructing normativity goes beyond that because the rights of the individuals caught up in these decisions themselves become a matter of judicial intervention and construction. When courts endorse the governing body's rendering of a 'modernist' use of land, for example, they simultaneously legitimize particular ways of life and, by consequence, the subject associated with those lifestyles. And so, a close look at land use jurisprudence reveals the legal processes through which other populations get dropped through the cracks of the economic structural shifts explored in Part II by being (implicitly) designated as outside of the project of modernity.

From the recognition of the right to life of slum and pavement residents in *Olga Tellis* to the more recent cases which declared that such residents should have no rights to rehabilitation, the cases in this trajectory illustrate the shift in legitimacy regarding the use of urban space. This Part situates this transition within these cases—in order to understand *how* slum residents are being further disenfranchised through legal discourse, and how deeply embedded such justifications are in the most recent formulations of modernity in legal, political, and economic discourse in India.

#### **A. *Olga Tellis* and the Narrative of History, Circumstances, and a Respect for Pluralistic Contributions to Urban Life**

The foundational case of modern treatment of slum residents is *Olga Tellis*, a Supreme Court case from 1985 in which pavement and slum residents in Bombay brought suit against the state and local government for their plans to remove them.<sup>125</sup> They alleged, *inter alia*, that (1) the government removal of pavement and slum residents violated their right to life (enshrined in Article 21 of the Indian Constitution) by precluding access to their ability to earn livelihood, and (2) this removal would also violate a property claim regarding a right to occupy public land.<sup>126</sup> The government claimed that the

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125. *Olga Tellis v. Bombay Mun. Corp.*, (1985) 3 S.C.C. 545 (India).

126. *Id.* ¶ 2.

residents did not have any rights to trespass public land and prevent free movement of pedestrians on sidewalks.<sup>127</sup>

On the first claim, the Supreme Court found in favor of the pavement and slum residents, with certain qualifications. They set certain conditions for the removal of slums sympathetic to slum residents, including that slums which had been in existence for more than twenty years and which had been “improved and developed” would not be removed unless the land on which they stand or the appurtenant land was required for public purposes, in which case, alternate sites or accommodation would be provided.<sup>128</sup>

Regarding the second argument, that slum residents had a right to be on public property, the Court did not find for the residents, and stated that “no person has the right to encroach . . . on footpaths, pavements or any other person reserved or earmarked for a public purpose.”<sup>129</sup> The language is unequivocal and indicated that such a person “becomes a trespasser.”<sup>130</sup>

While *Olga Tellis* is groundbreaking, and a high point for those who are forced to live on pavement and in slums, it merits still further exploration, given the trajectories that have followed from it. It is true that the Court’s ruling is more accommodating of the rights of pavement and slum residents than what might have been expected. The argument here, however, is that the significance of the decision lies in large part with the way that pavement and slum residents are respected as citizens and individuals (to some extent) and how legitimate uses of space are constructed. Moreover, as explained below, the qualifications<sup>131</sup> to the provision of alternative sites of residence left the law open for later reinterpretation and narrowing.

Three narrative threads in the case reflect the Court’s recognition of the ways in which these populations were being left out of the benefits of development, while bearing the brunt of shifts in the economy as it moves towards privatized industrialization and service. These narrative themes are: (1) the historical and economic circumstances of their marginalization, (2) their intent to reside where they do, and (3) their contributions to urban life. This respect for

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127. *Id.* ¶ 11.

128. *Id.* ¶ 57.

129. *Id.*

130. *Id.* ¶ 43. Note the mention of ‘necessity,’ but petitioners arguing for the higher ideal that property is meant to subserve the common good, questioning the function of property in a welfare state. *Id.* ¶¶ 24–25.

131. The court does rule for rehabilitation in this case, but it qualifies this by reiterating many times that this ruling does not *require* rehabilitation as a prerequisite for removal. *Id.* ¶¶ 37–46.

their agency and the recognition of the role of the state and market in creating these circumstances and constraints on their ability to live with dignity all but disappear in the later opinions discussed below.

### 1. *History of Displacement*

An acknowledgement of how slum residents ended up in their living situations permeated the opinion and drove the ruling. Bombay and Delhi (like many other cities) do not have public or low cost housing. Though such housing is provided for in various city plans, there has been no significant implementation of these provisions.<sup>132</sup> The residents who live in slums and on pavements are often displaced rural populations who moved to the cities for better employment opportunities as the primary engines of the economy moved from rural to urban settings. The common sequence of events which led to these slum residents living on the outskirts of legality was recognized in *Olga Tellis*:

[O]ne of the main reasons of the emergence and growth of squatter-settlements in big Metropolitan cities like Bombay, is the availability of job opportunities which are lacking in the rural sector. The undisputed fact that even after eviction, the squatters return to the cities affords proof of that position . . . . These facts constitute empirical evidence to justify the conclusion that persons in the position of petitioners live in slums and on pavements because they have small jobs to nurse in the city and there is nowhere else to live. Evidently they choose a pavement or slum in the vicinity of their place of work, the time otherwise taken in commuting and its cost being forbidding for their slender means.<sup>133</sup>

Once these residents find themselves in slums and pavements, they often are subject to cycles of demolition and displacement in the name of development or, more recently, beautification. Rehabilitation and relocation for these residents is spotty and rarely delivered, if promised at all.<sup>134</sup> This history of the economic shifts recognized here (and explored above in Part II) is relevant to understanding the limited choices of poor urban populations with respect to employment and residence. This history is lost in

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132. See, e.g., DELHI DEV. AUTH., CENT. GOV'T, MASTER PLAN FOR DELHI 6 (1962) [hereinafter 1962 MASTER PLAN] (detailing how housing for low income residents and low income migrants must be built and made available to them); see also DELHI DEV. AUTH., CENT. GOV'T, MASTER PLAN FOR DELHI 12-15 (1990) (discussing various schemes to improve the housing shortage for low income people).

133. *Olga Tellis*, (1985) 3 S.C.C. ¶ 36.

134. See discussion *infra* Part III.B.3.

subsequent cases when the recognition of the context of how and why residents live on the streets or on other public land does not appear to be a factor in the courts' decisions. Once this history is not acknowledged, the logic of accommodation of their circumstances falls away. Slum residences appear to be trespassers, occupying urban spaces for no clear reason except opportunism, and are then deemed undeserving of minimum welfare provisions.

## 2. *Intent and Circumstance*

After recognizing the prevalence of rural unemployment which compels many to move to the cities, the Court recognized that the petitioners had not intended to “‘commit an offence or intimidate or annoy any person,’ which is the gist of the offence of criminal trespass under Section 441 of the Penal Code.”<sup>135</sup> Instead, the Court observed that:

They manage to find a habitat in places which are mostly filthy or marshy, out of sheer helplessness. *It is not as if they have a free choice to exercise as to whether to commit an encroachment and if so, where. The encroachment committed by these persons are involuntary acts in the sense that they are not guided by choice.*<sup>136</sup>

By disavowing the petitioners of ‘intent’ to encroach, the Court prevents them from being found in criminal trespass. This lack of criminalization is significant. It rests on an understanding of how and why these populations are living on land that is not legally theirs to possess. Moreover, it respects the resilience of the marginalized to survive through their own hard work and determination. Living on pavement is not an ideal circumstance, nor is it conducive to a life with emotional or physical security or health. And yet, these populations survive in such situations, and the Court, in avoiding criminalization, refrains from further de-humanizing them and their existences. It is only through the recognition of the history and structural economic conditions that this characterization of a lack of intention to offend appears to be a natural conclusion. And, when such history is left behind in subsequent opinions, the door is left open for criminalization, or at least illegitimacy, to reappear.

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135. *Olga Tellis*, (1985) 3 S.C.C. ¶ 49.

136. *Id.* (emphasis added).

3. *Recognition of Individuality and Contributions of this Population to Urban Life*

The Court also articulates respect for these citizens by building a record of facts based on their very high employment figures and skills.<sup>137</sup> They also refer to several individuals, including a college graduate and a poet.<sup>138</sup> This recognition of individuals both humanizes and builds respect for the agency of these populations in the audience—be it a legal or popular one. These are not masses of indistinguishable poor, at least according to parts of the opinion.<sup>139</sup>

That said, though, the valuation is primarily justified based on economic considerations regarding this population's productivity, without regard to the communities they have formed which eviction would disrupt or their value simply as human beings. In later opinions and in later times, the citizen-agent of economic productivity is no longer the general working citizen, but rather the urban middle class consumer. As explained further in Part IV, once this shift happens, the slum resident is no longer seen as economically productive (despite their actual employment), and is considered to be a drag on the modern economy and beautified city.

**B. *Olga Tellis*' Progeny Post Economic Liberalization**

Various cases interpreted *Olga Tellis* first faithfully<sup>140</sup> and then increasingly narrowly, with fewer allowances of rehabilitation for the pavement or slum residents.<sup>141</sup> This section explores three cases since economic liberalization that narrowed the abilities of the urban poor to stay in their residences or access alternative ones and the rhetoric used by courts in justifying this. Reading later cases, the declining legacy of *Olga Tellis* becomes more apparent: these cases rely on each other and not on *Olga Tellis* in their endorsement of the attitude adopted towards the urban populations. These opinions weave an account of the circumstances of populations that is tied up with conceptions of morality, hygiene, and modernity. The impact that

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137. *Id.* ¶ 50.

138. *Id.*

139. *E.g., id.*

140. *See, e.g.,* Ahmedabad Mun. Corp. v. Nawab Khan Gulab Khan, A.I.R. 1997 S.C. 152; Chameli Singh v. State of U.P., A.I.R. 1996 S.C. 1051 (India); Shantistar Builders v. Narayan K. Totame, A.I.R. 1990 S.C. 630 (India); *see also* Jayna Kothari, *A Right to Housing?*, INDIA TOGETHER (Apr. 2002), *available at* <http://indiatgether.org/opinions/rhousing02.htm>.

141. *See* Kothari, *supra* note 140; Usha Ramanathan, *Illegality and the Urban Poor*, ECON. & POL. WKLY., July 22, 2006, at 3193.

this use of precedent has had on the rights position of the affected population could not have been more stark: not only did the change in the law lead to an illegalization<sup>142</sup> of these populations' existences in their accustomed-to urban spaces, but the characterization of these places in particularly conceptualized urban societies (both physical and existential) through specific language and historical framing made these legal shifts appear natural and desirable.

The historical and socio-economic contexts of how these populations ended up in the slums that *Olga Tellis* acknowledged—rural displacement and a need for employment—is not recognized in these cases.<sup>143</sup> That history, if it had been told, might have included not only how these populations ended up in the spaces in which they resided, but also how the nature of the patronage-style relationship between elites and slum residents had changed in such a way that meant less accommodation and provision for the poor.<sup>144</sup> The loss of recognition of the structural constraints of development is also indicative of a turn from analysis that acknowledges the past (displacement, employment, migration) to analysis that aspires towards a particular future. In other words, the later cases are not without a temporal context—it is just that the direction of that temporality has changed. The opinions no longer look back to what has happened to populations and land; they look forward to a modern future, and in doing so, draw out aspirations as to how a city (and citizens) should look in that time.

Each of the three factors above—individuality, intent, and history—are discussed in the cases that follow. The analysis below highlights how each of these cases is useful for revealing the loss of a particular factor: *Almitra Pate*<sup>145</sup> for the loss of individuality and contribution; *Pitam Pura*<sup>146</sup> for the loss of intent; and *Okhla Factory Owners*<sup>147</sup> for the loss of history.

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142. See Ramanathan, *supra* note 141, at 3195–97 (describing the increasing illegalization of the poor through the post-2000 Delhi cases involving slum residents).

143. For an account of how many of the slum residents in Delhi came to live where they do, see Lalit Batra & Diya Mehra, *Slum Demolitions and Production of Neoliberal Space: Delhi*, in INSIDE THE TRANSFORMING URBAN ASIA: PROCESSES, POLICIES AND PUBLIC ACTIONS 391 (Darshini Mahadevia ed., 2008).

144. See generally Partha Chatterjee, *Are Indian Cities Becoming Bourgeois at Last?*, in BODY.CITY: SITING CONTEMPORARY CULTURE IN INDIA 171–85 (Indira Chandrasekhar & Peter C. Seel eds., 2003).

145. *Almitra Patel v. Union of India*, (2000) 2 S.C.C. 679 (India).

146. *Pitam Pura Sudhar Samiti v. Union of India*, (2002) I.L.R. 2 (Del.) 393 (Delhi H.C.).

147. *Okhla Factory Owners' Ass'n v. Gov't of Nat'l Capital Territory of Delhi*, (2002) 108 D.L.T. 517 (Delhi H.C.).



*1. Almitra Patel, or the Loss of Individuality*

In 2000, after economic liberalization, the Supreme Court heard *Almitra Patel v. Union of India*, a case that would have large implications for slum and pavement residents.<sup>148</sup> To understand the significance of this case in shifting the legality of residence, it must be studied both *structurally*: who the parties were, what the legal issue was, and what the ruling encompassed; as well as *rhetorically and contextually*: what the Court said in the written opinion and how they said it, what they did not say, and what the socio-economic conditions in Delhi were at the time. Almitra Patel, an environmental activist, brought the case against the city of Delhi regarding the issue of waste management.<sup>149</sup> Though the actual legal issue was Delhi's failure to institute an effective waste management system, the Supreme Court, in the course of its analysis, drew slum populations into the scope of the situation in several ways, as explained below. By the time they issued the ruling on sanitation and eradication of slums (discussed below), it appeared like a logical answer to the problems as they had been framed.

The case is actually a consequence of the Court's decision to review a number of directives it had issued several years before.<sup>150</sup> Part of those directives included orders that certain cities would undertake comprehensive implementation of sanitation measures.<sup>151</sup> *Almitra Patel* is where the Supreme Court and Delhi face off regarding the apparent noncompliance with this directive—in short, why the Delhi government has not been effective at “keeping the city clean.”<sup>152</sup>

The Court begins by lamenting the fact that the “historic city” of Delhi is now “one of the most polluted cities in the world.”<sup>153</sup> It discusses in detail the orders given to clean up which have not been followed, and the massive pollution, in particular with regards to solid waste.<sup>154</sup> Through the process of holding the Delhi government accountable for the ‘unclean’ state of the city, the court explores why the Delhi government has failed in this regard. In the course of this

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148. *Almitra Patel*, 2 S.C.C. 679.

149. This case was brought as Public Interest Litigation (PIL), which allows for flexibility regarding standing. *See id.* For an explanation of PIL and an argument regarding its trends, see generally VARUN GAURI, WORLD BANK, PUBLIC INTEREST LITIGATION IN INDIA: OVERREACHING OR UNDERACHIEVING? (2009), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5109>.

150. *Almitra Patel*, 2 S.C.C. ¶¶ 1–2.

151. *Id.* ¶¶ 1–3.

152. *Id.* ¶¶ 6–9.

153. *Id.* ¶ 1 (quoting *Wadhwa v. Union of India*, (1996) 3 S.C.R. 80 (India)).

154. *Id.* ¶ 3.

explanation, the court draws slum populations into the ambit of blame for the massive pollution of the entire city.<sup>155</sup> This results in a double condemnation of slum populations: first, for not being good workers or cleaning Delhi effectively; and second, for living on public land. Each point is explored in turn below.

In the Court's account, the Delhi government's ineffectiveness at alleviating or preventing pollution can be traced to its ineffectiveness in managing its own sanitation workforce: "[t]olerating filth, while not taking action against the lethargic and inefficient workforce for fear of annoying them, is un-understandable and impermissible."<sup>156</sup> The opinion does not explore in detail who this "lethargic and inefficient workforce" is. It is possible that the Court meant middle-management of the Delhi government. That reading, however, is unlikely, as the Court also says that one of the local agencies alone employs approximately 40,000 people as '*safai karamcharis*' (sanitation workers, as explained further below) who are expected to work for eight hours a day and that, as noted by amicus curiae, "the [unsanitary] conditions of different areas of Delhi does not in any way show that the requisite effort has been put in or the required time spent in cleaning operations which are supposed to be carried out by this large workforce"<sup>157</sup>—observations which are clearly directed at the lowest workers, not the management. Given the uncritical referral of the amicus brief, it appears when the Court refers to lethargy and inefficiency, the court means the actual workers—who are, in the unacknowledged reality, making their living in incredibly harsh and unsafe conditions.

Despite characterizing them as part of the root of the problem, the Court leaves unexplained who these *safai karamchari* workers are. 'Safai karamchari' means, literally, 'cleanliness worker' and generally refers to people engaged with the most hazardous and polluted sanitation tasks. The term includes (but is not limited to) those engaged with 'manual scavenging'—the practice of cleaning out dry latrines and sewage by hand. These workers – some of whom are regularized (i.e., receive benefits from their employers) and many of whom are not (daily wage earners or contract labor)—are some of the most marginalized populations in the country. They overwhelmingly come from lower castes communities and most of them are female. There have been numerous efforts (including from public authorities)

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155. *Id.* ¶¶ 7–9.

156. *Id.* ¶ 12. Moreover, characterizing the poor as an ineffective workforce puts them in tension with the ideals of a capitalist form of modernity. See *infra* Part IV.

157. *Almitra Patel*, 2 S.C.C. ¶ 8.

to document their inhumane treatment and to improve their conditions, but despite later legislation and cases in their favor, the employment of people to do such work remains a widespread and terrible problem.<sup>158</sup>

In the Court's account of why Delhi is not clean, not only are these workers drawn into the narrative for failing to do their jobs, but the slum areas where workers such as these often live are brought in as well. This is a second condemnation of these populations—the Court first conflates them with land mafia:

Large areas of public land, in this way, are usurped for private use free of cost. It is difficult to believe that this can happen in the capital of the country without passive or active connivance of the land owning agencies and/or the municipal authorities. The promise of free land, at the taxpayers' cost, in place of a jhuggi,<sup>159</sup> is a proposal which attracts more land grabbers. Rewarding an encroacher on public land with 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.<sup>160</sup>

and then subsequently blames them for the increase in garbage and waste in the entire city:

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 . . . . It is the

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158. For more on their situation and the attempts to eradicate this work, see *Safai Karamchhari Andolan v. Union Of India*, (2014) WP(C) No. 583, ¶ 2 (India), available at <http://indiankanoon.org/doc/6155772/>; *Delhi Jal Bd. v. NCDRSAW*, (2011) Civ. App. No. 5322, ¶ 10 (India), available at <http://www.hrln.org/hrln/dalit-rights/pils-a-cases/678-delhi-jal-board-versus-national-campaign-for-dignity-and-rights-of-sewerage-and-allied-workers-a-others.html>; SARITA BHOI, HUMAN RIGHTS LAW NETWORK, DIGNITY AND RIGHTS OF THE SEWERAGE AND ALLIED WORKERS 6 (2011), available at <http://hrln.org/hrln/dalit-rights/reports/735-book-released-dignity-and-rights-of-the-sewerage-and-allied-workers.html>; HUMAN RIGHTS WATCH, SUBMISSION TO THE CEDAW COMMITTEE: CONSIDERATION OF INDIA'S PERIODIC REPORT 58TH SESSION (2014), available at [http://www.hrw.org/sites/default/files/related\\_material/HRW%20submission%20to%20the%20Committee%20-%20CEDAW%20India%20-%20June%202014.pdf](http://www.hrw.org/sites/default/files/related_material/HRW%20submission%20to%20the%20Committee%20-%20CEDAW%20India%20-%20June%202014.pdf) (discussing rural manual scavenging); Saasha Malpani, *Supreme Court Judgment Striving to Fully Eradicate Manual Scavenging in India: Another Attempt in Vain?*, J. INDIAN LAW & SOC'Y (July 14, 2014), <http://jilsblognujs.wordpress.com/2014/07/14/supreme-court-judgement-striving-to-fully-eradicate-manual-scavenging-in-india-another-attempt-in-vain/>.

159. 'Jhuggi' is a term used in Indian discourse and by Indian courts to refer to slums. As such, it is used in this Article with reference to the judgments.

160. *Almitra Patel*, 2 S.C.C. ¶ 14; see also Usha Ramanathan, *Demolition Drive*, ECON. & POL. WKLY., July 2, 2005, at 2908.

garbage and solid waste generated by these slums which require to be dealt with most expeditiously and on the basis of priority.<sup>161</sup>

In condemning the Delhi government, the Supreme Court condemns, even more harshly, the people whom they see as the beneficiaries of Delhi's failures to protect public property. The Court does not distinguish between those who profit from slums and those who end up residing there, despite the lack of options they face for housing. The Court refers to slums as 'good business' for the land mafia who run them, but then uses this minority of people who benefit from opportunistic squatting and illegal rent to characterize entire populations in this way. They do not tell the full story of slums with recognition of the many others who live in slums because of little alternative, and who are beholden to such slumlords as the only way of having a physical place to reside in the city.

Telling the narrative in a way that causally connects these populations (in a de-individualized way) to the problem of waste and undeserving profiteering is powerful. From there, the Court puts the first wedge between slum residents and rehabilitation. The statement, "[r]ewarding an encroacher on public land with free alternate site is like giving a reward to a pickpocket," has been cited in numerous subsequent cases and in the news.<sup>162</sup> This declaration, despite being out of context given the narrow legal issue in the case, arrives after the narrative is presented, and is asserted uncritically and in apparent solution to the problem at hand.

The Court might have issued a narrow opinion regarding an empirical analysis of the specific order and what measures Delhi government did take regarding sanitation and had not been implemented effectively. However, it goes much beyond this and paints a clear picture of the dire situation—by narrating the Delhi government to be nearly completely ineffectual and the slum residents to be unjustly benefiting from, and polluting through the use

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161. *Almitra Patel*, 2 S.C.C. ¶ 14.

162. *E.g., id.*; *A.A.Das v. Mohanty*, (2014) WP(C) No. 11585, ¶ 8 (Orissa H.C.), available at <http://indiankanoon.org/doc/24175965/>; *Jagjit Singh v. Union of India* (2010) WP(C) No. 2806-2934/2004, ¶ 21 (Delhi H.C.); *Wazirpur Bartan Nirmata Sangh v. Union of India*, (2003) 103 D.L.T. 654 (Delhi H.C.), available at <http://indiankanoon.org/doc/1927946/>; *Okhla Factory Owners' Ass'n v. Gov't of Nat'l Capital Territory of Delhi*, (2002) 108 D.L.T. 517 (Delhi H.C.); *Tripti Lahiri, The Ground Beneath Our Feet*, TEHELKA MAG. (Dec. 12, 2009), <http://www.tehelka.com/the-ground-beneath-our-feet/?singlepage=1>; *Encroachments Cleared to Make Way for Drain*, NEW INDIAN EXPRESS (May 25, 2014), <http://www.newindianexpress.com/states/odisha/Encroachments-Cleared-to-Make-Way-for-Drain/2014/05/25/article2244541.ece>.

of, space that is not theirs to use.<sup>163</sup> Despite the fact that these slum populations (and their conditional right to rehabilitation) was not the issue of the case, the right to rehabilitation gets chipped away by the time the opinion is done.

After this exposition regarding how migrants and slums are at fault, the Court ultimately directs the Delhi government to ensure that new “encroachments” are not created and that existing ones should be improved with regard to sanitation until they can be removed,<sup>164</sup> to create adequate compost plants, and to appoint adequate numbers of magistrates to enforce laws in relation to litter, nuisance, sanitation, and public health.<sup>165</sup> The case effectively intertwines issues of sanitation, slum populations, and law enforcement in the legal imagination—a combination which would then underlie later cases and rulings.

## 2. Pitam Pura, or the Loss of Recognition of Circumstance

Two years later, the Delhi High Court heard *Pitam Pura Sudhar Samiti v. Union of India*—the next case that moved urban slum populations even further away from occupying spaces in the city or even from rehabilitation on its edges. In *Pitam Pura*, in keeping with common practice, the Delhi High Court combined multiple petitions with similar legal issues and issued an opinion meant to apply to all of them.<sup>166</sup> The various petitions came with two sets of arguments and stances—the first, from residents of middle class colonies nearby to slums seeking eradication of slums, and the second, from residents of slums seeking government provisions or rehabilitation.

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163. *Almitra Patel*, 2 S.C.C. ¶ 14.

164. *Id.* ¶ 21.

165. It should be noted, however, that according to some, the case is also what led to “Municipal Solid Waste Management Rules”—perhaps a bright moment, though the implementation of such rules remains scant. Asha Sridhar, *A Woman’s Battle to Keep Waste from Ending Up in Landfills*, THE HINDU, Aug. 15, 2013, <http://www.thehindu.com/news/cities/chennai/a-womans-battle-to-keep-waste-from-ending-up-in-landfills/article5023257.ece>. It should also be noted that, from a read of her website, the activist Almitra Patel who brought the case for the purpose of waste management, also advocates for more recognition of the contributions and less vilification of slum residents. See *Solid Waste Management*, ALMITRAPATEL.COM, [www.almitrapatel.com](http://www.almitrapatel.com) (last visited Nov. 21, 2014). For an analysis of how these cases signify a shift in how nuisance has been redefined in the opinions of the last ten years—from activities in the slum which constitute nuisance to the slums themselves as nuisance, see generally D. Asher Ghertner, *Analysis of New Legal Discourse Behind Delhi’s Slum Demolitions*, ECON. & POL. WKLY., May 17, 2008, at 57.

166. *Pitam Pura Sudhar Samiti v. Union of India*, (2002) I.L.R. 2 (Del.) 393, ¶ 1 (Delhi H.C.).

In explaining the first set, the Court quoted from one of the petitions which detailed how the jhuggi cluster had come up in the previous three to four years, how they had caused many miseries on the residents, and how the Delhi Development Authority (DDA) had visited and ordered that the area should be cleaner.<sup>167</sup> In order to be cleaner, according to the petition, the DDA declared that the area the slum residents were using to ease themselves was meant to be “green” and “beautiful” and that, therefore, the slum population should be “restricted” to the area outside of the green area, with latrine facilities.<sup>168</sup> The quoted petition also stated that the DDA’s orders included that there should be four to five *chowkidars* (guards) to keep the area clean.<sup>169</sup> It appears that these directions, however, were not implemented, and the resulting situation had given rise to these petitions.

Applying the second set of petitions—those of the slum residents—the Court referred to one petition that narrated the following: the lack of rural employment that led to their migration to cities; the fact that jhuggi populations such as this one comprised twenty-five percent of Delhi population; and how these populations supply a major portion of the work force—from manual jobs in both domestic and commercial fields to more skilled jobs in the industrial sectors—in effect, “making a significant contribution to the economic life of the city.”<sup>170</sup> The petition also alleged that the failure of the Municipal Corporation of Delhi (MCD) to eradicate poor drainage systems caused the contaminated water in their residences that attracted mosquitoes and created serious health consequences for the local populations.<sup>171</sup> As the Court quoted, the petition also discussed how there have been numerous policy decisions to upgrade their slum, but that nothing ever transpired from them.<sup>172</sup> Finally, the petitioner cited to Article 21 for the Right to Life, noting that it included the right of shelter and basic facilities to enable each citizen to live his life with minimum human dignity.<sup>173</sup>

After laying out these petitions, the Court built another narrative for how Delhi has ended up with the huge housing shortage that resulted in this slum. The turn away from the contextual narrative

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167. *Id.* ¶¶ 3–6.

168. *Id.* ¶¶ 3–4.

169. *Id.* ¶ 4.

170. *Id.* ¶ 7.

171. *Id.* ¶ 7.

172. *Id.* ¶¶ 7–10.

173. *Id.* ¶ 8.

given by the slum residents above is subtle at parts—the Court sympathized with those without housing when it noted “the misery of the homeless” in having to pay slum lords but ultimately conflated these populations and held the Delhi government responsible for failing to prevent the growth of slums.<sup>174</sup>

In its exploration of the cause of the housing shortage, the Court first analyzed the history of the DDA—whose purpose was the “orderly development of the city.”<sup>175</sup> The orderly development was meant to be accomplished through the various ‘Master Plans’ of Delhi through the decades, which developed lands, provided basic amenities, and built residential and commercial complexes, “according to needs and aspirations of people.”<sup>176</sup> The Court then explored what has thwarted the accomplishment of these goals and finds that blame should be placed not only on the Delhi government who had failed at multiple points to prevent such “encroachments,”<sup>177</sup> but also on the “influx of people from all over the country” that has “posed [a] stupendous housing problem” resulting in “rampant construction activity, legal as well as illegal.”<sup>178</sup>

The Court listed various types of illegal construction and stated that they were only concerned with jhuggis here.<sup>179</sup> The court recognized that the “goal of every good administration is to have the capital city without slums,” and that this is a concern worldwide, but that “it is not necessary to address this issue in great detail.”<sup>180</sup> With that, the court moved its analysis to the “slum lords,” whom it saw as profiting from the illegal construction. Similar to *Almitra Patel*, the case furthers a certain story of who was benefiting from the slums. The Court spent significant energy on this point, including the following:

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174. *Id.* ¶ 19.

175. *Id.* ¶ 14.

176. *Id.*

177. After discussing the agencies’ civic duty to remove the jhuggis, it states:

[I]t does not require any great intelligence to know that it is because of the negligence, carelessness or rather active connivance of the officials of these Departments as well as others, at the helm of affairs that these encroachments take place and slums are created. In these petitions, itself, this Court passed Orders time and again to the effect that the concerned authorities including the Police Department shall ensure that no further Jhuggi/jhopri come up while the Court is considering these matters.

*Id.* ¶ 18.

178. *Id.* ¶ 14. The abridged nature of this history will be explored *infra* Part III.B.3.

179. *Pitam Pura*, I.L.R. 2 (Del.) ¶ 15.

180. *Id.* ¶¶ 16–17.

Countless slum lords who have cropped in public land are making large untaxed income every month out of the misery of the homeless. No doubt, shelter for every citizen is an imperative of any good government, but there are cleaner ways to achieve that goal than converting public property into slum lords' illegal estates.<sup>181</sup>

Once the existence of the slums is framed as primarily benefiting 'slum lords,' the only solution appears to be to demolish the slums. The Court opines that provision of shelter for the homeless cannot be in the form of these slums that benefit the slum lords—to do that would fail to distinguish “humanitarianism . . . from miscarriage of mercy.”<sup>182</sup>

What should happen to these homeless citizens, however, is left for another day, as the Court explicitly stated that it will address the eradication of jhuggis but not their rehabilitation. It did, however, close at least some doors to rehabilitation by ordering the demolition of slums not already protected by the Delhi government and the dismissal of petitions by the certain evicted populations, saying that the residents were “unauthorised occupants” living on “encroachments of public land” and therefore had “no legal right to maintain such a Petition.”<sup>183</sup>

Once the slums are seen as the projects of slum lords, and parts of their populations lose the right to petition their removal, then the narrative of the second set petitions laid out above—regarding the history of how they got there, the importance of their economic contribution, the lack of implementation of plans by the MCD—become moot points. The orders of the Court, then, did not have to include provisions for the welfare of these residents, and it expanded on the framing of the illegality and illegitimacy of the poor to reside in their homes.<sup>184</sup>

The order, which instructed the government to demolish slums that were not already specifically protected by government order, would have huge implications for further cases. Here was the Delhi High

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181. *Id.* ¶ 19.

182. *Id.*

183. *Id.* ¶ 20.

184. *Id.* ¶ 18 (stating “[t]here is large scale encroachment of public land by the persons who come from other States and after encroaching upon public land, they construct Jhuggi/jhopri . . . . There is no denying the fact that no person has right to encroach public land. It also goes without saying that if there is such encroachment it is the statutory duty cast upon the civic authorities like. M.C.D., N.D.M.C., as well as the DDA to remove such encroachments, be it by the lower strata creating slums or by other residents who encroach public land and make unauthorised constructions of big buildings thereon.”)



Court, one of the most influential courts in India, citing *Almitra Patel* with approval and reinforcing the framing of the urban poor and the duty of the local government to clear them from their spaces.

### 3. Okhla Factory Owners, or the Loss of History

Later that year, the Delhi High Court took this stance on the illegality of slum residences a step further and did away with almost all rights to rehabilitation. In *Okhla Factory Owners' Ass'n v. Government of National Capital Territory of Delhi*,<sup>185</sup> the Court again faced the situation of slum settlements on public land. In this case, the government had decided to develop land that it had acquired decades before from farmers. In constructing the history of the current situation, Justice Kaul's opinion provided a detailed account of various regulations that should be followed in the event of removal of a population.<sup>186</sup> It also detailed the history of the various resettlement policies and what the government provided to the populations.<sup>187</sup> While the opinion discussed the failure of government plans to effectively upgrade or rehabilitate existing slums, it framed the problem as one of limited resources: there is not enough land in Delhi, according to the Court, to accommodate these populations.<sup>188</sup>

Not unlike *Pitam Pura*, the Court blamed the migrants who came to Delhi every year in search of employment for the 'proliferation' of jhuggis/squatter settlements.<sup>189</sup> And in the end, it went on to place blame for the health environment of the entire city on these slums, despite some recognition of the housing shortage: "[t]his [lack of low-cost housing] has resulted in haphazard and unhygienic mushrooming of slums in the urban areas causing a lot of damage to the health environment of the city as a whole."<sup>190</sup>

Also like in *Pitam Pura*, the Court sympathized with the homeless by recognizing the paucity of low-cost housing but did not seem to take this sympathy into consideration in the ruling: the situation of the homeless might be unfortunate, but it did not make encroachment an option. And so while the opinion did acknowledge: "[i]t has been stated that the slums are products of structural inequality in the socio-economic development and that the authorities have been unable to

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185. *Okhla Factory Owners' Ass'n v. Gov't of Nat'l Capital Territory of Delhi*, (2002) 108 D.L.T. 517 (Delhi H.C.).

186. *Id.* ¶¶ 3–8.

187. *Id.* ¶¶ 4–22.

188. *Id.* ¶ 40.

189. *Id.* ¶ 8.

190. *Id.* ¶ 10.

provide affordable . . . low cost housing,”<sup>191</sup> it proceeded to do away with any measures that at least allow them to stay where they are. Finally, the Court recognized that while the Delhi government has “admit[ted] its responsibility to provide shelter,” it has also “stated that it has been unable to do so.”<sup>192</sup>

Another missing part of the history is how the public land itself was taken from citizens in order to build the city. The public entity tasked with the development of Delhi, the DDA, who owns much of the land on which slum residents reside in Delhi, obtained ownership of this land through displacing farmers and villages or taking over unoccupied land during the 1950s and 60s. It acquired the land in the name of development for public purpose.<sup>193</sup> The city plans at that point included affordable housing,<sup>194</sup> but were never pursued adequately. When the history of displacement for the public good is drawn upon, it is done to support the single view that the poor do not have any entitlement or should not have any expectation of accommodation. In short, the court referred to this history of displacement to argue that it would not have been right to have taken from those farmers and to let the poor live there, ignoring the original plans which would have in fact accommodated them.<sup>195</sup> Moreover, this neglects to consider that some communities who face eviction have been there for decades, and their expectation of some level of recognition by the local government is not baseless—some communities were accommodated by the local government with allocation for water, electricity, and other needs by formal and informal networks of patronage with the elite in ways that have broken down over the past few decades.<sup>196</sup>

Once this history is left out, or told with the framing described above, there is no room to acknowledge the economic and social constraints within which these populations live—decreasing employment opportunities in the rural areas, lack of low cost housing

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191. *Id.*

192. *Id.*

193. *Id.* ¶ 42.

194. See 1962 MASTER PLAN, *supra* note 132, at 5–6.

195. *Okhla Factory Owners*, 108 D.L.T. ¶ 42.

196. See Chatterjee, *supra* note 144, at 171–73, 176–77. When part of the history of resettlement is presented in *Okhla Factory Owners*, it is in the terms of what the government provided, not how many were left out of this system, and how many more would be after their opinion. See *Okhla Factory Owners*, 108 D.L.T. 517.

in cities, the former expectations of on-site accommodations, or even the lack of servants' quarters that used to be available.<sup>197</sup>

In the face of this lack of provision for shelter or low cost housing for the migrants who come to Delhi for work, and the apparent shortage of land, this court then abolished any remaining right or expectation of rehabilitation. The previous cases were important foundations for this ruling and are used to make this decision look like an application of the various precedents, rather than a further chipping away of rights. It drew on *Olga Tellis* for its qualification on the rights of pavement and slum residents—that providing an alternative site for living is not a condition precedent for eviction. It also quoted with approval the observation in *Pitam Pura* that humanitarianism must be separate from miscarriage of mercy when it discusses who benefits from the slums.<sup>198</sup> This allowed the Court to conclude that:

[T]he continuing existence of such a policy [of rehabilitation] serves no social purpose. Such a policy without any social criteria, is illegal and arbitrary and we hereby proceed to quash the same which requires alternative sites to be provided to slum dwellers occupying public land before they can be removed from such public land.<sup>199</sup>

The Court went on to direct the parties, *inter alia*, that while existing government orders should be abided by, “no allotment will be converted into ownership basis as is proposed by the Government of NCT of Delhi in its policy guidelines for implementation of the Scheme for relocation,” “[n]o alternative sites are to be provided in future for removal of persons who are squatting on public land,” and “[e]ncroachers and squatters on public land should be removed expeditiously without any pre-requisite requirement of providing them alternative sites before such encroachment is removed or cleared.”<sup>200</sup> As Usha Ramanathan succinctly noted, the Court “shot down the resettlement policy of the state and, in doing so, absolved

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197. See DASGUPTA, *supra* note 6, at 362–70 (describing how upper level small terrace apartments that used to accommodate servants are now increasingly being rented out to young people choosing to move out of family homes). While the evidence that Dasgupta offers is anecdotal, it fits my observations while living in Delhi as well, and is also supported by Chatterjee’s analysis of the breakdown of elite and poor systems of patronage. Chatterjee, *supra* note 144, at 171–73, 176–77.

198. *Okhla Factory Owners*, 108 D.L.T. ¶ 46.

199. *Id.* ¶ 47. The Court also states that it will be “open” to the government to “devise a policy for rehabilitation of the economically weaker sections based on a legitimate criteria but the criteria cannot be encroachment on public land.” *Id.*

200. *Id.* ¶ 49.

the state of its obligation to assist the urban poor in accessing affordable housing.”<sup>201</sup>

In sum, through this line of cases, the Supreme Court and the Delhi High Court moved slum residents from getting rehabilitation under certain circumstances to not having any such rights (outside of the recognition of particular fairly narrow government orders already in place before these judgments).

#### IV. THE JUDICIARY’S ROLE IN THE CONSTRUCTION OF ‘MODERN’ CITIES AND CITIZENS THROUGH SIGNALS TO PRIVATE INVESTORS

*“Besides, Delhi being the capital city of the country, is a show window to the world of our culture, heritage, traditions and way of life. A city like Delhi must act as a catalyst for building modern India.”*<sup>202</sup>

Constructing cityscapes to create a national identity that impresses tourists and the rest of the world has been a facet of city planning for centuries. Delhi, in particular, has an interesting history of whom it was meant to impress both internally and externally. The city had been built over multiple times before the English re-planned and rebuilt parts of the governmental area in the 1900s.<sup>203</sup> When they did so, they wanted it to “illustrate a rational modernity” and, according to the private secretary to King George V, “let the Indian ‘see for the first time the power of Western science, art and civilization.’”<sup>204</sup> Clearly, the power of architecture and urban planning to convey an identity, and in doing so, to intimidate, impress, and shape a population, are not new to Delhi.<sup>205</sup>

In the present day, once again we can conduct a careful analysis of the judgments to find judicial support of the projects embodied in recent changes in urban landscapes. The quote that began this Part and others found in judgments<sup>206</sup> intertwine ideas of culture, national

201. Ramanathan, *supra* note 141, at 3195.

202. Pitam Pura Sudhar Samiti v. Union of India, (2002) I.L.R. 2 (Del.) 393, ¶ 11 (Delhi H.C.) (referring to the secretary of Urban Development).

203. See WILLIAM DALYRYMPLE, CITY OF DJINNS: A YEAR IN DELHI (2003).

204. KHILNANI, *supra* note 36, at 121.

205. For a fascinating architectural and sociological account of modern architecture and city planning in India, see generally, RAHUL MEHROTRA, ARCHITECTURE IN INDIA: SINCE 1990 (2011).

206. See, e.g., Almitra Patel v. Union of India, (2000) 2 S.C.C. 679 (India) (stating that the previous Court had tried to prevent “the capital of the biggest democracy in the world” from being “branded as being one of the most polluted cities in the world”

pride, and modernity with city identity and assessment through the gaze of foreigners. The articulation of these in cases involving poor populations' right to their residences links these projects and issues together. It implicitly and explicitly justifies the clearance of slums for the 'higher' ideals listed.

To understand the quote above and the context it operates in, one should consider who is looking through this show window—who is being impressed—and for what reason? Specifically, the references in judgments to show pieces<sup>207</sup> and show windows reveal the elevation of assessments of the rest of the world regarding matters of pride for Delhi. The rebuilding and reconstructing and projection of modernity is about more than tourism or national pride. As this section explores, at the time these cases were decided, economic policy in India was heavily directed towards the attraction of capital for various avenues, particularly FDI. And, as we've seen throughout the political economic history of India, the courts in this moment as well are playing very tangible roles in paving the way for this kind of development.

This part draws together the analysis presented in the previous Parts and places the slum clearance opinions in context of economic development in India. First, it studies the increased role of investment in real estate in the economy. It then explores the judiciary's roles in sending affirming signals to capital through the rhetoric of strong property rights, a disciplined city and citizenry, and urban beautification. Finally, we must consider whether there were alternatives to the emphasis on these particular signals—are there other discursive narratives that the courts could draw from with regards to the position of the poor in the economy and in cities? In order to show the potential of possible narratives other than the dominant neoliberal one that has been explored in detail, several cases that treat slum residents in a more inclusionary way are investigated in hope that they will be drawn upon by courts more frequently in the future.

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and that Delhi, as the capital of the country, should “be its show piece” so there should be more efforts to keep it clean); *see also* Jason Burke, *Modi Launches Indian Clean-up Drive by Telling Officials: Get Sweeping*, *GUARDIAN*, Oct. 2, 2014, <http://www.theguardian.com/world/2014/oct/02/modi-launches-indian-clean-up-campaign> (discussing the recent campaign by India's Prime Minister to “Clean India”).

207. *See Almitra Patel*, 2 S.C.C. ¶ 11.

### A. The Rise of Capital Investments in City Spaces

The development of city space has been of particular interest to international capital during the past few decades—an interest that has been increasingly supported by government policies.<sup>208</sup> In the 2012–13 Industrial Report of the Department of Industry Policy and Promotion, the Indian government took care to show how its efforts to attract FDI have paid off—it cites reports from the United Nations Committee on Trade and Development (UNCTAD), the Japan Bank for International Cooperation, and Ernst & Young that all declare India to be one of the most attractive places in the world for FDI.<sup>209</sup> Indeed, total FDI flows have increased considerably in the 2000s and to-date:<sup>210</sup> FDI has increased from approximately four to six million dollars per year in the financial years 2001 to 2005, to between thirty-five and forty-seven million dollars per year in the financial years 2008 to 2014.<sup>211</sup> This is significant growth, occurring even during the Financial Crisis around the world. More specifically, the “Construction and Development: Townships, Housing, and Built-up infrastructure” sector received the second-highest percentage of all FDI in 2012–2013, with eleven percent.<sup>212</sup>

The focus on urban construction in particular is no surprise. Urban development has been touted as the place to invest and for India to

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208. As reported by India Knowledge at Wharton in 2006, a number of U.S. investment banks, including Goldman Sachs, JP Morgan, Morgan Stanley, and Merrill Lynch invested in real estate. See *Why U.S. Investors are Building Their Hopes on Indian Real Estate*, KNOWLEDGE@WHARTON (Oct. 31, 2006), <http://knowledge.wharton.upenn.edu/article/why-u-s-investors-are-building-their-hopes-on-indian-real-estate/>. For the foundational argument regarding global cities as key spatial units and strategic territories of development, and the role of international capital in this transformation, see SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (2d ed., 2001).

209. UNCTAD ranked India as the third most attractive location for FDI, the Japan Bank for International Cooperation ranked India as the second most promising country for overseas business operations for medium-term and first as a long term investment destination, and Ernst & Young found India fourth as a global destination for FDI. DEP'T OF INDUS. POLICY & PROMOTION, MINISTRY OF COMMERCE & INDUS., *ANNUAL REPORT: 2012-13* 84 (2013), available at [http://dipp.nic.in/English/Publications/Annual\\_Reports/AnnualReport\\_Eng\\_2012-13.pdf](http://dipp.nic.in/English/Publications/Annual_Reports/AnnualReport_Eng_2012-13.pdf).

210. The early increases in growth that India had after the 1991 reforms were not driven by large external borrowings or external capital flows. See FRANKEL, *supra* note 42, at 595.

211. See DEP'T OF INDUS. POLICY & PROMOTION, MINISTRY OF COMMERCE & INDUS., *FACT SHEET ON FOREIGN DIRECT INVESTMENT 4* (2014), available at [http://dipp.nic.in/English/Publications/FDI\\_Statistics/2014/india\\_FDI\\_May2014.pdf](http://dipp.nic.in/English/Publications/FDI_Statistics/2014/india_FDI_May2014.pdf).

212. The service sector received the highest percentage of FDI, at eighteen percent. *Id.* at 8.

focus on for over a decade. In a 705-page report in 2001 on strategies for growth, McKinsey Global Institute advocated for India to further liberalize their economy through various reforms.<sup>213</sup> In particular, McKinsey pointed to “inflexible zoning, rent, and tenancy laws” that “‘freeze’ land in city centres that would otherwise be available for new retail outlets and retail.”<sup>214</sup> Nine years later in 2010, the McKinsey Global Institute placed its faith squarely in the urban in a report titled: *India’s Urban Awakening: Building Inclusive Cities, Sustaining Economic Growth*. The report discussed how “cities will be central to India’s economic future,” on account of the rapid urbanization and jobs.<sup>215</sup> To meet this projected demand in Indian cities, massive construction would be needed—including “700–900 million square meters of commercial and residential space . . . —or a new Chicago every year,” “2.5 billion square meters of roads,” and “7,400 kilometers of metros and subways” by 2030.<sup>216</sup> Such projects were estimated to require \$1.2 trillion of capital investment. Large-scale construction is already underway in many cities, including Delhi. In fact, real estate now constitutes nineteen percent of Delhi’s contribution to GDP.<sup>217</sup> As noted in Part III, the new places of middle class consumption—residential high-rises, international-style malls, and offices—are all evidence of this exponential growth of industry.

How, then, have cities and their planners furthered endeavors to attract foreigners and foreign capital? As Swapna Guha-Banerjee notes, “[a]pparently the essential objective is to make these cities sufficiently investment friendly, acceptable to the credit rating agencies and help them emerge as geostrategic points to further neoliberalism in the Global South.”<sup>218</sup> Cities such as Delhi are not passively having neoliberalism furthered through them. Urban

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213. It also advocates for loosening of controls on FDI, removal of complex licensing requirements (deregulation), greater law enforcement, and privatization of electricity services. See generally BILL LEWIS ET AL., MCKINSEY GLOBAL INST., INDIA: THE GROWTH IMPERATIVE (2001), available at [http://www.mckinsey.com/insights/india/growth\\_imperative\\_for\\_india](http://www.mckinsey.com/insights/india/growth_imperative_for_india) (follow “Full Report” hyperlink).

214. See *id.* at 5.

215. See SANKHE ET AL., *supra* note 98, at 14–15. The report also discusses “inclusive” growth by growing affordable housing stock at length, noting that housing makes citizens “formal residents” of cities and that it increases consumption. See *id.* at 119–38. Their suggestions include a mix of local government funding, incentives to developers, and other policies. See *id.*

216. *Id.* at 9.

217. See MINISTRY OF EXTERNAL AFFAIRS, *supra* note 101, at 65.

218. Swapna Banerjee-Guha, *Neoliberalising the ‘Urban’: New Geographies of Power and Injustice in Indian Cities*, ECON. & POL. WKLY., May 30, 2009, at 95.

plans<sup>219</sup> and public-private partnerships show the cities' willingness to develop their own spaces according to the needs of capital. The next section explores the role of the courts in supporting the arrival of capital investments in cities.

### B. The Role of Courts in the 'Frictionless Landing'<sup>220</sup> of Capital Investments in City Spaces

The language in the *Pitam Pura* quote that began this Part—a city's need to act as a catalyst—recognizes the high burden of responsibility on the city in the attraction of international capital. How does a court support this endeavor of modernity in the new neoliberal urban development paradigm—specifically, in the pursuit of international capital? As the cases illustrate, by enabling the clearing out of city centers, by beautifying it for the visiting potential investors, tourists, and TV cameras, and by doing this all legally so that the 'rule of law' and 'strong property rights' remain unblemished.<sup>221</sup> The very language that the courts use to describe these priorities strengthens the larger discourse of this singular vision of neoliberal urban development. The route to beautification in the various cases is through the removal of slums and the shrinkage of space for certain populations—the removal apparently of un-modern ways of life in an effort to carry out the showing of “our . . . way of life” and “modern India” as noted in *Pitam Pura*.<sup>222</sup>

And so, through the opinions explored above, the courts do not just rely on an outside legitimacy constituted by development discourse; they play a crucial role in constituting this discourse as well through a variety of ways. Two themes are explored here: the support of capital investment in land (in line with neoliberal development), and the rewarding or disciplining of citizens according to their alignment with the new vision of modernity.

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219. For example, the *Jawaharlal Nehru National Urban Renewal Mission* (JNNURM)—the urban renewal plans launched in 2005. See *About Us*, JAWAHARLAL NEHRU NAT'L URB. RENEWAL MISSION, <http://jnnurm.nic.in/about-us.html>.

220. See MEHROTRA, *supra* note 205.

221. These changes are important factors in signaling a government's commitment to attract business. According to the World Bank's Ease of Doing Business project ranking system, “[h]igher ranks indicate simpler regulation and stronger protections of property rights.” See WORLD BANK GRP., *DOING BUSINESS 2007: HOW TO REFORM 74* (2007), available at <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB07-FullReport.pdf>.

222. *Pitam Pura Sudhar Samiti v. Union of India*, (2002) I.L.R. 2 (Del.) 393, ¶ 11 (Delhi H.C.). Note that ‘way’ of life is singular.



### 1. *Signals to Investors*

These judgments and other recent ones have been characterized as direct support for corporate interests.<sup>223</sup> In a 2009 article in the widely-read magazine *Economic & Political Weekly*, well-known human rights advocate Prashant Bhushan analyzed recent judgments by the Supreme Court that include sympathetic language to corporate interests and noted that “it is difficult not to get the feeling that court’s decisions were influenced by its own approval of the new politics of liberalisation, privatization and globalization.”<sup>224</sup> Bhushan is in good company in this assessment with a member of the Court itself: in 2010, Justice Singhvi, then a justice of the Indian Supreme Court, lamented the “visible shift” in social welfare cases.<sup>225</sup> In a judicial opinion, he stated that “attractive mantras of globalisation and liberalisation are fast becoming the *raison d’etre* of the judicial process . . . .”<sup>226</sup>

The opinions studied here support the attraction of capital in several ways. First, by espousing formality and the rhetoric of strong property rights, they reinforce what the World Bank and private financial actors need to feel confident to invest.<sup>227</sup> Second, their orders to the city agencies and police to be more vigilant in enforcing the law and protecting property, and also making the city beautiful, indicate to would-be investors that property rights are protected and therefore more certain and that spaces are modern and clean physically. That said, these chastisements of the city agencies can be read in more than one way—perhaps as keeping the cities in line with India’s broader commitment to development, or perhaps as part of larger themes in neoliberalism regarding reducing ineffectual government.

#### a. *Formality, Property Rights, and Rights of the Poor*

Protection of property rights is an important part of attracting investment (and of neoliberalism more generally).<sup>228</sup> This protection

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223. In particular, Prashant Bhushan sees the post-economic liberalization Supreme Court as “solicitous towards large corporates.” Suresh & Narrain, *supra* note 58, at 11. *See also* Bhushan, *Supreme Court, supra* note 123.

224. *See* Bhushan, *Supreme Court, supra* note 123, at 1772.

225. Suresh & Narrain, *supra* note 58, at 11.

226. *Id.* (quoting *Harjinder Singh v. Punjab Warehousing Corp.*, (2010) 3 S.C.C. 192 (India)). Justice Singhvi went on to observe that the courts are no longer listening to the plight of industrial and unorganized workers. *Id.* at 11–12.

227. *See generally* WORLD BANK GRP., *supra* note 221.

228. *See generally id.*; HARVEY, *supra* note 103.

may include a number of features, such as adequate land records, clear title, and judicial enforcement of property rights, and can be seen as an underlying motif in the slum clearance cases. In these cases, legitimate property rights and rights holders are constructed in contrast to what is perceived to be informal. In short, these cases construct an ideal of “formal” property entitlements that deserve protection through several justifications. *Almitra Patel’s* vilification of informality—of squatters, of informal labor (who often live in the kinds of slums they describe), and of informal work (which requires living nearby)—typifies the rhetorical valuing of the formal and the clean. *Pitam Pura’s* casting of “residents” whose welfare and other rights under Article 21 cannot be “sacrificed,” in contrast to the “slum dwellers,” whose rights under Article 21 are not even acknowledged, again illustrates the intertwining of formality and entitlement to rights.<sup>229</sup> Moreover, those in the middle class neighborhoods nearby are not asked to prove their formal rights to possession—they are assumed to have them, whereas those living on open land are not (despite the fact that much of Delhi property is “on the border of informality and legality”<sup>230</sup>). In *Okhla Factory Owners*, this valuing of formality can be seen in the Court’s defense of Delhi’s right to its (expropriated) land. Despite not having used it, despite the presence of marginalized populations who had come to depend on it, the right of the city to exercise use of land it had legally—however expansively this term is interpreted—made its own was deemed paramount. And so we end up with a new constellation of property rights and governance, and as Upendra Baxi argued in 2006, “demolitions, which were once seen as excesses perpetrated during the Emergency, now come to be seen as the badges of good governance.”<sup>231</sup>

This turn towards formality with regards to property and space renders even the human rights associated with clearance of slums, including the right to housing, hollow. The emphasis on formality makes property-related rights rhetorical devices, used to justify further marginalizing the poor legally through creating contrasts

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229. *Pitam Pura Sudhar Samiti v. Union of India*, (2002) I.L.R. 2 (Del.) 393, ¶ 19 (Delhi H.C.) (“The welfare, health, maintenance of law and order, safety and sanitation of these residents cannot be sacrificed and their right under Article 21 is violated in the name of social justice to the slum dwellers.”). The Court also quoted one of the petitioners, who lamented the fact that “young girls do not come to their *own* balconies throughout the day as obnoxious smell pollute the atmosphere and the entire environment is [unconducive] to public health and morality.” *Id.* ¶ 3 (emphasis added); see also Ghertner, *supra* note 165, at 62.

230. MENON-SEN & BHAN, *supra* note 8, at 3.

231. Suresh & Narrain, *supra* note 58, at 11.

between them and the formal. It also allows property rights to trump other rights (such as the right to dignity) in ways that are portrayed as being in society's best interests. Even when the rights of the poor in housing are respected in a formal sense, such rights lose their substantive meaning through their implementation.<sup>232</sup> For example, calling upon one's right to housing in the face of demolition often reveals an increased role of formality with regards to rehabilitation.

There is more and more red tape for rehabilitation, and so even when relocation is offered (on the outskirts of the city), Delhi policies give strict licenses to inhabit the alternate housing.<sup>233</sup> Residents do not get leaseholds or routes to ownership. These residences cannot be alienated or rented out, and there does not appear to be any route to property for the residents. Often, slum residents face problems proving that they have been in their homes long enough to qualify for rehabilitation. Such housing is often in architectural forms that do not fit their living patterns or needs.<sup>234</sup> Moreover, the location on the outskirts hampers their ability to get to employment, particularly for women.<sup>235</sup> This mismatch of needs and housing—where perhaps 'shelter' has been technically accommodated for, but at the expense of one's participation in the city or one's ability to conduct the life and livelihood that is fulfilling and sustainable—reveals the hollow nature of the purported fulfillment of these rights. And, of course, these policies do not even begin to address the various attachments that people have to their homes (psychological, historical, use). Nor do they account for the importance of community life, which is altered, if not destroyed, when people have to shift to other locations. How can such intangibles be accounted for in strictly formal interpretations of rights? In other words, too narrow of an interpretation on what it means to fill an obligation to a 'right to shelter'<sup>236</sup> does not recognize any sort of broader, more existential right participate in or shape the city in which these residents live.<sup>237</sup>

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232. Balakrishnan Rajagopal characterizes the forms of socio-economic rights being promulgated more generally as pro human rights but anti-poor. *Pro-Human Rights but Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective*, 18 HUMAN RTS. REV. 157, 157 (2007).

233. See, e.g., MENON-SEN & BHAN, *supra* note 8, at 9–15, 36–43, 86–89.

234. See MEHROTRA, *supra* note 205 (discussing the small square footage, boxed in high rise apartments that are a far cry from the community life that people seek to have); see also CHARLES CORREA, *Space as a Resource*, in THE NEW LANDSCAPE (1985), reprinted in THE OXFORD ANTHOLOGY, *supra* note 7, at 292 (regarding the five ways that people use space—the range of 'public space').

235. See discussion *infra* Part IV.C.

236. While the Right to Housing language is broad and recognizes the emotional attachments to one's home, the implementation and interpretation of it has been

Even when rights for the marginalized were accommodated with more substance—such as in *Olga Tellis*—they were accommodated as an exception to the legitimate citizenry of a city who *were* (literally, walking) on the path of legitimacy. It is not that, even in *Olga Tellis*, the residents of slums and pavement are recognized as part of a broader economic system of inclusive growth. This view of them as an anomaly to the legitimate political economic system is reinforced and constituted by how they are seen in the legal discourses examined here.

*b. City Governance and Beautification*

In the slum clearance cases, the courts have not shied from chastising the city of Delhi. They call upon the city government to protect their own property,<sup>238</sup> keep the city clean,<sup>239</sup> and follow through with its planning projects.<sup>240</sup> These attempts to keep cities ‘in line’ can be read as signals of judicial support of re-making cities into places to which capital would respond well<sup>241</sup>—disciplined, property rights-enforcing, respectful of rule of law, and, of course, clean. From these judgments, one is left with the impression that the courts are willing to be ‘tough’ on both cities and citizenry in order to get them to change their patterns. Relatedly, the courts also mention that the police should be used to protect land from the slum residents—another strong reinforcement of discipline and lawfulness.<sup>242</sup>

Along with beautification and keeping the city clean are the contrasts that are set up with relation to slum areas as unhygienic and unhealthy for the environment. For example, as part of the justification for removal, the Court in *Okhla Factory Owners* lamented the “unhygienic mushrooming of slums” and attributed

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limited at best. *See generally*, HOUS. & LAND RIGHTS NETWORK, THE HUMAN RIGHTS TO ADEQUATE HOUSING AND LAND IN INDIA: PARALLEL REPORT SUBMITTED TO THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (2008).

237. *See* HARVEY, *supra* note 104.

238. *See generally* *Okhla Factory Owners’ Ass’n v. Gov’t of Nat’l Capital Territory of Delhi*, (2002) 108 D.L.T. 517 (Delhi H.C.) (discussed *supra* Part III).

239. *See* *Almitra Patel v. Union of India*, (2000) 2 S.C.C. 679 (India) (discussed *supra* Part III).

240. *See generally* *Okhla Factory Owners*, 108 D.L.T.; *Pitam Pura Sudhar Samiti v. Union of India*, (2002) I.L.R. 2 (Del.) 393 (Delhi H.C.) (discussed *supra* Part III).

241. *See* discussion *supra* Part III.

242. *See* *Pitam Pura*, I.L.R. 2 (Del.) ¶ 15. And so, while they chastise the city governments’ ineffectiveness, they also draw on it to enforce the law.

“damage to the health environment of the city as a whole” to them.<sup>243</sup> This is an echo of *Almitra Patel* where the cleanliness and health of the entire city is seen to be at risk through the presence of slums.<sup>244</sup> Prashant Bhushan ties this kind of rhetoric to support of corporate interests. He has argued that the emphasis on the environment has come to be used as a shield—the poor end up losing out in the face of justifications for clearance based on the environment.<sup>245</sup> This is accomplished through the “right to a clean and healthy environment” being read into Article 21, which, as Bhushan notes, allows “individual benches of the court [to use] their own subjective understanding of what [is] needed for a healthy and clean environment.”<sup>246</sup> This subjectivity, in recent years, has led to corporates getting more favorable treatment than the poor.<sup>247</sup>

## 2. *Shaping the Citizenry*

The support for middle class ways of life and the capital interests that build and benefit from these ways of life can be seen in the way in which certain populations benefit from the rulings, in the disciplining of the poor through the language of hygiene and sanitation, and in the references to law enforcement and beautification. The cases above slowly cast slum residents as encroachers, associating them with ‘pickpockets’ and thieves, further confirming their illegitimacy and lack of right to exist in public space, even when they do not have access to private space. This evolution can be seen through the cases: if the theme of *Almitra Patel* was the supposed unsanitary ways of life of slum residents, then in *Pitam Pura* it was whose rights should be respected (the ‘residents’ or the ‘slum dwellers’), and finally in *Okhla Factory Owners* it is who, in the face of scarce resources (land), should get priority (the productive middle class). It must be noted that those who are given property rights are those who already live a more apparently legitimate existence—in better areas with higher property values, and in locations that enable them to be a part of urban consumerism in those spaces.

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243. *Okhla Factory Owners*, 108 D.L.T. ¶ 10.

244. See discussion *supra* Part IV.B.1.b.

245. See Bhushan, *Misplaced Priorities*, *supra* note 123, at 37. Moreover, as argued by Asher Ghertner, the rhetorical focus on the environment has also shifted jurisprudence and illegalized the poor by equating slums and slum residents with nuisance—rather than certain *activities* as nuisance. See Ghertner, *supra* note 165.

246. Prashant Bhushan, *Sacrificing Human Rights and Environmental Rights at the Altar of “Development”*, 41 *Geo. Wash. Int’l L. Rev.* 389, 395 (2009).

247. See Bhushan, *Misplaced Priorities*, *supra* note 123, at 37.

Similar to the construction of the peasant as “baffled by modern political and economic institutions,”<sup>248</sup> the construction of the urban slum resident as baffled in the new world of technology or consumption does not hold up. These poor are not alien to modern India—not only because they exist in the present day<sup>249</sup> and live lives that depend on technology, capitalism, and political institutions implicated by modernity, but because these capitalistic ways of life of broader society depend on the urban poor for sustainability. The urban poor populations construct and maintain the malls, homes, cars, roads, and other spaces that are celebrated as ‘modern.’ And so, the dark irony in *Almitra Patel* and the other cases chastising the poor for their hygiene and sanitation in the name of modernity is that (ignoring for a moment the prejudiced and false nature of these characterizations with regards to the residences of the poor), they are called upon to perform the very services that further the projects of modernity. The disciplining of the poor through the appeal to sanitation or public health, however, is not unique to India or to this time period.<sup>250</sup>

The *Pitam Pura* quote above that expressed hope that Delhi will be a catalyst was used to close the opinion—to provide the final justification for removing slum areas and to support beautification. The justification of tourism and a modern India is presented in an uncritical way. The elevation of foreign gaze (or, in other parts of the opinion, that of middle class residents) is treated as a given. This prioritization has huge effects for the poor. If their gaze (or their provision) is not the focus, then they are disciplined into non-interference with the middle class or the foreign experience of, or investment in, city life.

The chipping away of rehabilitation and rights described above further decreases the government’s obligation to take even minimal responsibility for its citizens. The distance from rights language and rights enforcement (which is used only in regards to the legitimate citizens) puts slum residents far from entitlement to anything property or resource related. From there, they can only come to the government as beggars asking for handouts, rather than displaced

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248. See CHAKRABARTY, *supra* note 25, at 9.

249. See CHAKRABARTY, *supra* note 36.

250. See generally MICHAEL FOUCAULT, *THE BIRTH OF THE CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION* (A.M. Sheridan Smith trans., Vintage Books 1994); see also ANNE MCCLINTOCK, *IMPERIAL LEATHER: RACE, GENDER, AND SEXUALITY IN THE COLONIAL CONTEST* (1995); TIMOTHY MITCHELL, *RULE OF EXPERTS: EGYPT, TECHNO-POLITICS, MODERNITY* (Univ. Cal. Press 2002).

citizens with grievances. If they are not entitled to anything, then ‘giving’ them the minimum—shelter on the outskirts of the city, licenses to live there without route to ownership, and strict requirements for proving entitlement to these paltry measures—is considered charitable provision. Indeed, the first line of *Okhla Factory Owners* saw rehabilitation as just that—benevolence—not the obligation of government: “Benevolence in administration is a necessity but this benevolence has to be balanced against the rights of the residents of a town specially when dealing with one commodity which can never increase which is land.”<sup>251</sup>

Once the slum residents are not seen as residents with rights, and rehabilitation is merely benevolence, it is hardly surprising that such provisions could be done away with.

### C. Alternative Narratives in Judicial Opinions

While many cases continue the line of reasoning and marginalization detailed above, there are two recent Delhi-based cases, which should be explored for the alternative account of law and circumstances that they present.<sup>252</sup> Unfortunately for now, these potential alternative formulations appear to be just that, given their treatment by subsequent courts—alternatives too far outside of the mainstream orthodoxy regarding urban space and citizenry to change the tide. However, while they remain minority judgments, their presence in jurisprudential discourse otherwise dominated by neoliberal tenets with regards to urban space should not be underestimated. If and when change does happen, it is often through such threads of dissent being woven into larger efforts with adoption and adaptation. Therefore, once again, the analysis in this section draws attention not only to the outcomes of the cases, but the rhetoric the judges employ and the contexts they recognize.

In the first case, *Sudama Singh v. Government of Delhi*,<sup>253</sup> Delhi High Court Chief Justice, Ajit Prakash Shah, contextualized the situation of the poor in Delhi by including a discussion of history and values. He discussed the Delhi Master Plan, and paid particular attention to the urban poor and the provisions for their

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251. *Okhla Factory Owners’ Ass’n v. Gov’t of Nat’l Capital Territory of Delhi*, (2002) 108 D.L.T. 517, ¶ 1 (Delhi H.C.).

252. There are also cases in various states of success or closure brought by the Human Rights Law Network. See *PILs & Cases*, HUMAN RTS. L. NETWORK, <http://www.hrln.org/hrln/housing-rights/pils-a-cases.html> (last visited Nov. 30 2014).

253. (2010) WP(C) Nos. 8904/2009, 7735/2007, 7317/2009, & 9246/2009 (Delhi H.C.), available at <http://www.indiankanon.org/doc/39539866/>.

rehabilitation.<sup>254</sup> This discussion framed rehabilitation within economic development. In words that recalled the inclusive ideals of development at Independence, he observed that “[t]he concept of land as a resource should be adopted to develop such accommodation with private sector participation and investment, to the extent possible.”<sup>255</sup>

This attempted balancing is also evident in his treatment of Article 21. When addressing the petitioners’ claim that demolishing the slums without ensuring relocation is violation of their fundamental right to shelter enshrined in right to life under Article 21, he engaged in a lengthy discussion of the human right to shelter, and how these populations ended up living in slums.<sup>256</sup> In his narrative, their intent and migration is attributed to the “pressure on agricultural land and lack of employment opportunities in the rural areas” and the large number of people who were “forced” to move to cities for the availability of employment opportunities in urban areas.<sup>257</sup> He also recognized how the “lack of access to legitimate housing” within their means “compelled” them to live in slums.<sup>258</sup>

Finally, he demonstrated respect for their resilience and participation in urban society by noting their varied livelihoods that included many based on daily wages, such as selling vegetables and other household items, as well as rickshaw pulling and several regular positions in “industrial units in the vicinity.”<sup>259</sup> This discussion acknowledged that the women were employed as domestic help in nearby houses and that some children were employed as child labor and a few “fortunate [ones] . . . [went] to municipal schools in the vicinity.”<sup>260</sup> It is worth noting that the proximity for work and education are vital to such populations, which he implicitly acknowledged.

From this account of the situation and “precarious” existence of the poor, he was then able to declare that they are not to be treated as second-class citizens, and expressed concern at the “lack of basic amenities at the relocated site.”<sup>261</sup> In the end, he found that “[a]

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254. *Id.* ¶¶ 2–4.

255. *See id.* ¶ 4. These accommodations might include: incentives by way of higher FAR, part commercial use of the land, and, if necessary and feasible, transfer of Development Rights. *Id.*

256. *See id.* ¶¶ 37–44.

257. *Id.* ¶ 44.

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* ¶¶ 26, 43, 60.



long as they were not on an existing road,” they could not be denied the benefit of rehabilitation/relocation.<sup>262</sup> He also situated this ruling in their right to life, stating that the “denial of the benefit of the rehabilitation to the petitioners violates their right to shelter guaranteed under Article 21 of the Constitution.”<sup>263</sup>

While this represented a major victory for the slum residents, and an important check on the three cases above, the impact of this case as a matter of law is not clear—it has not been taken up by subsequent courts in the manner that *Almitra Patel, Pitam Pura*, or *Okhla Factory Owners* have. It has only been cited by two cases: *Jagjit Singh v. Union of India*<sup>264</sup> (unfavorably, by the same judge that presided over *Okhla Factory Owners*) and *P.K. Koul v. Estate Officer*,<sup>265</sup> discussed below.

In *P.K. Koul*, Delhi High Court Justice Gita Mittal presented an alternative narrative that existed before the post-2000 cases. She quoted extensively from *P.G. Gupta v. State of Gujarat*<sup>266</sup> and *Chameli Singh v. State of U.P.*<sup>267</sup>—Supreme Court cases which had held that shelter was a fundamental right.<sup>268</sup> In *P.G. Gupta*, the Court held that “food, shelter and clothing are the minimal human rights” and that “the right to residence and settlement . . . is a ‘fundamental right under Article 19(1)(e) and it is a facet of inseparable meaningful right to life under Article 21’ of the Constitution of India.”<sup>269</sup> And in *Chameli Singh*, the Court held that “the right to shelter is a fundamental right available to every citizen of India.”<sup>270</sup>

Justice Mittal also drew from *Chameli Singh* to show the nature of the Right to Life, as interpreted by the Supreme Court, is not met merely by attending to “the animal needs of man,” but rather, “[i]t is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth.”<sup>271</sup> Justice Mittal

262. *Id.* ¶ 4.

263. *Id.* ¶ 52.

264. (2010) WP(C) No. 2806-2934/2004 (Delhi H.C.), available at <http://indiankanoon.org/doc/36602992/>.

265. (2010) WP(C) No. 15239/2004 (Delhi H.C.), available at <http://indiankanoon.org/doc/84234324/>.

266. (1994) 2 S.C.C. 182 (India).

267. (1996) 2 S.C.C. 549 (India).

268. Unfortunately, the formulation of the right to shelter found in these cases was not drawn upon by the slum clearance cases that are cited extensively and studied here.

269. See *P.K. Koul*, (2010) WP(C) No. 15239/2004 ¶ 25 (Delhi H.C.) (citing and quoting *P.G. Gupta*, 2 S.C.C.).

270. *Id.* (citing *Chameli Singh*, 2 S.C.C.).

271. *Id.* (quoting *Chameli Singh*, 2 S.C.C.).

incorporated additional language from *Chameli Singh* that read “the right to food, water, decent environment, education, medical care and shelter” into the Right to Life, arguing that they are basic human rights and that the human rights enshrined in the Universal Declaration of Human Rights and Convention and the Constitution of India “cannot be exercised without these basic human rights.”<sup>272</sup> With regard to shelter in particular, she recognizes the complexity of factors and the matters of dignity entwined in one’s living space by quoting the Supreme Court’s eloquent statement that:

Shelter for a human being, therefore, is not a mere protection of his life and limb. It is home where he has opportunities to grow physically, mentally, intellectually and spiritually. *Right to shelter, therefore, includes adequate living space and decent structures, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation.* The right to shelter, therefore, does not mean a mere right to a roof over one’s head but right to all the infrastructure necessary to enable them to live and develop as a human being. Right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right.<sup>273</sup>

Finally, not unlike the Court in *Olga Tellis*, she recognized the history of this population and their displacement (in this case, from Kashmir). In the end, she found for the displaced, but restricted the holding to situations where security is an issue.<sup>274</sup>

This account, and its respectful language towards the poor and appreciation of the context of their residences, stands in marked

272. *Id.* (quoting *Chameli Singh*, 2 S.C.C.).

273. *Id.* (emphasis added) (quoting *Chameli Singh*, 2 S.C.C.). She also comments on the nature of the judicial interpretation, and that it must remain relevant, and quotes Justice Bhagwati that the laws “change with the changing social concepts and values.” *Id.* ¶ 88. The full quote illustrates the importance of studying the role of the judiciary against the societal context:

We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still: it must change with the changing social concepts and values . . . . Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind.

*See Nat’l Textile Workers’ Union v. P.R. Ramakrishnan* (1983) 1 S.C.C. 228, ¶ 9 (India) (Bhagwati, J.).

274. *See P.K. Koul*, WP(C) No. 15239/2004 ¶ 259 (“[T]he principles laid down in this judgment would bind only a fact situation as in the present case or similar circumstances when the State has been unable to protect the fundamental and basic human rights of its citizens compelling them to be displaced from the place of their residence and is not in a position to ensure their safety or security in case they return to the place of their residence.”).

contrast to the other slum clearance cases explored herein. Unfortunately, this case, and this very comprehensive account of human rights and the right to shelter, has not currently been cited by any other judgment. And so, the cases on record, which continue to inform recent decisions, remain the cases of illegality.<sup>275</sup>

### CONCLUSION

This Article engages with the discourses of the political economy of development and the concepts of modernity and neoliberalism through the lens of the role of the judiciary in order to understand the context in which recent cases regarding the legality of slum residences have occurred.

The contextualization of these judgments shows the constitution and reinforcement of norms of legitimacy and modernity in development discourse, policy, and judicial opinions. More specifically, through this analysis the Article tries to show how, once modernity is taken to mean a collection of orientations which, in the context of urban development, includes neoliberalism, then the legal narrowing of rights of the poor to their residences appears to be a natural consequence. Just as the eras of socialism lent a certain lens to how the poor were seen, the discrediting of those socialist policies and the turn towards capitalism have had their own effects on the characterization of the poor.

The judgments focused on here might have been different—in rhetoric and in outcome—if the courts had had alternative narratives of an inclusive form of development or capitalism on which they could have relied.<sup>276</sup> However, within the current orthodoxy, the hold of neoliberalism and the attraction of capital on popular discourse, policy, and the judiciary have meant that the claims of the middle class are more likely than not to win with regards to urban space. When claims of the urban poor do ‘win’ with regard to rehabilitation, they are either provided for in a formal but not substantive way, or they are seen as anomalies to the system of growth and

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275. For example, cases such as *Asharfi Lal v. Union of India*, (2009) W.P.(C) 699–712/2006 (India), available at <http://www.indiankanoon.org/doc/102546270/>, continue to uphold this line of cases. See also *Milk Producers Ass’n v. State of Orissa*, (2006) 3 S.C.C. 229 (India); *Wazirpur Bartan Nirmata Sangh v. Union of India*, (2003) 103 D.L.T. 654 (2002) (India); *Friends Colony Residents Ass’n v. Lt. Governor of Delhi*, (2004) 114 D.L.T. 587 (India); *Gaya Parshad v. N.D.M.C.*, (2006) 127 D.L.T. 123 (India).

276. Thank you to Nick Robinson for discussion on this idea.

development—unfortunate accommodations that must be tolerated before continuing to move full speed ‘ahead.’

Without an alternative, inclusive, economic agenda, the judicial support for the political economic orthodoxy of neoliberal development has come at a frenetic pace. In India’s quest to “be made worthy” of entrance into the global economy, the corporate sector has begun “to be seen to be the engine powering this journey into the hypermodern.”<sup>277</sup> The judiciary’s part in this seems to be to support the engine of development and modernity by supporting what is seen to be the path accepted by policymakers—corporate and investment growth.

If an alternative existed in mainstream Indian policy discourse (or if courts chose to go against mainstream discourse more often), the judiciary might have had legitimate ways to acknowledge and respect the poor and to include them as full urban citizens with rights. In that event, judgments that included the rights of the poor would not have been seen as a benevolence or charity; they would be seen in a context where such rights furthered a political economic vision in which the urban poor would have a role.

The task remains to craft alternative narratives to neoliberal development and capitalism that do not fall prey to the same traps that socialism did. The role of the judiciary and of the articulations of values and legitimacy in their opinions are not to be underestimated in the project of re-crafting. Through the designation of rights and the framing of history, political-economy, and the humanity of the people who come before it, the courts play a huge part in reinforcing or shifting what is seen as legitimate—legitimate actions on the part of the government, the middle class, and the poor; legitimate laws and government responsibility; and, as specifically explored here, legitimate uses of space and resources in urban areas.

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277. See Aditya Nigam, *Embedded Judiciary: Or the Judicial State of Exception?*, in *THE SHIFTING SCALES OF JUSTICE: THE SUPREME COURT IN NEO-LIBERAL INDIA* 22, 33 (Mayur Suresh & Siddharth Narrain eds., 2014) (referencing Upendra Baxi).