LEGAL MOBILISATION THROUGH PUBLIC INTEREST LITIGATION IN THE CONTEXT OF URBAN SPACE:

A Case Study from Mumbai

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DECLARATION

I, Karan Misquitta, hereby declare that this dissertation entitled ‘Legal Mobilisation through Public Interest Litigation in the context of Urban Space: A Case Study from Mumbai’ is the outcome of my own study undertaken under the guidance of Dr. Geetanjoy Sahu, Assistant Professor and Chairperson, Centre for Science Technology and Society, School of Habitat Studies, Tata Institute of Social Sciences, Mumbai. It has not previously formed the basis for the award of any degree, diploma, or certificate of this Institute or of any other institute or university. I have duly acknowledged all the sources used by me in the preparation of this dissertation.
CERTIFICATE

This is to certify that the dissertation entitled ‘Legal Mobilisation through Public Interest Litigation in the context of Urban Space: A Case Study from Mumbai’ is the record of the original work done by Karan Misquitta under my guidance and supervision. The results of the research presented in this dissertation/thesis have not previously formed the basis for the award of any degree, diploma, or certificate of this Institute or any other institute or university.

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1 INTRODUCTION

In the courtroom of honor, the judge pounded his gavel  
To show that all's equal and that the courts are on the level  
And that the strings in the books ain't pulled and persuaded  
And that even the nobles get properly handled  
Once that the cops have chased after and caught 'em  
And that ladder of law has no top and no bottom  
...And he spoke through his cloak, most deep and distinguished  
And handed out strongly, for penalty and repentance  
William Zanzinger with a six-month sentence  
Oh, but you who philosophize disgrace and criticize all fears  
Bury the rag deep in your face  
For now's the time for your tears.  
- Bob Dylan

Since the advent of Public Interest Litigation, India’s Higher Judiciary has played an increasing and an increasingly visible role in the shaping and remaking of cities here. In the early years of Public Interest Litigation there was considerable optimism for its use as a tool for achieving progressive social change. However as time has progressed it has become clear that the potential of Public Interest Litigation to achieve widespread social change is limited and that groups that mobilise the law in the way of PIL, cannot be said to unambiguously pro-poor. Thus any analysis of urban development must account for the nature of groups that mobilise the law in Mumbai

1.1 THE GROWTH AND EVOLUTION OF PIL

In the years after Independence the Higher Judiciary had subscribed to a conservative reading of the constitution, especially in the context of land reforms and private property. This in turn led to considerable conflict between the executive and the Judiciary. The Judiciary was also seen as elitist and inaccessible, with law and the arcane practices of the judiciary making it next to impossible for the vast majority of the population to mobilise the law in their favour.

PIL arose out of the crisis that enveloped the Indian Judiciary immediately after the Emergency. Emergency era rhetoric painted the judiciary as a conservative institution that opposed moves towards social justice, and at the same the higher judiciary failed to oppose the gross violations of civil and political rights perpetrated by the state apparatus during the period. With the the
imposition of an internal Emergency by Prime Minister Indira Gandhi, there was a severe assault on civil liberties and the power of the judiciary to provide redress. Infamously, in the Habeus Corpus case the Supreme Court held that preventive detentions were immune to judicial review encouraging the sentiment that the judiciary would not protect fundamental rights in any meaningful way. However, in the acts of atonement that followed post-emergency, the court broadly sought to re-establish and re-assert its legitimacy -- this time in a populist spirit. Thus, the court made several procedural innovations that made the Higher Judiciary more accessible to the marginalised and their representatives, leading to the emergence of Public Interest Litigation. This included the relaxation of the principle of locus standi, appointment of amicus curae, continuous mandamus, epistolary justice, and expansive interpretations of the Constitution and fundamental rights. The Supreme Court's original jurisdiction is based on Article 32 of the Constitution - for the enforcement of fundamental rights - and these "public interest litigation" (PIL) cases must be anchored to this, although an expansive view of particular human rights provisions was introduced. The Supreme Court also moved away from its earlier concern with civil and political rights, and began focusing on social rights cases, with an emphasis on the oppressed sections of society. An important aspect of this shift was the expansive readings of the right to life under article 21 of the constitution, with this innovation the Supreme Court was able to overcome some of the problems associated with the inability of the courts to intervene in matters concerning the Directive Principles. In the early years of PIL, the Supreme Court pronounced many landmark judgements including key rulings on the rights of prisoners, bonded labourers, pavement dwellers, and children. During this time an informal network of Judges, lawyers, journalists and activists developed in order to petition the Supreme Court and High Courts. It was believed that something needed to be done in order to combat the gross injustices that persisted in the country and that the courts were the last and only resort short of extra legal action (Ahuja & Muralidhar, 1997).

By the end of the 80’s, the frequency of PIL cases in the Supreme Court and the High Courts increased as claimants and their lawyers learned to use the more liberal procedures associated with PIL (Cassels, 1989). Through the 90’s, the scope and breadth of issues raised also expanded tremendously from interventions in the protection of environment to corruption, education, sexual harassment at the workplace, relocation of industries, rule of law etc (Deva S., 2009). In a survey of PILs in the late 1990's, S. Muralidhar (1998) observes that “[t]he cases that were taken up for detailed consideration by the courts reflected a perceptible shift to issues concerning governance.” This was the period during which the Supreme Court became proactive in its efforts towards: i) cleaning up the political process by focusing on corruption at the highest levels of the political set-up in the Hawala case and the Fodder scam case; ii) solving the chaotic traffic and pollution in Delhi; iii) cleaning up the Taj and its surrounding area; iv) regulating the disposal of hazardous waste; v) regulating the manufacture and sale of pesticides; vi) addressing the issues of sexual
harassment and female foeticide; and vii) regulating the collection and distribution of blood by blood banks. According to Dembowski (2001), since the shift in the 1990’s, "[t]he judiciary has thus become a potential ally of individual citizens and of action groups insisting on better performance of State institutions. It has ‘become a byword for judicial involvement in social, political and economic affairs’, with a range so wide that ‘anything under the sun is covered under the rubric PIL.’"

### 1.3 PIL IN THE URBAN CONTEXT

Urban landscapes are undergoing significant changes all across the country and the Judiciary has played a significant role to play in this process. This urban transformation, requires a significant reshaping of the city in many ways, be it infrastructure, housing, services, etc. Yet simultaneously, services to the poor have decreased steadily in a city like Mumbai. In this process of urban development and change, the interests of poor and disadvantaged have either been increasingly sidelined or ignored completely. PIL has played a significant role in addressing issues in Urban Areas. More significantly PIL’s concerning urban issues have raised important questions about conflicting interests. In many cases the questions regarding environment and pollution have been pitted against and privileged before the immediate interests of the urban poor. The futures of the lives and homes of the urban poor in metropolitan cities like Mumbai and Delhi have been decided by the Higher Judiciary on more than one occasion. In Olga Tellis vs. Bombay Municipal Corporation\(^1\), commonly known as the pavement dwellers case. The Court, still under the influence of the populist mandate that characterised the early phase of PILs, was without doubt conscious and sensitive to the reality of the lives of the urban poor, “they choose a pavement or a slum in the vicinity of their work to cope with the costs of money and time;…that “to lose the pavement or the slum is to lose the job.”

As the 1990s came to a close, ‘judicial activism’ and PILs continued to grow, yet whether or not the judiciary continued to bat for the poor, especially the urban poor, came into doubt. In the Almitra Patel v. Union of India (Municipal Solid Waste Management) cases\(^2\), it became clear that the perception of the poor had changed considerably. In this case and from then on, slums were characterised only in terms of their legality, or rather illegality; the idea, put forth in Olga Tellis, that there could exist a right to shelter was dismissed. In the Almitra Patel case the court infamously compared slum dwellers to ‘pickpockets.’ Thus legality had been constructed by the
court in the narrowest way possible, to order urban authorities to demolish ‘illegal’ tenements (Ramanathan, 2006). While Olga Tellis demonstrated that courts could be mobilised on behalf of the urban poor, subsequent cases like those involving hawkers and the Sanjay Gandhi National Park, a series of slum demolitions in Delhi demonstrate that they can be equally easily mobilised against them.

1.3 METHODOLOGY

1.3.1 Theoretical Framework

Much of the existing work on judicial activism and PIL in the country is court centred, in that attention has been focused on judges, judgements and their implementation and their impact on governance and administration. This has meant that analytical focused has tended to shift away from those who mobilise the law through litigation. However, in American studies of law, society, and politics scholars have paid considerable attention to the actions of nonofficial actors during the process of litigation. In a review of American scholarship on the relationship between law and social movements, McCann writes of a similar problem that beset scholarship,

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Social science scholarship on social movements has documented many case studies in which legal claims, tactics, and actors figured or failed prominently, but these studies have rarely provided direct conceptual analysis about how law does or does not matter for the struggles at stake, and generally they have remained quite unformed by sophisticated socio-legal analysis. In short, social movement scholars do not seem much interested in law. Traditional legal scholars in law schools, by contrast, have written at length about litigation campaigns, judicial actions, and normative aspirations for rights-based social justice connected to social movements. But most of this scholarship has remained court-centred, sticking close to official case law and actions of legal elites while remaining distant from grassroots movement activity.
Thus Studies of PIL should focus on the complex interaction between law, social movements, and advocacy groups. Going to the courts requires groups to frame their demands in the language of rights, engage with the legal fraternity, and affects other forms of mobilisation through more conventional political channels. The tensions inherent in legal mobilization activity have raised a number of theoretical and empirical questions: What are the conditions under which individual and collective actors will turn to the courts to pursue political or social goals?

In order to study legal mobilisation, I will draw from both from process based studies which look at political opportunities as well interpretive studies of legal mobilisation. Studying political and legal opportunities draws attention to structural contexts that lead to litigation struggles, while at the same time pointing to judicial receptivity. However the expansion of the understanding of opportunities does not present us with the tools to provide a complete picture of the PIL. Interpretive legal mobilisation theory on the other hand, because it attempts to ‘decentre’ the study of law and legal mobilisation, refocuses critical attention on the actions of those who mobilise the law. The constitutive perspective that they propose moves beyond formalism, without falling into the pitfalls of realist studies and try illuminating both the instrumental and constitutive factors that drive litigation. Looking at the ideology of actors and how it is translated into the actual content of litigation, deepens our understanding of PIL and the transformation that it has undergone by underlining the relationship between legal translation and receptivity.

1.3.2 Why Urban Space?

As India’s urban population grows, and its structure changes conflicts over urban space will continue to emerge. It is in questions around urban issues that the conflicting interests of various groups come to be seen and in this conflict the higher judiciary and PIL in particular play an important role. Thus it is important to consider the actions of litigants in this arena if one is to properly understand these changes.

1.3.3 Research Questions

- Who mobilises the legal system through PIL to intervene in questions of Urban Space and why?
- What roles do Political Opportunity and Legal Opportunity and ideology play in determining who mobilises the Court through PIL?
How do these actors view the legal system and its relationship to the rest of the polity and society?

1.3.4 Research Design

For the Study A historical analysis of studies on PIL, in order to demonstrate some of the problems associated with research on PIL. A survey of some changes of that have taken place in urban India of and PILs associated with urban issues in order to determine the structural and contingent elements that play a role in determining groups approach to litigation in the context of urban issues, the following elements will will be considered

- Legal standing,
- Legal Stock
- Receptivity of legal system
- Costs associated with litigation
- Ideology

Using this framework to conduct a Case study of the experience particular groups have had with litigation and the role that ideology and legal opportunities have played in decisions to litigate and the outcomes that this has led to.

1.3.5 Data collection methods and analysis

A variety of data sources court orders, newspapers reports, face-to-face interviews, on-line data, and documentary data. Qualitative analysis is used to examine complex relationships, while it does not provide inferences in the statistical sense, it bridges the empirical evidence and theoretical arguments even if the sample is small by statistical criteria.

A database of cases related to urban space was created out of cases reported in Law Journals and Reports of the Bombay as well as some unreported cases which have been widely covered by the print media. By looking at the role that the courts and PIL have played in the process of urban change, I look at factors surrounding, the questions raised, judicial receptivity, the creation of legal stock, and impact on the city governance.
Out of these cases two groups who frequently used litigation were selected for a more indepth case study. The groups; the BEAG an elite driven environmental advocacy group and the GBGBA, a mass movement of the urban poor, fighting eviction are radically different in both style of functioning and goals. The groups were chosen as some of their cases appeared in the primary survey and However both groups frequently use PIL as part of their strategies in varying ways. By analysing the experience of these groups with litigation I shall to outline the role that political opportunities/legal opportunities play alongside certain ideological factors influence how these groups see and use the courts. For the purpose of the case study, data was collected through the study of secondary sources, judgments, petitions and Press releases documents, ethnographic observations and interviews with members of both organisations involved in the litigation process.

1.3.5 Chapterisation

The chapter scheme is based on the research objective. Chapter one delineates the research objectives and methodology. Chapter two presents a literature review of existing work on PIL, pointing out the lacunae in current studies of PIL and briefly surveys contemporary theory on legal mobilisation. Chapter 3 looks at instances of litigation by particular groups and the role that legal opportunities play while also analysing some ideological aspects. Chapter 4 presents some conclusions.

1.3.6 Limitations

Creating a database of cases has it’s challenges given the fact that the cases that are reported in law journals and reports are not selected, these cases are selected on their significance to the legal fraternity and cannot be considered a representative sample, the sample database was used to analyse. Given that this case study only looks at the activities and experiences of only two organisations, it is not possible to make strong generalisations, but it may be able to provide some insight into and a new way of looking at Public Interest Litigation and the actions of those who Mobilise it.
2 LITERATURE REVIEW

This chapter presents a literature review of the various perspectives on PIL that have developed on PIL, arguing that while the normative concern that PIL has characterised the study of PIL has raised important issues it has failed to look at PIL through the eyes of the litigants and actors who mobilise it. Thus there is a need to decentre the study of PIL and play closer attention to the role that litigants, actors and activists play. The second section, survey the literature on legal mobilisation theory. Section three looks at the role that PIL has played in issues around urban space.

2.1 ASSESSING PIL

While judicial interventions have increased dramatically in the past few decades, so also expanded a considerable body of criticism of judicial activism and PIL. There is a widespread consensus that they lack consistency (Veron, 2006) (Gauri, 2010) (Baxi). Court interventions have been decisive and positively received in some cases, its interventions in others have been controversial as was the case in T N Godavarman Thirumulpad vs Union of India, Almitra Patel, etc. Criticism has arisen over several issues, for example- it’s perceived elitist disposition (Bhushan P., 2004), its unwillingness to challenge the dominant nationalist-developmentalist discourse (Rajagopal, 2005), (Baxi, 1985), interference with governance and the division of powers between the different wings of government (Rajamani & Sengupta, 2010).

2.1.2 Phases of PIL

On the basis of four variables, litigants; subject matter or focus; against whom the relief was sought; and response of the courts, Surya Deva (Deva S., 2009) delineates three broad phases. 1. The early phase from the late 1970s through the 1980s where PILs were filed by public-spirited persons, with cases focusing on the rights of disadvantaged sections of society such as child labourers, bonded labourers, prisoners, mentally challenged, pavement dwellers, and women.
During the second phase, from the early 90’s to the turn of the century, the forum of the PIL became more formal and institutionalised, with the scope of PIL being expanded to the protection of environment to corruption-free administration, right to education, sexual harassment at the workplace, relocation of industries, rule of law, good governance, and the general accountability of the Government. It was at this stage that evidence that PIL could be mobilised for less than egalitarian goals began to mount. 3. The third phase, beginning with the turn of the century, according to Deva is characterised by courts embracing a logic consistent with liberalisation and neoliberal ideology, and an explosion of frivolous petitions, with the court practicing restraint in their regard. As Radha D’souza points out this was also a time of institutional crises and frustrations where there was a feeling that interventions and mobilisation from the top, through the Supreme Court could clean up the administration.

However, while Deva correctly delineates the early phase from the latter two, the distinction between the second phase and third is rather thin. Whether or not one accepts Deva’s three phases, it is clear that there has been a considerable changes in the nature of PIL since the 90’s. Scholars on PIL have tackled this problem in different ways and the next section will aim to provide a short

2.2 CRITICISM OF PIL

2.2.1 Normative Concerns

Initially in Public Interest Litigation there was seen the possibility of the development of a tool for the mobilisation of an unbambiguously progressivist, pro-poor agenda. In an optimistic article written during what we have called the initial phase of PIL, Upendra Baxi famously wrote (Baxi, Taking suffering seriously: Social action litigation in the Supreme Court of India. Third World Legal Stud., 107., 1985).

The Supreme Court of India is at long last becoming, after thirty two years of the Republic, the Supreme Court for Indians. For too long, the apex constitutional court had become “an arena of legal quibbling for men with long purses.” Now increasingly, the Court is being identified by justices as well as people as the “last resort for the oppressed and the bewildered.
Baxi was however, anxious that PIL maintained its focus on the problems of the poor and marginalised and described this legal phenomenon as Social Action Litigation rather than Public Interest Litigation in order to place stress on retaining a focus on the use of this mechanism for achieving social change that benefitted subaltern groups in the country, PIL’s original constituency. Baxi calls attention to the experience of PIL in the USA, which came to represent “interests without groups” such as consumerism or environment. This anxiety seems somewhat prescient given the experience of in the more recent past.

2.2.2 Progressive and Establishment Critiques of PIL

Many commentators have raised concerns over the increasing trends in judicial intervention -- characterising it as overreach and in violation of the distinctions between litigation and legislation - - and would like to see its ambitions reigned in. Thiruvengadam differentiates between progressive and establishment critiques of PILs. While both are critical of PILs, the establishment critique tends to focus on the need for judicial deference towards the executive and legislature. The progressive critique also expresses strong reservations about the potential of PIL and the courts to act as agents of social change, and is concerned with the direction in which public interest litigation is heading -- they are not yet willing to abandon it, rather they feel that it must be reformed and reinvented (Thiruvengadam, 2009).

Judicial review requires an active engagement with laws and policies, as Varun Gauri explains, "dispute resolution entails an elaboration and application of the normative structures of society as the necessary ground for the dispute resolver’s decision, judges inevitably involve themselves in rule making, which is a form of lawmaking whether in common law or civil law jurisdictions." Gauri suggests that appeals to the doctrine of separation of powers often arise out of an inarticulate expression of concern over the impact of judicial activism on sectoral governance. However, he adds that while this is a real concern which does requires attention, the expansion of judicial power in the area of social and economic concerns, on the other hand, catalyzes more often than paralyzes legislative and executive activity (Gauri, 2010). Given that the Indian Judiciary is reasonably empowered, commentators have gone so far as to call it “the most powerful judiciary in the world” (Rajamani 2010), and the current political climate -- it is unlikely that the Centre in its current coalition culture would have the power to muster and co-ordinate the majority required to overturn a judgement as it had been able to do in the pre-emergency era. Thus the possibility that parliament
would be able to exercise its powers and reign in the judiciary is doubtful. Additionally, as Pratap Bhanu Mehta points out, parliament has for the most part been reluctant to challenge the Judiciary from outside its institutional fabric (Mehta, 2005).

It is unlikely that the legislature will be able to curb judicial activism unilaterally and for now it appears that, for better or worse, the assertion of the judiciary in the sphere of the ‘political’ is here to stay. The debate on separation of powers, questions about whether or not Judges in the Higher Courts do or do not or ought to or ought not to make laws, are rendered somewhat inconsequential in light of the fact that appellate judges in India do and will continue to do far more than just interpret the law (Sathe, 2002). However Sathe continues to describe some instances which transgress the traditional understandings of the role of judiciary as “judicial excessivism” (Sathe, 2002, p. 143), yet criticism of judicial excessivism as D’souza points out are inadequate for understanding “the place of law in development nationally, internationally and historically...Instead, law-in-development studies need to produce geo-historically grounded, explanatory critiques that highlight the causal mechanisms at work in keeping the people of the ‘Third World’ in the conditions they find themselves in today, and must define the place of the law in the wider socio-historical processes (D’Souza, 2005).” This shift necessarily requires the decentring of studies of law and PIL away from the courts, and towards the actions of those who mobilise it.

The ‘progressive’ critique on the other hand argues that the court has failed to maintain PIL’s initial focus on the problems of the poor and has shown that the Baxi’s early terminological concerns were well founded. Usha Ramanathan (Ramanathan) writes of how in the 1990’s the Supreme Court had to balance competing interests, and its concern shifted away from the problems of the poor. Ramanathan describes some of the competing interests that the courts had to arbitrate and its failure to protect the interests of the poor:

The right of over 30 per cent of the residents of Delhi to their shelter in the slum settlements was pitted against the need to ‘clean up’ the city. The right to a relatively unpolluted environment by means of the relocation of industries was pitted against the right of the working classes to their livelihood. The right to life, livelihood and protection from immiseration and exploitation of communities displaced along the Narmada was pitted against the right to water that the dam was expected to reach to the people in parts of Gujarat; it was also pitted against the enormous amounts of money that had already been expended on the dam. Even the right of the victims of the Bhopal gas disaster to receive compensation was pitted against the bureaucratic imperative of winding up the processing of claims.
Prashant Bhushan (Bhushan P., 2004; Bhushan P., Bhushan, P), a noted cause lawyer, while surveying the development of PIL identified an ideological shift in the judiciary since the adoption of liberalization policies in the early 1990s that resulted in a reduced enforcement of the rights of marginalized groups. He argues that the courts construction of conflicting interests, and their tendency to come out in support for less than subaltern causes in the 90's is due to "the class structure of the Indian judiciary. The higher judiciary in India almost invariably comes from the elite section of the society and has become a self-appointing and self-perpetuating oligarchy."

Radha D’souza, however, warns that we should avoid reductionism by necessarily equating the Higher Judiciary with the interests of one particular class given, the original mandate of PIL. At the same time D’souza is unsurprised by this trend given her understanding of the role that law has played in the county’s history, as mobilisation from the top:

The ‘most articulate voices’ mobilized the law for a vision of nationalism and ‘development’ in the post-independence period. The legal innovations of PIL, hailed by many as India’s revolution through the law, now serve the new voices of nationalism and ‘development’ in the neo-liberal phase. The PIL jurisdiction was carved out over several decades spanning the post-war/post independence period in response to challenges that required the reconciliation of the individual rights and socio-economic development written into the constitution. Ideologically and theoretically the creation of a distinct jurisdiction was played out through discourses of ‘development’, subaltern perspectives, post-colonial theories and legal pluralism (D’Souza, 2005).

Raising the question of upper/middle class involvement in PIL, Dhavan (Dhavan, 1994) explains that by its very nature PIL necessitates an alliance between the disadvantaged, middle class intellectuals, and professionals. Here Dhavan invokes the normative understanding of PIL as SAL. Dhavan argues that there is certain ambivalence to middle class involvement, which although beneficial is "found on a mixture of confused, if not false consciousness, irrelevant ideological thinking, and careerism. Criticism of middleclass involvement for Dhavan is both perceptive and unfair. Perceptive given that PIL as struggle is by definition subject to middle class domination, as it cannot happen without the intervention of the middle classes as such. In particular PIL is located in the esoterics of law, needs the intervention of lawyers, judges, informed activists and the media to build on the power of the people. At the same time, the marginalised can get alienated from the process itself and may even cease to passively receive the ‘benefits’ that PIL bring. Being a high profile activity PIL becomes a salient and identifiable activity in itself, in which conflicts over the spoils takes place. The Indian legal system contains many possibilities of being the situs of struggle; PIL is a means by which this struggle can be articulated. Law and PIL possess that open
ended quality of empowering the oppressors with as much ingenuity as their victims (Dhavan, 1994).

Thus while the neoliberal turn in policy has may have had an impact on the judiciary and it’s ideology, D’souza’s vision is excessively structural and fails to allow for the fact that the courts can still present an arena, albeit a constrained one, in which democratic contests take place. Chittaroopa Palit and activist with the Narmada Bachao Andolan argues that

There are many people who believe that the institutionalisation of justice in the form of the judicial system that accompanied the emergence of bourgeois democracy only serves the interest of the ruling classes in this country. For them it is only natural that the courts will not and cannot give justice to the poor. But for those of us who believe that the courts – like any other institution in this troubled democracy – are contested arenas for conflicting interests, the only means that courts continue to function as institutions that affirm democracy, is by subjecting them to intense and persistent scrutiny (Palit, 2000).

For Palit, courts are not necessarily conservative or elitist, but instead provide an arena for contestation to take place. Both the progressive and establishment critiques raise important question about PIL, however as argued earlier they have been highly court centric in their analysis.

2.2.2 Spread to the High Courts

Another aspect of the growth of PIL was its spread to the High Courts. While the jurisdiction of the Supreme Court develops from article 32, at the High Court level the relevant article - 226 - reads:

[E]very High Court shall have power...to issue to any person or authority, including in appropriate cases any Government... directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III [fundamental rights] and for any other purpose.

Article 226 is in many ways wider than article 32, and presents the High Courts with considerable power. In a study of 114 cases at various High Courts, at the time when PIL was beginning to expand from the Supreme Court to the High courts as well, Cotterrell (Cottrell, 1992) argues that despite the presence of several cases that could be described as valid PIL, "[t]he overall impression is that litigants have been using - or trying to use - the High Courts for
purposes which are more parochial, more middle-class, more paternalistic and, in a number of ways, more overtly political than has been permitted in the Supreme Court.” This Cotterrell feels is encouraged by the current functioning of the court hierarchy, where "A broad PIL strategy would suggest that the Supreme Court should be used where it is desirable to obtain the articulation of a principle that could then be used in the lower courts, or where an issue is of national importance. This would mean that a large no. of cases at the High Courts would lack the scope and sophistication of those in the Supreme Court (Cottrell, 1992).

2.3 EVALUATING CRITICISM OF PIL

2.3.1 Constituencies

Another important study is Varun Gauri’s (Gauri, Fundamental Rights and Public Interest Litigation in India, 2010) comprehensive survey of Public Interest Litigation. Most striking is Gauri’s conclusion that his findings are “consistent with the claim that judicial receptivity in the Supreme Court to Fundamental Rights claims made on behalf of the poor and excluded individuals has declined in recent years.” Although Gauri’s conclusions provide strong empirical support to the progressive critique of contemporary trends in PIL, the question remains whether the progressive critique offers any other insights beyond the descriptive claim that PIL is no longer serving the constituencies it was originally created for. What D’ souza (D’Souza, 2005) and Dhavan (Dhavan, 1994) draw attention to is that PIL by its very nature requires elites to mobilise it, these elites on the one hand being Judicial actors, but on the other hand, and equally important the middle class activist as such.

2.3.2 Efficacy and Implementation

Another frequent source of criticism of PIL is the difficulty that the courts experience in its implementation of their orders. The court has limited capability to enforce its orders. Much of the critique of PIL as has been pointed out is normative in nature. Empirical assessments of PIL have been few and far between, however in recent years a body of research has begun to emerge. In an empirical study of the impact of the Indian Supreme Court’s decisions on health and education, between 1950-2006, Pratap Bhanu Metha and Shylashri Shankha (Shankar & Mehta, 2008) focus on 382 cases relating to health and education. A number of these cases were designated as PIL cases, and they find that courts may not be “the right avenue for improving the realisation of social
rights to health and education (Shankar & Mehta, 2008) While this criticism is valid, it is premised on the somewhat naïve idea that litigation and court orders by themselves are sufficient to produce social change.

The efficacy of PIL has been understood very narrowly, in that the instrumental aspects of the courts in a particular struggle remain uninvestigated, as courts proceedings are understood as culminating in an order which is then either implemented or not implemented and that the role of the groups involved in the struggle end their interventions at that point. This isn’t to say that all criticisms of PIL have subscribed to this narrow conceptualisation of the efficacy of PIL. Lavanya Rajamani (Rajamani2010), in an essay highlighting many deficiencies and problems with the processes used in PIL cases also notes that the Court’s actions have “enhanced accountability of public servants” and expresses optimism that if the defects are rectified, PIL’s capacity to bring about greater and more effective change would be enhanced. Avani Mehta Sood’s appraisal of the Court’s record on gender issues notes the many accomplishments of the Supreme Court in seeking to create greater awareness (Sood, 2008).

2.3.3 Litigation and Mobilisation

PIL has also received criticism that it is a hindrance to public action and social movements, because resources and attention are diverted away from other forms of action, and instead channel them into drawn out litigation processes that have limited efficacy. The idea that PILs could provide something of a safety valve to prevent unrest from reaching uncontrollable levels by channelling it was supported by Justice V Krishna Iyer, who stated:

We have no doubt that in competition between courts and streets as dispenser of justice, the rule of law must win the aggrieved person for the law court and wean him from the lawless streets.  

Sivaramayya (Sivaramayya, 1993) reaches the conclusion that public interest litigation works as a sedative rather than providing meaningful remedies, since most changes are only effected in the judicial arena. Dembowski (Dembowski), in his controversial study of environmental litigation in Calcutta finds that the notion that PIL serves to divert and depoliticise and thus weakens social movements does not seem to hold for his study, suggesting instead that,

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5 Fertilizer Corporation Kamagar Union (Regd.) Sindri and others v. Union of India and others AIR SC 344 at 353
“public interest litigation appears to be an increasingly important resource for political movements. It needs to be accompanied by monitoring and other mobilizing activities. This suggests that the concern that legal action may deprive social movements of their scope might be a primarily academic one.”

2.4 CONCLUSION

This survey of the development of PIL and literature on tries to establish a few things. Firstly that there is a consensus that PIL has been significantly transformed in both scope and focus from its original genesis. Secondly that concerns over the separation of powers are misplaced and in many ways misleading as they serve to divert attention away from the analysis of the constituencies of PIL.

Thirdly that the relationship between PIL and civil society has been ambiguous, as although PIL always required the middle class to play a leading role, in its original avatar it sought to represent the interests of the poor and marginalised. However with the shifts that it has experienced over the last few decades, the definition of public that is the judiciary is most receptive to is readily amenable to middle class interests, and not always. This shift is related to the expansion of PIL to the High Courts, in that more parochial issues have been brought to the fore. Fourth, that understanding the efficacy of PIL requires one to look beyond simply the implementation and impact of judicial decision. Fifth, that criticisms and commentaries on PIL were primarily concerned with the judiciary and subsequently lost sight of the roll that litigants play. Varun Gauri writes, hitherto the debate over PIL and judicial activism has largely been abstract and while it has helped generate a set of normatively significant questions at his stage of the research cycle, the need for empirical work may be more pressing (Gauri, 2010). A major reason for this blind spot is the leading role that the Judiciary, as opposed to the Bar played in developing PIL in its early phase. This period was also characterised by what Baxi (Baxi, Taking suffering seriously: Social action litigation in the Supreme Court of India. Third World Legal Stud., 107., 1985) calls juristic activism, i.e. “enunciation of new ideas and techniques perhaps not even urged at the Bar, which are in no way necessary to the instant decision but relevant, and in some cases decisively so, for the future growth of the law.” Even in the 90’s there was an impression that PIL movement depended on the attitude of judges (Anthony). While this is not to say that judges are not important; that the judges have and will play a central role in the development of PIL is but obvious. It is important to expand the focus of analysis beyond the courtroom. This is not to say that there are no studies on the legal mobilisation at all some studies. D’souza’s call for an explanatory critique of requires the
decentring of studies of law and PIL away from the courts, and towards the actions of those who mobilise it.

2.3 LAW AND SOCIAL CHANGE

This section draws attention to a strain of literature in law and society studies in which attempt to study law and litigation from the bottom up i.e. from the point of view of those who mobilise the law, these studies are less concerned with measuring the impact of judicial decrees but instead try to understand the relationship between the law and those who live their lives in the law.

2.3.1 Mobilising the Law

It is important to recognise that legal practices or mobilization activities are not imposed from outside existing social relations. Social terrains of struggle are themselves formed by existing institutional arrangements and relations, and structures of power, which include legal institutions and norms. The Politics of legal mobilisation involves "reconstructing legal dimensions of inherited social relations, either by turning official but ignored legal norms against existing practices, by reimagining shared norms in new, transformative ways, or by importing legal norms from some other authoritative source into the context of the dispute (McCann, 2006)."

Much of the existing work on judicial activism and PIL in the country is court centred, in that attention has been focused on judges, judgements and their implementation, and their impact on governance and administration. This has meant that analytical focus has tended to shift away from those who mobilise the law through litigation. However, in American studies of law, society, and politics, scholars have paid considerable attention to the actions of nonofficial actors during the process of litigation. In a review of American scholarship on the relationship between law and social movements, McCann writes of a similar problem that beset scholarship,

“Social science scholarship on social movements has documented many case studies in which legal claims, tactics, and actors figured or failed prominently, but these studies have rarely provided direct conceptual analysis about how law does or does not matter for the struggles at stake, and generally they have remained quite uninformed by sophisticated socio-legal analysis. In short, social movement scholars do not seem much interested in law. Traditional legal scholars in law schools, by contrast, have written at length about litigation campaigns, judicial actions, and normative aspirations for rights-based social justice connected to social movements. But most of this scholarship has remained court-
centred, sticking close to official case law and actions of legal elites while remaining distant from grassroots movement activity.”

Thus, studies of PIL should focus on the complex interaction between law, social movements, and advocacy groups. Going to the courts requires groups to frame their demands in the language of rights, engage with the legal fraternity, and affects other forms of mobilisation through more conventional political channels. The tensions inherent in legal mobilization activity have raised a number of theoretical and empirical questions: (1) what are the conditions under which individual and collective actors will turn to the courts to pursue political or social goals? (2) What is the best way for researchers interested in social movements to determine social movement success within the courts, within the policy realm and beyond? (3) What is the impact of legal mobilization on a social movement’s collective identity?

2.3.2 Political & Legal Opportunity

**Political Opportunity Structures.** Theory surrounding Political Opportunity structures (POS) has been influential in explaining the development of new Social Movements and the strategies that they employ. Kitschelt (Kitschelt, 1986) argues that political opportunity structures function as “filters” between the mobilization of the movement and capacity and strategic choices of the groups to produce changes in their social environment. POS are thus comprised of “specific configurations of resources, institutional arrangements and historical precedents for social mobilisation, which facilitate the development of protest movements in some instances and constrain them in others (Kitschelt, 1986, p.?).”

However Rootes (1999), in a critique of Kitschelt’s theory of POS, argues that Kitschelt "tends to conflate genuinely structural features of political systems with aspects of them which, because they change relatively quickly and are themselves shaped by relatively durable institutional arrangements, are more properly recognised as contingent or conjunctural features of those systems (ibid).” Thus, what appears as a structural characteristic at one point of time appears far more contingent when the time period is extended. Hilson’s (2002) Political Opportunities is an attempt to overcome this problem. Hilson uses the term 'Political Opportunities' rather than "Political Opportunity Structures” because, as he points out POS gives the impression that protest, lobbying, litigation etc. are governed by structural factors when in fact they are more contingent. He uses PO's to refer to two factors. First, it refers to the "structural openness or closedness of the political system” and second to the more contingent receptivity of political ‘elites to collective action.
Hilson also criticises Kitschelt for subsuming law within the POS instead of treating it as a separate variable. Hilson goes on to delineate what he considers as legal opportunity by restricting legal opportunities to only court based litigation as legal strategy. Receptivity is a key element in understanding PO as the argument turns on the fact that litigation or protest may arise from lack of success in conventional political arenas, but while access would be a necessary condition for the use of a particular strategy, political/establishment elites must also be receptive to the claims being made and willing to change policy accordingly. Thus, while groups like environmentalists may be given access to state and planning machinery, they may still resort to litigation if the political establishment remains unresponsive to their claims.

**Legal Opportunity.** Like political opportunity, legal opportunity consists of both structural and contingent features. On the structural side, one might include relatively stable features relating to access to justice such as laws on standing and the availability of state legal funding, while the key contingent feature is judicial receptivity to policy arguments in particular cases. Hilson argues that a lack of Political opportunities may influence the adoption of litigation as a strategy in place of lobbying, and that the choice of protest as a strategy may be influenced by poor political and legal opportunities. Hilson is careful to point of that that choice of strategy is not uniquely determined by PO or LO and that there are many other factors which come into play in determining a choice of strategy in any particular case – such as resources, identity, ideas and values. These other factors must be considered while studying instances of legal mobilisation.

Andersen (2006) adds the concept of framing to Legal Opportunity structures. According to Andersen, "[s]uccessful framing occurs when a speaker’s discussion of a subject leads the receiver of the discussion to alter the criteria on which she judges the subject. To succeed in her task, the speaker must package her discussion in a manner that resonates with the beliefs of the receiver (Andersen, 2006, p. 6)" The framing of a litigation struggle, besides being constrained by existing cultural stock, is also constrained by the existing legal stock and must articulate their claims in a language amenable to the combination of existing constitutional, statutory, and case law (Andersen, 2006, p. 12). What makes legal stock different from cultural stock is the relationship of the past to the present. Judicial precedent dictates that new decisions are constrained by previous ones, and shifts in legal stock can create or foreclose opportunities for actors to frame their claims successfully independent of social stock. At the same time however, there is no clear hierarchy between the two and they should be seen as mutually constitutive.

Ideas and values are also important factors influencing strategy choice (Rootes, 1999). In their study of litigation initiated by religious groups in the U.S.A., Israel and India, Krishnan and Dulk
(2001) found that conventional theories of litigation that centre around political environment and available resources only partially explain the tactical and strategic decision made by these groups. Instead the authors highlight the role that ideas and attitudes play in shaping legal activity. Admittedly Krishnan and Dulk are unable to provide and analysis of the relative weight of "institutional, resource, or ideational determinants of legal mobilisation. (Krishnan & den Dulk, 2001)"

A caveat to all this is that much of this much of the literature on law and politics is based on the notion that there is an almost unambiguously progressive politics of legal mobilisation that can be differentiated from the regressive politics of counter-mobilisation. However, in the Indian context, particularly in the context of mobilisation on urban issues where conflicting interests are exposed, it becomes considerably harder to determine this. Establishing the lexical priority of the environment over the rights of the poor or vice versa is a complex, though certainly not an impossible task. However, legal opportunities provides us with a framework in which to understand the trends that PIL has described in its past, both progressive and regressive, and to understand the contemporary state of affairs.

2.3.3 Legal Mobilisation Theory

As argued in the earlier section opportunity structures only give a partial account of the use of litigation in attempts to achieve social change. Studies of Opportunity Structures point to the fact that examining agency and ideology are vital to understanding legal mobilisation. Interpretive studies of legal mobilisation have played a major role an important role in this area.

Rather than provide a discrete analytical model, the legal mobilisation framework provides the researcher with a tradition of loosely allied interpretive approaches crafted by scholars with quite different conceptual concerns and empirical applications. Much of scholarship on legal mobilisation focuses on the mobilisation of law by individuals in the resolution of mostly private disputes (Zemans, 1983) (Black). On the other hand, another stream of scholarship has developed an approach to legal mobilisation that analyses the ways in which organised movements seek broad changes in public policies and social practices (McCann, 1994; Scheingold, 2004; Paris, 2009)

According to Zemans (1983), the law is mobilised, "when a desire or want is translated into a demand as an assertion of one's rights." From this simple assertion, it is possible to articulate some important characteristics of the legal mobilisation framework. First, one can make a “standpoint
shift” to decentre the study of law and litigation from the courts and other official state actors, and instead refocus attention on the actions of unofficial actors, both common citizens as individuals and group actors who mobilize the law, thus making it more ‘bottom up’ (McCann, 2004). The goal is to understand meaning and action from the vantage point of these actors, given their history, experience, goals and sense of their environment (Paris, 2009). Studies that focus on individuals do not only involve instances that reach litigation. Instead, they often study how individuals conduct their lives in the ‘shadow of the law.’ (Ewick & Silbey, 1998) Studies that focus on group mobilisation of the law usually involve actual instances of litigation. Group-based legal-mobilisation studies at both parallel and provide an alternative framework to the “top down” studies of the impact of the ‘real’ impact of social reform litigation.

Secondly scholars interested in legal mobilisation tend to view the choices made by actors as complex, indeterminate and contingent. Finally, studies of legal mobilisation must account for the fact that access to legal remedies is highly unequal and that loaded against the ‘have nots’ (Galanter, 1994). However, despite this, many studies of legal mobilisation look at how subaltern or marginalised groups mobilise the law. As a result, while remaining sceptical about the possibility of using litigation and the law as the sole tool for achieving social change, scholars like McCann stop short of agreeing with Rosenberg’s characterisation of litigation centred social reform as a ‘hollow hope.’ While early work on legal mobilisation focused on the experience of the less advantaged, more recently, scholarship has begun focusing on ‘counter-mobilisation’ and litigation initiated by groups representing elite interests.

Another important aspect of much of the literature on legal mobilisation is the relationship between instrumental and constitutive action. Much of American research in law and politics grew out of the Legal Realist paradigm, which tends to see litigation as something that is deployed in a purely instrumental fashion. However, this instrumentalist perspective presents a simplistic understanding of mobilisation. Interpretivist scholars who use the legal mobilisation framework (McCann, 1994; Paris, 2009; Ewick & Silbey, 1998)employ and develop a culturalist conception of law, which McCann referred to as “law as social practice.” The legal mobilisation model emphasises an understanding of law as “identifiable traditions of symbolic practice” which provides actors with leverage, legitimacy, stigma, models, and so on. This is not to say that law is only a set of abstract concepts that informs people’s attitudes and preferences. Rather, McCann argues that legal discourses are constitutive practical interactions among citizens. To constitute means to stand at the core, and a constitutive approach looks at those instances in which law is at the core of the phenomena being studied. The law constitutes when it composes, constructs or forms something, that is, when it acts as a verb (Brigham). This understanding means that to some degree, inherited legal conventions shape the very terms of citizen understanding, aspiration, and interaction with others. The most important of such legal conventions are discourses regarding basic rights that
designate the proper distribution of social burdens and benefits among citizens. At the same time these inherited legal symbols and discourses are not immutable and can be reconstructed as citizens seeks to engage and employ them in their everyday life. Hence, they provide actors with a malleable set of resources for reconfiguring past settlements over legitimate expectations and for expressing aspirations for new entitlements. Obviously this potential for reconfiguring relations is not without its limits. Even highly innovative legal practices have their own limitations and biases. Thus Legal cultures “provide symbols and ideas which can be manipulated by their member for strategic goals…but they also establish constraints on that manipulation.(p. ?)”

The primary project of legal mobilisation model is to analyse the constitutive role of legal rights both as a strategic resource and as a constraint for collective efforts to transform or reconstitute relationships among social groups. Paris delineates three approaches to law, which guide actors strategic approach. He calls these three orientations legalism, realism and culturalism. Legalism views law as “an autonomous realm of ideas and practices that are superior to mere politics” and legalistic actors hope that law has the capacity to rationalise political debate and to render substantive justice. This is similar to Scheingolds (2004) concept of the myth of rights, which rests on a faith in the political efficacy and ethical sufficiency of law a principle of government (pg 17). Realist positions on the other hand, views law as synonymous with politics, with actors seeing litigation as a weapon to be employed in a larger political battle. The third orientation, the Culturalist orientation, develops the realist perspective while at the same time does not see the content of legal doctrine as just a cover for material interests and raw power. It acknowledges that law and politics are entwined and that instrumental action is integral to the mobilisation of law. However, at the same time, it is argued that the realm of the legal embodies and promotes ideas and discourse that exist in complex relation with other cultural and political discourses (Paris). Key characteristics of this framework is that it sees legal mobilisation as just one aspect of the strategies employed by actors in the process of dispute resolution. Thus it looks at mobilisation as part of a larger praxis and does not ignore the instrumental aspects of actions, but instead looks at the relationship between law and action as being more complex than instrumental analysis would suggest, without regressing to the naïve formalism that characterises much legal scholarship.

Thus Legal doctrines structure politics by setting the terms of political debate and parameters of action, and provide the “discursive resources for reshaping meaning.” Paris goes on to suggest that each orientation gives a different take on six roughly elements of thinking and practice:

1. How actors understand the nature of law and its relationship to politics;
2. How actors understand the primary audience for their legal claims;
3. How actors understand the nature of the attorney-client or attorney constituent relationship;
4. How actors view the nature of judicial decision making, or why courts decide cases the way they do;
5. How actors see the implementation powers and capacities of courts and the likely impact of court decisions;
6. How actors understand the nature of social change processes (or how change actually occurs).

These factors in turn affect the way that these actors "translate" their causes into instances of litigation. Paris describes two ideological factors that impinge on the process of legal translation; the ideological orientation toward the cause that these actors espouse, and their ideological orientation toward law, politics, and change. These orientations shape the contours and processes of legal translation. Legal translation is the practical activity at the core of legal mobilisation, which is in turn a broader process requiring material resources and, often, at least some measure of judicial support. What follows is that as a consequence of their legal ideologies, actors may embrace different ideas about the lawyer-client relationship, different ideas about combining litigation with other forms of political organising and actions, and different ideas about what courts can and cannot do for them.

Bringing particular legal claims present courts with opportunities for decisions and often shape the content of judicial opinions. In turn, these decisions can play an influential role in determining and defining the idiom of public debate. In short, legal translation matters because law can and often does frame politics and speaking one way rather than another within the law is likely to have significant political implications. (Paris, 2009 pp. 219-220)

While most studies of collective legal mobilisation present a qualified positive account of the use of law and litigation in order to achieve progressive social change, there also exist accounts of the use of law in order to produce less than egalitarian social outcomes. While the language of rights does contain the tools for achieving positive change, its determinacy means that it is also amenable to being mobilised for in order to serve a distinctly anti-egalitarian agenda. Feldman, in an account of homelessness, explains how the confiscation of the property of those who live on the street is justified on the grounds that they have chosen to live there rather than in one of the shelters provided by the city. Thus, “agency is converted into a form of blame.” Here the discourse of individualism and freedom is itself used in order to dispossess the poor (Feldman 2000). Once blaming begins, exclusion quickly follows. It is thus, in the nature of rights to be both agents of equality and perpetuators of inequality. While counter-mobilisation is a strong term to use to
characterise certain aspects of PIL, it draws attention to the fact that the use of law is easily amenable to agendas that exclude, while at the same time maintaining an aura of neutrality.

In order to study legal mobilisation, I have drawn from both from process based studies which look at political opportunities, and interpretive studies of legal mobilisation. Studying political and legal opportunities draws attention to structural contexts that lead to litigation struggles, while at the same time pointing to structural aspects, in particular, judicial receptivity. However, the expansion of the understanding of opportunities does not present us with the tools to provide a complete picture of the PIL. Interpretive legal mobilisation theory on the other hand, because it attempts to ‘decentre’ the study of law and legal mobilisation, refocuses critical attention on the actions of those who mobilise the law. The constitutive perspective that they propose moves beyond formalism, without falling into the pit falls of realist studies and tries illuminating both the instrumental and constitutive factors that drive litigation. Looking at the ideology of actors and how it is translated into the actual content of litigation, deepens our understanding of PIL and the transformation that it has undergone by underlining the relationship between legal translation and receptivity.

2.3.4 Studies of Legal Mobilisation in India

As argued earlier, studies of PIL in India have tended to focus on the Judiciary and rarely fixed their gaze on non-official actors or the actions and strategies that they use, and have instead directed attention towards judicial attitudes and behaviour, implications for governance, and other issues. This has meant the while many commentators are critical of some of the developments in PIL, they have done little to examine the logic that drives activists or the strategies that they employ. The relaxation of standing in PIL allows “Publicly Spirited Persons” to mobilise the courts on behalf of those who cannot or in public interest. What exactly constitutes public spirited or public interest remains poorly defined. This is not necessarily a problem, given that it allows space litigants occupying different places in the ideological and class spectrum to bring a diverse range of problems to the court. While there is a growing sense that PIL has been increasingly hijacked by a middle class agenda, there have been no real attempts to study this. Oddly enough, it is the judiciary that has raised this question, albeit in a conservative manner, in the growing tendency to question the bonfires of litigant. Yet these actions, instead of raising important questions about who mobilises the law and for what, have instead been used to undermine litigation (Sahu, Gonzales). In this section I shall examine a few studies that have looked at litigation from a somewhat “decentred” perspective or at least demonstrate a concern with the actually happenings of litigation rather than a solely normative concerns.
**Litigants and Lawyers.** Baxi’s exploration of the ‘geographies of [in]justice (Baxi, 2000) stands out for its treatment of non official actors. Firstly he points to the contradictions that run through cause lawyering at the Supreme Court, with cause lawyers representing the interests of the countries subaltern classes while at the same time arguing in court on behalf of big capital. Second, and more important, Baxi recognises that in order to go beyond general accounts of Judicial activism one must pay closer attention to the actors and constituencies. Baxi delineates a typology of fifteen categories of social rights activist groups who ‘activate’ judicial activism. These actors are both producers and consumers of judicial activism and their actions are in turn affected by the dispositions of judicial actors who shape the pattern of demand and supply for activism. Baxi goes further to describe the outcomes that these actors seek to achieve, on the basis of which he characterises them as retailers and wholesalers, retailers being those who seek instant outcome solutions and wholesalers, those who seek to make long term interventions. Yet these outcomes, or arenas, are themselves transformed in the process of translation from a social cause to an instance of litigation, and many times the litigation takes on a life of its own, autonomous from the actions and intentions of those who initiated the litigation. Yet while Baxi manages to articulate the interactions between non judicial and judicial actors, his concern remains with accounting for judicial actors and the presence and influence of non – judicial actors quickly fades from his analysis (Baxi, 2000). Jayant Krishnan (Krishnan, 2005) focuses on cause lawyers in India, applying Sarat and Scheingold’s concept of transgressive cause lawyering. Krishnan looks at the actions of cause lawyers at different levels of India’s Judicial/Court Hierarchy. He finds that lawyers at the district courts are most constrained by their circumstance, while advocates at the High Court and the Supreme Courts in particular have considerable freedom. Krishnan stresses that legal environment and reputation exhibit considerable constraints on their ability to make transgressive actions. The point is that lawyers exist, mediating and translating in many cases between the litigant and the court, and that these lawyers have considerable constraints on them, and that this must have consequences in terms of litigation.

**Civil Society and Class.** Dembowski’s controversial book, *Taking the State to Court,* is possibly the only in depth study of public interest litigation focuses primarily on mobilisation and how civil society groups mobilise the law in Calcutta. Dembowski finds that Calcutta’s urban activist civil society is too weak to actually control the government and effectively limit its powers. This is due to an overarching lack of trust both among the various agents of civil society and with respect to government agencies. In his study of environmental litigation in Calcutta, he finds that, the judiciary has become a forum that can, in a limited manner, provide such transparency. Public interest litigation provides access to the wielders of state power and, accordingly, a minimum level of scrutiny of their doings. He maintains that despite the shortcomings of litigation, the long
delays, the risks involved, going to court is not an irrational act given that PILs get considerable media coverage which helps these groups change opinion, and that even moderate implementation is well received by the public in general. The courts may even further the emergent public sphere in I Other studies have showed how PILs have actually created a fore shortened Public realm. In a study of environmental public interest litigation, Rajamani observes that litigation has been dominated by a few individuals and that their leverage within the Courts may constrain the vision of the court and lead to a situation where one strain of opinion is privileged, while all others are ignored. Similarly, Zerah argues that in the case of the litigation surrounding the Sanjay Gandhi National Park in Mumbai, PIL enabled the environmentalists groups to make their concern visible and to get their claims validated through a legitimate process. On the other side of the coin, despite the involvement of a vocal NGO, the inhabitants of the park were unable to influence the decision process. They were sidelined through the process itself, in that slum dwellers could put forward their demand only through a redressal grievance committee and they could not approach the high court or any other bench.

2.4 URBAN CHANGE AND PIL

According to Chatterjee the post reform period has been characterised by a more or less concerted effort to ‘clean up’ the Indian cities, to reclaim public spaces for the use of ‘proper’ citizens. This definition of citizen often excludes the poor; who find themselves, by default, at the margins of legality and thus unable to make effective claims on ‘citizenship’ (Chatterjee P. , 2004). Additionally the judiciary has been able to define which resources and spaces are public and which are private. For example, clean air or planned cityscapes have become reaffirmed as public goods whereas water supply, latrines, etc moved to the private realm (Veron, 2006). Similarly, Baviskar considers this form of activism as bourgeois environmentalism, “For the bourgeois environmentalist, the ugliness of production must be removed from the city… unpleasant sites that make the city a place of work for millions, should be discreetly tucked away out of sight, polluting some remote rural wasteland. So must workers who labour in these industries be banished out of sight…domestic workers, vendors and sundry service providers, should live where their homes do not offend the eyes, ears and noses of the well-to-do.” It is this brand of environmentalism that seems to have found resonance with the views of the Judiciary (Baviskar, The politics of the city, 2002). Bourgeois desires for an ordered environment are reflected and taken up by an activist judiciary, willing to step into the breach left by the executive and legislative branches of the state, especially a regulatory structure that is susceptible to political pressure and corruption. By ignoring the absence of low-income housing, the judiciary has criminalised the very presence of the poor in the city. Evictions are justified as being in the public interest, as if the public does not include the poor and as if issues of shelter and livelihood are not public concerns. The courts have not only
brushed aside representations from basti-dwellers, they have also penalised government officials for failing to demolish fast enough. Similarly when it comes to dealing adjudicating conflicts the rights of the poor and the infrastructural projects, the rights of poor have been consistently sidelined for example the Delhi Metro etc (Baviskar, 2011). It would appear that the perceptible shift in PIL is in many ways related to the transformation of India’s cities thus the the court have played an important role in the defining at demarcating urban citizenship in the last couple of decades.

The Elusive Middle Class. In 2004, Mckinsey came out with its vision Mumbai plan, the plan had been commissioned by Bombay First, a think tank set up by the cities commercial elites, to suggest ways to make Mumbai into the next, Shanghai. Bombay first was set up to mirror London first, an organisation which was instrumental in the process of making London a world financial centre. However as Roy points out the making of the Indian “world-class” city, is not solely the project of the propertied elite. It is also engendered through claims of integration, public interest, and urban democracy. It is a reclaiming of the city, of the urban commons, rather than a retreat to gated enclaves. This reclamation takes place in the name of the “middle class consumer-citizen”, who’s interests as Fernandes and Heller (2006: 500) point out are at once distinct from those of the poor and the working class, as well as from those of the propertied classes. Yet, organized as neighborhood associations and reform movements, the middle class has taken up the cause of spatial order in Indian cities. Their goal is broader than the simple defense of property values, and they constantly invoke the idea of the good city, while of course the urban poor have no place in the good city. In short, they “represent class projects of spatial purification” (Fernandes and Heller 2006, pp 516). Analyzed by Baviskar (2003) as “bourgeois environmentalism,” in Delhi, environmental and consumer rights groups have led the battle against slums and squatter settlements. Through the filing of public interest litigation, they have managed to criminalize poverty and assert the values of “leisure, safety, aesthetics, and health” (ibid, p 90). Such claims to the urban commons do not oppose, but rather align with, the world-class city of the Global Indian (Roy, 2011, pp 279). In other words, the making of the Indian world-class city cannot be simply understood as an elite project or as the interests of property capital, or even as the practice of an activist state, in which interest align beyond groups immediate arrangement vis-à-vis capital.
3 MOBILISING THE LAW IN MUMBAI

This Chapter will analyse the experiences of the two groups who mobilise the courts as part of their strategies. The first group studied is the Ghar Bachao Ghar Banao Andolan, a movement of the urban poor that resists evictions and slum demolition and works towards house. The second is organisation studied if the Bombay Environmental Action Group, an elite environmental NGO that has been actively pursuing a ‘green’ agenda for the three decades.

3.1 NOT LITIGATING FOR HOUSING RIGHTS

3.1.1 Locating Legal Opportunities in the Housing Struggle

*Locus Standi.* According to the traditional rules of standing, a person must show that she is adversely affected by the impugned action or that her own right has been violated, the rule is justified on the grounds that it is required to prevent an explosion of frivolous and spurious litigation. However in a country like India, where a vast numbers of the population are still poorly educated, conservative rules of standing proved to be a barrier to access. As mentioned earlier, period immediately after the emergency, the Supreme Court began relaxing the rule of standing in an attempt to make the Courts more accessible to the poor and marginalised and their representatives. The Court seemed motivated by the desire to de-professionalise the system of justice and in effect two reforms were taken: (1) Public spirited persons were allowed to move the court on behalf of the victims of injustice who were poor, illiterate or otherwise disadvantaged. (2) By introducing the concept of epistolary justice it became possible to activate proceeding through a letter rather than a writ petition. The practice of epistolary justice was later reduced given the fact that it does present certain problems regarding procedure and intent, and the court now usually appoints Amicus Curiae and asks them to draft a regular petition on the lines of the letter. In the early stage of PIL the relaxation of standing allowed groups like the PUCL, PUDR, Bandhua Mukti Morcha etc to bring matters to court on behalf of the poor and marginalised. As PIL was further developed standing was extended to allow those people who had a direct or indirect stake in the outcome of the suit, but did not have standing in the traditional sense of judicial proceedings. In Ratlam Municipality, for the first time people were allowed to approach the court for violations of

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their collective rights and were rewarded with a judgment seeking the enforcement of positive obligations.

The relaxation of Locus Standi, was the catalyst of for the development of the body of litigation against both government lawlessness and environmental degradation. Sathe explains how with the gradual relaxation of rules of standing, it was only inevitable that matters involving environment and governance appeared in court and since the late 80s issues of malgovernance and environment have begun to dominate the agenda of PIL (Sathe, 2002, p. 218). Thus as things stand at present the rules of standing in PIL have been relaxed to the extent that standing is rarely an impediment to litigants. However at there is a growing tendency to question the bonafides of a litigant along with the threat of imposing cost (Gonzalves & Sahu, 2011) has the potential to reduce access.

**Legal Stock.** Surveying PILs concerning issues that have a particularly urban concern, Olga Tellis or pavement dwellers case stands out. However Olga Tellis, also stands out for its failure, while the court did make important declaration on the nature of fundamental rights, it failed to provide any meaningful relief to slum dwellers. Olga Tellis also demonstrated to activists that going to court could actually be detrimental. A worker at Society for the Promotion of Area Resource Centres noted,

> Right After Olga Tellis did a census in 1985, we learnt from Olga Tellis not to go straight to the court, of course. The judgement had declared that the right to life included the right to livelihood, but in the judgment the court declared that these pavement dwellers were illegal. There was nothing before, saying they are illegal, and this ambivalent situation was better. (ahuja)

If examines cases by slum dwellers in the period after Olga Tellis it becomes clear that housing groups were unable to build on Olga Tellis and subsequently stopped using PIL as an arena in which to oppose evictions. Furthermore in the last two decades, PILs filed across the country have eroded even the small gains made in Olga Tellis, these cases.

**Receptivity.** If the Olga Tellis judgment failed to provide meaningful relief to the petitioner, it at least demonstrated that the Judiciary accepted the role that it would be wrong to understand the lives of the poor only in the context of legality and illegality. How as the years progressed even this disappeared.
In the 90’s when the judiciary began to express itself on the space occupied by the poor in the city, a picture significantly different began to emerge. In Lawyers’ Cooperative Group Housing Society Vs Union of India, the court lamented the burden that the urban poor placed on the ex-chequer and directed that the resettled jhuggi-jhupdi dwellers should not be given an alternative pitch on leasehold but rather license in order to prevent them from selling it. In Almitra Patel vs Union of India, while dealing with the problem of solid waste disposal in Delhi, the Supreme Court spoke of the need to clean up the city and located a significant amount of the blame on the slum dwellers.

In the Almitra Patel case, it became clear that the Judiciaries perceptions of the poor had changed considerably. From then on, slums were characterised only in terms of their legality, or rather illegality; the idea, put forth in Olga Tellis, that there could exist a right to shelter was dismissed. In the Almitra Patel case the court infamously compared slum dwellers to ‘pickpocket.’

What is more telling of the lack of receptivity towards the problems of evictions is the fact that much of the Judiciaries declarations on slums were not actually sought out by the petitioner and arose because the judiciary took a special interest in that particular aspect; An aspect which in the larger scheme of things, concerning waste management is doesn’t justify the primacy that the court gave it considering that fact that slums and squatter settlements actually generate considerable less solid waste per capita compared to middle-class and upper-class colonies and slums given the lower levels of consumption. Speaking of the effect that Almitra would have on important aspects involving access and participation in the court Rajamani points out that this “The perception of the judiciary as middle class intellectuals with middle class preferences for fewer slums, cleaner air and garbage-free streets, at any cost (to others), has in itself silenced certain voices. The poor, and those who represent them, are unlikely to approach the Court with their concerns, as they are likely to be left the poorer for it.” (Rajamani L. , Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability. , 19(3), 293-321., 2007). By ignoring the absence of low-income housing, the judiciary has criminalised the very presence of the poor in the city. The courts have not only just brushed aside representations from basti slum-dwellers, they have also penalised government officials for failing to demolish fast enough (Baviskar, Cows, Cars and Cycle-rickshaws: Bourgeois Environmentalism and the Battle for Delhi’s Streets, 2011). Ghertner (Ghertner A. , 2008) (Ghertner A. , 2011) presents an account of Delhi’s court driven slum clearance campaign that is simultaneously fascinating and distressing. Ghertner argues that in the early period of PIL, the problems of slums were discussed in the framework of a larger failure of the authorities to provide services and infrastructure, then came Almitra Patel, which radically swept the “discursive terrain” of when the Supreme Court framed slums solely in the context of nuisance and illegality. He further points at that it was only once the
Court had framed the problem in the language of “nuisance” did middle-class RWAs start using it as an argument in courts.

In the context of Mumbai also the Bombay High Court has also demonstrated this bias, in a case concerning corruption in the Slum Rehabilitation Act the court made the following comment,

It is now a well known fact of which judicial notice has been taken repeatedly, that large scale encroachment takes place as far as Government properties and land are concerned. The Government and its instrumentalities and agencies are unable to control encroachment, illegal squatting and un-authorised development on its lands as the political will and strength is lacking. The slum pockets being Vote Banks, preventive or prohibitory measures are not initiated at right time. The number of encroachers and squatters on lands roads and pavements has increased and one can witness the same.

Once the incentives were offered as above and regulatory and rehabilitation measure and schemes were mooted number of dispute and difference between the slum dwellers/encroachers and the local authority and appropriate agencies have arisen which are consuming valuable time of this Court.7

In another judgment, this time in a PIL filed by a middle class group, the court made the following comment,

Those who pay taxes also have a right to life, including living in a clean environment and with proper infrastructural needs. Their rights cannot be defeated merely on the pretext of housing those who continuously continue to occupy public and private lands for residence or business inspite of the cut-off date. There has to be a balancing of rights. No Nation, no State or the Rule of law can survive, if illegalities continuously are legalised in the guise of social obligation. The State which has a constitutional duty to protect all the citizen cannot wear the mantle of Robinhood, by depriving the tax payer of his right by protecting and rewarding law breakers. Extraneous considerations, out not to weigh the constitutiona and the Rule of law, will have to step in, if Constitutional authorities deviate from protecting the rights of its law abiding citizens.8

At the same it would appear that to the Court that these notions of legality and illegality do not apply to everyone, Baviskar when considering the order for the eviction of the Pushta colony

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dweller in Delhi writes that, while it was true that the settlers were squatting on land that was legally owned by Government Agencies, larger tracts of these two agencies’ lands along the river had been taken over by the government and handed over to private bodies in blatant violation of the master plan for Delhi which designated these lands as an ecological zone. Several Projects, including the Akshardham Temple Complex, were retrospectively legalised by the Supreme Court over the protests of the landowning agency (Baviskar, Cows, Cars and Cycle-rickshaws: Bourgeois Environmentalism and the Battle for Delhi’s Streets, 2011). Ghertner (Ghertner A., 2011) describes how a challenge made by a group to the construction of a Mall in the Delhi ridge failed at the high court, despite demonstrating flagrant violations of regulations.

Showing architectural blueprints and artistic renderings of the proposed development emphasizing the project’s US$300 million price tag, and describing the mall as a “world-class” commercial complex, the DDA suggested that the visual appearance of the future mall was in itself enough to confirm the project’s planned-ness. How could a project of such strategic importance in Delhi’s effort to become a world-class consumer destination not be planned, the DDA’s lawyer argued. Even after its own “Expert Committee” found the complex in “flagrant violation” of planning law, the Court concurred in early 2007, allowing construction to go forward based on the mall’s capital-intensiveness and associated world-class appearance.

While the Judiciary frames the urban poor as transgressive encroachers, it regularises other violations by the state and other powerful actors. Survey the Legal Opportunities, as well as the political opportunities available to housing groups, it would appear that while the experience the legal opportunities available to these groups are limited, given the contemporary legal stock and the closedness and hostility of the judiciary towards housing group like the Ghar Bachao Ghar Banao Andolan would be unlikely to use litigation as a strategy. The next sub-section shall evaluate the experience of the GBGBA and the effect that litigation and PIL has had on the organisation and the goals it seeks to achieve.

3.1.2 The Ghar Bachao Ghar Banao Andolan and the National Alliance of People’s Movements

The Ghar Bachao Ghar Banao Andolan, is an organisation working on the issue of housing rights in the city of Mumbai. It arose in the wake of the demolition drive that took place in Mumbai towards the end of 2004, where as part of the project to turn Mumbai into a ‘World City’ or
Shanghai or the like over 400,000 people were displaced among widespread coercion and repression (George and Nautiyal, 2006). It is a movement of slum dwellers, SRA affected and the unorganized sector workers and describes itself as a movement for development with justice and equity and therefore also “fights corruption, malpractices and protests against accumulation of resources like land in the hands of a few.” The GBGBA is also part of the National Alliance of People’s Movements (NAPM), an association of various social movements, organisations, and unions across the country, led by prominent activists like Medha Patkar.

*Keeping up with the Jones’s.* Much of the GBGBA early experience with the courts came in response to various PILs that had been filed by middle-class groups and housing societies, in which the High Court gave orders that were detrimental to the interests of slum dwellers.

It was in the wake of the 2004 demolition spree that the GBGBA had its first experience with litigation. After the demolition drive and the protests that followed it, there was considerable pressure on the state to rehabilitate those who had lost their homes. The state, ostensibly in an attempt to do this filed a notice motion, to revive an older PIL that had been filed by a resident’s welfare association challenging an aspect of the slum rehabilitation scheme. Since the State had approached the court, the activists felt the need to intervene in the case as well. This writ petition was filed in the Bombay high court by Relief Road Housing Society association, challenging the slum rehabilitation policy which permitted utilisation of the plots designated for public purpose including recreation grounds, play grounds, etc., but were occupied and encroached upon by the slums to be utilised by slum rehabilitation scheme, an intervention application was filed in this petition by NAPM. On 5th September, 2005, the High Court ordered that a high power committee be created to formulate a policy for the rehabilitation of slum dwellers in general, a representative of the NAPM organisation was also made part of the committee. However another PIL filed by a middle class group the court ordered that the cut off date for relief and rehabilitation of slum dwellers could not be extended, this was despite that fact there were no pleadings at all regarding the same. This order was passed when a scheme for the housing of the poor living in slums formulated by the state government pursuant to the order, was allowed to go ahead with the cut off date for the regularisation of slums extended from the year 1995 to the year 2000. The 2006 order thus interfered with the functioning of the high power committee appointed by another division bench of the same high court but this time presided over by the Chief Justice of the high court, in response to this the NAPM subsequently took the matter to the Supreme Court.

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9 Relief Road Welfare Association
The conflict around Golibar, a key site for their campaign, has also gotten entwined in litigation. Golibar is one of the largest development projects in Mumbai, involving 46 societies and around 5000 eligible families. One of the societies, Ganesh Krupa Society (GKS), had entered into an agreement with a small developer to implement the SRA. Subsequently the project came to be promoted by Shivalik ventures. Under the SRA, a developer requires the consent of 70% of the residents. However many of the residents of GKS alleged that Shivalik ventures had fraudulently obtained their consent, and an FIR was filed. In April 2010 orders for eviction were given by the SRA and in September an Appeal before the Additional Commissioner was also dismissed. While the GBGBA does not approach the court in eviction matters, individual slum dwellers do. Here In this case many slum dwellers did, alleging widespread fraud in the slum rehabilitation process committed by the developers. The High Court however refused to provide relief and the matter went to the Supreme Court where it was also dismissed. In May 2011, the dissenting residents of Golibar staged a protest, and after several activists, including Medha Patkar went on a hunger strike, the Chief Minister of Maharashtra agreed to form two committees headed by a retired Justice at the High Court to look into allegations of fraud in the case of Golibar and several other SRA projects and also stayed the enforcement of the demolition. After this the developers Shivalik ventures, along with another developer approached the court arguing that the committees themselves were biased as some of the members were involved in the protests and that the High Court and the Supreme Court had already dealt with the matter. The High Court commented and while it only asked the state to reconsider its position, the state subsequently scuttled the committees, and many of the gains made through the mobilisation by the GBGBA were reversed.

Developing a Strategy. What appears from this experience is that the in the context of their struggle, the GBGBA has not been able to ignore Judicial system and the High Court in. In response to these events and the repeated framing of slum dwellers as lawbreaking encroachers and the activists decided to challenge various illegalities and irregularities that they had found in several development projects, following the logic that if illegality and encroachment were the sole condition of slum evictions and demolitions, then many high profile project that violate building regulations and other regulations like CRZ and development reservations should also be demolished. They filed petitions challenging the construction of a mall in Worli, alleging gross violations of regulations. The mall as they discovered from several RTIs that they had filed, had been built on land reserved for housing the dishoused and a municipal school. The mall case is currently languishing in the court and has not been heard seriously for more than a year. The activists point out to the strategies that the respondents and their lawyers use to keep the case from being heard; on the scheduled hearing date the respondents or their lawyers do not appear in court,
or if they file an application or a notice of motion a few days before the scheduled hearing which again delays the hearing by a few days. another fact, is that the case is currently before a judge who the activists have little faith in, and in the past has been quite critical of their actions.

Activists also filed PILs challenging the building of a 40 storey building in Walkeshwar and irregularities regarding a McDonalds restaurant near CST station, and a film stars mansion in an upper class suburb. However these petitions were subsequently dismissed by the HC. In the Walkeshwar\textsuperscript{11} case the petitioners listed 24 violations of various regulations but interestingly enough making little mention of public interest. In this case the court dismissed the case on the grounds of delay. In the case regarding the film stars mansion the petition\textsuperscript{12} that was filed listed some 36 violations and again making little mention of public interest.

The activists also uncovered the Adarsh land scam, the fallout of which led to the resignation of the then Chief Minister of the state, Ashok Chavan. Another PIL that the activists of GBGBA were involved in challenged the construction put on 230 acres of land in Powai, in violation of a tripartite agreement between the State of Maharashtra, the Mumbai Metropolitan Regional Development Authority (MMRDA) and the developer, Niranjan Hiranandani. The agreement required the developer to construct affordable housing, with units of 40 sqmts and 80 sqmts which are part of the conditions for exemption under the Urban Land Ceiling Act. However Hiranandani developed and marketed the constructions as luxury apartments and amalgamated these smaller flats into large, high income oriented units between 180 sq mts and 457 sq mts. Through mobilisation, which involved the occupation of areas of Hiranandani Gardens by slumdwellers and a PIL in which they received a favourable issue, the GBGBA have been able to foreground their case. These high profile test cases have received widespread coverage in the media, and do generate and have helped generate some of the discussion that the GBGBA hopes to generate on the current state of urban development (in the city?).

As discussed earlier, pro-poor organisations like the GBGBA that organise against evictions operate in a hostile climate in which public discourse has consistently delegitimized rights claims made by slumdwellers and frames them in the context of legality and illegality and as encroachers. This sentiment is echoed by the higher judiciary, indicating just how pervasive this consensus is. While in the past the higher judiciary failed to provide any relief to slumdwellers who approached it, more courts have displayed a naked hostility to them. While individual slum dwellers do approach the courts, the GBGBA does not approach the Court for relief on the matters of eviction,

\textsuperscript{11} Simpreet Singh and Anr v State of Maharashtra And Ors PIL No.96/2009
\textsuperscript{12} Simpreet Singh and Anr v State of Maharashtra and Ors PIL No.48/2010
As an organisation we have never taken any case on behalf of slumdwellers, if a slum is facing eviction, there is not a single petition asking for relief in the name of the GBGBA. Because we know, from experience that if the case is taken to the court an order is going to be given: demolish the slum in one week and report back to us about what has been done or not been done. Instead if we don’t approach the court, we might prolong the process for at least six months, but once it is in the hands of the courts then it will have a deadlines (Interview).

By not raising the questions of evictions in the court as an organisation, the GBGBA avoids being bound by potentially adverse orders, and thus can negotiate with the state and municipal authorities. At the same time, the GBGBA is unwilling to cede ground to a hostile judiciary and the litigation strategy that they developed reflects this. Confronted with a situation in which slumdwellers were continuously described as transgressive encroachers undeserving of leniency, they developed a strategy to challenge this, while at the same time challenging another aspect of contemporary urban development: the flagrant violations of development regulations and reservations by builders and developers in the city.

So to counter this argument we started exposing encroachments made by influential people in Mumbai. Trying to raise the argument that if the only reason that slums are being demolished is encroachment, then its not only the poor who are encroaching. There are other actors who are encroaching, and by that logic the same yardstick should be applied and then those constructions are to be demolished. That strategy we continue till date.

By turning the argument around on the transgressions of the worlding city, they hoped to challenge the hypocrisy and double standards of contemporary discourse. Adopting a legalistic framework, they identified several cases of violations and filed PILs on them, arguing for the demolition of the structures. Their experience with this strategy has been mixed. While they have had success in the Adarsh case and the Hiranandani case, in other instances this strategy has backfired, with the High Court dismissing their petitions and reprimanding the activists for frivolous and publicity oriented public interest litigation, even imposing costs of Rs. 20,000 in one case13 ("Petition against SRK’s house is frivolous," n.d.). The Hiranandani case has also been a qualified success, while the activists demanded stern action, the approach of the High Court’s tone was more reconciliatory tone and expressed concern for the creation of third party rights. In an order it was declared:

Though we do find a lot of substance in the Petitioners contention that the State Government officers in collusion with the developer have turned a Nelson’s eye to the gross violations of the

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13 Simpreet Singh & Anr v Union of India & Ors, 2011(3)BomCR832
tripartite agreement by the developer, which has resulted in the aggrandisement of the developer also which smacks of acts of corruption in not heeding the report of the Metropolitan Commissioner of the MMRDA dated 14 February 2008, and instead calling upon the developer to deposit a paltry sum of Rs. 3 crores for the massive construction put up by him in violation of the terms of the tripartite agreement, we would rather direct corrective action for the public which would be entitled to take up such affordable housing of specified size being 40 and 80 sq. mtrs of flats rather than punitive action in these writ petitions upon collusion with the Government officers, leaving the petitioner free to take up the issue of corruption in a criminal prosecution against any errant public officers and the developer (emphasis added).

The GBGBA are caught in an awkward position, while they are wary of litigation, they have been forced to engage with it. More often than not some of the more damaging judgments have come from PILs themselves. Rather than confining themselves to only reactive litigation, the activists do themselves initiate PILs. In this context they do not use PIL as a strategy to combat evictions. Instead, using it as a subordinate strategy they have as well as intervene in other cases, often themselves PILs, in which orders detrimental to the interests of the urban poor have been passed tried to use to counter the dominant perspective on slum dwellers, a perspective that has been embraced and articulated by the judiciary. At the same time by raising issues of malgovernance and corruption, they have tried to frame parts of their arguments in ways the judiciary is more sensitive to.

The activists of the GBGBA go to court with a certain scepticism that the court will rule in their favour, but litigate nonetheless,

If not at the level of organisation, I as a person am convinced that you can’t get justice from the court. When we file a case we don’t think that… even in Adarsh we see it as an aberration and exception…in the present day with courts the way they are. But we are still filing because we feel that that is one forum where this issue needs to be raised. So Courtrooms need not only being echoing these words that slums dwellers are encroachers or they should be evicted. But also should be standing there saying this building is illegal, that politician is that. Even for the sake of raising an argument. We are raising an argument in other areas, so why not use this forum also, not with the hope that we will obtain justice. But, this is also a space where we should be raising our issues. Personally whenever I file PILs and work on PILs, I go by that argument.

The GBGBA’s strategy to reveal the double standards of contemporary development has in many ways been successful. However at the same time it has come up against a situation in which the consensus while not outrightly legitimising the transgressions and fraud committed by developers,
seems to view them as correctable if not errant developments, and has instead framed the activist’s work as frivolous.

**3.2 ENVIRONMENTAL ACTIVISM IN THE CITY**

**3.2.1 Legal Opportunities in the context of Environmental Organisations**

**Locus Standi.** As explained in section 3.2.1 standing was expanded in the particular context of environmental litigation. Thus under most conditions the standing of environmental groups is not challenged.

**Legal Stock.** In the arena of environmental protection the Indian Judiciary has played a central role in the protection developing a substantive body of case law. Through PIL the Judiciary has expanded the constitutionally protected fundamental right to life and liberty to include the right to a wholesome environment, that is, ‘right of enjoyment of pollution-free water and air’. This right was recognised as part of the right to life in 1991, and in the years since the High Court has come to receive so many cases demanding the protection of the environment that it has gone so far as to declare that, ‘[a]t this point of time, the effect of the quality of the environment on the life of the inhabitants is much too obvious to require any emphasis or elaboration’. The Court has since fleshed out the right to a wholesome environment by integrating into Indian environmental jurisprudence not just established but even nascent principles of international environmental law. These include the polluter pays principle, the precautionary principle, the principle of inter-generational equity, the principle of sustainable development and the notion of the state as a trustee of all natural resources. Through PIL the Court, has passed (and continues to pass) orders inter alia to protect the Taj Mahal from corrosive air pollution, protecting the Ganges from industrial pollution, addressing the issue of the air pollution in Delhi and other metropolitan cities, protect the forests and wildlife of India, and clear the cities of their garbage. These cases represent a small, albeit significant, minority of the dozens of public interest environmental cases that reach the have come before the Indian courts. So involved has been the courts disposition in cases of environmental protection that there are few areas of environmental governance where the Judiciary has not had an impact. While developing and Indian environmental jurisprudence the Courts have consulted and invoked concepts of international law and introduced concepts such as the polluter

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14 Given that there has been extensive research done in this field I only cover this section briefly, a more indepth analysis see (Rajamani L. , The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip?, 2007) (Rajamani L. , 2007)among others
16 M.C. Mehta v Union of India (Delhi Vehicular Pollution Case) (1998) 9 SCC 589, 590.
pays principle, the precautionary principle, inter-generational equity, sustainable development and the notion of the state as a trustee of all natural resources (Rajamani L. , 2007).

**Receptivity.** While it is the Judiciary’s and PIL’s role in developing a green jurisprudence has been undeniable, it has also raised some important questions regarding its impact on participation, access, etc. Rajamani argues that the vast discretion available to judges in public interest environmental litigation, in combination with the proliferation of imprecise rights, has allowed preferences for certain rights and certain modes of argumentation to prevail. The court has largely taken what has popularly been described as a middle-class perspective and has largely been unconcerned with the possibly adverse impact that its decision have on the lives of particular groups of society. Litigation has also been dominated by a relatively small group of lawyers and activists, thus raising questions about participation and access. Additionally, in dealing with environmental issues, the court has taken a stand in which it tends to favour the environment over the rights of poor when the two conflict, while tending to favour ‘developmental’and infrastructural interventions over the rights of the environment and the poor.

On the basis of these two factors it becomes clear that as it stands the opportunity structures clearly favour environmental litigation, and environmental groups will use litigation

### 3.2.2 The Bombay Environmental Action Group

The Bombay Environmental Action Group (BEAG) was founded in 1979 by Shyam Chainani and a small group of environmentalist and conservationist. Chainani had studied at IIT, MIT, and Cambridge and was the son of an ex-Chief Justice of the Bombay High Court. The BEAG aims to protect the environment and ecology by conserving and protecting natural resources, wildlife and forests, man-made heritage, air water and combating noise pollution. BEAG is an advocacy group and does not use mass mobilisation as a strategy, instead they rely on lobbying and influencing key decision makers, and if that fails turning to PIL a strategy that it have used very effectively right from its founding (Raj, 2012). One of the first major cases that the BEAG had initiated was a challenge to the de reservation of plots in Mumbai. Since then the BEAG has initiated PILs challenging the building of the Bandra-Worli Sea link, the sale of Mill land, air and noise pollution in Mumbai. The BEAG has also championed a conservationist agenda initiated PILs for the protection of Mangroves and for the removal of encroachments from the Sanjay Gandhi National
Park and its hardline green agenda has meant that it has received considerable criticism from different quarters in the city.

While their involvement issues in environment, conservation, and development have not been limited to those concerning the city of Mumbai. For the purpose of this study I shall look at only those some of the issues that the BEAG have fought in Mumbai. It is possible to divide the kind of cases that the BEAG have worked into two categories, cases which are primarily conservationist and pollution related, and cases that revolve around the heritage and the development of Mumbai. While these categories are not mutually exclusive they, the two major conservationist cases involving the Sanjay Gandhi National Park and the Mangroves in and around Mumbai, noise pollution and vehicular pollution in Mumbai In other are their challenges to the Bandra-Worli Sealink, the construction of a major North-south flyover on the the sale of Mill land. Looking at the outcomes that these cases have had, one begins to see a trend, in which the BEAG has received favourable orders in cases concerning environment cases while it the cases surrounding developmental issues have been less successful. This division also manifested itself when, one of the key members of the BEAG founded a spin off organisation, the Conservation Action Trust (CAT), in 2005. At present the BEAG focuses primarily on heritage, CAT focuses on the protection on the protection of forest and wildlife,

The main purpose of CAT is to educate and enlighten decision makers and the public about the importance of forests for our survival. One of the major thrust areas of CAT is advocating the role of forests in protecting the water security of the country while simultaneously acting as major carbon sinks thus mitigating the effects of climate change.

Since the cases analysed here were all filed under the name of the BEAG, the analysis refers to both the activities of both organisations as the BEAG.

**The Early Years.** In the late 80’s the BEAG filed two cases, one challenged changes made to the Development Plan on the grounds that they had been made without receiving comments from the general public, while the second challenged the constitutionality of the de-reservation of large no. of plots in greater Mumbai. Instead of pointing out the problems with all 285 plots, the BEAG took a sample of ten of the plots and tried to show that the reservation was driven by intention to permit landholders and builders to profit at the expense of the general public. Their arguments of the petitioners were all rejected by the court. One of the reasons for this was the problem faced in accessing information making it hard for these groups to identify the plots. This prevented the BEAG from taken the matter to the Supreme Court. According to one of the leading members of the BEAG,
Another thing that happened was that the lawyers actually suggested you will face a mayor problem if you take all the plots; take ten and highlight these in the petition… a list of ten was made. Unfortunately it was a bad choice. The 285 was a series of accidents… The BMC must have received thousands of objections. The BMC gets many responses for each plot and somewhere it decides that this is the tipping point and probably the highest bidder who also has access to the ultimate decision maker wins. The task is huge and complicated, negotiations go on for months. No attempt is made to look at the locality or to analyse and examine its carrying capacity/ecological foothold. No attempt to see what the neighbourhood is like and whether changing the use would invite more residents and users and whether the area has the required infrastructure for these changes (Raj, 2012)

Raj (Raj, 2012) describes the BEAG as part of the no-growth coalition, as an elite environmental group it professed an extreme green agenda, and was opposed to the trend of urban growth, and using their embeddedness within the political elite they managed to influence the Development Plan. What made them unique was the ability to mobilise the courts, through PIL in order to further their agenda, using PIL they were able gain access leading to reserving some areas as Non-Development Zones and other environmentally friendly policies. In 1987 the D’souza Committee, which had been appointed to look into charges of corruption against the municipal planning committee, but which also paid special attention to the DCR rules and generally supported the liberalisation of the land regime in the city through introduction of TDR and other instruments, criticised the groups influence,

It is clear that all these instruments aimed at keeping people out tend to keep out those with lower incomes. In short, local population control policies are regressive… city after city are experiencing three cornered fights amongst the advocates of business and development, the poor and working class and their liberal advocates and the environmentalist in alliance with no-growth people who are usually middle class young or upper middle class (Raj, 2012, p. 110).

Interestingly the BEAGs interests in the late 80s aligned with the large landowners, who stood to lose during the shifting land regime, and supported them financially. However, the no-growth coalition weakened. The environmental groups like the BEAG, began looking for a compromise, using the courts they managed to gain access to, but not control, the policy negotiation process. They saw the New Policy instruments as acceptable, since they both accommodated their interests, while at the same time decreased the dominance the political and landowning elite had over the decision making process. In the end some of the policies championed by the environmental groups were accepted, but they simultaneously accepted and emergence of a neo-liberal land regime (Raj, 2012, p. 115).
Another significant and controversial case that the BEAG fought was regarding the encroachments made into the Sanjay Gandhi National Park. One of the key activists in the BEAG, who was to become the driving force behind the SGNP case, became involved in nature conservation and the SGNP, after visiting the park over many years as a member of the BNHS and a birdwatcher. Over the years, after witnessing the gradual expansion of settlements in the SGNP, the activists of the BEAG brought the case to the notice of officials in the Forest Department and MoEF, and discussions with various officers however after several months of follow up. In February, 1995 the BEAG filed a writ petition before the Bombay High Court. The Sanjay Gandhi National Park case also marked one of the first times that public interest litigation was used in a way that was directly in conflict with the interests of the urban poor. Even before going to court, the members of BEAG had their doubts about the case, but went ahead on account of a his commitment to the matter,

Historically the High Courts were always in sympathy with the slum dwellers... When we filed this case there was a feeling, within the organisation and the lawyers as well that it was a complete waste of time, nothing was going to happen... You’re tackling a combination of politicians and poor people, which is a lethal combination. This is Mumbai, land prices are high, stakes are enormous, nothing’s going to happen, you’re banging your head against a brick wall. I said, let me bang my head, we’ll see.

The Petition identified the reason behind the encroachments as the announcement of the 1995 elections, and vote bank politics, it invoked the Wildlife Protection Act 1972, the Indian forest Act, an the Forest Conservation Act (1980) and sought the eviction of all encroacher and the demolition of all types of illegal structures within a period of six months and that no amenities should be provided to them. During the hearings it was estimated that there were approximately 80,000 families living within the boundaries of the park May 1997 the BEAG obtained a favourable judgment, in which the court clearly ruled in favour of the environment, stipulating that (i) a map with clear boundaries be prepared (ii) all types of public infrastructure and amenities be removed (electricity, water, phone, transportation) (iii) all existing commercial and industrial licences were to be cancelled. (iv) a survey of families living in the park had to be carried out within two months; and (iv) all those who settled after 1995 were to be evicted.

This order and many that followed it were characterised by the details that the Court went into in the course of hearing the petition and managing the evictions. In the same order the court also

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18 Bombay Environmental Action Group v State of Maharashtra and Ors. Comprehensive final judgment n the case was give in 2003
provided details on how many bulldozer would be required, directed the presence of a SRP battalion and a Helicopter during the demolitions. Slumdwellers and housing groups representing the interests of the slumdwellers challenged the orders on the basis of their right to stay within the park. But the High Court dismissed all claims made by arguing that the scheme for rehabilitation that had been delivered was very fair\textsuperscript{19}. Even though the site suggested for the rehabilitation scheme was some 60 km away. The court also set unrealistic deadlines for evictions to take place, the may 1997 order required all encroachments to be cleared within a period of 18 months. But given the unattractive rehabilitation package the encroachers continued to stay more evictions were ordered Yet As of 2011 there were approximately 11,000 eligible families residing in the park (Lappas, Engelman-Pilger, & Walsh, 2011).

The slum dwellers rallied behind two organisation the Nivara Hakk Suraksha Samiti and the Ghar Hakka Jagruti Parishad (GHJP), created and headed by a local politician and social activist. During the early phase of the case the organisation opposed resettlement proposals and demanded in situ rehabilitation. When the forest department started demolishing houses in the south western part of the park in 1995 after the PIL was filed, they immediately went to the Court, raising the issue that there under the Maharashtra Slum Areas Act there could be no demolition without an alternative accommodation being provided which had the consent of the slum dwellers, it was also argued that it was not clear whether the slum settlements were even in fact on proper forestland but were summarily dismissed by the Court. These rulings destroyed any hope the slum dwellers had of stopping the demolitions through the legal process. Second the focus of their negotiations and legal activities shifted to the fight for beneficial resettlement conditions for those that are were eligible.

The scale of human displacement created considerable controversy and attracted much criticism. In the entire process the considerably less energy was expended by the court on ensuring a secondary concern. During the process the BEAG were able to embed themselves into the parks management. The BEAG on the saw the case as a watershed in environmental protection,

The Borivili judgement was a signal victory. It made the impossible possible by ordering the removal of a quarter of a million encroachers. This makes it theoretically possible to extend this to other national parks and sanctuaries. Without the Borivili judgement, a thriving business would have continued unopposed between slum lords in league with local politicians. The slum lords would grab forest land and the politicians would regularise such encroachments. In the process, the national park at Borivli, which is vital to the water security of Mumbai, would have been lost. Today the Court is one of the most effective means of defending our environment, but this is mainly

\textsuperscript{19} Order dated 28\textsuperscript{th} April 1999
because most wings of government and their decision makers are more interested in destroying nature for their short-term gains.20

On the other hand many have questioned the role that this particular PIL has played in this movement. Masselos and Patel (Bombay and Mumbai: the city in transition Oxford University Press., 2003) questioned the long term sustainability of the maximalist green agenda pointing out that contemporary environmental cases are increasingly anti-poor and do not consider the issues of housing an integral concern, and so exclude the poor from the environmental cause and expose the bourgeois character of the environmental movement.

Thus Through litigation the BEAG has been able to bypass aspects of what could be described as political society. The BEAG petition and the Judgment of the High Court cite politics as a reason for the encroachment, and while this is not untrue, the reference to Vote Bank politics is used to delegitimize political parties as well as urban poor. Court orders for evictions weakened the clout of patrons that many of the residents of the SGNP depended on. It also rendered ineffective, the attempts of organisations representing the interests of the slum dwellers to argue for anything more than better terms of rehabilitation for those who were residents. It is important to remember that the Courts rulings in favour of the green agenda, based on a particular interpretation of the

The Jog Flyover21 While the BEAG uses PIL as a strategy to achieve their primary goals through favourable orders, they do acknowledge that just litigation itself can sometimes have its benefits. In February 1999, the BEAG challenged the construction of a major flyover in Mumbai. The Court however held that the environmental organisation should have approached the court earlier in the matter if it wanted to challenge the construction of the flyover in toto considering that the 65% of the construction work on the flyover had already been completed and hence in May 1999, the court conducted a restricted enquiry to the large scale commercial use of the space below the Andheri Flyover. The court finally held that reviewing a policy decision was beyond the scope of judicial review and therefore held that, “In the context of expanding exigencies of urban planning it would be difficult for the Court to say that a particular policy option was better than another. Thus the project cannot be said to be ultra vires of the powers of the Municipal Council.” While the petition ultimately failed, the proposed mall has not come up,

20 http://www.sanctuaryasia.com/people/interviews/137-interviews-archive/1453-meet-debi-goenka.html
21 Bombay Environmental Action Group and Anr. v The State of Maharashtra and Ors 2002 (104) Bom. L.R.434

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We got into a very peculiar situation with the JOG flyover case because there was no support from the government also, the government itself was interested in building the project. The minister at that time was pushing that flyover. It was difficult to convince the court. Whether that the flyover should be east-west or north-south was out of the technical expertise of the court. Even though the technical consultants had said that three east-west flyovers would be better that one major north-west flyover...But in effect we made sure that no commercial activity will come up, the real estate scenario has changed completely. The mall that was supposed to come up, will never happen, i dont think so. In a way though we didn’t achieve a court order in our favour, in practice we achieved what we wanted to do. So sometimes that's also helpful, a legal delay is expensive for the builder, it cost him money. I don’t see anyone today wanting to visit a mall under a flyover.

The Mill Land Matter. The other agenda that the BEAG was regarding the development of the city of Mumbai and one of its most significant interventions in here was the PIL they filed ith to mill lands. In the matter the BEAG received considerable support from the press and the media.

Girangaon, as Mumbai’s old historical centre covers 600 acres in the middle of the island city. Until 1996 there were 54 textile mills in Mumbai: 29 privately owned, and 25 in the state sector, ie chiefly the National Textile Corporation (NTC) which was formed in 1974 after nationalization of sick mills. In the 1980’s Mumbai’s textile mills entered into a crisis, industrial sickness had plagued the industry for decades, caused by the diversion of profits, lack of modernisation, and a booming real estate market. After the historical strike of the mill workers led by Datta Samant in 1982, a many of mills closed down and never reopened. In 1991 the State Government introduced new Development Control Regulations (DCR), 1991 as part of the shifting regulatory regime that accompanied liberalisation, DCR 58 allowed sale of mill land on the basis that 1/3 of the land should be handed over to the Municipal Corporation for open space for the city, 1/3 for affordable housing to MHADA, and 1/3 could be developed by the millowners. In exchange for the two thirds given up, the owners were guaranteed equal land as TDR outside the island city. In 2001 DCR 58 was amended again, this amendment made provisions for the provision of housing for ex-mill worker as well as introduced an ambiguity into the the procedure for determining the share of land to be distributed.22 In March 2003, it issued a so called “clarification” by which the calculation of the one third area for open spaces and the one third area for public housing would be based only on the current unbuilt areas of the mills, what this clarification did was reduce the open space availability from 200 acres to about 32 acres, with a similar reduction in the space available for public housing.

22 See Appendix 1 for DCR 1991 and the 2001 amendment
In the controversy that followed this decision the Maharashtra Government set up a Committee, to which the activist of the BEAG made the suggestion that at least the opens space amount be kept at the original figure and mill owners be compensated by way of TDR while Charles correa. The activists also made representation to the Maharashtra Urban Development Secretary, Manmohan Singh, and Sonia Gandhi. With the demolition of the mills taking place, the BEAG had no option but to take the matter to court.

While the case in the Mill land Involved both public housing and open spaces, the BEAG’s primary concern and priority was always open spaces. In his account of his involvement with the Mill land case, the founder of BEAG writes that initially his plan had been

I suggested that one third of the land be used for public recreation spaces or green parks or other open areas, one third be used to make up for the shortfall in public amenities such as schools, hospitals, dispensaries, and so on, with the remaining one third going to the owners of the industrial units for sale or redevelopment (Chainani, 2007, p. 112)

Similarly before they went to court, he had also suggested to the Committee set up by the Maharashtra Government to deliberate on the problem that “at least the open space amount be kept at the original figure and the mill owners be compensated by way of TDR. (Chainani, 2007)”

At the High Court the BEAG emphasised that the main thrust of the petition was for the protection of “open spaces” and the need for public housing. The BEAG made a strong case for the need for open spaces in the city. On the other hand the state argued that under the old DCR 58, very few mills had come forward for development, and this is was the context that the DCR was amended in 2001, in order to make redevelopment more enticing for the mill owners. Much of the debate in the court centred around the interpretation of the DCR 58, ruling in favour of the BEAG the court held that DCR 58 should be construed so regard to the importance of open space and public space. The judgement at the High Court, was given in the wake of the 2005 floods in the city which had a considerable impact on the collective imagination of the city, foregrounding considerable problems that the city was facing. This was noted in the judgment of the High Court itself,

In every city there is a wide range of public spaces, from streets, chowks and public square to paths and maidans and including important civil and religious buildings. We seem curiously indifferent to this crucial determinacy of our urban environment. Our lack of concern for (and more often than not, callous misuse of) these spaces has reduced our urban environment to the pitiful state that it is in today...
It is vital to note that we are neglecting the importance of these open spaces both from environmental angle and from the ecological angle, and the importance has been grossly underestimated and undervalued. The importance of natural wetlands and waterbodies for flood control has been completely overlooked in the planning process. The approach has been to destroy the natural resources and in its place construct man made projects. As a direct result Mumbai has already lost a large no. of freshwater reservoirs, tanks etc., and even the existing ones are under perennial threat. This has been one of the major causes for heavy flooding in Mumbai during the last week of July, 2005.23

The mill owners made an appeal in the Supreme Court. At the Supreme Court the BEAG managed to enlist the support of high profile lawyer, who argued the case on their behalf. However in 2006 the Supreme Court reversed the decision and the BEAG’s battle was over.

Looking at these four instances one beings to see a pattern in the BEAG’s functions. The BEAG are generally opposed to the political elite and operate at the level of the bureaucracy in order to influence overcome resistance. While the BEAG has been relatively successful mobilising the courts through PIL to achieve their ends they in more recent times they have begun to withdraw for the courts;

So please understand when you’re fighting a project, it’s a question of what will work, as I said going to court itself is a last resort, public pressure, getting signatures, writing letters campaigns and today effectively, let me tell you we are more and more reluctant to go to court. Corruption is more or less widespread. There are cases we know. Earlier a corrupt judge was extraordinary. People would talk about in hushed tones. Most lawyers would refuse to talk about a corrupt judge. However today you sit down with a lawyer and they’ll tell you this judge is corrupt, that judge is corrupt etc... So in the textile case we know for a fact how much money was paid to the judges, we can’t prove it. In that case the judges decided that the interests of 15 mill owners were more important than the interests of the city! I don’t know what else to say.

In terms of the ability of the judiary being able to intervene decisively they, see the Higher Judiciary and the Bombay High Court in particular as being highly constrained by factors exogenous to legal matters.

My experience is that courts are very uncomfortable in getting into all these major issues. Particularly when there are such high stakes are involved. You have to really push them into passing order, and then push them in getting the orders implemented. It’s an uphill battle all the way. There

23 Bombay Environmental Action Group v State of Maharashtra 2005(6) Bom CR 574
are a few judges in the High Court willing to take these things on... and traditionally you have to understand that the chief justice of the Bombay High Court is a bird in passage, they come here with the expectation that they will be raised to the Supreme Court... so they’re very very conservative, and not willing to take on politicians.

3.3 CONCLUSION

From the analysis of Legal Opportunities that are available to both groups we find that over the years the legal opportunities which have been created through Public Interest Litigation militate against the interests of housing groups while they support a particular kind of environmental group, especially groups like the BEAG, which operate at the level of the bureaucracy and push a maximalist “green” agenda. PIL presents itself as forum which is insulated from outside challenges where they can portray their agenda as being the necessarily ‘public’ one. Looking at both organisations we find that their litigation strategies are broadly governed by the political and legal opportunities that they are presented with. The GBGBA as a mass organisation relies on the politics of protest and negotiations with the state in order to prevent evictions and lobby for slum rehabilitation. The BEAG as an advocacy with no mass base cannot and do not stage protests of anykind. However their members, as part of Mumbai elite have been able to embed themselves within bureaucratic and administrative circles. They use litigation in order to bypass elements of the political establishment that do not respond to or resist their efforts to influence them.

Exogenous Events. In the previous judicial receptivity purely on the basis of ideology and middle class bias, however looking at the cases like the mill land case, in which the Bombay High Court supported the BEAG and struck down the clarification of the DCR 58, though reflecting the middle concern for open spaces cannot be explained only by this given that judicial receptivity has generally been lower in matters relating to land use (ahuja). However when one considers the mention of the Mumbai Flood during the process of hearing and the memory of which was still fresh when the court gave its judgment in 2005, the order becomes less. Similarly in explaining the relative success that they have experienced in the case surrounding the Adarsh Scam, the activists place stress the fact that the Adarsh Scam was uncovered during the same time as the a series of scams were uncovered at the national level, ie the 2G Spectrum and the controversy surrounding the Common Wealth Games. This they felt created a situation in which the High Court became more sensitive to big ticket corruption in the Government. Thus it appears that another contingent factor is the larger political-economic-social climate and exogenous events that appear
3.3 Other factors that influence Legal Opportunities are:

**Lawyers.** Both groups have a network of committed cause lawyers who handle their cases for them. The Lawyers themselves are committed to the causes that the groups espouse and so they do not charge the organisation. The activists see their lawyers commitment to their causes as a reason for the successes that they had. Also given that the GBGBA does not pay their lawyers, the fact lawyers themselves bear much of the burden of costs related to litigation in terms of court fees, photocopies etc, and the limited nature of the pool of lawyers available to and willing to take up the cases and cause the GBGBA, there are many cases in which the GBGBA are forced to ‘lump it,’ because the and thus choose their cases strategically. Another factor is the difference between the styles of functioning of the lawyers who they engage. One of the lawyers who represent the GBGBA, appeared in the case involving the film star, is a highly technical lawyer, petitions drafted by him rarely invoke public interest, but instead read like a litany of development and environment litigation and so the activists tend to play a very minor role in this. Other lawyers on the other hand, are more sensitive to questions of Public Interest, this means that the activists can also contribute to the process. The BEAG on the other hand has been using PIL for more than 20 years and has been able to create and extensive network of lawyers meaning that it does not have to forgo litigation.

**Cost.** Litigating also places a considerable burden on the activists of the GBGBA, before taking the issue to court considerable time and money is spent on obtaining the correct documents and doing groundwork. Secondly as pointed out by an activist, when a case comes up for hearing they have to brief their lawyers, draft case notes and often spend the entire day in court, and more often than not the case is postponed. On the other hand the BEAG, as a funded group.

**Access.** While the relaxation of Locus Standi, is still in place today the experience of the GBGBA in the case in which costs were imposed on the litigant is troubling. The imposition of costs is a drastic move, and has raised problem for the GBGBA. After the case the group decided that they would no longer file petitions in his name given that the court did not view him favourably.

**Access to Information.** Another important element that has had an impact on both groups ability to litigate is the Right to Information Act (RTI), through RTI the groups have been able to access information otherwise unavailable and this has improved their prospects going into litigation.

**Perceptions of the Judiciary.** Both groups have a developed a highly realist view of the Judiciary, and generally see it as highly compromised and constrained. Though while both the GBGBA and
the BEAG make whispers about judicial corruption as an explanatory factor the BEAG’s. The GBGBA, like other housing groups sees a deep class bias pervading the High Court.

3.3 Litigation Strategies

The BEAG have consistently used Public Interest Litigation. As an organisation, they attempt to influence and lobby decision makers at the level of the bureaucracy while. They are also uncomfortable with popular political elite and use PIL as a strategy to bypass them,

We go to court with a very clear cut manner, advocacy, lobbying, etc. There are many situations when we know that the bureaucrat is not going to be taking on the minister and chief minister. Where the minister himself is making large chunks of money, when he himself has large chunks of land The expectation is that the court will uphold the law and pass an order in the larger public interest for the protection of public property.

Thus the BEAG’s strategies are consistent with the opportunities framework, strategies that the GBGBA have developed is not. The Legal Opportunities framework would dictate that the GBGBA would not use litigation, and while this is partly true in that the GBGBA does not use litigation to resist litigation. However, the legal opportunities framework is unable to explain why an organisation like the GBGBA would use its already scant resources on litigation. The GBGBA do this because they believe that the courts and the law are not inherently biased and that it is necessary for them to continue raising questions in the courts in order to maintain a democratic culture in the city.
4. CONCLUSION

This study only present preliminary results for a study on PIL. In the first section i have argued that the study of PIL has been hamstrung by its highly court centric approach, this has meant that the actions of those who mobilise the court have been somewhat ignored. This is a serious problem in the contemporary situation where there are real concerns that PIL has been hijacked by a middle-class agenda. This study, while not generalisable paints a particularly bleak picture of the state of PIL today. It seems to confirm the findings that PIL no longer seeks to improve the conditions of the poor and the marginalised. Rather, in the Urban context particularly, it has been captured by groups who take advantage of the constrained space for debate that it has produced to push a particular agenda and line of thinking. This line of thinking especially in the context of environmental litigation is couched in the language of universalism and “public” interest. However at the same time it potrays an unrealistic and foreshortened view of the contemporary state of events, privileging a green agenda over all others, on account of the assumption that a green agenda.

The legal opportunities framework that has been outlined suggest the way that structural and contingent elements have contributed to the determining who uses PIL for what. According to the PO/LO framework groups are more likely to use PIL if the political opportunities available to them are limited. This is an important when considering the shifts in urban governance in the past two decades. As expanding middleclass begins to assert itself in issues of governance, however in this arena theses groups, which in the words of John Harris, “operate” have come up against what John Chatterjee describes as “political society” the vertical arrangments of power in which much of India’s urban population finds itself in,

Groups in political society have to pick their way through this uncertain terrain by making a large array of connections outside the group – with other groups in similar situations, with more privileged and influential groups, with government functionaries, perhaps with political parties and leaders. They often make instrumental use of the fact that they can vote in elections, so that it is true to say that the field of citizenship, at certain points, overlaps with that of governmentality. But the instrumental use of the vote is possible only within a field of strategic politics. This is the stuff of democratic politics as it takes place on the ground in India. It Involves what appears to be constantly shifting compromise between the normative values of modernity and the moral assertion of popular demands (Chatterjee, 2004).

The urban poor have often used political society and the franchise as a tool from which to receive support from the state. Not withstanding the violence inherent in political society, political society
presents a barrier for the implementation of becoming metropolitan cities desire to become, world class cities. This desire is articulated by Indian middle class, who’s interest while not exactly identical to those of big business often align. This is revealed by the complex relationship the BEAG has with the urban elites in Mumbai. PIL, as they have proved an effective tool.

In order to counter this trend the GBGBA developed its strategy, but this strategy has not been very effective and has in fact back fired at times and they have received criticism on this front. Yet, if many of the PILs seem detrimental to the interests of the urban poor, the other seem irrelevant or frivolous. However by focusing on the petitioners and activists who mobilise the courts it allows us to see some of the PILs in a different light. While the petitions filed by the activists of the GBGBA and NAPM in the case of the building violations may seem frivolous at first glance, looking at them in the context of the situation that the activists found themselves in, allows a more nuanced understanding of their actions. The question that remains is how to evaluate the strategy taken by the GBGBA? Rather than looking at their litigation campaign from its actually achievements, I argue that looking at it from the perspective of the goals they sought to achieve is more insightful. However there is still the problem of what to make of it? The GBGBA hoped to turn around the argument made around legality and the urban poor and point out the hypocrisies that plague the High Court today. There are however considerable problems with this idea. First it seems to be based on the understanding that illegality is the main reason behind evictions. Ghertner (2008) argues that we must not see the weakening of the right to life in recent court decisions as the cause of slum demolition, it might be more useful to see this weakening as the effect of a whole series of prior negotiations and contestations over the meaning of citizenship, the correct land disposition, and the vision of the city. Thus simply turning the argument on its head is not sufficient strategy? This study will not be able to discern what possible strategies will work or will not. However this study suggests that it is in investigating the process of legal mobilisation and legal mobilisation strategies that we can produce a body of work that is less prone to abstraction and more grounded.

The study also points to the limitations of the Legal Mobilisation, in spite of various mobilisation strategies the activists were still constrained by the structural characteristics of the court. Legal Mobilisation theory does not suggest that those mobilising the law can declare its agenda, instead it argues that the relationship between the mobilisation and the agenda of the court is complex. And it is important to analyse the relationship between the two. The findings of this research are limited, but it does raise some important questions about legal mobilisation and the role that it play, indicating that it can present a viable framework for investigation.
Bibliography


Dembowski, H. (2001). Taking the state to court: Public Interest Litigation and the Public Sphere in Metropolitan India.


& Society Review, Vol. 9, No. 1, Litigation and Dispute Processing: Part One, 9(1), 95-60.

& Economics, 74-92.


Economic and political weekly, 43(20), 57-66.

Weekly, 46(14), 18-21.

Policy, 9(2), 238-255.

movements. British journal of political science, 16(1), 57-85.

Scheingold, The Worlds Cause Lawyers Make: Structure and Agency in Legal Practicex (pp. 349- 
390).


Capstone.

Chicago University Press.

17-38.

Social Science, 17-38.

India:Performance and Design (pp. 154-180). Delhi: Oxford University Press.


Stanford Law Books.

Splintering Communities.


Cases & Judgments cited

Almitra H Patel vs Union of India WP (C) 888 of 1996

Bombay Environmental Action Group and Anr. v The State of Maharashtra and Ors 2002(104)Bom.L.R.434

Bombay Environmental Action Group v AR Bharati, Deputy Forest Conservator of Forest & Ors 2004(3) Bom C.R. 244

Bombay Environmental Action Group v State of Maharashtra 2005(6) Bom CR 574

Fertilizer Corporation Kamagar Union (Regd.) Sindri and others v. Union of India and others AIR SC 344 at 353

Olga Tellis and Ors v. Bombay Municipal Corporation and Ors AIR 1986 SC 180

M.C. Mehta v Union of India (Delhi Vehicular Pollution Case) (1998) 9 SCC 589, 590.

Medha Patkar v. The State of Maharashtra & Ors PIL 21/2010

Simpreet Singh and Anr v State of Maharashtra And Ors PIL No.48/2011(3)BomCR832

Simpreet Singh & Anr v Union of India & Ors, 2011(3)BomCR832

Subash Kumar v. State of Bihar (1991), 1 SCC 598