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COURTING CHANGE: THE ROLE OF APEX COURTS AND COURT CASES IN URBAN GOVERNANCE: A DELHI-JOHANNESBURG COMPARISON

By

Margot Wendy Rubin

A thesis submitted to the Faculty of Engineering and the Built Environment, University of the Witwatersrand, Johannesburg, in fulfilment of the requirements for the degree of Doctor of Philosophy

Johannesburg, 2013

I declare that this dissertation/thesis is my own unaided work. It is submitted for the degree of Doctor of Philosophy (Urban Politics) in the University of Witwatersrand, Johannesburg. It has not been submitted for any other degree or examination in any other university.

_____

(Margot Wendy Rubin)

September, 2013

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Abstract

The courts are recognised as playing an increasingly important role in the realisation and concretisation of socio-economic rights. However, the implications of these activities for notions of voice, engagement and access to decision-makers and those in power, are largely not understood. This study seeks to address key questions around what type of platform for engagement the courts are providing for more marginalised groups beyond sites of redress, as well as to consider the impacts of court cases, decisions and remedies on policy, practice and the everyday life of urban residents. The study utilises a comparative approach between India and South Africa, and examines two seminal court cases - one in Delhi, the Sealings Case, and the other in Johannesburg, the Olivia Road Case. The case studies demonstrate that the litigants' decision to go to court is, in part, closely linked to the failure of representative democracy and is influenced by the coalitions and alliances of urban actors. Furthermore, the case studies look at the court as a site of engagement between citizens, residents and the state in order to see what benefits or dangers exist when engaging in litigation. The case studies further provide some insights into the implications of being denied access to the courts and how alternative modes of power-seeking and voicing issues come to the fore. Lastly, the case studies offer an account of the consequences of litigation and looks at the impact of court cases on policy, policy-making process, practice and the lives of citizens and notes that these are not only highly differentiated but also extremely unpredictable. In making sense of the role of the court in urban governance, the study argues for a conceptualisation of courts as institutions of hegemony, and pushes Gramsci's notion to explain courts and court cases as platforms on which litigants can promote their own hegemonic or counter-hegemonic project. However, courts are not neutral containers in which these politics unfold; rather they are engaged actors with their own agendas and hegemonic visions, which they seek to enforce through the decisions that they make and the roles that they carve out for themselves within the urban governance terrain.

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Acronyms and Abbreviations

ANC	African National Congress
BBP	Bad/Better Buildings Programme
BJP	Bharatiya Janata Party
CAIT	Confederation of All India Traders
CALS	Centre for Applied Legal Studies
CHETNA	Culture Heritage Environment Traditions and Promotion of National Awareness
CM	Chief Minister
COHRE	Centre on Housing Rights and Evictions
CoJ	City of Johannesburg
DCB	Delhi Cantonment Board
DDA	Delhi Development Authority
ICRS	Inner City Regeneration Scheme
ICO	Inner-city Office
JPC	Johannesburg Property Company
MCD	Municipal Corporation of Delhi
MEC	Member of the Executive Committee
MLA	Member of the Legislative Assembly
NCTD	National Capital Territory of Delhi
NDMC	New Delhi Municipal Committee
NCT	National Capital Territory
NIUA	National Institute of Urban Affairs
RWAs	Resident Welfare Associations
SA	South Africa
SCI	Supreme Court of India
SCMC	Supreme Court Monitoring Committee
The Congress	Indian National Congress
URJA	United Residents Joint Action of Delhi

Key Figures, Organisations (*Dramatis Personae*) and Terms

a. *Indian Organisations and Institutions*

- **Confederation of All India Traders (CAIT)** is considered the apex body of the Indian trading community, which includes all formal retail, wholesale activities, petty manufacturing and services. The organisation assists traders with; interacting with administrators; education and training; and assisting the government in policy and procedure development that affects the trading community. CAIT has regional branches in all of the states and major cities, and its head office is located in Delhi (CAIT, 2012).

- **Delhi Development Authority** is an appointed, non-elected, administrative body, chaired by the Lieutenant Governor of Delhi and reports to the Ministry of Urban Development. This body is responsible for all urban planning and public housing but has no authority over roads or infrastructure, which sits with the MCD and its boards (DDA, 2006).

- **Municipal Corporation of Delhi** administers 97% of the **National Capital Territory of Delhi (NCT)**, which is the official name, for the city and which includes the metropolitan area of New Delhi. It is considered to be one of the largest municipal corporations in the world, providing civic amenities to an estimated 13.78 million people. The MDC has two wings: a deliberative and an executive wing, which are responsible for developing policy and implementing programmes on certain functions such as roads and infrastructure development in Delhi (MCD Online, 2012).

- **People's Action** is an advocacy group that was established in 2002-03 with the intention of influencing governance at all levels of the National Capital Territory of Delhi and the National Capital Region of Delhi. The **National Capital Region** (NCR) refers to the metropolitan area, which encompasses the entire National Capital Territory of Delhi, as well as urban areas around it in the neighbouring states of Haryana, Uttarakhand, Uttar Pradesh and Rajasthan. The group focuses its actions on issues that impacts the social, economic and political life of the citizens of India and is a pressure group for "the advancement of good governance, human rights, social justice, economic equity and political awareness" (People's Action, 2009).

- A **Resident Welfare Association** (RWA) is a voluntary civic body that represents the interests and needs of the citizens and residents of a specific urban or suburban locality in Indian cities. RWAs are generally elected by members who pay fees to the RWAs to support their efforts (Jumani, 2006), although more common in wealthier areas, there are instances of RWAs all over Delhi.

- **United Residents Joint Action** (URJA) is the apex body of Delhi Resident Welfare Associations (RWAs) and the RWA wing of People's Action. In 2005, Delhi's government increased the electricity tariff, which sparked the need for joint actions of the residents. People's Action supported a confederation of Delhi RWAs to fight against this and, in the process, URJA was born (URJA, 2012).

b. *South African Key Institutions and Organisations*

- The **Centre for Applied Legal Studies** (CALS) is an applied research, non-governmental organisation (NGO) at the University of the Witwatersrand. CALS is committed to "promoting democracy, justice, equality and peace in South Africa". It was one of the key legal institutions during the Olivia Road court case,

providing legal counsel, community facilitation, research and negotiation with the City of Johannesburg (CALS, 2012).

- **City of Johannesburg** is the official government structure of Johannesburg and consists of elected (executive) and administrative branches. Together they are responsible for the development and implementation of policy within the municipal boundaries (CoJ, 2012).

- **Moodie and Robertson** is a private-sector firm of lawyers that has a long history of acting for the City of Johannesburg (having done so since 1918). It was involved in the development and implementation of the Bad Buildings Programme, the City of Johannesburg project that precipitated the case. During the Olivia Road Case, it took instructions from the City of Johannesburg's legal department and represented the City as its attorneys.

- **San Jose Residents Committee** was an elected body that ran the building from 2003 in the absence of a body corporate or management company. The number of representatives varied over time. The committee controlled who was allowed to settle in the building, cleaning activities as well as trying to ensure that illegal activities such as sex-work and 'chop-shops' did not occur within the building (Royston, 2009). The power of the committee dissipated quite rapidly once the residents were moved to their new buildings (Royston, 2009).

- **Webber Wentzel *Pro Bono* Practice Group** co-ordinates and conducts most of the firm's public interest work. It has provided services to NGOs and taken on class action suits for low-income groups. They have litigated on HIV-workplace discrimination, refugees and informal dwellers, and cases revolving around gender and gender-based violence (Webber Wentzel, 2012).

c. *Indian Case Study Key Figures*

- **Ajay Maken** was the Union Urban Development Minister and has had a meteoric political career in the Indian National Congress, moving swiftly through the political ranks and was elected Urban Development Minister on 31 January 2006 just in time for the Sealing Case (Friends of Ajay Maken, 2012).

- **Manmohan Singh** of the Congress Party was the Prime Minister of India during the Sealings Case. He is the first non-Hindu Prime Minister and the second Prime Minister to have been voted in for two consecutive terms (2004 and 2009) (Government of India, 2012).

- **Praveen Khanderwal** was at the time of the case and remains CAIT's Secretary General of Delhi. He acted as the spokesperson and traders' leader during the sealings. He was the key person in charge of negotiations and discussions and also featured frequently in the press (CAIT, 2012).

- **Ramesh Khanna,** at the time of the Delhi sealings, was the Vice President of CAIT's Delhi division, and currently serves as the President. During the sealings, he mobilised traders to demonstrate and protest and was very much the man on the ground (CAIT, 2012).

- **Sheila Dixit** is the Chief Minister of the National Capital Territory of Delhi and thus the most powerful executive figure in the state government. She is a member of the Indian National Congress and is best known for her controversial `Bhagidari Scheme', intended to encourage people's participation in governance. (Government of National Capital Territory of Delhi, 2003).

d. *South African Case Key Figures*

- **Karen Brits** is the Director of the City of Johannesburg's Legal and Compliance Department, and oversees all legal matters, including litigation, involving the CoJ. Brits oversaw and instructed counsel during the Olivia Road Case and was apparently directly involved in the negotiations for the Constitutional Court instructed settlement agreement (CoJ, 2012).

- **Graeme Gotz** is a Policy and Strategy Specialist who worked in the Central Strategy Unit of the Office of the Executive Mayor of the CoJ during the Olivia Road trial. He was a central figure during the court case, especially the negotiated settlement where he represented the City's interests. Gotz has subsequently left the City of Johannesburg and is now with the Global City Region Observatory (GCRO, 2012).

- **Moray Hathorn** has been a partner and head of the *Pro Bono* Practice at Webber Wentzel since 2003. He has a long history of socio-economic rights litigation and represented the residents of the Rand Properties in the initial Olivia Road Case. He worked closely with CALS and continues his long-standing practice of defending inner-city residents (Webber Wentzel, 2012).

- **Nelson Khetani (*aka* Nelson Chawe)** was the Chairman of the San Jose Residents Committee. He moved to San Jose in 2003 and was a key player in discussions initially with the City around ownership and later throughout the court case and the Constitutional Court negotiated settlement (Khetani, Pers. Comm., 2010).

- **Isaiah Mahlobo** was an intermittent San Jose Resident Committee member who moved into the building in 1997 and is currently the Secretary of the Residents Committee. He was involved during the High Court Case and the Supreme Court Case, as well as the negotiated settlement between the City of Johannesburg and San Jose residents (Mahlobo, Pers. Comm., 2010).

- **Stuart Wilson** is a human rights lawyer and activist who ran the Litigation Unit at the CALS. He is often credited with ensuring that the Olivia Road Case went to court, and was a leading figure throughout the case. He was also involved in every aspect of the case, from litigation to research and community engagement. He has subsequently co-founded the Socio-Economic Rights Institute (SERI) (SERI, 2010).

Chapter One: Introduction: Context, motivation and some words on what it all means

1.1 A mind wondering

By the mid-2000s, local newspapers and news in South Africa were full of headlines about the decline of the inner-city of Johannesburg. Articles detailed the crime, grime and vice of dilapidated and overrun inner-city buildings, 'hijacked' by thieves and syndicates.[1] Following quickly on the heels of these news stories were opposing narratives of the horrors of evictions by the 'red ants': the squads of private security guards hired by the City of Johannesburg and private owners to clear buildings once eviction orders had been passed by the local South Gauteng High Court.[2] In 2004, the situation came to a head in the Olivia Road Case, in which four hundred poor residents who were being evicted by the City of Johannesburg fought back, taking the case all the way to the South African Constitutional Court. The case was reported on, not extensively, but sufficiently to keep those of us who were interested and concerned about inner-city housing issues aware of what was happening.[3]

In 2008, after the Constitutional Court had ruled on the case, the Centre for Applied Legal Studies (CALS), its affiliates, the Centre on Housing Rights and Evictions (COHRE) and Webber Wentzel Attorneys' *Pro Bono* practice, pronounced it a victory:

> *"The success of the relocation shows what is possible when the constitutional rights of the poor are taken seriously by the state", said CALS Head of Litigation, Stuart Wilson. "This is a victory for the Bill of Rights and the rule of law. It is noteworthy that the residents of San Jose and 197 Main Street relocated freely and voluntarily. Not one person was forcibly evicted from either of the properties. I hope that*

[1] Cox, A., 2005: Joburg building managers gunned down in CBD, *IOL News*, 1st August 2005, http://www.iol.co.za/news/south-africa/joburg-building-managers-gunned-down-in-cbd-1.249710#.ULhi_uQ3uz4, accessed 30.11.2012 *;* News24, 2006: Deathtrap building Hi-jacked, News24, 29th March 2006, http://www.news24.com/SouthAfrica/Politics/Deathtrap-building-hijacked-20060329 accessed 30.11.2012; Fife, I., 2007: High hopes for naïve investors, *Financial Mail,* 14th December 2007, *http://free.financialmail.co.za/07/1214/features/gfeat.htm,* accessed 30.11.2012

[2] Eliseeev, A., 2005: Hundreds evicted from Jo'burg office building, *Mail and Guardian,* 14th July 2005, http://mg.co.za/article/2005-07-14-hundreds-evicted-from-joburg-office-building accessed 30.11.2012; Green, J., 2005: Red Ants swarm on inner-city 'deathtrap', *IOL News*, 15th July 2005, http://www.thepost.co.za/red-ants-swarm-on-inner-city-deathtrap-1.248233#.ULhmVeQ3uz4 , accessed 30.11.2012; News24, 2007: "Red ants" move residents out, *News24,* 19th March 2007, http://www.news24.com/SouthAfrica/News/Red-Ants-move-residents-out-20070319, accessed 30.11.2012

[3] In total I was able to find just 22 articles on the Olivia Road Case, in a range of newspapers and the details of which will be discussed in Chapter Three.

that this spells the end of forced evictions in the name of inner-city regeneration.'[45]

I began to wonder, "What happens now? What will be the impact on the residents? What will the judgement mean for the City of Johannesburg? Will the case make any difference? And if so, to who and how?"

A few months later, in January 2009, I made my first trip to India for a conference looking at the voices of the poor in urban governance, and with a view to potential comparative work between South African and Indian cities.[6] It was at the conference that the vague rumours that I had heard about a powerful judiciary and a form of mobilisation known as Public Interest Litigation (PIL) began to crystallise. At the conference, I learnt more about both and heard, for the first time, the narrative that would become all too familiar through my research, of a court that had begun as a site of justice and redress for the poorest, but which had lost its way and now held an antagonistic position to the poor.

The trajectory made me ask, "Is this our future? Will South Africa follow a similar path?" These initial experiences catalysed my interest in the role that the court was playing in urban India and South Africa.

My initial forays into the literature indicated that there were few answers to these questions, as studies of court action have generally focussed on: why litigation is used and by whom, with a strong focus on issues of access and resources (Hilson, 2002; COHRE, 2003; Sibley, 2005; Gloppen, 2005; Mitlin and Mogaladi, 2009); the problems and concerns with the implementation of courts' decisions and remedies and discussions around court remedies and their failures or successes (Madlingozi, 2007; Mbazira, 2008; Langford and Kahanowitz, 2010). Studies also looked at the effects of court decisions on policy or their ability to affect any kind of social change especially for the 'have-nots' (Galanter, 1974; Rosenberg, 1991; Scheingold, 2004; Vieira and Zucchi 2007; Gauri and Brinks, 2008 and 2012; Rodriguez-Garavito, 2010). Further work analysed the dangers of

[4] Webber Wentzel Press Release, 27th August 2008 http://www.webberwentzel.com/wwb/content/en/press-releases-archive?oid=19399&sn=Detail&pid=20948 accessed 13.10.2011.

[5] The thesis draws on a range of material including primary and secondary material. Since there is no separate literature review, each chapter reflects both theoretical work and relevant literature as well as empirical findings, and so I have chosen to represent the texts in different ways: all primary data is reported in italics with single '*quotation marks*' with its source footnoted at the bottom of each page or the name of the respondent that was interviewed. Quotes from my respondents have been reported as accurately as possible and I have not changed or edited the style or expression. All direct quotes from secondary sources are quoted using "double quotation marks" with the conventional referencing of author, date and page number.

[6] The conference was called "The voice of city dwellers in urban governance: participation, mobilisation and local democracy – Comparing Indian/South African debates", co-organised by the Mumbai University, The Centre de Sciences Humaines (New Delhi), The Institute of Research for Development (Paris); and the Centre for Urbanism and Built Environment Studies (Wits University, Johannesburg), 12-14th January 2009, Mumbai University, Mumbai.

courts apparently usurping the mandate of other branches of the state and the impact that such actions have on democracy (Geller, 2001; Gloppen, 2003; Mijin Cha, 2005; Rosencranz and Lele, 2008).

The rights-based literature seemed to provide more fertile ground for my questions as authors noted that there is "no doubt that the global spread of the discourse of human rights has provided a huge boost to local democratic formations" (Appadurai, 2002: 25) and these "political claims are phrased in terms of rights and pursued through judicial rather than majoritarian channels" (Butt, 2006: 1). Gauri and Brinks, (2012: 4) further observed:

> "Overall, it is clear that constitutional rights are increasingly supporting demands for social and economic goods and services, and that courts are taking on an increasingly important role in deciding the extent to which the seemingly non-negotiable interests embodied in constitutions should be considered and protected in policy making. The mounting evidence that courts are indeed taking important steps, with increasingly important policy consequences, has shifted the terms of the juriskeptical debate".

Thus, despite substantial bodies of work into rights, the judicialisation of politics and the increasing importance of the courts in rights-based claims, it became clear to me, as it did to Gibson, *et al.* (1998: 343), that

> "[W]e know precious little about the judicial and legal systems in countries outside the United States. We understand little or nothing about the degree to which various judiciaries are politicised; how judges make decisions; how, whether, and to what extent those decisions are implemented; how ordinary citizens influence courts, if at all; or what effect courts have on institutions and cultures" (cited in Epstein and Knight, 2004: 118).

Furthermore, it is unclear as to exactly if, and how, human rights and their enactment through litigation have "provided a huge boost to local democratic formations" and what that means in the lives of citizens and residents of cities. In addition, we seem to know little about "the capacity of social groups and litigants to turn courts to their own purposes" (Gauri and Brinks, 2012: 6).

It seemed that much had kept us away from studying the court as a political site and object of analysis. In part, I would argue that the court has been conflated with the 'state' and analysis has fallen into the trap that Marion Young (2004:62) articulates:

> "[I]t is a misleading reification to conceptualise government institutions as forming a single, uniform, coherent governance system, 'the state'. In fact, at least in most societies in the world today with functioning state institutions, these institutions interlock at different levels, sometimes overlap in jurisdiction, and sometimes work independently or at cross purposes."

Furthermore, courts seem to be shrouded under a "mythical legitimacy" (Barzilai, 1998:16) where they are insulated from study and critique because of public myths about their "impartiality," "fairness", "professionalism," and "morality". This results in an "irrational aspect of public dispositions towards the higher courts" and allows courts and court cases, especially in cities of the south, to escape attention and analysis as institutions with their own agendas.

From these wonderings, it became clear to me that there is a need to analyse courts as part of the political realm; not separate from it, and highly engaged, inculcated and articulated by other political processes such as power, ideology and collusion. In addition, there is a need to examine the complexity of intra-state relations and expose the tangles and 'messiness' of these interfaces and, in turn, what they mean for state/civil society interactions (Corbridge, *et al.*, 2005; Fuller and Harriss, 2001) especially in urban environments, which are becoming increasingly important sites of state/society engagement and contestation.

In addition, the impact of court decisions on the everyday lives of litigants, officials, politicians, residents and users of the city remains relatively opaque. For example, there is uncertainty as to what difference court cases and decisions make in how more marginalised residents access urban resources or negotiate with those in power after legal action has been undertaken. Thus, I argue that the role of the court within urban projects has not been sufficiently explored or theorised, especially in the cities of the south. This thesis attempts to address at least some of these issues and, as such, to begin to unpack what role the court is playing in urban governance and what litigation means for progressive politics.

1.2 Research questions

My wonderings crystallised into four main areas of concerns and interest, all grouped under the larger question:

"What are the roles of the apex courts and court cases in urban governance?"

The first set of questions revolved around the following concerns: What, if any, are the conditions of urban governance that entice groups and organisations to pick up the cudgels of litigation? Is it due, as Miraftab (2006) and Benit-Gbaffou (2008) have suggested, to the failure of other channels and mechanisms of engagement or is it one tactic within a larger strategy of claim-making?

I also wanted to know what happened within the space of the court and the court case once litigation had begun: what did these spaces mean for issues of voice, engagement, and empowerment, especially for poorer and more marginalised groups? What was the experience for those who chose to enter the portals of the court? Furthermore, I wanted to understand: what does litigation and using the court offer litigants by way of engagement, interaction and participation? Is the court the same as or different to other sites of engagement? And if so, how and why?

The third set of questions concerned issues of inclusion and exclusion: What happens if a group is excluded from being able to take part in trials and litigation that directly affects them, and how do they leverage their rights and have their voices heard? Why would some groups be allowed in but not others? And, what does that say for the broader questions of inclusion/exclusion and urban alliances?

The last set of questions related to what happened after judges made their decisions, orders and remedies. I wanted to know not just from a policy perspective but rather to understand the entire gamut of what, if anything, changes, how and why, i.e., what did it mean for the litigants to have gone to court and won/lost? What, if any, were the effects of court decisions and choosing to litigate, on their daily lives/interactions with the state, with other bodies, and with one other? How do institutions respond to being engaged in litigation? What does it mean for their daily practices, their relationships with other state agencies and with their constituencies?

1.3 Choosing the cases

Given these concerns, my own interests, and a process of trial and error that will be described in Chapter Three, it became clear that the best way to access and understand the role of the court was to study court cases in critical detail in order to unpack these various dimensions. From this perspective, court cases should be seen as social and political phenomena rather than discrete legal moments solely dealing in the intangibles of legal theory and doctrine.

I chose to engage in a comparative study between South African and Indian case studies in order to try and understand: if Public Interest Litigation made the Indian courts a better site for redress and urban justice for the more marginalised communities; and to see what the implications of a powerful court were and how it differed from our own apex court's far more modest interventions into the urban realm. I was also troubled by the "what then" question: what happens after the court cases, to the litigants, the different spheres and aspects of the state and the urban spaces of each city? How do the specifities of the structures of government and governance, modify court decisions and their implementation. Thus, I wanted to understand the courts in terms of their own contexts as well as trying to understand what difference the differences made.

Thus in choosing the specific cases for examination, I needed to understand the trajectories of court decisions around the urban in both countries. In India, there is a strong sense that the Indian middle class has managed to capture the courts and is at the forefront of using PIL and the courts for their own purposes (Dupont and Ramanathan, 2004; Te Lintelo, 2009a and b). Middle-class concerns over slum dwellers, so-called crime and grime and host of other issues have been re-framed as 'environmental concerns' and have routinely 'trumped' the needs and issues of poorer people (Sharan, 2005; Zerah, 2007a; Rosencranz and Lele, 2008). In South Africa, the courts have historically been seen as the preserve of the wealthy elite who have been able to afford its costs and who steer away from other modes of engagement in urban politics (Gauri and Brinks, 2012; Pernegger, 2012). However, since 2001 and the seminal Grootboom Case, which advanced the right to housing and shelter[7], there has been a steady stream of poorer and more marginalised citizens taking various institutions of the state to court, in order to realise some of their constitutional rights (Coggin and Pieterse, 2011).

I elected to look at court cases that seemed to exemplify the paths of the two courts briefly outlined above and which will be discussed in much greater detail in Chapters Three and Four. I chose the MC Mehta versus Others Case (2006) known as the Sealings Case in Delhi and the Olivia Road Case (2008) in Johannesburg. The Sealings Case concerned the question of illegal land uses, particularly the commercialisation of residential space. The Supreme Court of India (SCI) took the decision to seal up and close down all business-related activities that contravened the 2001 Delhi Master Plan. The case resulted in widespread protests and public action by the business-owners,

[7] The Grootboom Case was named after Irene Grootboom who together with her community of over 800 people were evicted by the City of Cape Town from the land on which they were living informally. The community fought the eviction, taking the case all of the way to the Constitutional Court, who decided that the national housing policy was insufficient as it did not provide for shelter for those in desperate need. It also protected the community from immediate eviction and allowed them to claim shelter from the state, although not as an immediate demand (Wesson, 2004).

known as traders, until these issues were resolved through political intervention and the promulgation of a new Master Plan that made provisions for mixed land use. The Sealings Case illustrates how influential the SCI's vision of Delhi was (or was not) and how it was able to directly impact on local policy-making and implementation. The Delhi case thus provided an opportunity to look at a 'typical' situation in which a "middle-class" cause was taken up as a PIL and found favour with the SCI. The case also allowed me to examine some of the "cracks" in the Indian middle- class as this was not a case of the very poor against the wealthy, but rather a case of competing middle-class visions of the city. In addition, the Sealings case revealed the manner in which two quite different groups were able to access different channels of engagement with the state and how the SCI was able to marginalise the traders and limit their access to litigation. At another level, the case also attracted me because when I started looking into it I found that very little (Mehra, 2009; Jain, 2010) had been said or written about a PIL that literally brought the city to a standstill.

The Olivia Road Case, which began in 2004 and finally ended with a Constitutional Court decision in 2008, was a further example of a poor and marginalised community litigating against the state in order to have their rights recognised and made concrete. The matter involved a group of residents living in the San Jose building in the Johannesburg inner-city. For reasons of urban regeneration, the City of Johannesburg (CoJ) wanted to evict the residents. However, with significant legal assistance the residents were able to fight the eviction order and take the case to the apex court, which provided a landmark decision regarding the right to housing and shelter and issues of procedural justice. The case demonstrated a situation of marginal citizens utilising litigation as a mode of engagement and mobilisation. Legal scholars have paid significant attention to the case (Chenwi, 2006; Tissington, 2008; Ray 2008 and 2009; Wilson, 2009; Chenwi and Tissington, 2010; Wilson, 2011a and b) and debated its merit. However, there was limited analysis by geographers, urban sociologists and anthropologists of the post-case impact or its longer term implications.

In order to gather the relevant data that would allow me to explore these cases in the necessary depth, I spent four and half months in Delhi and six months in Johannesburg spread over two years interviewing key informants, seeking out relevant documents, collecting media reports and any other material artefacts concerned with the two cases.[8] As an urban geographer, without a legal background, I also had to spend a significant amount of time familiarising myself with the South African and Indian legal framework. However, just looking at the law did not turn out to be sufficient and by the end of the

[8] Full details of my research method will be discussed in Chapter Three.

thesis, I had delved into media studies, anthropology and political studies among a host of theoretical concepts which helped me begin to think about and theorise what I was seeing.

1.4 The quest for theories on the role of the court in urban governance

After analysing the court cases, my findings left me puzzled about how to explain and understand what I had observed. The decision to litigate differed significantly amongst the various urban actors: the middle-class Resident Welfare Associations and the City of Johannesburg chose to litigate. However, the San Jose residents and the Delhi traders were forced into litigation but seemed to relish the opportunity and take advantage of the access that they were given. There were also moments of exclusion from the courts which struck me as curious, such as the Supreme Court of India's (SCI) decision to considerably limit the Delhi traders' access to litigation. These moments led me to start to think about how different forms of marginalisation operated within Delhi's governance structures, i.e., political, economic, spatial and judicial. Similarly, the South African Constitutional Court refused to add the national and provincial spheres of government as respondents in the Olivia Road Case, despite the fact that according to the South African (SA) Constitution, housing is a concurrent function shared by the national and provincial spheres. I was also perplexed by the traders' response and why they chose public protest as a way of accessing powerful decision-makers and key politicians in Delhi but why the San Jose residents never used public protest.

Furthermore, I had difficulties in trying to understand the apex courts' decisions: why, in the face of substantial opposition and obvious injustice, the SCI chose to stay with its original judgement to seal what amounted to tens of thousands of small businesses, most of which were quite harmless and were only guilty of being in the wrong location? Why did the SCI try to enforce an out-dated piece of legislation, and then why only selective parts of it? I could not quite make sense of why they did not just regularise these activities or demand that a new master plan be promulgated. Furthermore, why did they enforce their decision, then constantly monitor, and berate the institutions of the state for not carrying out their orders even when they turned Delhi upside down and caused a crisis of law and order?

Similarly, in a situation of strong arguments for minimum core standards and greater judicial oversight in a context in which there has not been sufficient acknowledgement or enforcement of judicial remedies, why has the SA Constitutional court consistently stepped back from the breach? Why has it not been a more "hands-on" judiciary and instead focussed on issues of procedural justice?

I was also quite confused by the apex courts' decisions: when analysed over time, each court seemed to be making similar decisions to similar cases with similar remedies, and I wanted to understand why. What was driving these trajectories? Why was there such startling consistency during certain periods?

Due to the range and scope of my interests, my research traversed several fields and disciplines: urban studies, society and law studies, and social movement research and as such there was no overarching theory or readily accessible conceptual framework that I could turn to. Rather, it was from within these fields that I found a number of concepts that were particularly useful, including: urban governance, regime theory and ideas around urban coalitions and alliances; Chatterjee's dichotomy of political/civil society; and Gramsci's notion of hegemony and counter-hegemony. I do not claim that through using these theoretical frameworks to have evolved into a Chatterjean or Gramscian scholar, but rather that I have found their ideas useful catalysts for thinking through some of my findings. I have tried to use their ideas to begin to understand my own work but I have extended and expanded their original theories and concepts in order to explain findings that do not fit into their schema. These frameworks and my extensions are briefly explored in the rest of the thesis with a very broad introductory overview in the following section. So, rather than a single literature review, I followed a different model: each chapter has a specific theoretical or conceptual focus which is mobilised to analyse and explore the empirical evidence relevant to that chapter. The last section of this chapter provides an overview where the areas of focus and concern are in the rest of the thesis.

1.4.1 Urban governance: regimes, coalitions and sites of engagement

A key element of the thesis was the idea of urban governance, which I identified as not just a multiplicity of formal and informal agents and actors who are making decisions and shaping the city (Jessop, 2002; Rakodi, 2003 and 2004), but includes networks of actors and institutions joining forces to drive certain spatial, ideological and political projects (Boyle, 1999). Within the urban governance arena important approaches have been that of Urban Regime and Growth Machine theorists. These frameworks posit that coalitions between state actors in local government and business interests coalesce in order to boost urban growth and increase the exchange value of land (Molotch, 1976 and 1999; Mossberger and Stoker, 2001). My findings indicated that the courts could be seen to be playing a part of these coalitions, either protecting the interests of these groups or actively participating in alliances to drive specific urban visions. However, the literature on urban governance has not paid attention to the idea of the court as a player within urban networks and coalitions. Thus, I had to extend the original approach by Molotch

and Logan and Mossberger and Stoker to include the courts in order to accommodate my findings.

Therefore, when looking at the two cases, concepts of urban governance helped to reveal that the court was one more actor helping to re-order the city and whose aims and intentions aligned with other urban agents that they were willing and able to support. As such actors choose litigation not only because of the opportunities for redress that it provides but also because the court is caught up in alliances and in some cases coalitions of group and individual interests and provides a powerful ally. Thus the Urban Regime and Growth Machine approaches provide a tool for analysis that allowed me to unpack how the relationships between the various actors were built and how they operated.

Studies of urban governance have not only focused on these coalitions, but have also looked at the nature and forms of interaction and engagement between urban residents and those in power (Mollenkopf, 1992; Stoker, 1998). Studies have revealed that over the last few decades, largely based on international discourse led by organisations such as the World Bank, there has been a focus on the state ensuring sites of participation. Therefore, governments around the world have promulgated policy and legislation to create official spaces of engagement with residents and citizens, especially of poorer and more marginalised communities (Cornwall, 2002). McEwan (2005: 4) notes that governments "have embraced citizen 'participation' and 'empowerment' as a panacea for addressing inequalities (Wolfensohn 1996) or, as some would argue, to foster 'good' governance and the spread of neo-liberalism (Duffield 2002)". Cornwall (2002) has termed these officially sanctioned and state-led sites of engagement as 'invited' spaces. She contrasts these against the 'invented spaces' in which communities create and construct their own sites of engagement and interaction with the state.

According to Sinwell (2009: 16), the usefulness of "[a]nalysing these spaces enables one to see the potential that "communities" have to influence local government and state policies or, more broadly, to control the everyday aspects of their lives". A presentation and analysis of invited/invented spaces also allows for an understanding of intra-community dynamics; the ability of poorer and more marginalised citizens to set their own needs on the agenda and be heard by the state. The court has not traditionally been seen as a site of engagement and interaction, even though it is precisely the space in which decision-makers and residents often come face to face. I use Cornwall's (2002) notions of invited/invented spaces to analyse the court and court cases. An interpretation of her schema provides a way of accessing what happens during a trial, across a variety of axes that she generally applies to community fora but which are equally applicable to court

cases and trials. Some of these include: how litigation is accessed, what is put in an agenda, who controls the agenda, and what the protocols and social rules are and how they affect the engagement between the various parties, Thus Cornwall's tools which effectively analyse power are useful in order to see what kind of space the court offers litigants and how it compares to other sites of engagement.

1.4.2 Chatterjee: civil/political society

Understanding the court and the court cases within a grid of intersecting players and interests seems however to only partially answer the questions of: who approached the courts; why they chose litigation; who was excluded; and, the modes of engagement that they chose in response. A further analytical framework comes from the work of the Indian scholar Chatterjee (2004) whose civil society/political society dualism provides a helpful analytical frame. Chatterjee maintains that the middle classes who are seen as legitimate rights-bearing citizens are able to access and utilise the formal institutions of the state i.e. civil society in order to represent their needs, access resources and influence decisions that affect them. Chatterjee also points out that urban dwellers living and working in situations of illegality or extra-legality are less able to make the same type of claims on the state. Therefore, they have to find other forms of leverage and "buttons to push" in order to have voice, space and access to those in power to drive their agenda. Thus, they rely quite extensively on relationships with those in power i.e. politicians, local 'big men' to pursue their own interests, and so they enter into the realms of political society (Harriss, 2011).

Chatterjee's framework allowed me to see why the RWAs and the City of Johannesburg, and its coalition of middle-class and private-sector interests, used the courts as an institution of the state to pursue their ends and why the traders accessed key politicians to pursue their causes. As will be seen, Chatterjee's polarisation was useful in assisting me to frame the comparison between the two case studies in their different contexts and gave me a way of seeing how rights and rights-claims worked. It also allowed me to see just how far these discourses have infiltrated into different aspects of society and are being used to leverage claims on the state in the two cities. Furthermore, Chatterjee's work helped me to frame questions around the nature of different groups' political strategies and tactics.

My findings also allowed me to nuance some of Chatterjee's work and to demonstrate how political society is not just used by the poor but is also mobilised by groups who may be marginalised in other ways, such as the traders who are relatively well-off, but were excluded from the courts. The evidence also suggested that it is not just the poor who are

able to claim some forms of victory through political society but in fact other groups who live in situations of informality or extra-legality. Furthermore, my findings also indicate that it is not just "legitimate" citizens who are able to access civil society. The poor can and do, in certain circumstances, make use of rights to leverage their claims through the formal institutions of the state such as the court. Thus my research extends beyond Chatterjee's duality and offers an account of political and civil society, which indicates that the determining factors of who uses political society is more closely related to questions of scale, legality, access and marginalisation rather than income. I also posit that Chatterjee missed a key aspect of why different groups access both civil and political society, which is because the status quo which is applied to the majority does not work for these groups, who are in some way attempting to access some form of exceptional treatment. The full discussion of these points can be found in Chapter Six.

1.4.3 The apex courts, hegemony and governance: a potent cocktail

The two bodies of work on civil/political society and urban governance were useful in helping me to understand and unpack some of my findings but still did not explain the courts' longer trajectories, and their stubborn adherence to specific decisions. Nor, given the cost and time of litigation, did the other two frameworks completely explain why litigants chose the courts or exploited the opportunity for litigation as opposed to other forms of mobilisation and social action (especially as it may be seen as contradicting Chatterjee's central argument). Given these findings, it seemed to me that something more than just a fight for a specific social good was at stake. I thus began to think about what role courts and court cases play within societal relations, and how—if at all—they are involved in the reorganising of power and power relations. Such thoughts led me to Society and Law literature and through that to writings around Gramsci and hegemony (Hunt, 1990; Litowiz, 2000). Thinking about courts and court cases in hegemonic and counter-hegemonic terms let me begin to understand that both of these are institutions, which have long-term and particular effects in society. I then began to think about these institutions not at the national scale, which was not the scale of my analysis, but rather what role these cases and institutions played at the level of the city and within city dynamics.

Thus, after much time and thinking I hypothesised that the court is involved in a contest for an urban hegemony. The relationship between the state and the court and the drive for ideological dominance within a city has three inter-related parts to it: first, is the classical understanding of the court as an instrument of hegemony, in which the court and the law are able to coerce and persuade people into following and subscribing to a specific vision (Kennedy, 1982). Thus, given the fact that the court has this special status and ability to legitimise a vision, the court may also be a site in which different blocs vie

for hegemonic dominance, either in defence of the existing hegemony or in an attempt to counter it. Within the court both sides attempt to use the legitimising power of the court to further and embed their own hegemonic project (Litowitz, 2000: Hunt, 1990). Second, is the unrealised or under-theorised aspect that courts form coalitions and alliances with other groups in an attempt to shape and propagate a specific urban vision. The third point is that they also use their privileged position to embed their own role within the governance milieu and to further their own or their shared project.

The hegemonic role of the court and the collective vision that they advocate is operationalised through making decisions, and providing remedies, and legal support to its coalition's interests. It is also through punishing activities and groups that dissent, marking them as illegal and/or criminal. Courts' ability to designate groups as being in contempt gives them an unparalleled ability to silence voices, which challenge their views and visions (Chandrachud, 2010). Furthermore, driving urban visions in this manner may have a two-fold benefit for courts: on the one hand, they may be involved in the physical reordering of urban space to fulfil the desires of those who comprise the coalition, which may include the court; and on the other, they also may be able to secure the courts' own role and position within the city's governance nexus. All of these aspects are inter-related and mutually supportive. The following section provides more detail as to why I argue for this conceptualisation and explores the relevance of Gramsci's idea of hegemony for understanding the nexus between urban governance and law and unpacks both classical Gramscian theory and my reinterpretation of his work as well as the links between urban regime theory and Chatterjee's binary and thus forms the most significant part of this chapter.

Hegemony and law at the urban scale: Exploring the relevance of Gramsci in understanding urban Governance

Recent work on geography and Gramsci (Ekers, *et al*., 2013) argues that there is a close relationship between space and hegemony and that "space [is], indeed, produced, differentiated, and contested within any hegemonic project" (Ekers and Loftus, 2013: 27) Within the same collection Kipfer (2013) unpacks Gramsci's understading of the relationship between hegemony and urbanity. He notes that in order for a national hegemonic project to be embedded, a transnational collaboration of urban and rural forces in which a compromise of both sets of struggles is combined to reformulate a hegemony that is satisfactory to both groups. He also noted that within the urban, hegemony can be inscribed by the dominant bloc through a variety of spatial-symbolic strategies such as the renaming of streets and suburbs (ibid.).

However, the nature of hegemonic projects at the intra-urban scale is not well conceptualised and only a few authors have examined the operation between urban regimes and hegemony (Logan and Molotch, 1989) and the manner in which specific urban visions are in fact part of hegemonic projects (Paul, 2004; Ghertner, 2004). As such I extend Gramsci's account of hegemony in order to understand some of the actions and decisions of the various urban agents in my case studies. In order to do so, I begin by recounting some of Gramsci's key concepts and then explore how they have been used in related disciplines and go on to define and describe how I have expanded and extended these theories in order to try and account for what I have observed.

Gramsci did not provide a comprehensive view of what constitutes hegemony, and his definitions and thoughts on the topic are scattered throughout his *Prison Notebooks.* The following extracts provide some of the most useful quotes that I found to help unpack the process by which a group becomes dominant and is able to instil their hegemony into the wider society. Gramsci argues that:

> "In order to become a State, they [a potentially dominant group] had to subordinate or eliminate the former and win the active or passive assent of the latter. A study of how these innovatory forces developed, from subaltern groups to hegemonic and dominant group, must therefore seek out and identify the phases through which they acquired: 1. autonomy vis-a-vis the enemies they had to defeat, and 2. support from the groups which actively or passively assisted them; for this entire process was historically necessary before they could unite in the form of a State (Gramsci, 1996: 53).

Once a group has gone through these stages and is in power, in what is called the "dominant bloc" then they are able "to create favourable conditions for the maximal expansion of the same group", but he underlines that "this development and this expansion are conceptualised and presented as motor force of an universal expansion, of the development of all national energies" (Gramsci, 1996: 182). It must also be remembered that according to Gramsci "the *supremacy* of a social group manifests itself in two ways, as 'domination' and as 'moral and intellectual leadership'"(Gramsci, 1996: 45). Gramsci posited that it is through the work of intellectuals and institutions, or what have been called "the apparatus of hegemony" that domination and leadership are maintained and hegemony is entrenched. Gramsci further argued that such processes need to be on-going, they cannot ever be relaxed because hegemony needs to be consistently articulated and embedded and can never relax its grip on those who are being dominated. According to Cox (1987:168), Gramsci also identifies agents of hegemony, especially intellectuals who are "organically connected" to the hegemonic

class and “they perform the function of developing and sustaining the mental images, technologies and organisations which bind together the members of a class and of an historic block into a common identity”.

The documentation of these features is also useful in providing a methodology for identifying how and where hegemony is entrenched. Following Gramsci, Thomas (2009: 203) argues that one can recognise the praxis of hegemony, “the concrete form in which hegemony is exercised” through the examination of both private and public institutions, such as publishing houses, newspapers, journals, literature, museums, art galleries etc. which help to impose consensus. However, such an approach remains fairly nebulous and Gramsci did not provide a tangible method for identifying when and if an activity or group is hegemonic as opposed to merely dominant or the precise practises which can be identified as contributing to the embedding of the concept. This work has been left to other scholars who have enthusiastically taken up the challenge. The following section provides a very brief overview of how the idea of hegemony has been mobilised and identified in some academic disciplines and which have proven useful analytically and methodologically for my own work.

How precisely hegemony has been studied has varied across space, time and although the idea has been used in any number of disciplines ranging from cultural studies (Hall, *et al*., 1978; Wood, 2000) to international relations (Arrighi, 1994; Antonides, 2008; Rajagopal, 2005; Fusaro, 2010); and law (Gabel and Harris, 1982; Barzilai, 1998; Thomas, 1998; Litowitz, 2000) and of late to questions of space and geography (Ekers, *et al*., 2013). Through a critical re-articulation of some of Gramsci’s key insights the authors in the collected work have attempted to understand Gramsci’s approach to the spatial world and spatial concepts. However, despite vast attention given to Gramsci and hegemony, it does not seem that the concept has so far been fully operationalised, and certainly not at an urban scale. This added to my challenge as I needed to find ways of unpacking the modes and motifs of what I saw as projects to instil specific societal, spatial and institutional visions within the two cities. This was a difficult task and one, that I have not fully resolved (but have made some progress and aim to continue working on these issues). However, the next section exposes how I engaged with Gramsci’s notion of hegemony and extended it to the urban scale and the role that I thought that the court was playing.

Urban Hegemony and the Law

As mentioned, even though Gramsci utilised the idea of the city in his explanations of domination and power, how hegemony operates at the urban scale has not been well

explored at the scale of the city. I offer a modest contribution to the task in order to frame my work. For this thesis, I use a broad understanding of hegemony, in which

> "A social group or class can be said to assume a hegemonic role to the extent that it articulates and proliferates throughout society cultural and ideological belief systems, whose teachings are accepted as *universally valid* by the general population (emphasis added)" (Fontana, 1993: 140).

A further useful definition is supplied by Kennedy (1982:33) whereby

> "Hegemony… is the notion of the exercise of domination through political legitimacy, rather than through force. Hegemony is the notion of the acquisition of the consent of the governed… [and] in order to understand ideological power to generate consent from the masses through the creation of institutions and organisations, and social patterns that appear legitimate to the masses of the people".

When looking at hegemony in the urban context, I would argue that urban hegemony is the fight by one group or coalition of urban actors to try and embed their spatial and political vision onto the landscape of the city and the minds of the urban residents. This would be the attempt to materially convert, change or maintain a city's built environment so that a specific aesthetic was maintained or pursued (Ghertner, 2004) e.g., order, strict separations of land use; control over space. The benefits of such a vision would accrue mainly to that specific group but the attempt would be to legitimise the urban project so that all urban residents bought into the idea and felt that they too would benefit or that it was a legitimate end to be pursued. Urban hegemony is also a spatial-ethical project, which defines what certain spaces *should* look like, what it *should* be used for and who *should* be allowed to use it (Purcell, 2001). Furthermore, I have also adopted some thinking from the Growth Machine approach. Logan and Molotch do not explicitly explore the idea of hegemony but they conceptualised the manner in which urban growth is naturalised through various means (i.e., local newspapers, school competitions, etc.) into urban residents' imaginations and pushed by urban "boosters" (Logan and Molotch, 1989). Such an approach was very useful to me when I tried to get to grips with the apparatus of hegemonic praxis at the urban scale. Thus in my understanding, the urban hegemonic project could resonate with larger national and international discourses but would have a very local material manifestation and use very local instruments (city websites, slogans and posters, events and celebrations, symbolic projects, etc.) and local groups and organisations to try and fight for dominance.

The question that then logically occurs is: how does one prove or identify urban hegemony? What does one study and look for? Drawing from the earlier sections and

other disciplines, I would posit that methodologically urban hegemony may be identified in a variety of ways: Gramsci argued that "…, hegemony is *produced and reproduced in everyday transactions* (emphasis added)" (Sibley, 2005: 330-331); and a hegemonic project is entrenched through the exchange and interaction of symbols that are ingrained "in the popular imagination" through "…the education system, the work of intellectuals, religion, art, and even in the mundane reaches of common sense" all to construct a "dominant worldview" (Litowitz, 2000: 524). The same apparatus and systems, in my view, occur at the urban scale using local government, local civil society groups, by-laws, and police, as well as those actions previously mentioned, i.e. local symbolic projects and events, festivals, urban slogans, policies and programmes. I would also argue that the courts and the law begin to play an important part in the local dynamics of attempting to entrench an urban hegemony, a point which will be discussed more fully throughout the thesis.

Furthermore, since hegemony is in a sense "unstable" (i.e., has to be constantly fought for, updated and institutions need to be constantly mobilised) there are moments in which it "slips" or reveals itself, moments of crisis in which the fact that it is not to everyone's benefit become apparent. Fusaro (2010: 15) argues that it is these "[o]*rganic crises* [that] are then associated with a situation in which "*insuperable* contradictions show up" (emphasis in original). It is also during these crises that the work of the "intellectuals" and the institutions or apparatus of hegemony are made visible. Thus in the contest for urban domination, a groups' hegemonic project is apparent in the moments in which it becomes apparent that their goals are actually not to everyone's benefit. Furthermore, Gramsci argued that in moments of crisis the more coercive aspects of the state become more prominent, revealing that the dominant bloc is under threat (ibid.). Similarly at the city scale, a group's move from persuasive to coercive tactics may signal a hegemonic project under threat and so alert analysts to look more closely at what is taking place.

Thus, what can be studied in urban contexts are the strategies and tactics of institutions such as the media, educational facilities, social movements and coalitions of urban actors, the local government and litigants and their attempts to naturalise their spatial vision and fix it onto the landscape. Furthermore, urban hegemony can also be studied in its moments of crisis when it reveals itself as not being universally beneficial or when it is under threat.

Gramsci highlighted that the law was a key institution of hegemonic dominance, which has a coercive aspect: police officers, jails and penalties, as well as a persuasive aspect by which it is able to act as the legitimator of the social rules and values that those in power wish to maintain (Litowitz, 2000). Put another way, "Power is exercised by

controlling the way the world is constructed and understood – *and law is a powerful means of conceptualising and categorising the world (emphasis added)*" (Sibley, 2005: 331). Courts inculcate societal norms by acting out the laws' normative framework, whereby correct action is rewarded and seditious action is punished. The result is that what the legal system approves or endorses is taken to be moral, legal and permissible and what it disapproves of means that it is illegal, criminal and unacceptable. At the local level, phenomena that are generally taken for granted, such as by-laws, become a clear example of the invisible power of the law.

The key to understanding the hegemonic role of the law and the courts is that its persuasive power is generally invisible and saturating, whereby it is constantly presented as a form of "common sense" (Mann, 2013) which makes its control difficult to detect and counter. Legality is embedded in the milieu of human behaviour, everything, from which side of the road to drive on, to how items are bought and sold is regulated by the law. However, for the most part, the actual laws which govern the interaction of everyday life are not consciously nor constantly considered but form the background noise of modern existence. Law is able to construct social reality by detailing what is appropriate or inappropriate, what is valuable and valued and what is not. Thus, it is able to construct social meanings, but it does so in such a way as to make them appear natural (Pradhan, 2007):

> "More often than not, as we go about our daily lives, we rarely sense the presence of the law. Although law operates as an assembly for making things public and mediating matters of concern, most of the time it does so without fanfare, without argument, without notice. We pay our bills because they are due; we respect our neighbours' property because it is theirs… We rarely consider through which collective judgments and procedures we have defined "coming due," "their property," "prudent driving," or why automobiles must be registered and why traffic stops at red lights. If we trace the source of these expectations and meanings to some legal institution or practice, the origin is so far away in time and place that the matters of concern and circumstances of invention have been long forgotten. As a result of this distance, sales contracts, property, and traffic rules seem to be merely efficient, natural, and inevitable facts of life. As naturalized features of modern life, the signs and objects of law are omnipresent.
>
> Through historic as well as contemporary legal decisions that are no longer actively debated, countless aspects of human life as well as matters of concern have been resolved, concretized, and objectified, literally written onto the surfaces and figuratively built into the very

> structures of ordinary social relations, places, and objects" (Sibley, 2005: 332).

Within Gramsci's original development of the notion of hegemony, the law and the court were institutions, which embedded and enforced the dominant hegemonic discourse (Litowitz, 2000). The court and court cases are visible "icons" whereby the invisible law is made visible:

> "…the trial is presented as the site of legality, a carefully orchestrated contest through which aggregations of persons, words, stories, and material are legitimately transformed into facts of intention, causality, responsibility, or property… we take for granted the appropriateness and legitimacy of trials for resolving conflict and for mediating and legitimating the use of force" (Sibley, 2005: 331).

The court is able to transmit the values and worldview of those in power and in doing so "it puts in place a set of values, renders them coherent, but most importantly, they become material in providing an active framework in the sense that what law proscribes as self-evidently 'wrong' and what it valorises tend to become perceived as how things should be" (Hunt, 1990). According to Sibley (2005) and Pradhan (2007), it is therefore this dual nature of the law that allows those in power to maintain control, i.e., the ability to govern through the rule of law as well as the ability through the law to construct social reality, which is then internalised and accepted. According to Gramsci, the court is deeply implicated in the political aim of maintaining or entrenching a hegemonic project (Kennedy, 1982; Litowitz, 2000). Its ability to promote a worldview as correct and appropriate means that those wishing to promote a certain idea would be well-placed to use the courts given their powers of normalisation and valorisation.

The above means that even if there are contradictions between different spheres of the court, such as the High Court, Supreme Court etc, when looked at overall, the collective decisions of the legal system, the *juris prudence,* create a set of 'norms' and 'values' of a specific ideology by maintaining what and who is right and wrong. However, here is where Gramsci and I part ways: I would argue that courts can also be sites of hegemonic contestation and not just apparatuses of the dominant bloc. Court cases can represent or surface some type of crisis, which "… can be considered an 'enabling moment'" (Pieterse, 2006: 288-289). In these moments of crisis, it becomes clear that the prevailing hegemonic bloc does not best serve everyone's interests and is revealed to only be best for a specific group, and possibly to the detriment of other groups. These "breaks" make the projects visible and consequently vulnerable to countering. Court cases over contested socio-economic rights can offer counter-hegemonic opportunities as they can

reveal quite clearly “winners” and “losers”. When the right to property competes against the right to basic shelter, the elite would be hard-pressed to maintain the hegemonic vision that those made homeless would benefit from such a protection. Not that it could not be done, as Ghertner (2011) has indicated through his work on slum clearances in Delhi, but that there are opportunities or potential cracks that can be exploited.

Thus, “It is in and through law – whether through existing state law or other legal orders - that the subjugated peoples can offer resistance to law and the meanings it creates and imposes” (Pradhan, 2007: 5). Court cases can offer the space to present counter-hegemonic visions. Although the definition, like most of Gramsci’s terms, is highly contested, I use the term to go beyond “renovating” what is already in place and “making critical an already existing activity” (Gramsci quoted in Hunt, 1990: 313). Rather, it is the challenging the dominant discourse so that the *status quo* can be supplemented, extended and in some cases totally overthrown and replaced (Carrol and Rathner, 1996; Worth, 2002). However, there is a dialectical relationship between hegemony and counter-hegemony, whereby “… hegemony informs counter-hegemony, and counter-hegemonic efforts cause hegemonic forces to realign and reorganize themselves” (Katz, 2006: 336).

Therefore, a court case concerned with urban goods, urban space or rights made manifest at the city-scale, such as the right to trade in a public space or the right to housing, would mean that the court could become the site in which contrasting urban visions are pursued by opposing urban coalitions. I explore this idea in the rest of the thesis.

A vision of the city: coalitions, counter-hegemonies and coercion

The courts and court cases can thus become the spaces in which alternative visions are articulated and where hegemonic and counter-hegemonic worldviews vie for dominance. At the local scale, courts can be used by litigants who want to legitimate and inculcate their worldview in ways that seek widespread and popular support. However, I argue that courts have another potential role in which they are not merely legitimators of other groups’ urban projects; rather, I argue that apex courts at the local level can become part of local coalitions, with whom they share spatial and political ideas. Their decisions thus seek to entrench and legitimise these visions and they use their considerable authority to mobilise other organs of the state, such as local government and the police to carry out their projects.

Even where courts are not part of local coalitions, they may have specific projects that they are seeking to entrench and use the privileges of their position to enforce their

decisions and to support the projects of local coalitions. Thus, through deciding for a specific group or alliance courts may find ways of expressing their projects, which then may have spatial and material ramifications on the landscape. To make the point slightly clearer: a court which seeks to pursue a project of procedural justice may decide for a coalition of litigants from whom such opportunities have been withheld. The result may be increased engagement with the authorities and a redistribution of resources or space to people who had previously been excluded, or the chance to participate in city-shaping activities such as planning processes.

There are two possible sets of benefits that then accrue to courts at the local level: the first is the spatial or material benefit of ensuring that a landscape looks the way that the courts and the rest of the coalition are aiming for; and the second, is that through pursuing a specific spatial and political vision the courts reinforce their own position as a legitimator and may be able to give it even greater force through defining/constructing a specific identity or role within the urban governing milieu, i.e., as the state institution that pursues urban growth or spatial justice.

These urban visions and the courts' roles become apparent when looking at the trajectories of the two courts: the SCI has chosen a role of judicial activism and direct intervention into the daily practices and policies of the official producers of the city (Dembowski, 2001; Bhan, 2009). It consistently establishes committees and legal interventions that allow it to meddle in policy with direct engagement and enforcement of its judgements (Robinson, 2013). In contrast, the South African Constitutional Court has used an administrative justice approach with a special emphasis on procedure and engagement and, for the most part, has trusted the state to carry out its orders (Bilchitz, 2002 and 2008; Christiansen, 2010). Through their decisions and the court cases that they have chosen to adjudicate both courts have attempted to carve out specific roles for themselves within networks of urban governance: the SCI has tried to ensure that it is considered the last bastion of law and order and through this identity it justifies its own intervention in other branches of the state. The project that the case of South African Constitutional Court has chosen for itself is not spatial (although it may be spatially manifested) but rather social and political: it has been attempting to enforce procedural justice through consistent application of engagement as a remedy. It sees itself as a facilitator of interaction between different aspects of South African society through constructing an environment where the state and its citizens need to collectively consult and negotiate with each other to add content to socio-economic rights and their manifestation through state policy. Thus, by making sure that all voices are heard and through forcing different constituencies to try work together the court understands its project to be one that is encouraging the maturation of democracy.

What I hope to demonstrate throughout the thesis is how the case studies surface different insights into the relationship between hegemony, the law and the city and to test the ways that the Gramscian notion can be operationalised in urban governance. Using these ideas, I argue that I am able to indicate the three modes or moments in which notions of urban governance, coalitions, and hegemony coalesce, i.e., the court as a hegemonic instrument and thus as a site of competing urban hegemonic projects, the court as an urban agent attempting to drive a specific urban project possibly in alliance with other actors and the court as an agent that attempts to cement its own role within the urban governance setting.

1.5 Thesis structure and title

I have entitled the thesis 'Courting Change: the role of apex courts and court cases in urban governance: a Delhi-Johannesburg Comparison'. On the one hand, this is an obvious pun about the main object of analysis. However, the title is also intended to resonate with two further images: the first is that of court games - sports played on or in an arena of contest. The idea is to reiterate the sense of opposition, contestation, competition and often antagonism that are typified in sporting events, where teams battle for victory and supremacy within and outside the arena. Largely, this is the case with court trials: oppositional forces seeking the dominance of their vision or worldview through direct confrontation but quite clearly following a set of rules and protocols that define appropriate behaviour.

The second intended resonance is that of the so-called 'courtly games' of the middle-ages, in which the ladies and gentlemen of the court followed precise protocol in seeking the affection of their objects of desire. Courtly games were not just about love and sex, they were also about power, political manoeuvring and 'winning', gaining prestige and influence over the monarch or individual in power. The collusions, alliances, and feuds are also resonant of the manner in which the various actors, agents and individuals ally themselves in cities and the how the court is both a site of these games as well as a major player. These debates are carried throughout the thesis and presented through a consistent combination of theoretical discussions and empirical findings. The following outlines the structure of the thesis and the contents and main arguments of each chapter.

Chapter One has provided an overview of the main concerns, research questions and theoretical frameworks that I have engaged with and will now give a sense of the overall structure of the thesis.

Chapter Two is a preamble to the main body of the thesis and provides background, context and a summary of the two case studies. It is intended to act as a reference for the rest of the thesis and to be referred to when and if clarity is sought over the chronology of the events and the roles of each of the key actors and institutions.

Chapter Three offers insight into how I worked through and developed the findings and argument. It contextualises the study in terms of larger methodological considerations and offers justifications and rationalisation for the decisions that I made, which led the specific case studies and the data that is presented throughout the thesis. It answers the questions of what I did to gather my data and why I did it in that particular way.

Chapter Four starts to consider the main arguments and content of the thesis. It has three main functions: first, it provides the reader with general context of the manner in which government functions in Delhi and Johannesburg, and its failings and dysfunctionalities; second, it offers a sense of the governance in both cities and the nature of the coalitions, convergences and alliances of interests that operate and demonstrates how these groupings drive specific hegemonic visions and, thus, introduces the terrain of contestation between the different actors; and third, the chapter reveals the constellation of factors that drove the key urban actors in both cases to litigate or to exploit the opportunity for litigation and explains the motivations for using the court.

In Chapter Five, I move on to examining the actual court cases within the courtroom and how the sites unfolded as spaces of engagement, participation and interaction between various urban actors. It evaluates the courts to see how they are constructed, how engagement is modified or influenced and who sets the agenda and how much power various groups have in a site that is heavily mediated by legal protocol. It also explores the nature of the narratives and narrativisation that exists in court cases and in the specific case studies and asks questions around “voice”, and empowerment for the litigants. The chapter concludes that the court is a third type of space, a paradoxical one, that does not fit in to the invited/invented dichotomy but one that is governed by its own set of rules and protocols that can be simultaneously liberating and antagonistic, politically empowering and personally disenfranchising.

Chapter Six explores the idea of inclusion, exclusion and the idea of exceptional treatment. How access, coalitions and shared interests drive certain forms of claim-making mobilisations. The chapter also describes the repertoires of public action and protest that the traders’ engaged in due to their exclusion from the court case and their use of “political society” to access exception. This is contrasted against the San Jose

residents' use of the courts and their ability to access "civil society" and exceptional treatment through the Constitutional Court. After using Chatterjee's schema of "political and civil society" the chapter also demonstrates how the rights-based discourse is far more widespread than Chatterjee has conceived and is mobilised by all members of society. Furthermore, it also indicates that in certain cases the courts can provide marginalised citizens with access to civil society.

The penultimate chapter examines the consequences of the court cases and develops a model of analysis to assess the impact across different dimensions of governance. The model utilises five axes: 1) policy; 2) policy-making processes; 3) institutional values, culture or dominant hegemony; 4) practice, and 5) the changes in power relations. It argues that some actions have more significant political utility than others and that court cases and judicial remedies are uneven in their ability to affect change. Furthermore, that change in one dimension does not mean that there necessarily will be changes in others, i.e., if there is a change in policy it does not necessitate that there will be a change in practice or power relations.

The last chapter considers why certain modes of action such as litigation or public protest were more successful than others and why there was more openness to certain kinds of changes than others and offers an account of how the court cases feed into existing trajectories, which reinforces or retards their efficacy.

Chapter Two: Setting the scene: A brief introduction to the cases

The thesis examines two cases, described below, in order to address the question "What is the role of the courts and court cases in urban governance?" The following section outlines the case studies and gives a sense of the chronology and context in order to introduce the reader to some of the key aspects of the study.

2.1 Sealing Delhi: a battleground for governance

The Sealings Case began in 2006 when almost half a million people in Delhi were directly affected by the Supreme Court of India's (SCI) decision to seal commercial enterprises that contravened the 2001 Delhi Master Plan. The SCI case dragged out for over a year and resulted in mass protests, bringing Delhi to a standstill by closing down all public and private activities for days at a time and a direct and fraught confrontation between the executive, legislature and judiciary. By the time the court case ended, there had been a change in the landscapes of power in the city: the Indian National Congress (The Congress) had been replaced by the Bharatiya Janata Party (BJP), the Delhi traders[9] had been able to heavily influence the new Master Plan in their favour and the middle-class Delhi residents and their Resident Welfare Associations (RWAs) had lost much of their power.

2.1.1 A small point of the law

The Sealings Case, or as it is officially known, the MC Mehta case, is constituted of a collection of writs, petitions and appeals that date back to 1985. It first appeared in a series of cases taken to the High Court principally by Resident Welfare Associations (RWAs) and their federations. The RWAs from the wealthier and more middle-class areas of Delhi were concerned about the changing nature of their neighbourhoods to a more commercial profile (Kakria, Pers. Comm., 2010). Their anxieties centred on the consequences of these changes on traffic, safety, and the availability of resources (especially water and electricity of which there is a chronic shortage in Delhi) for the residents (Sharma, Pers. Comm., 2011). The RWAs had also historically found a sympathetic ally in the courts and thus were used to utilising litigation to try achieve their ends. In this case too, they were able to find legal grounds on which to base their concerns as the commercialisation of residential properties and the construction of

[9] In this case the term 'traders' refers to all people engaged in commercial enterprises whether wholesale or retail, service provision or manufacturing and operate from formal premises and thus are not street traders or hawkers. A full discussion of the term "traders" can be found in Chapter Four.

buildings and shops for commercial use contravened Delhi's Master Plan and by-laws. The two matters took different paths through the legal system: litigation concerning illegal constructions and demolition stayed in the High Court, whereas the issue of misuse and sealings was elevated to the SCI. However, officially the SCI case did not concern the legality or illegality of commercialisation but turned on a small point of Indian law: which local authority, the Delhi Development Authority (DDA) or the Municipal Corporation of Delhi (MCD), had the legitimate mandate to seal properties.

MC Mehta, a well-known public interest lawyer, filed the original complaint as a Public Interest Litigation[10] case, but within a few weeks the SCI took over as the petitioner and drove the case forward using it as a vehicle to push forward a number of their goals.[11] The SCI decided it could, and - more importantly - that it should order the MCD to enforce the provisions of the earlier Master Plan. However, it also took the case far beyond its original legal concern. The SCI took the opportunity to make a stand about its own position in the structure of governance in the city: it levelled a series of accusations of corruption, connivance and incompetence at both officials and councillors and stated that the Supreme Court of India had the responsibility and jurisdiction to force implementation in the face of the local authorities ignoring or acting against the law (Sharma, Pers. Comm., 2011). As the trial dragged on the SCI also used the case to pit itself and its authority against that of both the legislature and the executive in a bid for the power and control over Delhi. The case became the latest platform for the on-going battle between the branches of the state.

2.1.2 Sealing away…

In its first order, the SCI called on the MCD to put up public notices detailing the various contraventions and to begin to seal within 30 days of the Court's judgement (Senior Official in the MCD, 2011). They were also ordered to inspect colonies across the city in search of people who were violating the law (Lal, Pers. Comm., 2011). Traders who were guilty of these violations were given ten days to submit affidavits stating that they acknowledged their wrong-doing, would stop their illegal activities and remove their equipment. If they did not submit affidavits then the MCD was ordered to give them 30 days' notice and then seal the premises. 'Sealing' generally meant chaining and padlocking the premises and then sealing the lock with gum and tape (see Figure 1), bricking up the doors and windows, or barring entry to the premises with tarpaulins and ropes (See Figure 2). The premises would be un-sealed when violators signed an

[10] This was a Public Interest Litigation because MC Mehta had no direct interest in the case but rather filed the case as he felt that there was an issue of wider concern at hand.

[11] This is a feature of Public Interest Litigation, whereby the original petitioner may take the case to court but then the matter can proceed *suo motu* or on its own volition, whereby the petitioner no longer has to drive the case forward but rather that the matter can be taken up and pushed forward by the Supreme Court.

affidavit guaranteeing that they would ensure that their premises would conform to the required land use regulations (Senior Official in the MCD, Pers. Comm., 2011).



Figure 1: Lock and seal used in Delhi to close a commercial activity[12]

Soon after the sealings had begun, the Supreme Court realised that they would not be able to manage the sheer number of affidavits nor cope with the details of administration that the Delhi sealing would require. Thus, on 24 March 2006, they set up a three-man monitoring committee intended to be the liaison between the public and the SCI. The Monitoring Committee was also supposed to keep an eye on the MCD's and other government agencies' performance and report back to the SCI.

2.1.3 Responses to the court orders

The judgement caused massive resentment mostly aimed at the MCD who were made to enforce the ruling and the government who were seen to be powerless and unable to protect its citizens. The anger was also due to the manner in which the sealings took place: initially, there was no specific appeals process and property was sealed on an arbitrary basis. Some areas and properties felt the full force of the court order, whilst

[12] India Daily, 2007: http://www.indiadaily.org/images/sealing-drive-delhi154_26.jpg accessed 12.07.2010

others escaped relatively unscathed. Moreover, allegations were made that in some areas no notice was actually given and trading establishments were immediately sealed (Senior Official in the MCD, Pers. Comm., 2011). In response to the SCI order, various traders' organisations unified under the banner of the Confederation of All India Traders (CAIT). Initially they attempted to petition[13] the SCI for relief but were allowed only very limited access to the court. As a result, they organised a campaign against the Supreme Court (Mehra, 2009). They held a series of protests, demonstrations and sit-ins,[14] some of which turned violent as traders, the army and the police clashed and on a few occasion the traders brought the city to a standstill as they blocked traffic and took over public areas (Jain, 2010).



Figure 2: Sealed Building on Mehrauli-Gurgaon Road, sealed in 2006[15]

As a result of their public action, the Confederation of All Indian Traders (CAIT) met with a wide variety of ministers and parliamentarians including the President, Prime Minister, the Minister of Urban Development, Ajay Maken and Sheila Dixit,[16] the Chief Minister of the National Capital Territory of Delhi (NCT) to try bring about a halt in the sealings.[17] The Delhi and Union Governments attempted to help the traders using the various instruments at their disposal. Thus, the DDA, at the behest of the government, proposed a set of amendments to the proposed Master Plan 2021, which the Urban Union Development Ministry notified (i.e., made into Law). The notifications allowed for mixed land-use and provided some relief but only for a minority of traders (Jain, 2010). Knowing that the notifications were not sufficient, the Central Government approached the SCI in April of the same year, and requested a six-month moratorium on the sealings. The state argued that the traders were not at fault since there had not been any proper planning in the city for over 40 years and they should not be penalised for local government's failures.[18] In addition, the Central Government appealed to the court to pause its sealing drives,

[13] A petition is a written application from a person or persons to the court asking that some authority be exercised to grant relief, favours, or privileges or to try and ensure that a state body enacts a right.
[14] CAIT, Press Releases: 11 August 2006, 25 September 2006, 18 September 2006; 2 October 2006, CAIT Archives.
[15] Our Delhi Struggle Blog, 22nd July 2008, http://ourdelhistruggle.com/2008/07/ accessed 12.07. 2010
[16] Sheila Dixit's name is spelt in a wide variety of ways, including Dikshit and Diksit, I have used the Anglicised Dixit unless quoting directly from another source.
[17] CAIT, Press Releases: 21st September and 30th September 2006, CAIT Archives.
[18] The Asian Age, 2006: Centre approaches top court, *The Asian Age*, 13th April, NIUA Archives.

arguing that from a 'natural law' perspective, the drive was depriving poor households of their right to life by denying them the ability to earn to earn a living (Khanna, Pers. Comm., 2011). The Court refused the state's petition, claiming that the SCI needed to protect the rule of law even if the government was going to ignore it, and proceeded with the sealings.

The limited success of the notification and the failure of the petition to the SCI meant that the government was in danger of losing the support of its votebanks within the city. As a result, they began to look for a way of offering relief to all traders. The Congress-led Union Government then promulgated the Delhi Laws (Special Provisions) Act in May 2006 to try halt the sealings. The Laws were a temporary solution that only protected buildings and traders in unauthorised colonies from having their properties sealed or demolished on the promise that they might one day in the future be regularised.[19] It also provided a one-year moratorium on all sealing in the City and ordered the de-sealing of some of the properties that had been sealed (Jain, 2010). As a consequence of the Delhi Special Provisions, the MCD was put into an untenable position as it was instructed by the Central Government to stop sealing and yet directed by the Supreme Court to continue.[20] Much to the confusion of the citizenry of Delhi and the Supreme Court's chagrin both took place, with sealings stopping in some parts of Delhi and continuing in others.[21]

Over the next few months (See Figure 3) similar sets of actions played out as the Union and Delhi Government attempted to halt the sealing and bring relief to the traders. However, the SCI countered their moves and insisted that the sealings continue. Uncertainty prevailed. As a result, the traders continued their public action and through September until the end of 2006 the situation was highly volatile. On a number of occasions the MCD and the Union Government appealed to the Supreme Court for relief arguing that the sealings were destabilising the city and that the rule of law was in danger, as evidenced by the range of clashes between police and protestors since the sealings began. The Delhi police supported this claim and told the Supreme Court that they could not help the MCD to carry out any more sealing until they received reinforcements. The SCI paid some attention to the various petitioners and provided limited relief and moved a few deadlines but in essence refused to relinquish their earlier decision.

[19] Mahajan, N., 2006: Op-Ed Piece: The Bill keeps all building by-laws on hold, may face judicial scrutiny, *The Hindu,* 11th May, NIUA Archives.
[20] Joshi, S., 2006: Moratorium on sealing puts officials in a fix, *The Hindu*, 15th May, NIUA Archive.
[21] The Pioneer, 2006: MCD's demolition drive continues: 130 structures brought down, *The Pioneer,* 16th May, NIUA Archive.

2.1.4 Master Plan 2021: An end to the sealings?

In the meantime, the Union Government and the DDA in conjunction with the traders and their representatives were working frantically on a new Master Plan for Delhi, which was already long overdue (Mahashabdey, Pers. Comm., 2010). The Master Plan was considered imperative as the Delhi Special Laws did not protect traders in authorised colonies and were also only an interim solution (Jain, A.K., Pers. Comm., 2010). The Central Government appealed to the SCI to halt sealings whilst the Master Plan was being formulated. A new master plan would have solved most of the issues and legalised and regularised much of what was happening in Delhi, bringing a halt to the sealing. However, the SCI remained stubborn and even as late as a month before the new Master Plan was promulgated the Supreme Court refused the DDA and Union Government's petition to stop sealing.

However, the Central Government told the MCD and various traders that since the Master Plan was completed, even if not promulgated, sealings should be stopped and sealed properties de-sealed. The SCI disagreed and insisted that sealings continue up until the very moment when the Master Plan was notified. This decision caused massive confusion in Delhi. It was only once the Master Plan had been notified in February 2007, that the Supreme Court stayed the sealing orders for the over 2000 roads mentioned in the Master Plan and provided relief for the majority of traders. The whole question of sealing was supposed to have been resolved by the promulgation of the new Master Plan. However, at the time of writing the Master Plan had not been approved by the SCI and there was some controversy as to its precise status. This is due to the case that an NGO, the Delhi Pradesh Citizen Council, has brought to the SCI. The NGO claims that the Master Plan was passed only to appease the traders ahead of incoming municipal elections and does not take ordinary residents and their needs into account. My study, however, ends at the point when the Master Plan was promulgated and the "sealings" case came to an end.

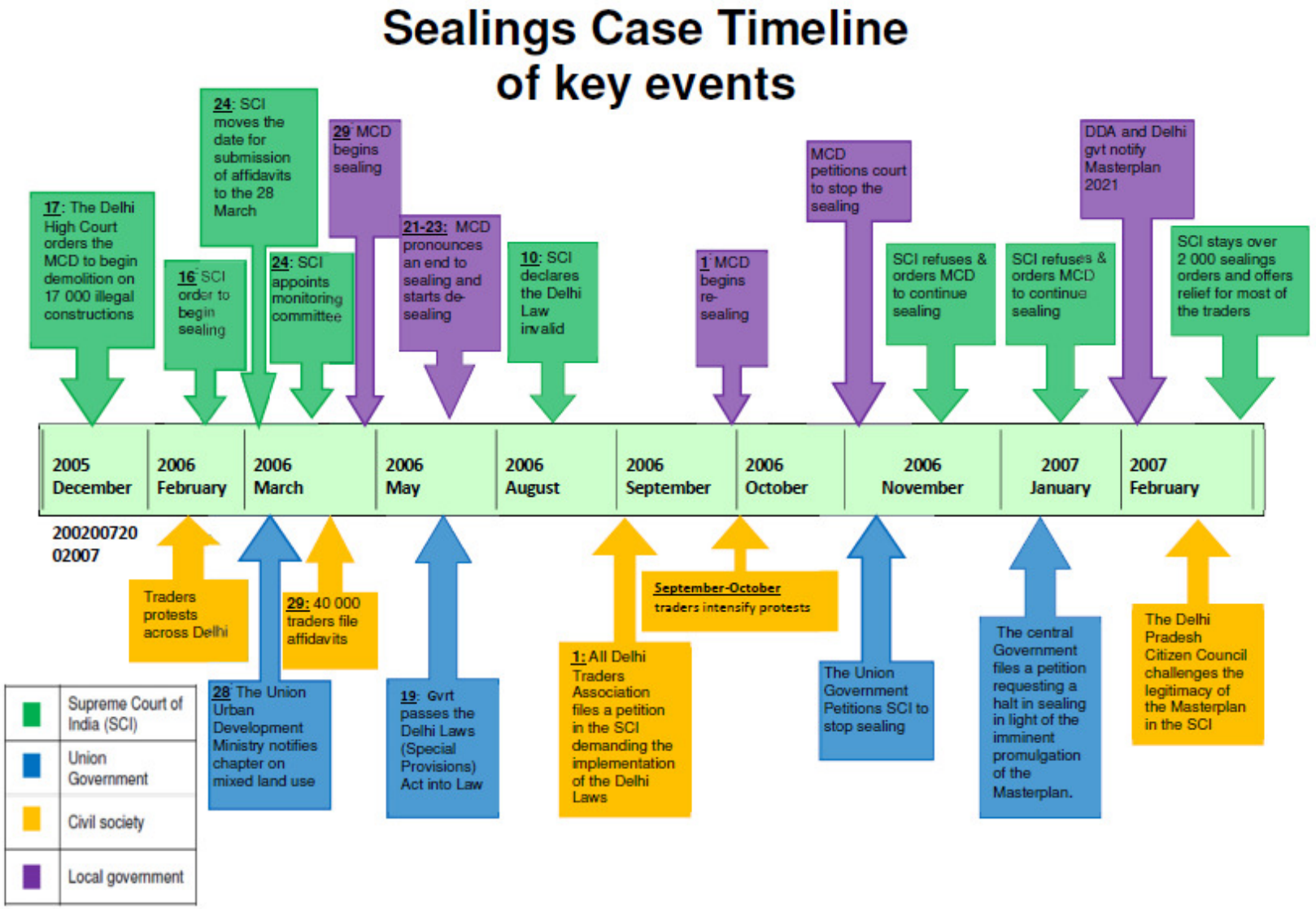


Figure 3: Delhi Sealing Case timeline of key events

2.2 Olivia Road: opening channels or being a channel?



Figure 4: San Jose Building circa 2004[22]

At almost the same time, half a world away, the residents of the San Jose building, a community of poor and marginalised, inner-city residents took the City of Johannesburg (CoJ) to court to contest their eviction (Chenwi, 2006). The case was combined with another eviction by the City of Johannesburg (the Zinn's Building) and both cases were jointly taken up by the Centre for Applied legal Studies (CALS) and Webber Wentzel's *pro bono* department (Hathorn, Pers. Comm., 2011). The court case worked its way through all three tiers of the judiciary and finally the Constitutional Court ruled on the constitutionality of the CoJ's actions. The Constitutional Court provided a novel remedy to the intractable problem of competing rights and provided an interim judgement, which required the litigants to engage with each other and come up with a mutually satisfactory solution, which was then made into a court order. By the end of the case, which took over three years, there were significant changes in policy and programmes, including the end of the Bad Buildings Programme and the Inner City Regeneration Scheme (ICRS). Furthermore, the inner-city residents had gone through a transformation from illegal occupants to inner-city residents with whom the state had to engage and in certain circumstances provide alternative accommodation. The Olivia Road court case has been seen as a landmark in the field of socio-economic rights in South Africa and exemplifies the role that the Constitutional Court has defined for itself within South African jurisprudence and governance (Wilson and Dugard, 2011).

2.2.1 Background to the Olivia Road Case

Information on the history of San Jose is limited but Neil Fraser, an inner-city expert and commentator, described the San Jose building as,

> '… *a block of sectional title flats on Olivia Street, Berea - or was! One wing is 14 floors high and the other is 10. The building was abandoned by its various sectional title owners quite some years ago - I would imagine in the mid-to-late 1990s when the residential scenario in places like Hillbrow and Berea went through dramatic and often violent change*[23].

[22] Photographs by Guy Tillim (2005) Courtesy Michael Stevenson, Cape Town, http://www.michaelstevenson.com/contemporary/exhibitions/jhb/jhb1.htm, accessed 29.07.2010.
[23] Fraser, N., 2008: Neil Fraser visits San Jose, Chit Chat, 1st September, http://www.joburg.org.za/content/view/2909/291/#ixzz0uPu9HiXG, accessed 22.07.2010.

When the case started in 2004 San Jose was tenanted by a range of different residents, including formal renters leasing from the owners, a few scattered owners and some "illegal occupiers" who neither owned nor formally leased their flats. The building had no services, and water and electricity had been cut off by the council for non-payment. Nelson Khetani who moved into the building in 2003 remembered that when he moved in residents used to, '*draw water from Olivia Street ... in the little park*' (Khetani, Pers. Comm., 2010).



Figure 5: Corridor of San Jose building circa.2005[24]

By 2003, the CoJ had two operational inner-city redevelopment programmes consisting of the 'Better (previously Bad) Buildings Programme' and the Inner-city Task Force. These programmes were committed to trying to make the inner-city into a more functional property market in order to catalyse and sustain inner-city regeneration. According to Charles Beckenstrater, a lawyer from Moodie and Robertson, (a private sector law firm that represented the City of Johannesburg during the case), the San Jose building came into the cross hairs of both the Better Buildings Team and the Inner-city Task Force. Due to its poor condition, lack of services, and high municipal arrears, it was considered ripe for eviction and re-development (See Figure 4 and Figure 5). The plan was that the tenants would be evicted, and the building would be sold to a private developer, Brian Miller from Ithemba properties, for renovation and rental.

2.2.2 High, Supreme and Constitutional Court Cases: In brief

After the City's eviction order had been served on the San Jose residents, the tenants committee approached Webber Wentzel and the Centre for Applied Legal Studies (CALS) to help them attain a legal injunction against the eviction order (see Figure 6). The injunction was heard in the Johannesburg High Court[25] who ruled that the residents should not be evicted and,

> '*declared that the housing programme of the Applicant fails to comply with the constitutional and statutory obligations of the Applicant. The Applicant has failed to*

[24] Photographs by Guy Tillim (2005) Courtesy Michael Stevenson, Cape Town http://www.michaelstevenson.com/contemporary/exhibitions/jhb/jhb1.htm, accessed 29.07.2010
[25] The Johannesburg High Court became the South Gauteng High Court.

provide suitable relief for people in the inner-city of Johannesburg who are in a crisis situation or otherwise in desperate need of accommodation…'[26]

The High Court judge also ordered the City of Johannesburg to clean the building, supply chemical toilets, water and solid waste removal to the residents.

The City of Johannesburg opposed the High Court's decision and petitioned the Supreme Court of Appeal (SCA). The Supreme Court of Appeal offered a contrary ruling and stated that the residents could be evicted but that the City must, in accordance with what was then Chapter 12 of the Housing Code, provide alternative accommodation for all of the residents. From the perspective of the San Jose residents, there were two problems with the SCA ruling: the first was the ruling ignored the residents' contention that there had not been proper consultation before eviction and claimed that there was a point of procedural justice, which the ruling did not address. The second issue was that the residents could be re-located almost anywhere within Johannesburg since neither the judgement nor existing jurisprudence stipulated location. The relocation to alternative accommodation could mean that many of the residents, who were informal traders, recyclers or employed within the inner-city, would be cut off from their livelihoods (Tissington, Pers. Comm., 2010).

At the same time, CALS and Webber Wentzel, the two legal aid firms that were involved, saw that there were larger issues of justice to pursue. They wanted to push the courts to a greater realisation of housing rights envisaged by the SA Constitution and to address the issues of procedural justice. As such, the case was taken to the Constitutional Court, where it was accepted as a constitutional matter and the bench agreed to pass judgement. The Constitutional Court was asked to consider both the matter of eviction for the 400 residents and the larger question of whether City of Johannesburg had '*made reasonable provision for those thousands of people who were said to be living in desperate conditions in the inner-city'.*[27] It was also asked to pass judgement on a procedural issue of eviction and relocation.

2.2.3 "Go away and talk" - a negotiated settlement

The Constitutional Court chose not to make a decision immediately and instructed the two parties to engage with each other meaningfully. The parties were set the task of coming to agreement about temporary and longer-term housing solutions for the residents, as well as interim measures to make the two buildings safe for human occupation until a final agreement was reached. The Court also ordered that the parties report to the court about the decisions by a certain date. The negotiation was hammered out during a series of meetings between the San Jose residents and their legal representative and community facilitators, who had been accepted by the residents to be in the meetings to help to present their interests. From the City of Johannesburg's side, there were

[26] Johannesburg High Court, 2007: *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W) judgement

[27] Constitutional Court of South Africa, 2008: Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street Johannesburg, v City of Johannesburg *et al.*, 2008 Case CCT 24/07 ZACC 1 judgement

members of the CoJ Mayor's office, CoJ's legal department and their lawyers (Khetani, Pers. Comm., 2010, Tissington, pers. Comm., 2010 and Gotz, Pers. Comm., 2010). By all accounts, the meetings were generally quite heated and both sides were vociferous in their claims. It was also the duty of both sets of negotiators to report to their constituencies and to bring any issues, concerns, disagreements or approval back to the table. The lawyers for the San Jose residents held continuous meetings with the residents in order to consult, gain consensus and ask for direction (Royston, Pers. Comm., 2010). The process took longer than anticipated and according to Constitutional Court documents, the parties requested two extensions to the original deadline, which were granted by the Court. A negotiated settlement was eventually reached, and brought before the Constitutional Court for ratification.

The negotiated settlement was not able to agree to the details of everything that the Court required and most importantly there was no decision about permanent accommodation for the San Jose residents[28] (Royston, Pers. Comm., 2010). However, a series of interim plans were agreed to and the City undertook to clean and sanitise the building and provide basic water and sanitation within 21 days of the court order. The residents agreed to be relocated to temporary, alternative accommodation, within the inner-city. Two buildings, MBV and Old Perm, owned by the City, were to be upgraded and provided to the residents by the Johannesburg Property Company (JPC) and the CoJ's Housing Unit (Magoro, Pers. Comm., 2010). Furthermore, it was settled that the City would not charge more than 25% of a household's income for rental in the two new buildings. An important aspect of the negotiated settlements was that the 'resettlement' process was to be consistently negotiated between the CoJ and the residents. All aspects of the residents' new homes in terms of the layout and design of the units, and their final allocation had to be agreed to by all parties.

2.2.4 The Constitutional Court decides…

Once the Constitutional Court converted the negotiated settlement into a Court Order, it then made a set of judgements which had wider ramifications. The court ordered that municipalities must engage meaningfully with residents before evictions, if the eviction would mean making the person or household homeless. It further took the view that although it recognised the city's obligation to eliminate unsafe conditions, it was also obliged to consider what evictions might mean for people who would be made homeless and reiterated an earlier decision around the provision of alternative accommodation. However, it also mentioned that the eviction or relocation could not deprive the households in question of their livelihoods. The Constitutional Court then struck certain sections from the National Buildings and Regulations Act, stating that it was unconstitutional to remove residents from buildings after a writ of eviction had been served but before there was a court order.

[28] Ibid.

After the final decision and significant further discussion and negotiation between the San Jose residents and the CoJ, the residents moved into Old Perm and the MBV building. There were, however, a number of unresolved issues, around how the building would be run and what the residents could demand from the city. Further problems related to how long the residents could stay and how much rental they would pay. There have also been reports from the residents that the building has been poorly managed and that there are structural and security concerns (Mahlobo, pers. Comm., 2010). At the time of writing, many of these issues remained unresolved and CALS was having difficulty in contacting the CoJ and eliciting a response (Munyembate, Pers. Comm., 2010).

The significance of the Olivia Road Case goes far beyond its seminal importance to South Africa's jurisprudence. The case shifted the relationships between the inner-city residents from illegal occupiers to rights-bearing citizens and forced a situation of real engagement and negotiation. It also indicated how far the Constitutional Court was prepared to step into the realms of governance and where it considered the line to be. Furthermore, SACC utilised its powers to ensure that its vision of South African society was realised by constructing a situation of procedural justice and a negotiated future. The results of the Olivia Road Case were not as dramatic as that of the Sealings Case, but I would argue that they are deeper and further reaching and their consequences will increasingly be felt over the forthcoming years.

2.3 Conclusions

The cases exemplify the legal trajectories of both countries and through their complexity and 'messiness' offer a lens through which to analyse the role of the courts in Delhi and Johannesburg. The following chapter describes how these cases were chosen and analysed before moving on to the next few chapters, which explore my key empirical and theoretical findings.

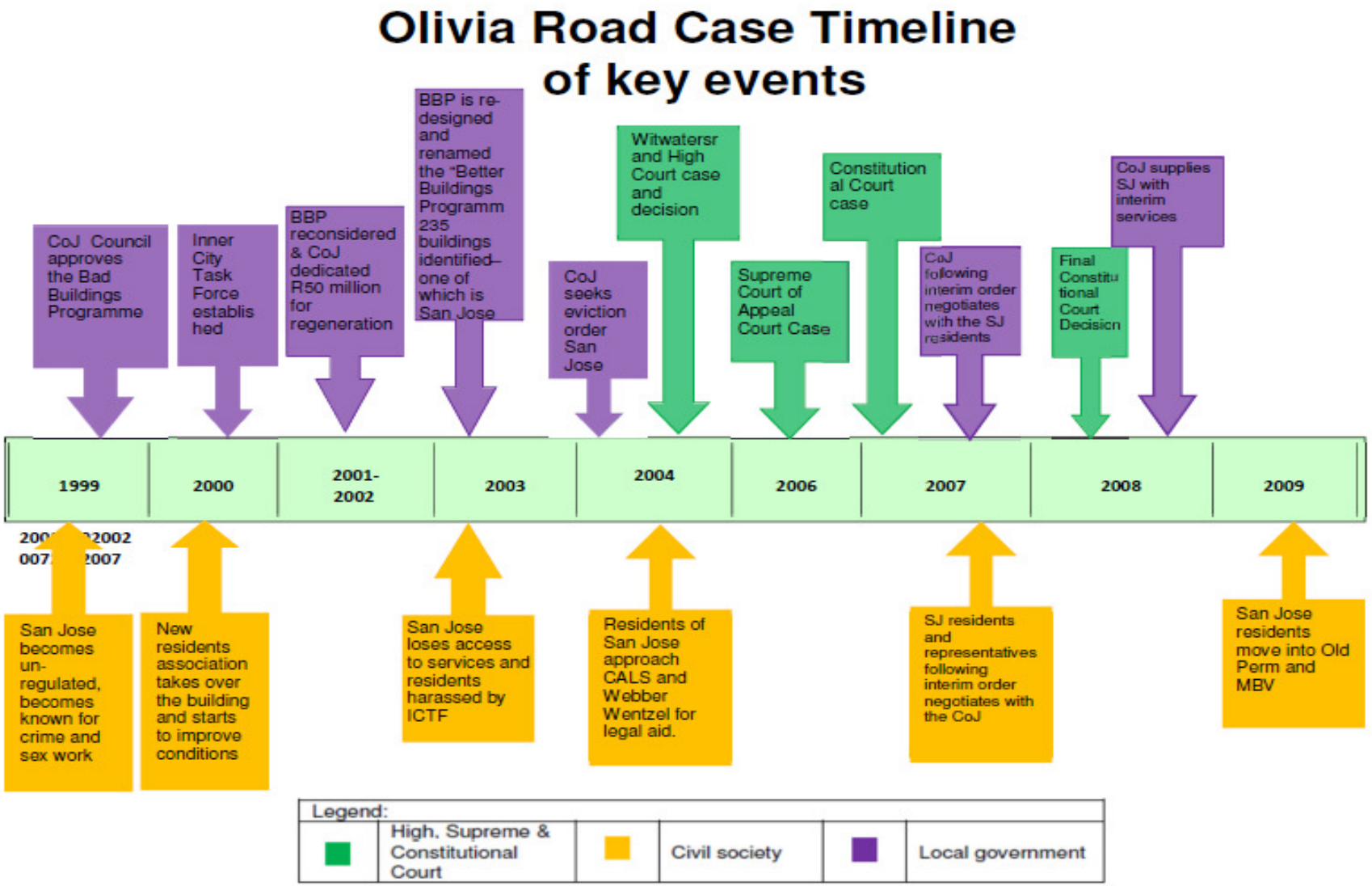


Figure 6: Olivia Road Case Timeline of Key Events

Chapter Three: Turning the light on narratives: data collection and analysis

3.1 Introduction

A theme that runs throughout my thesis is the idea of narrative: how narratives are constructed, how they relate to discourse, hegemony, myth-making and finally, practice. I have used narratives in a number of ways as "the object of inquiry, the method of inquiry, [and] the product of inquiry (the researchers' representation)" (Ewick and Sibley, 1995: 202-3). As such, this chapter is a discussion of the manner in which the narratives were collected, collated, analysed and finally, represented. Following Griffin (1993: 1097), I have understood narratives to be "the organization of contemporaneous actions and happenings in a chronological, sequential order that gives meaning to and explains each of its elements and is, at the same time, constituted by them". In a sense, the chapter is the telling of stories about stories and turning the light of narrative analysis and deconstruction on both the research method and the larger research project of the thesis. However, as Conle (2000: 193) says "This is a complicated task, because I seem to speak in two voices simultaneously: the narrator's voice that presents the case and the theoretical voice that conceptualizes what is presented."

I am also critical of the idea of narrativisation, and the first part of the chapter is a discussion of why and how I believe the methods sections of theses and dissertations have become overly narrativised. By this I mean that the 'messiness', uncertainty and complexity of doing social science research is often glossed over in favour of the production of a seamless account that is logical, rational and coherent. The reality is that research is far messier than the textbooks and methods courses would have us, as post-graduate students, believe. Research is recursive, iterative, confounding and intuitive. It is also highly dependent on luck. As such, I reject the neat formulation of a coherent narrative, arguing that to present research in this way is profoundly epistemologically unhelpful. It does not add to the body of knowledge in the discipline but simply provides a sanitised version of what did not happen.

Following this discussion, I move on to "how narrative is understood and employed as a method of social research" (Merrill, 2007: 8). In this section, I demonstrate how and why I collected a series of narratives from a range of different sources such as key informants, the media and archived material, and court documents. This was undertaken with the intention of constructing highly detailed and descriptive case studies. However, as Burgess (1983) observes, for the most part data collection and data analysis were not discrete stages in the research process; rather, they blurred, flowed and constantly informed each other. Furthermore, I reflect on how my positionality may have influenced my data collection and what it meant for the analysis and interpretation of my data (McDowell, 1992 and 1999; Nast 1994). The last part of the chapter returns to engage with some of my concerns of

narrativisation, and is dedicated to a discussion of the representation of my data and the acknowledgement that a thesis is also a type of narrative construction.

Overall, I would like to present my research as a type of "anti-narrative", not in the sense of it being somehow outside the narrative construction, but rather a rejection of representing my work as a seamless and totally coherent process. I want to expose what I did 'warts and all', describing how some of my choices were intuitive rather than rational; how I had to go back and re-do some things; how I made mistakes and blundered often and how I believe it all still worked. I do not want to present my work as a lie, or smudge over the reasons I made the decisions that I did, some of which were wrong, misguided and, in retrospect, not very smart, but they were mine and they affected my research. If the point of qualitative, social science research is to "sophisticate our beholding of it" (Stake, 1995: 43), which I believe it is, then it needs to begin with an acknowledgement that our 'beholding' is not always clear-cut. We need to concede that there are practical constraints to our work and that intuitive leaps and chances must be taken if we are ever going to be able to find out, and engage with, the complexities of our world. Therefore, the following chapter is a reflection on the journey that I have taken as a PhD student through the highways and by-ways, blind alleys and paths through the forest. It is both a description and a defence of what I did and why I did it.

3.2 Anti-narrative: a start

There are good reasons why the methods sections of theses are constructed as specific narratives. Like most narratives, they are intended for a specific audience, namely the academy and more particularly "the people who decided whether your document warrants the award of a graduate degree" (Thomas and Brubaker, 2008: 285). As such, they are shaped and narrated in order to meet the conventions set down by this specific community of scholarly researchers (Thomas and Brubaker, 2008). Chanell, (2008: 335) agree and note "Any higher degree thesis, whatever its topic, must provide clear evidence that the research in it has been carried out using appropriate approaches and methods… The examiners will want to know exactly what you did, and why you adopted the approaches and methods used"'. Textbooks and methodology courses reinforce the importance of the methods section and how it is presented. They advise post-graduate students that their research method "is a crucial step in a thesis because, if a wrong decision is made, the whole study may be criticised on the grounds of inappropriate design or, even worse, as being unscientific or illogical" (Anderson and Poole, 2009: 22). Further advice that is given to emerging scholars states that, "The methods section is the most important aspect of a research paper because it provides the information by which the validity of a study is ultimately judged" (Kallet, 2000: 1229).

More pressure is added as the requirements for PhD students to pass their degree include demonstrating "competence in research processes, including an understanding of, and competence in, appropriate research techniques and an ability to report research" (Perry, 1998: 3). As such, the stakes are high and presenting anything other than an unassailable defence of one's methodological choices, quite risky. Thomas and Brubaker (2008: 29) also suggest that post-graduate students

should scour the literature on research methods because "information not only can guide your choice of research design but also can aid you in devising a defence of that choice". Furthermore, there is significant pressure within the academic environment (and rightly so) to be as rigorous as possible and to make sure that the claims are reliable and valid (Walsham, 2006). Given all of these factors, it is unsurprising that post-graduate students produce unified and coherent narratives about their research process.

Students are also provided with templates of what their method chapter should look like. These descriptions (see Box 1 as an example) generally argue that students should articulate their specific epistemological positions and then justify and describe the research method that was chosen. The idea is to give the impression that the research methodology was decided early on and with rational justification and then successfully mobilised in order to answer the research questions. The researcher, particularly the aspiring PhD, does not want to give the examiner the sense that perhaps not everything was premeditated or that the research was not as smoothly carried out as it could have been. The intention is to give a generic account, which defends what was done and gives as few opportunities as possible for critique or doubt.

Box 1: Examples of what should be in a methods section

Example 1: Monash University

- Presents an understanding of the philosophical framework within which you see your inquiry (ie, discusses epistemology of the research - using literature).
- Presents a rationale for the methodological approach (using literature).
- Describes and justifies the methods of research and analysis (using literature).
- Reveals the boundaries of the research (this may occur instead in the Introduction).
- Describes what you did (past tense) for selection of site, participants, data gathering and analysis.
- It may include illustrations (e.g. a timeline depicting stages/steps in the research). In minor theses, this section may appear in the Introduction.
- Describes steps taken to ensure ethical research practice (shows you are a serious researcher who takes account of how research may affect participants).

(Source: http://www.education.monash.edu.au/students/current/study-resources/thesiswriting.html)

Example 2: Extract from Fundamentals of Social Research Methods: an African Perspective

The method incorporates consideration of the following:

1. Subjects (respondents/participants)
2. The task and the material or instrument
3. Analysis of variables
4. Procedures
5. Data Analysis
6.

(Source: Bless and Higson-Smith, 1995: 149-150)

However, if the intention of the PhD degree is to add to the field of inquiry, reflect and engage as accurately as possible with its nuance and complexity, and to demonstrate the ability to undertake research, then what value is there in constructing a linear, coherent but somewhat less-than-accurate account of the research? Surely, it is more productive and useful in the creation of academic knowledge to be able to demonstrate the ability to do research within the real-life context - a context

filled with complexity, difficulty and nuance where not everything goes as planned or, in some cases, where there can never be a plan. It would seem to me that an account that includes how difficulties are overcome adds significantly to the overall body of methodological knowledge. As a young(ish) researcher, I would far rather read about how colleagues and predecessors handled issues that arose during their research and to which they had to respond creatively, than a re-hashed account of what should have been. So here I have tried to give as an accurate a reflection of my own journey, "warts and all".

3.3 My journey in stages

The research, particularly the data collection and analysis, went through a number of stages, some of which were more confusing and iterative than others. The following section describes the stages of my research and the challenges and issues that I faced, and also attempts to describe why I made certain decisions.

3.3.1 Stage 1: Starting from a point of knowledge

Although what I have been describing pertains to the challenge of working with and through uncertainty, I did know what I wanted to explore and what my aims were. By the time I started my doctorate I had been working in and around the inner-city of Johannesburg for seven years and had tackled questions of housing and shelter as an academic and government official. Therefore, I knew that I wanted to interrogate and unpack the trends in socio-economic rights (SER) litigation in cities, as well as the motivation of litigants, the nature of claim-making through the courts and the spatial, social and political consequences of litigation. At the theoretical level, I wanted to be able to understand what kind of space the court offered to different urban actors and if it was a space of social mobilisation or was, in itself, a type of social mobilisation. I wanted to understand how the apex courts were interacting and engaging with a series of different institutions (state entities and spheres of government), as well as collectives and individuals with their own interests; and how, if at all, the court was embedding and entrenching itself and its ideas into the landscape of the city in which it was operating. I also wanted to understand what, if anything, the courts' larger projects were: what were they trying to achieve through their judgements; why those particular goals and aims were chosen, and then understand what the outcomes and consequences had been for urban actors who had been affected by these decisions and their relationships with one other and the court. Furthermore, my experience in India had demonstrated that in other countries and contexts, the answers to these very same questions would be different, but I wanted to understand how and why, and get a sense of the difference that difference makes.

To answer these questions, I initially tried a longitudinal approach, studying court decisions in India and South Africa over time in order to try and identify trends and changes. I also wanted to find out if there was any evidence to support the contention that Indian courts had become increasingly conservative and anti-poor over time, or if there was any substance to the idea that the SA Constitutional Court was making consistently progressive judgements. The intention was to classify

the court decisions along a variety of axes, such as 'pro-poor' or 'anti-poor'; 'progressive' or 'positivist', Following that, the trends would be examined statistically, including who the lawyers/organisations involved were; who the clients were (i.e., did we see a rise in poor urban dwellers/ middle-class residents/ business using the courts over time?); and the types of cases taken to the courts. I then intended to map the various cases across the city and overlay that with land use, economic and demographic data.

However, as soon as I tried to "classify" any of the cases in the ways I first suggested, it became clear that I would be wielding a strong normative bias and would often be trying to "squash" very complex issues into very small and narrow categories especially when considering that court cases and judgements are constituted of a number of component parts, some of which might be considered helpful and supportive to poorer people and others may be seen as repressive and conservative. The 2009 Mazibuko Water Case comes to mind as an example, where the Constitutional Court ruled on only two out of three aspects of the case, i.e., on the prepaid meter application the quantum of water to be provided, but not on the lack of notice, which accompanies the installation of pre-paid meters. The Constitutional Court also indicated that they thought the CoJ's water policy was reasonable (Smith and Rubin, forthcoming). Thus, the following questions arose: was the case pro-poor? Anti-poor? Neither? Both? Furthermore, there was the concern of what did something mean to be "pro-poor" or "anti-poor": were pre-paid meters, as some authors pointed out, a system which allowed poorer people to budget and thus supportive of their livelihood strategies? Alternatively, did it really constitute an example of the corporatisation of a basic service? Moreover, because South Africa is a water-scarce country, is it not reasonable to find ways to limit water use? The complexities of these questions made them difficult to categorise as either/or binaries. Some authors, (Gauri, 2009; Gauri and Brinks, 2012) have been able to classify court judgements generally using statistical modelling, I thought that to do so would overly simplify court decisions, and I was interested in the nuance, so I found that I needed a subtler, sharper instrument. When I could not access the on-line court system for the SCI, the idea was fortunately abandoned.[29]

Through the process, I also found that my focus had shifted from trends, to trying understand how courts were inculcated in governance networks, and what the range of implications were after the decisions had been taken. I realised that in order to begin to answer my questions, I needed to engage with the detail to see what happened before, during and after the case, not in broad strokes but in fine lines. I needed to be able to construct what Geertz (1973: 28) has called a "thick description" which, according to Denzin (1989: 83):

> "… does more than record what a person is doing. It goes beyond mere fact and surface appearances. It presents detail, context, emotion, and the webs of social relationships that join persons to one another. Thick description evokes emotionality and self-feelings. It inserts history into experience. It establishes the

[29] Kapoor on-line, which is public access source of all Indian Court decisions but only came on-line in 2012, by which stage my research was almost complete and I had gone down another path.

> significance of an experience, or the sequence of events, for the person or persons in question. In thick description, the voices, feelings, actions, and meanings of interacting individuals are heard".

What I was looking for was a method that would allow me to delve into context, history, causality and intentionality but since I am not an anthropologist and did not want to engage in deep ethnographic work, what I was really looking for was a way of constructing what perhaps could be called a "thicker description" rather than a "thick description". I also needed to do this whilst attempting to navigate my way through what was, at least for me, uncharted territory. Therefore, I knew that I needed a technique that could be as flexible as possible and able to engage with complexity. I wanted to involve myself fully with the intricacy of the court cases and their historical, social and economic contexts; to be able to look at the court from a variety of angles, hearing a range of different voices in order to be able to produce a detailed narrative for analysis. Since "broadly speaking, case study research aims to explore and depict a setting with a view to advancing understanding of it" (Cousin, 2005: 421) and as Flyvbjerg (2011: 314) has argued, "[i]f you want to understand a phenomenon in any degree of thoroughness - say, child neglect in the family or cost overrun in urban regeneration - what causes it, how to prevent it, and so on, you need to do case studies", case studies seemed to be the best option for understanding my topic and achieving my research objectives.

Undertaking case studies research offered me a number of advantages in my chosen project, including allowing me to track processes through tracing links between causes and outcomes, and the ability to explore the hypothesised causal mechanisms in both contexts (Flyvbjerg, 2011). Furthermore, case studies let me 'close in' on real-life situations so that I could test views, ideas, concepts and theories directly in relation to phenomena as they unfolded in practice. It would also allow me to link "ideas and evidence … in many different ways" (Ragin, 1992: 225) in situations where "the boundaries between phenomenon and context are not clearly evident" (Yin, 1981: 59). The case study method was also chosen as the nature of the research was profoundly exploratory and I needed to be able to respond to new sources that could potentially unfold. Since I knew that I did not know all of the factors, I also needed a method whereby I would be corrected by my respondents who could "talk back". George and Bennett (2005: 20 quoted in Flyvbjerg, 2011: 309) describe this all-important feature of case study research:

> "When a case study researcher asks a participant "were you thinking X when you did Y," and gets the answer, "No, I was thinking Z," then if the researcher had not thought of Z as a causally relevant variable, she may have a new variable demanding to be heard".

Since I did not know what I did not know, qualitative case studies allowed me to enter the worlds that I was interested in and explore them, and have the experts in these cases, i.e., the people who had lived through them, guide me. So it was only by placing myself "within the context being studied" that I was able to begin to understand "the viewpoints and the behaviour that characterize[d] social actors"

(Flyvbjerg, 2011: 310). It was also the immersion in the setting and the ability to explore the situation from a number of different aspects that, as will be shown later, gave me the material to "provide a holistic portrayal and understanding of the research setting" (Cousin, 2005: 423).

Yin (1982 and 2009) further notes that case studies are not necessarily only composed of one method by which to attain the full range of data, especially if one which seeks to provide a "thicker description". Given that I wanted to be able to examine the cases from a number of perspectives and I was unsure about exactly what and who was available, I decided to use a number of methods of data collection. The next section describes the various methods and their results.

Towards a comparative analysis

As mentioned earlier from my previous exposure to India, I also knew that I wanted to engage in comparative work. I had a strong instinct that a comparative study would "… not only uncover differences between social entities, but reveal unique aspects of a particular entity that would be virtually impossible to detect otherwise" (Mills, *et al*., 2006: 621). I knew that by undertaking comparative research it would allow me to try and understand those activities, actions, intentions and consequences that were unique to each context and set of conditions (Mills. *et al*., 2006). In addition, comparative work "enables one to take the analysis one step further towards scientific explanation" (Pierre, 2005: 446) and following Durkheim, "ceases to be purely descriptive and aspires to account for facts" (Durkheim, 1938: 139). Thus, I felt that a comparative approach would enable me to make more general statements about issues that were common to the court/governance nexus. Comparability also allows research to resonate with more contexts and be relevant to a wider audience as the comparisons draw out and reconfigure ideas and concepts that are not possible in single case work. Thus, there is an underlying commitment to the idea that "the definition and understanding of concepts and the relationship between concepts are of critical concern in comparative research, that crosses national, social, cultural and linguistic boundaries" (Hantrais, 2009: 72 cited in Benit-Gbaffou and Tawa Lama-Rewal, 2011: 176).

There are, however, some methodological concerns with comparative research. Mills, *et al.* (2006: 620) point out that "… the selection of cases (including the unit, level and scale of analysis), construct equivalence, variable versus case orientation and the pivotal problem of causality", are issues that need to be addressed in order to attain sufficient rigour and comparability between differing contexts. Thus, the selection of the appropriate cases is critical and Ebbinghaus (2005) maintains that initial errors at the selection stage affect the reliability of the comparison. These concerns were considered when the cases were chosen for my study. The following sections detail how and why the selections were made and how I addressed these concerns.

3.3.2 Stage 2: India/SA and Delhi and Johannesburg

As a result of my visit to India and preliminary reading, I felt intuitively that India's judicial activism and emphasis on access to the courts through PIL would force me to look carefully at how and by whom

courts were used in India, and if and why that differed to South Africa. It would also mean that I would have to face questions of what an activist court meant for governance and coalitions of urban actors as opposed to more restrained apex court. I was also intrigued by the idea that considering some of the similarities between the two countries, India might show us a glimpse of South Africa's potential judicial path. At a very personal level, I found India intoxicating: exotic and yet strangely familiar. Furthermore, I could see myself spending a significant amount of time in the country and learning about it and from it. It is here that passion and rationality had to be combined and it was at this point that I needed to see if India was actually a good idea for comparison with South Africa or if the comparison was "misplaced and misconceived" (Worby, 2011: 244). I needed to consider the vast discrepancies in scale, population and land mass (the Indian population is estimated at over a billion, whilst South Africa is just over 52 million), density and distribution, (only 30% of the Indian population is urbanised whereas in South Africa it is over half) (Worby, 2011). I felt that if I wanted my research to be as rigorous, resonant and relevant as possible and be able to contribute to generalisable theory I needed sites that bore striking similarities and important differences. I also wanted to be able to practically operationalise the research within the time and budget that was available to me.

India/South Africa: a fruitful comparison?

There was a need for sufficient similarities as well as discernible differences between the two contexts if a comparison was to make sense. Thus, the following key areas were examined: political history; the institutional structure, the role of the courts and the structure of the legal system, as well as the nature of rights.

The two countries bear some historical similarities, i.e., a shared colonised past followed by dominant party state constituted by the liberation movements that led each country out of their previous regimes (Hofmeyr and Williams, 2009). In South Africa, this was the African National Congress (known by its acronym ANC) and in India the Indian National Congress (known as the Congress). India and South Africa's struggles were several decades apart, which meant that "The African National Congress and South African Communist Party drew on ideas and strategies from Indian nationalist struggles" (Hofmeyr and Williams, 2009: 6).

In the post liberation period:

> "India and South Africa are arguably the most successful cases of democratic consolidation in the developing world. With the exception of a brief authoritarian interlude – the emergency of 1975-1977 in India – neither country has experienced a serious challenge to democratic rule since transition, and the likelihood of democratic reversal or even destabilisation, especially when compared to Latin America, East Asia and the rest of Africa, is remote" (Heller, 2011: 150).

Fundamentally, they bear strong institutional similarities. Both countries are representative democracies governed by powerful constitutions. Parliament in India is the supreme legislative body

and is constituted of two houses, the Council of States (Rajya Sabha) and the House of the People (Lok Sabha) (Republic of India, 2012). The Rajya Sabha represents the States and Union Territories, and is officially led by the Vice President as the ex-officio Chairman but it is actually run by a Deputy Chairman who is elected from among its members. The senior most minister member of the Rajya Sabha is appointed by the Prime Minister as Leader of the House. The Lok Sabha is composed of representatives of people chosen by direct election. According to the Indian government website, the core functions of the Legislature include oversight of administration, passing budget, providing opportunities for the expression of public grievances, and discussing issues of national interest. Furthermore, Parliament is also vested with the power to initiate amendments to the Constitution. In India, all legislation requires the consent of both Houses of Parliament in order to be promulgated as law (Republic of India, 2012).

In South Africa, the executive is led by the Cabinet, whose foremost member is the President. The Cabinet consists of the President, Deputy President and Ministers. The President appoints all of these posts and assigns to them a set of powers and functions. The legislative function of the state is undertaken by Parliament, which is made up of the National Assembly and the National Council of Provinces. The National Assembly has the responsibility of ensuring government by the people, which it does through choosing the President, providing a national forum for public consideration of issues, passing legislation and scrutinising and overseeing the executive. Members of the National Assembly are elected through a system of proportional representation for five years, and are presided over by the Speaker of the House, assisted by the Deputy Speaker. The National Council of Provinces ensures that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a forum for public consideration of issues affecting the provinces.

The third branch of the state is the judiciary. The Supreme Court of India (SCI) sits at the apex of the judicial system and has original, appellate and advisory jurisdiction. The High Courts sit at the state level and below the High Courts lies a hierarchy of Subordinate Courts, including Panchayat Courts in the rural areas, and District and Sessional courts, which decide civil and criminal disputes of petty and local nature. However, the SCI is able to hold people or organisations in contempt and has wide powers to enforce its decisions. Significant for this study is that the SCI has the authority to cast judgement on any dispute that involves a question on the existence or extent of a legal right. Similarly, in South Africa, the judiciary constitutes a separate and independent branch of the state. South Africa also has series of subordinate courts, including Magistrates, High Courts and the Supreme Court of Appeal (SCA) that handle criminal and civil issues. The Constitutional Court is the highest court and the only one that may adjudicate disputes between organs of state concerning rights, obligations and powers and decides on the constitutionality of any parliamentary or provincial bill.

India and South Africa's law and jurisprudence share a basis in the British legal system. India's legal framework has maintained its common-law[30] roots whereas South Africa's system has evolved into a mixed format.[31] South Africa operates under a system of judicial supremacy, which provides the Constitutional Court with the right of judicial review. In contrast, India operates under a system of legislative supremacy whereby both the courts and the executive are at the mercy of India's parliament, although as will be seen, this constitutional distinction has not stopped the SCI from attempting to direct almost all aspects of state action. India's legal system also has the unique feature of Public Interest Litigation (PIL), which was intended to protect the interests of the public at large and in particular the underlying intention of assisting the poor, marginalised, illiterate and so-called "backward classes" by providing them with access to the courts. PIL operates through loosening "rules and traditions related to standing, case filing, the adversarial process, and judicial remedies" (Gauri. 2009: 2). It means that any well-intentioned person, not just the individual directly affected, can bring a case and defend it before the SCI.

Both countries share a serious statutory commitment to the progressive realisation of socio-economic rights made manifest in their constitutions (Butt, 2008). However, each country has defined different types of justiciable rights: the South Africa Constitution is the supreme law of the country and is binding on all legislative, executive and judicial organs of state at all levels of government. Once described as: "… the darling of both liberals and social democrats around the world. Widely seen as a 'state of the art' document, it contains a wide array of classic political and socioeconomic rights, institutional innovations…" (Mattes, 2002: 24). Coggin and Pieterse, (2011: page web) note that

> "… the South African Constitution's entrenchment of rights to access water, housing, health care services and education, alongside its guarantee of a substantive right to equality, mean that urban design, policy making and regeneration processes have become increasingly legalised and will increasingly be tested for constitutional compliance, especially in instances where they have the effect of excluding poor and marginalised persons from the city".

The Indian Constitution's rights discourse is quite confusing: the document identifies seven rights as justiciable, namely the rights to equality, freedom, freedom of religious practice, cultural and educational rights, rights against exploitation and the right to constitutional remedies for the enforcement of fundamental rights (Republic of India, 1949: Part III). It also identifies a set of freedoms, such as freedom of association, settlement and movement. Furthermore, the Constitution contains Directive Principles, which are intended to guide the state and its citizens as to what should be incrementally achieved over time. Disconcertingly, though, within the actual Constitution they are called 'rights' and include the rights to basic health care, adequate livelihoods and social welfare and

[30] According to the Duhaime Law Dictionary, (2012: webpage) "Common law, also known as case law or precedent, is law developed by judges through decisions of courts and similar tribunals, as opposed to statutes adopted through the legislative process or regulations issued by the executive branch".

[31] In this case "The South African legal culture is mixed into three general parts: (1) Dutch-Roman law of the 17th and 18th centuries, (2) English common-law and the 19th and 20th centuries, as well as (3) African native/traditional law" (Modéer, 2001/2: 11)

basic conditions of employment (Kothari, 2008; Republic of India, 1949: Part IV). However, they are intended as guidelines in the design and implementation of laws and policies and to provide a yardstick or benchmark by which to measure the progress of the realisation of socio-economic rights (Republic of India, 1949). Although they are principles, not legal rights and were originally not justiciable, many have subsequently been the subjects of litigation and there are now legal precedents regarding their content, implementation and realisation.

The local scale: why Delhi and Johannesburg?

Both countries' commitment to neo-liberal reforms in the 1990s has shifted government investment and has seen the privatisation of local institutions. India and South Africa are now rated as middle-income nations within the global economy and form part of the so-called BRIC-SA conglomerate of nations (Hofmeyr and Williams, 2009). They have seen above average-growth rates[32] (India has had exceptional growth whilst SA has lagged with more modest percentages) but are still afflicted by issues of inequity that revolve around questions of class, race and caste. Importantly for this study, India and South Africa both went through official processes of decentralisation and the diffusion of power down to the local sphere. Although in both countries processes of decentralisation have been paired with attempts by political figures to re-centralise and claw back power. The resistance to decentralisation has also been a key factor in the failure of the statutory concommitment to participation in local policy and city-making processes (Benit-Gbaffou and Tawa Lama-Rewal, 2011; Heller, 2011). There are also important differences in the relative importance of cities in their respective national economies and discourse.

Within the milieu of urban India and South Africa, there were a number of reasons for choosing to compare Delhi and Johannesburg: both cities are large, nationally important economic and administrative centres, which play vital roles in the economies of their countries and regions. They have high immigration rates and rates of natural growth. Both cities are governed by forms of local authorities which have executive and administrative authority (Benit-Gbaffou and Tawa Lama-Rewal, 2011; further detail is provided in the next chapter) and are the sites of the apex courts. The latter was an important feature as I had an intuition that the physical proximity of the court allowed for direct and constant interaction between the court and the local authorities. Delhi is the national capital and is both a Union Territory and simultaneously a metropolitan area, and is host to all three spheres of government. There is some overlap of functions between the various spheres, which has been an issue that has plagued the city since decentralisation in the early 1990s. Johannesburg is not the nation's capital but is home to its own local government, as well as the provincial authority. In this instance too, there are overlaps around various functions especially land, housing and the provision of services.

[32] According to the International Monetary Fund India has seen a growth rate of 7.2% in its GDP between 2000-2010 whilst South Africa has only achieved 3.1% over the same period (CIA World Factbook, 2012).

Both cities have experienced institutionalised segregation that still haunts their urban forms. Lutyen's design for converting Delhi into the new capital of the British Empire effectively meant that Delhi was divided into an older, pre-exiting "indigenous" section and a newly laid out southern portion. Currently the northern section of the city, which was the old capital Shahjahanabad, is home to the poorer sections of the population (Jain, 2004). The area has grown organically into a series of small pedestrian alleyways and un-regulated multi-storey residences, interspersed with light industrial and small retail. The southern part of the city, planned, and laid out by the colonial planners, Baker and Lutyen, and intended as the home of the White, colonial elite and the upper-caste members of the "native" civil service, has maintained its Parisian-styled boulevards and triumphal arches (Kumar, 2004). The north/south divide of the city has been preserved and almost all important government functions are housed in the southern portion of the city. Commercial activities vary vastly across the city and the northern section is famous for its small jewellery manufacturers and street hawkers. Commercial activities in the south were originally confined to the planned markets, and each residential neighbourhood, known as a colony, had some space that was designated for commercial use. Over the last few years large, western-style shopping malls have become significant features on the Delhi city-scape and commercial activities have spread throughout the residential colonies.

Johannesburg's segregation has colonial and Apartheid underpinnings. The original layout of the city was a series of segregated 'locations' for different so-called "race groups" close to the city centre and the mines. However, quite soon after the founding of Johannesburg the "non-White" populations were moved out of the city proper and into 'townships' some distance from their original homes (Beavon, 2004). The segregation of Johannesburg was strictly policed by the Apartheid government although there were always pockets of subversion (Parnell, 2003). By the mid-1980s, urban space was far less strictly policed and inner-city neighbourhoods in Johannesburg began to exhibit a more mixed profile as Black, Coloured and Indian households moved in from the 'townships' and 'locations' (Morris, 1999). Post-Apartheid, the city layout has maintained its segregated character: with the wealthy and largely White middle class living in the north and the poorer and working class population in the south and west of the city. The previous townships and locations in these parts of the city were designed as dormitory towns with little industrial or retail space. Both of these spatial features have been changing over the last five years, although the South African public housing programme has unfortunately continued to maintain much of the Apartheid geography of Johannesburg (Huchzermeyer, 2004).

There are, of course, also substantial differences between the two cities. Delhi is significantly larger than Johannesburg with a population of between 14-19 million people, whereas Johannesburg is estimated at 3.5 million. Although both are sprawled cities which cover large areas, the arrangement of densities differs; the highest densities of people in Johannesburg are, since the end of Apartheid, in the inner-city suburbs (Koseff, 2011) with relatively low densities around the peripheral settlements and suburbs. Delhi has the opposite issue with relatively high densities on the peripheries and low populations living close to, or in, the centre of the city (Kumar, 2004).

The above-mentioned points to some of the important similarities and differences between the countries, and cities that made the comparison attractive. However, there were also practical methodological questions that needed to be addressed: I needed to be able to access the relevant data, such as court documents, letters and media reports, and conduct interviews, all of which would have been possible with the assistance of a translator but it would have also raised the cost of the study and I was only able to secure limited funding. Furthermore, our school and one of my supervisors has a relationship with the French Centre for Indian Research (the CSH) in Delhi. Thus, choosing Delhi meant that I would have a secure and supportive institutional base to work from with some French colleagues that I had previously met. All of these factors enticed me to Delhi.

3.3.3 Stage 3: Choosing the cases

Once I had decided to conduct case study research, I then needed to resolve which cases to choose and developed a set of criteria to guide my selection, these included:

- the case studies obviously needed to be concerned with, and based in, the two cities in question;
- they had to have a spatial dimensions in the sense that they had to have taken place within the two cities and their impacts needed to visible in the contexts;
- they needed to be court cases that sat in the apex court and were issues of rights and rights claims;
- They had to be widely acknowledged as seminal, in the sense that they had changed policy, either intentionally or unintentionally, and I required that the state was at least one of the litigants involved in the case.
- They also had to have already taken place so that the case was no longer *sub judice* and outside of the public purview.
- As the research deepened it became clear to me that an ethnographic study of the socio-political profile of the judges would be extremely interesting and illuminating. However, a very early interview with Judge Edwin Cameron, which is reported on later in this chapter, revealed the difficulties of this line of enquiry and I thought that just focusing on the impact of the court decisions would be sufficient and an ethnographic study could form the basis of a future study.

I also wanted to look at cases that in some way typified larger judicial trajectories and their engagement with urban issues and city-level concerns (Chapter Four provides a more comprehensive overview of these trajectories in both countries). Tracing research on the SCI, there is consensus by a number of authors (Demobowski, 2001; Ramanathan, 2005 and 2006; Zehra, 2007a and b; Bhan, 2009 and Te Lintelo, 2009a and b) on the path that the SCI has taken. These authors maintain that the Indian court has moved from a position of sympathy and concern for the poorer members of Indian society, expressed initially through the development of Public Interest Litigation (PIL) and the expansion of the interpretation of India's constitutional rights, to a situation in which PIL has become the weapon of choice of the middle-class and the corporate sector against the urban poor. The SCI

has also been accused of a type of judicial activism, particularly in Delhi, that has been anti-poor and anti-informal, driving a campaign that is expressly concerned with middle-class interests. As a consequence, informal traders, rickshaw drivers, informal food vendors, slum dwellers and a range of industrial activities have, over the last ten years, been litigated against, and literally driven by court order from the streets and suburbs of Delhi (Te Lintelo, 2009a and b). As such, I wanted to look at a case which was driven by middle-class interests, taken up by the SCI and which had a clear spatial dimension in the city of Delhi.

The South African Constitutional Court has a far shorter history but seems to have expressed a clear direction: the Constitutional Court has been consistently sympathetic to listening to all manner of socio-economic rights cases, which have evoked Constitutional rights and held the state to account for either contravening these rights or not acting sufficiently on the claims that citizens have been making (Coggin and Pieterse, 2012). Wilson and Dugard (2011 and forthcoming) as well as Bilchitz (2002 and 2008) have also noted that the Constitutional Court has steered away from providing minimum core standard judgements. This means that they have left questions of the content of constitutional rights to the government. Instead, the Constitutional Court has pursued remedies that evoke procedural and administrative justice claims and have repeatedly attempted to encourage engagement between the litigants, which have generally been constituted by various spheres of the state and lower income communities (Christiansen, 2007 and 2010; Ray, 2008 and 2009). As such, I wanted to look at a case which typified these elements, i.e., concerned a contestation between a lower income community and the state and concerned very clear constitutional rights; where the court had stepped away from making a content-related decision but had suggested an administrative justice or procedural justice remedy. Thus I wanted to be able to compare cases across the two contexts that were typical of the larger judicial trajectories in their respective countries, which I hoped would allow me to see what factors and outcomes differed between the two contexts. Since I was also interested in the idea of hegemony, looking at longer term trajectories also permitted me to see what ideologies, if any, had been pursued by the courts and by various litigants utilising the courts.

Furthermore, I wanted to see if I could trace longer term consequences and implications. In the South African context, this left only a few cases to choose from, as the Constitutional Court has only seen 446 cases since its establishment in 1994. As such I was able to narrow down my decision quite quickly to the Olivia Road Case. The only other option at the time was the Mazibuko/Phiri water case, which met all of the criteria except that the Constitutional Court had effectively decided not to rule on some of the more substantive rights issues of the case. Subsequently, there have been two other cases - the Aengus Property and the Blue Moonlight cases - which would have satisfied my criteria.

The Indian context provided for far greater choice as the Indian Supreme Court sees many more cases than their SA colleagues. Krishnan (2003) estimated that ten years ago, there were 20 000 pending cases in the SCI. Thus, as would be imagined, a literature survey turned up a variety of choices. It was at this point that I undertook my first visit to Delhi in January 2010. The visit was

intended to give me some idea of the urban context, the issues facing the city, and to seek advice from local experts about cases that met my criteria. I was there for one month and interviewed 18 people (see Appendix I), most of who were researchers and commentators in the fields of law, urban studies and governance. I was able to identify the key respondents through my literature review that allowed me to see who was writing on issues of socio-economic rights, litigation and governance in India. I was also helped by contacts that I had made though the SA-India research network that had met in Mumbai in 2009, following which I used a 'snowballing' method to identify further contacts. Of the 18 interviews, there were two that really stood out: first, my discussion with a senior member of the Delhi Development Authority who gave me an overview of city planning structures and the masterplanning process; and, second, a conversation with the registrar of the SCI, who described the operation of the SCI, took me on a quick tour of the Court and even into one of the courts that was in session and which are not generally open to the public. All of the interviews concerned three main areas of discussion: the history of governance in Delhi, who were the main actors and agents and how was governance organised, formally and informally; what was the trajectory of the SCI, how was it viewed and then, lastly, I asked for advice about cases that met my criteria. I recorded and transcribed the interviews where possible; otherwise, I took copious notes, which I wrote up as soon as possible after the interviews.

In Delhi, there were a number of possibilities that would have been interesting to explore, especially the Yamuna forced removals and any number of housing and relocation cases. However, after having read the available literature and through my various discussions I decided that the MC Mehta versus the Union of India and Others case of 2006, known as the Sealings Case, would best be able to demonstrate the court's engagement with governance. The case did not deal with housing nor was it concerned with the very poor but it offered the chance to look at the typical nexus of the Indian middle-class and the courts and their battle to re-shape urban space, as explained in the previous section. Furthermore, the case surfaced litigation over another type of urban space, i.e., commercial space, and meant that I could engage with mobilisations over a different set of rights claims. This allowed me to see if and how these claims and forms of mobilisation differed from concerns around housing rights.

In addition, little work had been completed on the Sealings Case when I started my research in 2010 (Mehra, 2009; Jain, 2010), whereas significant attention has been paid to the issue of housing, relocation and the environment litigation and conflicts between the middle classes and informal segments of society over space and urban goods (Rajagopal, 2005; Menon-Sen, 2006; Zerah, 2007a and b; Bhan, 2009). It should also be noted that the Delhi traders were not the poorest nor most vulnerable members of Delhi society and in some ways could be seen to be part of an extended definition of the Indian middle-class (Mehra, 2012). However, where they join the ranks of what may be seen as typical Delhi litigation is in the fact that the traders' activities were largely extra-legal and contravened the RWAs' and SCI's desired aesthetic, which had been informing significant numbers of

PILs over the preceding decade. Thus, the case was an exemplification of the trajectory of Indian litigation and also offered the opportunity for me to make an original contribution to our knowledge.

From what I could see, these two cases were most likely to show some evidence of the manner in which the courts, especially the apex courts, were involved in governance and would allow me to see the range and consequences of the courts' involvement. In addition, I chose these two cases because they offered two very different scales of engagement. I hoped that the dissimilarities would allow me to analyse whether the size of the "class action" made any difference in issues of access to the court, or the impact of the court decision on policy or practice. The San Jose building provided a study at the micro-scale, with 200 initial respondents and a final figure of just over 400 people. The Sealings Case offered the opposite extreme, where I was able to look at governance issues at the macro-scale considering that the case affected literally hundreds of thousands of people and the entire city of Delhi.

As it turned out, the cases accidentally and only retrospectively fulfilled Flyvbjerg's criteria of being critical and paradigmatic. The cases were exemplars of larger trajectories of jurisprudence in both countries and thus 'critical' in the sense that they had "strategic importance in relation to the general problem", in this case of understanding the overall roles that the courts have played in both countries and urban environments. Thus through using these cases, I was also able to make the generalised claim that "If it is valid for this case, it is valid for all (or many) cases." (Flyvbjerg, 2011: 307). Inadvertently, I also chose case studies that were paradigmatic, "… that is, cases that highlight more general characteristics of the societies in question" (Flyvbjerg, 2011: 308). Thus through studying these specific case studies I was able to unpack and examine some of the dynamics of urban governance in Delhi and Johannesburg and the nature of urban coalitions, alignments, power structures and their development or evolution.

Casings: delimiting the boundaries of the cases

My "casing" or "the case study boundary [which] concerns its physical confines, its activities and the time span of the study" (Cousin, 2005: 423), evolved over time. As I collected more data and began to understand my cases, better I was then able to narrow down some of the casings/boundaries. I cast the net very wide initially, and interviewed respondents and gathered documents that in the end were only peripherally associated with my cases. In both cases, I decided that although I was interested in the issue of why the various actors engaged in litigation, it was not the main focus of the thesis and as such I would not examine the forms of mobilisation that preceded the actual court cases but rather try understand what had happened during and after the trials at a variety of scales.

The case studies are understood to be constituted of the lower court, as well as the apex court proceedings. The procession of the Olivia Road Case was linear and much easier to trace than the Sealings Case. The Olivia Road Case went from the High Court, to the Supreme Court of Appeal to the Constitutional Court. In all three, a core set of issues were presented and judged. However, the

origin of the Sealing Case is far more difficult to pin down. There had been a series of High Court cases that preceded this case and there had also been a set of Supreme Court rulings on similar matters. Thus, the case had a long legal history. There were also difficulties in deciding the absolute extent of the boundaries of the cases. Spatially I chose studies that originated in specific sites and specific cities, but since the apex courts are national institutions, I decided not to institute an upper limit on the effects of the cases as I imagined that some of the policy implications of the two court cases would occur at the national level.

Then there was the important question of where to stop. Implications and changes can, and do, ripple through societies almost endlessly but as they do, causality becomes more and more difficult to determine. As such, I decided that I would look at the Sealings Case from the first seminal decision of 16th February 2006 until 8 February the following year, when the new Master Plan for Delhi was promulgated and, at which point, another PIL came to the fore with a completely separate set of issues. However, there were certain policy and practice implications which can be directly attributed to the Sealings Case and which also formed part of the study that occurred after this date. The same is true of the Olivia Road Case: the case began with the issuing of the eviction order in the High Court in 2006 and the final judgement from the Constitutional Court on the 19 February 2008. For both cases, the majority of documents and media reports that I gathered were for these periods but I also collected supplementary materials for periods after the cases had ended in order to gain insight into the implications and consequences of these trials.

3.4 Data collection: a mixed methods approach

Since I did not have a set of "explicit theoretical assumptions" but did have "an interest in a particular phenomenon" (Flyvbjerg, 2011: 312) and I knew that I wanted a 'thicker description', I intuitively felt that there were stories to be told that I needed to hear. So, I knew to look for people who could narrate their stories to me, people who were participants and simultaneously commentators on what had happened (Connelly and Clandinin, 1990). However, I also agreed with Read and Marsh, (2002: 237) that "restricting one's research to one particular method may not address all aspects of the research question, and, second, the use of multiple methods enhances the validity of research because each method serves as a check on the other". So I chose to triangulate my interviews with other types and sources of data such as media reports, court documents and archival material. The research was not conducted in a linear fashion: document and media collection was carried out simultaneously with the interviews. This was especially necessary in India where I only had three- and half months to complete my fieldwork. It was not only data collection that was conducted simultaneously, my analysis occurred at the same time (Burgess, 1982). Burgess (1982: 236) notes that in social science:

> "… the research process involved constant analysis as field notes were read and reread to discover relevant problems of the study… Analysis continued throughout

the study and provided an outline for many of the conclusions contained in the final research report".

This way of working meant that there were no discrete stages between data collection and analysis and it was through the analysis and writing process that I realised I needed more data in some sections. However, for the sake of clarity the data analysis will be presented in more detail in later sections.

3.4.1 Key informant interviews

In terms of the narrative inquiry, I conducted a set of key informant interviews. I developed a standard interview guide which was intended to begin a discussion around key points relevant to the case. The instrument was designed so that it could be used in both contexts to aid with the comparability of the data. However, since reflection and analysis was taking place at the same time, many of my questions and prompts changed over time. Generally, it was because I realised that a question did not 'work' or because I had found a particularly rich vein that I wanted to mine. The initial sampling was purposive and key respondents were identified from court and media documents. Following that, a 'snowball' sampling technique was used to identify further relevant respondents. Some respondents were interviewed more than once because we ran out of time or because there were issues that I realised needed greater detail and depth when I started my writing and analysis process. In the South African case I conducted 38 interviews but since I interviewed some of the respondents, such as the residents from San Jose, Nelson Khetani and Isaiah Mahlobo, and Graeme Gotz who was part of the negotiating team for the City of Johannesburg, more than once, I actually only interviewed 35 different people (See Appendix III). In India, I conducted 33 interviews with 36 respondents (See Appendix II). Table 1 below provides a breakdown of the sector that the respondents represented. Interviews averaged at just under an hour with some interviews going on for much longer. I generally travelled to my respondents' offices, homes or other locations that they nominated.

	Gvt Officials/ councillors	RWA	Lawyers	SCMC/ Judges/ Court officials	SJ residents/ Traders	Civil society/ activists/ Consultants/ media	Property Developer	Total
India	15	6	6	3	3	3		36
South Africa	16		7	1	2	6	3	35

Table 1: Breakdown of respondents by sector

However, Table 1 does not give a full sense of the spread of people that I engaged with, nor some of the challenges that I faced. When looking at the Indian case, I managed to interview all three members of the Supreme Court Monitoring Committee who were essential in carrying out the SCI's ruling and were the first point of contact for the local authorities and the traders. In the case of the traders, I spoke to only three of them, but they were: the head of the Confederation of All Indian Traders (CAIT); the head of the Delhi branch of CAIT (who was in charge of most of the mobilisation in Delhi); and, the head of the traders association for M-Block market, where some of the most violent demonstrations took place. I tried to get interviews with three other traders but met with no success.

In South Africa I was able to access a number of government officials which, when analysed, included: two national government official; two provincial officials; the MEC for Finance; the previous Councillor with the Inner-city Portfolio; and, seven officials from various City of Johannesburg departments, including the Johannesburg Development Agency, Johannesburg Inner-city Task Force, Department of Housing and the ex-City Manager. I only interviewed two San Jose residents: the chair and secretary of the residents committee and supplemented these interviews by engaging with the two civil society facilitators who were closely involved in all aspects of the case. I interviewed a total of 13 lawyers: in India, I interviewed one lawyer who represented the traders, one lawyer who acted for RWAs, a human rights lawyer who closely monitored the situation, and two solicitors who were employed on behalf of the MCD. In South Africa, I was able to interview three lawyers who acted on behalf of the CoJ, the Director of the CoJ legal services, two human rights lawyers who were interested in the case and had an understanding of issues that pertain to claim-making through litigation; and a lawyer who worked for CALS and directly on the case. Unfortunately, in both cases I was refused interviews with the key lawyers.

Box 2: Extracts from my Field Diary

Interview with Mr SW, January 2011
We spoke for 20 minutes and when guests arrived, he thought we were finished. Said we weren't and then waited an hour for him to come back - then another 15-20 minutes of interview. Very hard to get detail. After the interview also wanted to know how my work could benefit his organisation and if I would write to [local authorities] on their behalf. I said no - that I was very happy for them to have a copy of the dissertation and they could use the information for their purposes but that I needed to be neutral and could not take a side. He became a great deal less friendly after that.

Interview with Mr SS, December 2010
Yesterday I went to interview a man who was a lawyer for one of the government agencies. I had told him on the phone why I was coming and what I was looking for and, OK, granted my accent is not the easiest to understand on the telephone but I start the discussion and it is clear that this bloke does not want to chat. Also tells me after I mention that RK [one of the other lawyers] refused to be interviewed, that he also did not do interviews, which is a bit odd considering that he had agreed to be interviewed… "No, it was just another matter" and "Oh, there were about 50 different issues". I asked, "Really? What were the main ones? Did any of them stand out for you?" He replied that he could not remember.

Interview with Mssrs R, J and L, December 2010
So today I go to interview a Mr R. When I walk in there are two men and I discover that the second man is someone I wanted to interview but who I hadn't yet been in touch with (Mr J) so initially I was delighted. I sat down and introduced myself and my topic and asked if I can tape and they agree and it is all going swimmingly. So what I normally do is start with the most obvious questions to get a sense of their narrative and then start to pry. I start and then the one man's cell rings so he gets up and moves away from the desk and the proceeds to bellow into the telephone so that I can barely hear the other fellow. Then he comes back and we start again and then an underling walks in and Mr R starts chatting to him very, very, very loudly. Now it must be remembered that these are all old dears and slightly deaf so a game of one-shoutsmanship ensues…eventually [telephone] conversation ends and start to chat to both of them again. Then someone else walks in, [a respondent] Mr L, who I had interviewed the day before. Mr J's cell rings again and I start talking to Mr R, and start to get somewhere - he is answering my questions, start to get him to laugh a bit and he opens up just a crack and then Mr J comes back and demands to know what the joke is, basically shouting on top of his lungs, "tell me, tell me" while Mr R is trying to finish what he is saying. I start to get flustered because now I am not sure what to do…do I interrupt Mr R, talk over him and respond to Mr J, or ignore Mr J? With that, two other men walk in and I get told that they have little time and I should read a court document and come back unless I have any more questions and must ask them now. This is told to be in stereo at varying decibels so I get flushed and totally lose what little train of thoughtI have.It was a total disaster – I am not sure I got any usable material out of it but to be honest – it was extremely funny!

I requested permission to record the interviews and take notes and the vast majority of respondents were happy to let me do that. Similarly, for my first set of interviews in Delhi in cases where I was not given permission to record the interview I took many notes and then transcribed the interview as soon as possible. The recorded interviews were transcribed by a professional transcription service and it is here that I had a piece of luck. The transcribers in the first tranche of interviews (my SA respondents) were South African but then the service providers, without my knowledge, began to outsource their transcriptions to India. This meant that in my second tranche of interviews, which were my Indian respondents, accent and the few words that were in one of the Indian languages were not a problem. I was also provided with definitions of some terms and phrases and, where necessary, translations. Once the transcriptions were completed, I checked their accuracy and sent some back due to lack of precision or other problems.

Methodology textbooks advise researchers to arrange interviews in advance and carefully prepare questions for the respondent (Seidman, 2006). Even after carefully following this advice, some of my interviews were not successful and I had some truly excruciating moments, the worst of which was my interview with Constitutional Court Judge, Justice Edwin Cameron, who was as charming and helpful as any researcher could have asked for, but I did not realise how little he could actually say as a member of the Constitutional Court. After 16 minutes and 46 seconds, it became clear that I was woefully ignorant of his constraints and he very politely terminated the interview. Seidman (2006) also advises researchers to conduct interviews in quiet, private environments. As such, I arranged a number of interviews in people's offices, which often meant that we were constantly interrupted by telephones and colleagues. This is a reality - people are busy and they cannot generally afford to give up an hour or two of totally uninterrupted time. My fieldwork diary is also filled with observations and frustrations of interrupted interviews, being made to wait while my respondents finish conversations, start conversations, arrive late, do not arrive at all, or attend to other work/people (see Box 2). Furthermore, research involves meeting and engaging with perfect strangers and and some of the respondents sounded a bit suspect, conversely, some of my respondents were clearly suspicious of me, in these cases, we met in public spaces: coffee shops, restaurants or cafeterias. Thus, interviews do not always run according to plan, and I had to adapt, adjust, be patient, and come back the next day or, on bad days, just give up and move on. On all of these days I dearly wished that I had a methodology textbook that gave me better advice than simply to try and find somewhere quiet to interview my respondent.

3.4.2 The kindness of strangers: access to archives, media and documents

While I was in India, I was in touch with the National Institute of Urban Affairs (NIUA) who had not been directly involved in the case but had made inputs into the final Delhi Master Plan. During a discussion with Professor Chetan Vaidya, the Director of the NIUA, he mentioned that they had a press-cutting service and I was welcome to use their archives. Here too was another piece of luck and kindness; the press-clipping service had cut out every article in the Hindi and English press that had to do with the masterplanning process of Delhi since the early 2000s. Although the press clippings did

not focus on the Sealings Case, they included all of the articles on the topic that they could find for the duration of the case. I was thus able to go through the clippings and extract all of the articles which were about the Sealings Case or anything pertaining to it. I supplemented them with an Internet search of news articles. In total, I came out with over 2000 articles, however 2000 articles were simply too many to engage with so I extracted a purposive sample from each month, ensuring that I had a spread across the month and across the various newspapers. In total, 253 news articles were used (see Figure 7) from a range of the English-medium newspapers in India.

Trial and error continued and after I started working with the Indian media reports, I wrote a first draft of one of my chapters that included an in-depth look at the media reporting of the case. At the time, I discounted the SA media as I had only found a few articles pertaining directly to the Olivia Road Case. However, after a supervision session my supervisors and I took the decision to expand the section on the media into a complete chapter. I then went back and conducted a rigorous search of SA print media, looking at the major English newspapers in the country. I combed the following SA newspapers: the *Mail and Guardian*; *The Star*; *Saturday Star*; *Mercury*; *Cape Times*; *Pretoria News*; *Daily News*; *City Press*; *The Sowetan* and *The Times,* and found 22 newspaper articles relating to the San Jose Case. I also came up with a few hundred articles on the Johannesburg inner-city, at the time of the case. I took a purposive sample and worked with 56 articles that directly or indirectly related to the San Jose Case and provided context and a sense of the consequences. This meant that once again, and much later in the process, I went back into data collection. Then, once the entire thesis had been written, my supervisors and I decided that the media section did not constitute a chapter on its own and the relevant sections were incorporated into Chapter Six and the rest of the thesis.

Since I was not exactly sure about what I would eventually need, I collected every single document that I could access. In particular, I wanted transcriptions of the court cases, copies of the judge's ruling and the submissions of the various litigants. In the South African case, all except the transcriptions were available to me via the Internet and I just downloaded whatever I needed from the Constitutional Court website[33]. The Indian court documents were far more difficult to access. Although the SCI's website states that one can access court decisions from it, it is in fact unworkable and no matter how one searches the site and what one does, these cannot be found.

[33] The website is: http://www.constitutionalcourt.org.za/site/home.htm

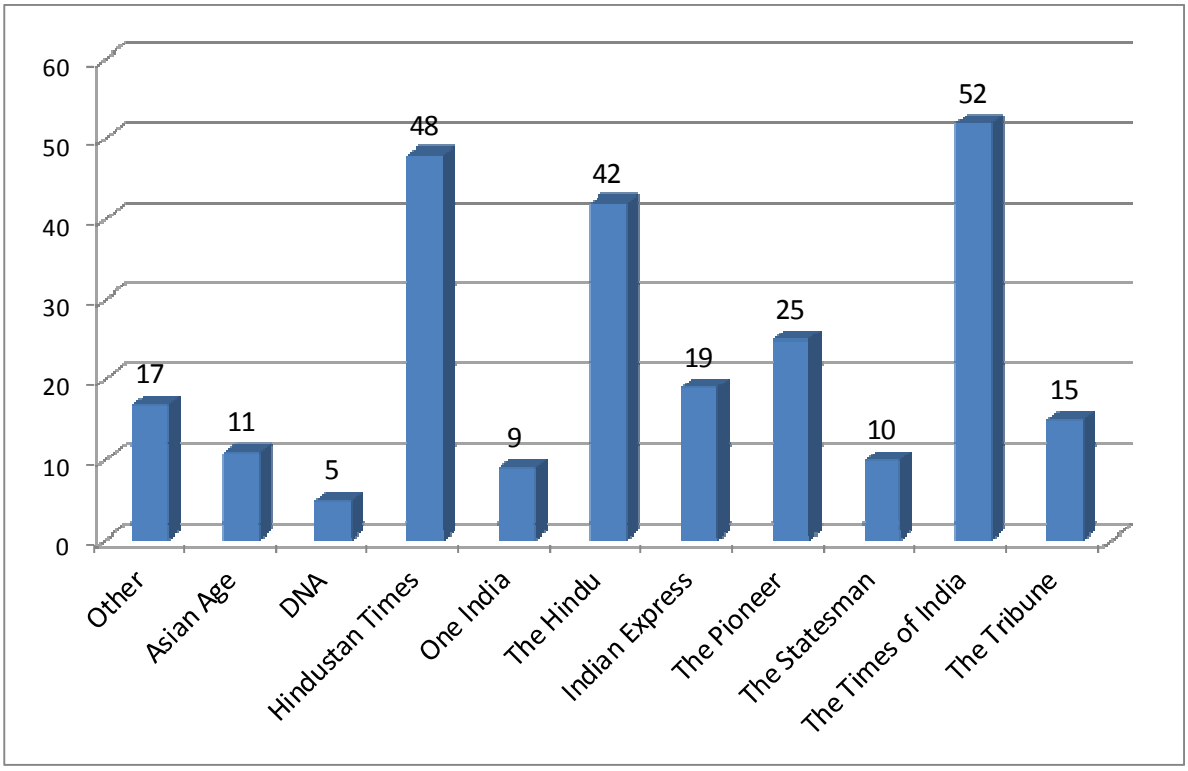


Figure 7: Purposive sample of Indian print media on the Sealings Case (N=253)

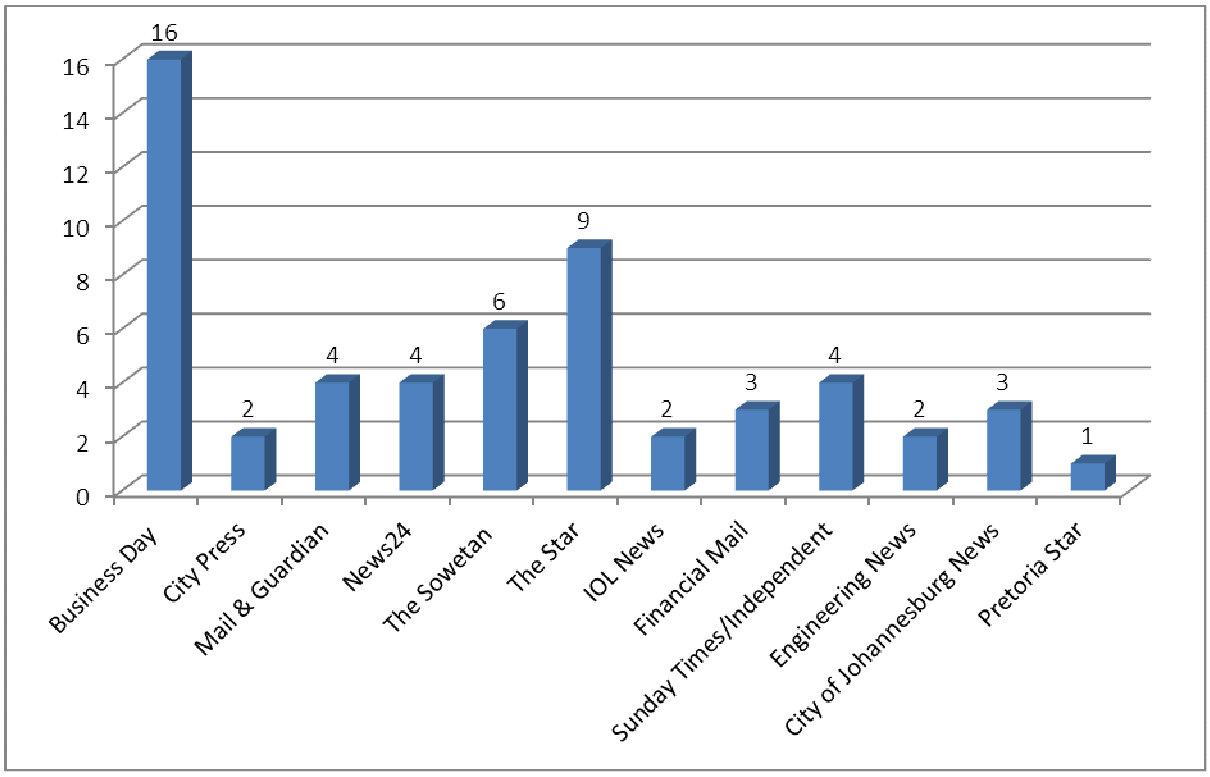


Figure 8: Purposive sample of SA media on inner-city Johannesburg and Olivia Road Case (N=56)

Furthermore, I could not apply for the court documents as they are generally not available to the public, as this discussion with RP Sharma, the advocate for one of the original High Court cases that led to the Sealings Case, demonstrates:

> *Margot Rubin: Are these [court rulings, submissions, affidavits, etc.] public documents? I mean, can you get hold of these orders?*
> *RP Sharma: These are court orders. They are public documents.*
> *Margot Rubin: Where do I find such documents?*
> *RP Sharma: You can take it from the court.*
> *Margot Rubin: But for me, how would I find them?*
> *RP Sharma: No, you can't approach. I think you may have some difficulty. Anybody who is connected with the matter, who is a party.*
> *Margot Rubin: I will manage…*
> *RP Sharma: Now you are coming at the dead end of March 2011, so anybody who is connected with the matter who is a party. He apply for certified copy and given and again he applied for certified copies [sic].*

Mr Sharma was basically telling me that only those who were directly involved in the case could apply for court documents. I did not have contacts that would have applied for the documents for me and, as previously stated, this was before Kapoor.com came on-line. However, I met Rajeev Dhavan, who is a human rights lawyer and social activist, and although he had not been involved in the case he was very interested in it and kindly offered me the use of his electronic and print library, and his assistant. With their help, I was able to obtain copies of all of the Supreme Court's decisions. This was a third piece of luck.

I was also able to access a significant amount of archival material: the Centre for Applied Legal Studies (CALS), the Confederation of All Indian Traders (CAIT), Moodie and Robertson law firm and the Municipal Corporation of Delhi all gave me access to their archives. The San Jose residents mentioned that a large box of their correspondence with the City of Johannesburg that preceded the case was kept in CALS' archive. CALS gave me access to this material as well notes from the entire period of CALS and the San Jose residents' interaction. The Confederation of All India Traders (CAIT) opened what was left of their files to me, all of which were hard copies as their electronic copies of the case were destroyed when their computer malfunctioned and could not be repaired. However, I did manage to garner 35 of CAIT's press releases, starting in February 2006, just after the first sealing order and going through until October 2006. I was also able to access press releases from other organisations and institutions, including eight newsletters from the residents' organisation, the United Residents Joint Action of Delhi (URJA), for the period February 2006 until February 2007 and five press releases from CALS, Webber Wentzel and other legal parties who were involved in the Olivia Road Case. There were also a few opinion editorials in both cases that were useful in publicising specific perspectives from each side.

Much of the archival material from all of the sources was mixed up and in no specific order. The Municipal Corporation of Delhi (MCD) archive was particularly difficult to decipher, especially since much on the material was undated and unsigned. To make matters even more difficult the MCD is not well-resourced and I needed to make a number of copies. Therefore, I returned a few times and the very kind officials who I met at the MCD insisted on helping me to photocopy the records and some of them did not come out very well. As a result, the records and documents are vastly disparate: thousands of newspaper articles for sealing, 56 for the Olivia Road Case; and archives that were all incomplete and many cases difficult to place in the chronology of the cases. The material was not collected in one sweep, much of it was found by sheer luck and the kindness of people who were willing to help. Material was also collected when it became available or I realised that I needed it. This is hardly the smooth process of research collection that the textbooks would have us believe.

3.4.3 Reflecting on being inside and outside

The process of data collection was not straightforward and as has been extensively written on my positionality, further affected what I could collect, who I could access and how we responded to each other (Haraway, 1991; McDowell, 1992 and 1999; Nast 1994; Rose, 1997; Staeheli and Lawson 1994). The following section is a reflection of what it meant for my research to hold certain positions of insiderness and outsiderness but it also aims to cast doubts on these categories. This view continues in the tradition of Gilbert (1994), Mullings, (1999) and Sultana, (2007) who have demonstrated that researchers can be simultaneously insiders and outsiders. I further argue that recognising the concurrence of these identities is useful in constructing relationships with respondents and moving away from extractive research and into a more 'co-productive' mode.

To begin with, I need to outline my own context and history, which partially informs my positionality. In the South African academic environment there has been a tradition of close association between universities, the state, consulting and activism. As an under-graduate student I was encouraged to engage in applied research and was part of a department that ran 'development' and action-research projects. As a post-graduate student I was introduced to, and engaged in, consulting work and short-term contracts with a range of clients, including the government, which was not (and is not) unusual. The boundaries between various sectors in SA are highly porous and many people involved in socio-economic rights issues, policy-work and research hold a multiplicity of identities in a number of spaces. Lecturers might be activists; government officials may hold sessional lecturing posts in universities and academics may consult to government and sit on the boards of NGOs or a dozen other configurations of these identities. I am a product of this context with a multitude of consecutive and simultaneous identities and a history of working for the state, as a private-sector consultant and as an academic. I have written policy, research reports, a full research dissertation, as well as refereed articles.

As such, I am part of a small group of people most of whom are familiar with each other and can make claims to be an 'insider'. Therefore, when it came to my Johannesburg case study, of the 35

people I interviewed I had worked with or for 18 of them and knew almost everyone else at least by reputation, making me a clear 'insider'. From a theoretical perspective, there are supporters of the 'insider' position who argue that being an insider gives researchers "an advantage because they are able to use their knowledge of the group to gain more intimate insights into their opinions" (Mullings, 1999: 340). In contrast the 'outsider' does not share socio-economic, historical or ethnic characteristics with their informants (Mullings, 1999) and are supposed to be more 'neutral', with "no preconceptions, no vested interests" (Ritchie *et al*., 2009: 108). However, over the last few decades doubts, that I share, have been cast on the possibility of distance, neutrality and impartiality (Butler, 1990 and 1991; Haraway, 1988).

However, according to the binary, I was an outsider in Delhi. I went to India twice: as already mentioned I conducted a 'scoping exercise' in January 2010 for a month, and I then went back for a further three-and-a-half month stint from December 2010 through to the middle of March 2011 to complete my fieldwork. As previously mentioned, I conducted 33 interviews and I was very different to almost all of my respondents. Of the 33 respondents, 30 were male, all were Indian nationals, older than I was and had grown up in India. Furthermore, the majority were self-proclaimed committed Muslims or Hindus. Most of my respondents were professionals: lawyers, engineers, town-planners or business-owners. Unlike my South African informants, I had never met most of my Indian respondents. I knew them only by reputation from other informants, the media, social networks or court documents. The informants had also never met me but only two of the respondents requested proof that I was actually a student.

Across three axes of measurement: access, the quality of data and the retrieval of records and documentation it would seem that being an insider/outsider made very little difference (Ergun and Erdemis, 2010). I was able to access respondents equally easily in both contexts. In SA, my personal contacts with many of my South African respondents often allowed me to sidestep gatekeepers and intermediaries (Seidman, 2006). Surprisingly, my lack of contacts in India did not prove to be a significant obstacle, as court documents, media reports and social media content provided contact details (often cell phones) and mostly negated the need to work through intermediaries. Where there were gatekeepers, it generally required significant patience and persistence. After meeting with the first round of interviewees, the advantages of the 'snowballing' technique eased further introductions by establishing my legitimacy as a researcher to the next round of respondents.

The quality of information gathered is also comparable. Unsurprisingly, lawyers and politicians in both countries were more reluctant and cautious than other respondents but most respondents were generous with their time and knowledge. As also mentioned in an earlier section, in both countries following initial interviews or discussions, I was given extensive access to archives, including the lawyers' own copies of court documents. As such despite being an 'insider' in one context and an 'outsider' in the other I feel I was able to elicit a similar quality and quantity of information from both contexts. I think this was because I was able to retain some degree of reflexivity and recognise

commonalities with my respondents and thus build a rapport (Dwyer and Buckle, 2009; Ergun and Erdemir, 2010; Mullings, 2005). Such reflexivity required me to acknowledge that my positionalities were not mutually exclusive and I could be both insider and outsider in the same time and space.

In South Africa, my identity is neither uncontested nor uncomplicated. Many of my informants had known me in previous incarnations and some viewed my new or concurrent identity as a PhD student with suspicion or uncertainty. Furthermore, some potential respondents did not appreciate the academic lens that I brought to bear on an area that they felt was more important than mere academic inquiry. I also interviewed people who have been and I hope will one day again be my clients. During interviews, these multiple identities created a tension between what I needed as a PhD student and the fact that these people provided me with an income. Additionally, some of my respondents were people with whom I had pre-existing relationships, both good and bad, and I had to make sure that I did not express my personal feelings towards them during the interview or the analysis. In some cases there were also age, gender, ethnicity and "race" disparities and it was only a very few respondents with whom I shared many of these characteristics.

In India, many of my respondents asked me questions about myself, including my age, marital status, if I had children, and where I was staying in Delhi. I always answered these questions in as much detail as my respondents required. I believe that my perceived 'otherness' often turned out to be very useful. For example, being a younger, foreign female provoked strongly, (and admittedly sometimes quite irritating) paternalistic attitudes towards me (Parameswaran, 2001). Respondents often said that it was their duty to help me as I was "like a daughter" to them, which always struck me as a bit odd after one meeting, but it did mean that I was provided with much of what I requested. Many of the respondents initially assumed that because I was a white, English-speaking female student I was from the "north". Others assumed that my family had moved from Britain to South Africa. I would explain that I was of Eastern Europe Jewish origin and my family emigrated to South Africa decades ago. Interestingly, once I informed my respondents that I was not British, European or American, many of them warmed up considerably. According to my respondents, this was because we shared a colonised past, we were developing middle-income countries (although of vastly different scales, which I was repeatedly reminded of) and had a sincere appreciation of cricket.[34] I think that my history distanced me from the colonial dynamics of India and, in some way, legitimated me and my work. Equally, my being Jewish meant that I did not fit into the expected identity boxes, enhancing my "outsiderness" in ways that moved beyond anticipated insider-outsider relations. I think that all of these factors meant that I was so alien and "other" that informants seemed to feel "safe" enough to share thoughts and feelings that I do not believe they necessarily would have had I "fitted" more neatly into a known category.

[34] The Cricket World Cup was taking place at the time and the South African and Indian teams were both strong contenders for the title.

However, other aspects of my identity constructed important connections between us and I was able to use my multiple identities to establish rapport. I would share aspects of myself with my respondents that I thought would resonate with their own positions to construct "alliances" (Harvey, 1996). Thus, with the government officials I shared my experiences as a housing official; and, with the business owners, the challenges of being a consultant and running my own company. As such, certain commonalities created a rapport and mutual appreciation of "the personhood" that we shared (Dwyer and Buckle, 2009: 53).

Thus, being a certain kind of "insider" where there were areas of commonality was extremely helpful in creating a rapport and creating a relationship (Harvey, 1996). However, so too was being a certain type of "outsider", one with shared commonalities and differences, which at the same time allowed me to really engage with my respondents and share moments of personhood and break down stereo-types, enhancing the experience for myself and, I hope, my respondents.

3.5 Data analysis and interpretation

"Analysis," writes Stake (1995: 71), "is a matter of giving meaning to first impressions as well as to final compilations". In analysing the data three main forms of analysis were undertaken: coding, which was mainly utilised on the interviews; content; and narrative analysis. The analysis was undertaken simultaneously with the data collection process. At all points I was profoundly aware of Geertz statement that "What we call our data are really our own constructions of other people's constructions of what they and their compatriots are up to" (Geertz, 1973: 9).

As I conducted the interviews and had them transcribed, I began on the long process of coding and collation. Initial thoughts and themes were taken back into the data collection and interviews and tested and explored with my respondents. From the interviews and through an iterative process that required working both "within" the interviews and "across" them a set of themes emerged. As I was working in two very different contexts, I had to be very careful about whether I was seeing the same or similar phenomenon, which was being manifested in a different way or whether I was seeing an entirely different phenomenon. In these cases, I resorted to attempting to understand the phenomenon within its larger context and to get to grips with its "meaning" in order to answer that question. The data was then arranged into a set of themes with a sub-set of headings, these were the preliminary version of each chapter (Burgess, 1983). However, similarly to Burgess' (1983: 235) description of Wolff, "…when the process of writing up began, there were shifts between the way [I] intended using material and the way in which [I] actually used it".

The media reports and the various court documents underwent narrative and content analysis. In this case I understood content analysis to be the "systematic, replicable technique for compressing many words of text into fewer content categories based on explicit rules of coding" (Berelson, 1952; GAO, 1996; Krippendorff, 1980; Weber, 1990) and like Holsti (1969:14) understanding it as, "any technique for making inferences by objectively and systematically identifying specified characteristics of

messages". Content analysis relies on coding and categorising large bodies of data where "A category is a group of words with similar meaning or connotations" (Weber, 1990: 37). Thus, I took each "group" of data, such as the CAIT press releases or the South African media reports, and constructed matrices, which included the details of each document: its date, title and source (where I accessed the piece). I then used a mixed method of attaining the various categories, some of which had been defined during the interview coding and a significant number, which emerged out of the content analysis. I then went back over my interviews to see how the new categories applied to these narratives.

Documents: a cautionary tale

The various texts that were analysed were not treated as neutral documents. Each one was understood to be fully embedded in a local nexus of power and discourse. Media reports "… should not be seen merely as a ready "product" of news-gathering activities, but as the manifestation of a complex process in which knowledge, beliefs, and opinions are matched with existing or incoming information about events, the social contexts of news production, and representations of the reading public" (van Dijk, 1983: 28). Thus, the idea that newspapers represent "facts" was rejected in favour of understanding newspaper articles as social artefacts representing the views of both readers and journalists.

I followed Cunliffe (2007: 77) who rejects ideas of neutrality and impartiality in court documents and further argues that

> "While court records are a valuable resource, I contest the occasional practice of representing transcripts and other court records as a site where coherent, fully formed narratives can be collected like wildflowers by the assiduous researcher. Court records are more challenging, and more interesting, than that".

Sarat (1999: 356) usefully provided some guidance on how to read and interpret court documents. I took seriously his suggestion that "the transcript is at once an assertion of history against memory and a particular kind of memorialization", and "[e]very trial is as much about the cannot-be-said as it is about the constructed narrative." Furthermore, legal documents are given a sense of heightened legitimacy that allows them to construct and sometimes reconstruct social reality. Following Cunliffe and Sarat, I agree that part of my fundamental project was to inquire about what was not said, what or who was excluded from the proceedings or even from the record and how arguments and narratives were mobilised into narratives for the purposes of constructing certain kinds of social realities. Media reports and court documents were also understood to be implicated in rhetorical processes that given the spaces that they occupy are profoundly powerful in entrenching and embedding hegemonic projects.

Following Smith (2006) and Hull (2003) court documents, government material and archives drawn from legal organisations and practices were also interpreted in light of their institutional functions. Smith (2006:65):

> "'explains texts' institutional function in terms of three characteristics. Texts are material and replicable, thereby able to coordinate institutional activities across time and space. Texts are stable, providing an institution with a reliable history of its activities...Third, texts operate in hierarchical relation to one another. Some texts render subordinate actors within an institution answerable to their superiors, while others govern the actions of people elsewhere within an institution, and thereby help determine the form and contents of texts those people produce. Hierarchical relationships between texts reflect hierarchical relationships between people who are differently situated within an institution" (quoted in Cunliffe, 2007:78).

Hull (2003) sees institutional artefacts as more than passive instruments of social agents. He argues rather that they are active in the creation and maintenance of those agents. However, Hull (2003) proposes going further and contends that one should look not only at the documents but also at how the texts are composed by whom and for what purpose. Documents are not written without intention and the authors' agendas need to be considered when texts are read and analysed. Furthermore, Hull (2003: 310) points out that by looking at these issues one can gain a sense of "how files shape structural relations of influence… and provide opportunities for functionaries to pursue their own interests. Control over the speed and path of files is a means by which officials exercise power over people and things and is metonymic of power and influence". Thus, when I analysed the various documents that I had collected, I kept these points firmly in mind.

3.6 Data presentation: the narrative of narratives

Constructing the thesis was an iterative process of writing, finding data, filling gaps, conducting the analysis and re-writing and then going back and doing it again. Since I wanted my respondents to have their own voices within the text and wanted to be able explain motivation, causality and consequence, I knew that the case studies needed to be highly detailed. I also wanted to ensure that my respondents spoke in their own voices as often as possible. As such, I used "narrative devices like cameos and vignettes alongside more formal analysis in an attempt to capture multiple realities and meanings within the setting" (Cousin, 2005: 424). The work that follows is densely peopled, and as far as possible I have hesitated to summarise my findings, being aware of Peattie's (2001: 260) caution that "It is simply that the very value of the case study, the contextual and interpenetrating nature of forces, is lost when one tries to sum up in large and mutually exclusive concepts". I wanted to give my readers as far as possible, "the vicarious experience of 'being there' so that they can share in the interpretation of the case, adjudicating its worth alongside the researcher" (Cousin, 2005: 424).

I also chose the "manuscript" approach to writing whereby I decided against separate theory, findings and analysis sections. Thus, I chose to do as Flyvbjerg suggests:

> "authors of case studies may avoid linking their study with the theories of any one academic specialization. Instead, they may choose to relate the case to broader philosophical positions that cut across specializations. In this way, authors leave scope for readers of different backgrounds to make different interpretations and draw diverse conclusions regarding the question of what the case is a case of. The goal is not to make the case study be all things to all people. The goal is to allow the study to be different things to different people. Here it is useful to describe the case with so many facets - like life itself - that different readers may be attracted, or repelled, by different things in the case. Readers are not pointed down any one theoretical path or given the impression that truth might lie at the end of such a path. Readers will have to discover their own path and truth inside the case. Thus, in addition to the interpretations of case actors and case narrators, readers are invited to decide the meaning of the case and to interrogate actors' and narrators' interpretations…" (Flyvbjerg, 2011: 312).

However, I am not convinced how open to interpretation the narratives actually are, as a thesis "is an act of persuasion that is as much about rhetorical flair as it is about care in matters of method and theory" (Walsham, 2006:326). A thesis is a constructed narrative in which I, as the author, undertake a story-telling process and as such a produce an account of social life (Maines 1993; Somers 1992; Cohen and Rogers 1994). According to Sibley and Ewick (1995: 202-3), "… narrativity inheres in the scholarly production itself as much as in the object of study or the lens for observing social phenomena". Indeed the production of a convincing narrative is in large part how the success of a case study is measured. Riessman (1993, 65-68) argues that there are three criteria for evaluating a good case study: "The first is persuasiveness: participants may judge how their voices are represented, and scholars consider how the research fits in with other similar literature. If both parties are persuaded, then one criterion for validity is met. The next is correspondence. Do theories derived match the data? Finally, the work may be judged valid if it can be useful to future research". Labov and Waletzky (1966: 37–39) argue that when a good narrative is over

> "it should be unthinkable for a bystander to say, 'So what?' Every good narrator is continually warding off this question... A successful narrative does not allow the question to be raised at all. The narrative has already supplied the answer before the question is asked. The narrative itself is the answer".

So, as a post-graduate student I have attempted to construct a thesis that satisfies all of the requirements of a good narrative, which are the same criteria required of a good thesis. Although I do not have an overarching argument or theory, I do present particular arguments in each chapter which I attempt to make convincing. I have also taken trials which were confusing, messy and often

disjointed and whilst still trying to represent and engage with the "messiness", present a synthesised and coherent set of accounts which can then be analysed, theorised and generalised.

I have also tried to heed the caution that goes along with case study and narrative research and not just cherry-pick the "evidence" that supports my argument or narrative. Instead, I have attempted to balance the material with findings that are not consistent, and demonstrate moments of contestation, debate and disagreement. I have given space and voice to accounts that deviate from the typical narrative and add confusion and other points of view. However, to add a further layer of complexity to this conscious construction of a narrative is the awareness:

> "that researchers attend to experience selectively. We cannot make sense of everything around us, so we make sense of some things. Our choices largely reflect who we are, including social positions we occupy (gender, sexuality, age, and so on). Experiences are then told to others, a process that is also infused with subjectivity - ours and our audience's. The character of narratives depends on who is listening (or reading), as much as who is telling" (Merrill, 2007: 19).

My positionality was part of the data collection process, and it also affected my analysis and the representation of my material. So I have also tried to do as Alvesson and Sköldberg (2009) described by turning the analysis as much inwards as outwards and to see how my assumptions, placement and position impact on the manner in which I asked, responded and interpreted my research. Thus, I consistently tried to "proceed with care and reflection, pondering a good deal more upon what the empirical material means and why we make just these particular interpretations…" (Alvesson and Sköldberg, 2009:10).

3.7 Conclusions

A thesis is a learning process and I made mistakes and learnt from them. The above sections provide insight into the various methods that I have used to construct this thesis and the journey that I have taken navigating through, and stumbling over, the numerous obstacles and challenges. It is also an attempt to demonstrate the difficulties in engaging in social science research from a number of perspectives, including the practicalities of doing research, "at home" and "abroad" as well as the constant awareness that one has to have of one's own position, the issues that it can cause, and the history, context and agenda of each piece of data and each respondent. It is also an argument for presenting methods sections in research as more accurate reflections of what actually happened in the field, showing the successes and failures. Furthermore, I am making the case for turning the lens of narrative analysis on the process of thesis writing and showing that it is a constructed narrative, which obeys a series of academic and rhetorical conventions. I have tried to make this section an honest a depiction and description of my choices and decisions, to justify and defend and, most of all, to reflect on what I have done.

Chapter Four: Pushed, driven or triggered: reasons for engaging in litigation

4.1 Introduction

A key question for my research was; why do groups, individuals and organisations choose to engage in litigation? In this chapter, I explore this question and propose that the decision to go to court is cumulatively motivated by a range of intersecting and mutually reinforcing factors that are uniquely configured for each group or "class" who choose to litigate. I explore four dimensions of urban governance and litigation: institutional failure of representative democracy; the inclusion or exclusion from urban coalitions and alignments; the court as a choice due to its hegemonic role; and, last, the practical considerations of access, legal support and the legislative requirements, which may "trigger" litigation. The conclusion discusses the "configuration" or combination of these dimensions for each of the litigants, which drove, pushed or "triggered" their decision to litigate.

The first set dimension posits that the failure of local representative and participatory mechanism was a fundamental reason why some of the actors chose to litigate. The key figures and organisations of the two cases had extremely limited access to the political and administrative apparatus of their cities. Furthermore, they were excluded from most formal city-making processes, including, in some instances, processes that directly affected their lives. The exclusion was, in part, due to the convoluted and confusing arrangements that exist in Delhi as well as the nature of representative democracy in both cities.

A second dimension concerns how inclusion and exclusion from certain urban coalitions and convergences of interests eventually led to litigation: the Resident Welfare Associations (RWAs) chose litigation because the courts have, over time, demonstrated that they are sympathetic to RWAs' Public Interest Litigation (PIL) and more recently, in instituting a shared world class city vision for Delhi. By comparison, the Olivia Road Case revealed that in Johannesburg alignments and coalitions did not involve the courts. Rather, a shared vision of the inner-city drove a coalition of the City of Johannesburg and private-sector land-owners and developers to adopt specific urban regeneration strategies. The coalition developed and instituted the Inner-City Regeneration Strategy (ICRS) and its Bad/Better Buildings Programme (BBP) but with limited consultation or community participation. Poorer residents were, thus excluded from the city-making development coalition and chose litigation as a form of recourse and having their voices heard in the city.

The chapter goes on to explore the third aspect, which concern the courts' role in hegemonic projects and their ability to legitimate worldviews and perspectives. Using the concept of hegemony provides the opportunity to examine the processes by which certain ideas or values are inculcated or naturalised within policy and practice and gain widespread acceptance by a specific group. It also

offered me a way of analysing how hegemonic projects are contested and challenged. I argue that the two cases demonstrate that the alliances and coalitions had specific visions that they wished to instil, and the choice to litigate was based on an understanding of the court as an institution that was able to validate and normalise a particular vision. The middle-class Delhi RWAs, the City of Johannesburg and its coalition of property owners and developers were deeply invested in entrenching the world class city agenda in Delhi and Johannesburg. They saw the court as a way of gaining legal and social sanction for their projects. In opposition, the Delhi traders, the San Jose residents and their lawyers, were engaged in a counter-hegemonic project as they sought to expand and normalise their own view of the city, which was a more inclusive and pro-poor environment. Therefore, these groups exploited the opportunity for litigation when it presented itself.

The last element is concerned with the practical reasons for entering into litigation, such as the legal requirements around eviction, which "trigger" litigation and the ability to access lawyers and advocates.

The chapter is structured around each dimension, concluding with a discussion of how constellations of factors are configured and reconfigured in different ways to drive the different actors to litigate or exploit the opportunity once it is presented. However, it should be noted that the chapter presented some challenges as there were many interconnections and overlaps in the theoretical and empirical aspects. Many of the empirical findings could demonstrate more than one dimension, whilst much of the theory could be applied to more than one set of narratives. Thus, I have chosen to place the material under those dimensions which I think it best elucidates but with clear references to other elements in the chapter.

4.2 No other options? The failings of institutional structures in Johannesburg and Delhi

Despite significant institutional differences and vast differences in scale, Johannesburg and Delhi share some startling similarities around the problems of representation and participation. The following section provides some context and background to the government of both cities and reveals how the dysfunctionalities in the state mechanisms have contributed to the desire for litigation. Furthermore, the section exposes how the various urban actors in my case studies experienced these political and institutional breakdowns and which significantly contributed to their decisions to engage in litigation.

4.2.1 The confusion and profusion of Delhi's government

Delhi's institutional structures are confusing to even the most adept student of political studies: the National Capital Territory of Delhi is a federally administered Union Territory[35] with a special status, as

[35] According to the Indian Government Portal, "A Union Territory is an administrative division of India, in the federal framework of governance. Unlike the states of India, which have their own elected governments, union territories are ruled

it is the capital city of India and home to the national or Union Government of India. As a result, Delhi is jointly administered by the Government of National Capital Territory of Delhi (NCT), and the Union Government of India (Republic of India, 2012). The NCT has its own legislative assembly, executive and judiciary and the executive is officially led by the Lieutenant Governor. However, the position is largely ceremonial and most of the executive responsibilities rest with the Chief Minister who is the head of the Council of Ministers and the leader of the majority party in the Delhi assembly. At the NCT level, there is also a legislative arm and the Members of the Legislative Assembly (MLAs) are directly elected from territorial constituencies in the NCT.

In parallel to the NCT structures, there is also the Municipal Corporation of Delhi (MCD), which handles the civic administration for the city and is responsible for 97% of the NCT. It was and still is considered one of the largest municipalities in the world, providing civic amenities to an estimated 13.78 million people. The MCD has two wings: a deliberative and an executive wing. The deliberative wing is comprised of elected and appointed councillors, with the majority being directly elected by their wards and the rest (exact numbers change over time) are appointed with specific portfolios or by lobby groups. To make matters more bewildering, the wards do not match up with the territories of the MLAs.

The MCD is officially led by the mayor and a deputy mayor who are elected by the councillors from within their ranks but these positions hold little real power and most of the authority lies with the Chief Minister and the Lieutenant Governor. Within the MCD there are "39 committees... [t]hese include a Standing Committee, 12 Wards Committees, a Rural Areas Committee, an Education Committee, 13 Special Committees and 11 Ad-hoc Committees" (Mathur, *et al*., 2006: 23). The Legislative Assembly also has a set of thematic committees or House Committees who have monitoring and oversight responsibilities. They meet a few times a month and summon officials to report on projects and programmes. Bizarrely the "thematic classification of House Committees does not correspond to the various [MCD] Departments" (Tawa Lama-Rewal, 2008: 8). The standing committees are led by elected officials who are responsible for appointment and transfer of staff within the MCD. The councillors are also expected to establish ward committees and to be responsible to and for their constituencies.

The administrative side of the MCD is led by a Commissioner who is appointed by the Central Government and governs the nine districts and 27 sub-divisions of the city. The MCD together with the legislative assembly control a wide range of service providers, such as the water and electricity boards, to Delhi residents. However, the Union Government, through its agencies, is responsible for some key mandates and functions such as the police, law and order and land. One of the most important agencies is the Delhi Development Authority (DDA), which is an appointed and not an elected body and whose Chairman is the Lieutenant Governor of Delhi and reports to the Union

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directly by the federal government; the President of India appoints an Administrator or Lieutenant-Governor for each territory."

Ministry of Urban Development. This body is responsible for all urban planning and public housing, land, land management and acquisition but has no authority over roads or infrastructure, which sit with the MCD and its boards.

At the time of the Sealings Case, the MCD shared administration of the NCT with two other local authorities: the New Delhi Municipal Council (NDMC) and Delhi Cantonment, each of which administers a different geographical area of Delhi (see Figure 9). The Delhi Cantonment areas are spaces that are owned and administered by the Indian military and thus do not have a great deal to do with the administration and governance of the rest of the state/city. The New Delhi Municipal Council (NDMC) lies in the heart of Delhi and is often called Lutyen's Delhi (referring to the colonial planner who designed the area) or New Delhi, and hosts much of the City's and country's most powerful institutions (NCT, 2006: 79) and is administered by a Central Government appointed chairperson. All of which mean that in order to do anything in Delhi requires the co-operation of three spheres of government, numerous bodies of elected officials and any number of boards and agencies.

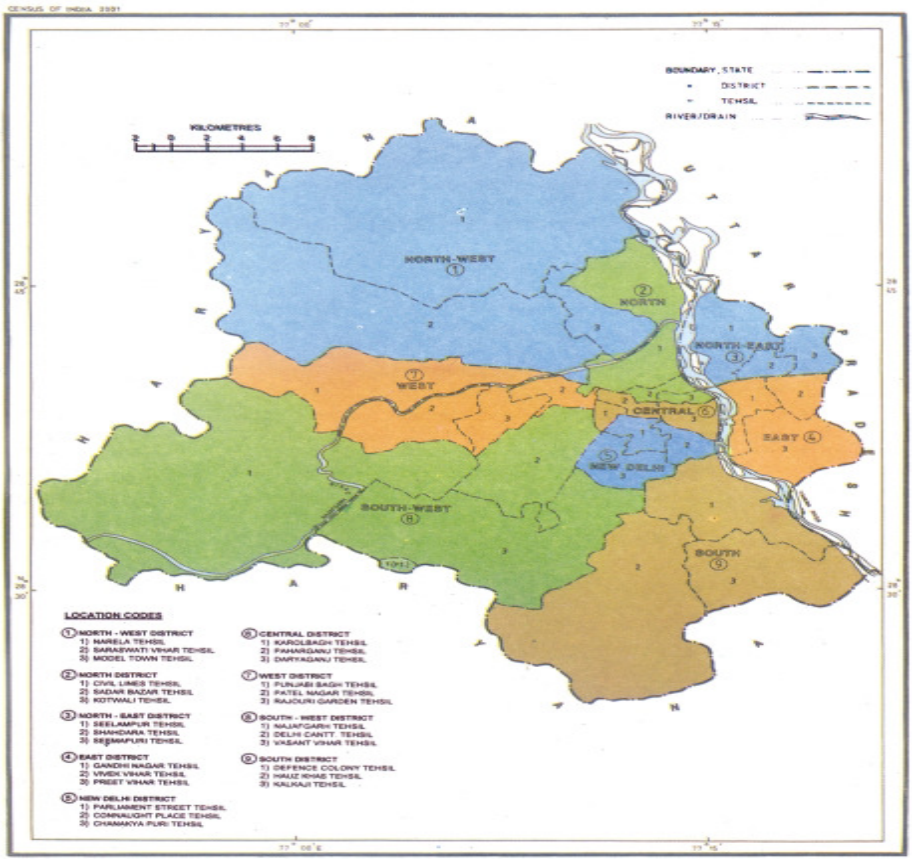


Figure 9: The National Capital Territory of Delhi[36]

[36] Source: http://delhi.gov.in/wps/wcm/connect/doit/Delhi+Govt/Delhi+Home accessed 12.07.2011

4.2.2 Johannesburg: a much simpler institutional structure

By comparison, the City of Johannesburg (CoJ/the City) government is extremely simple. The City is led by the Executive Mayor who is elected from among the 248 city councillors. The Council is in turn constituted of 124 ward councillors and the same number of proportional representative councillors (PR councillors). Ward councillors are directly elected by their constituencies, whereas PR councillors represent their political party and are ranked on a party list. Both types of councillors have similar responsibilities at the council level and can be elected to the Mayoral Executive Committee (MEC) which holds executive responsibility and provides regular reports to the council. The MEC, who reports directly to the Mayor, comprises ten Councillors and is responsible for individual portfolios. The Council has a number of functions, including legislative and oversight responsibilities.

Councillors sit on Section 79 and Section 80 committees which have oversight roles over different departments and report to the council. Each committee monitors a council portfolio and may call departments, municipal entities and members of the mayoral committee to account. They do not, however, have any decision-making powers. There are also standing committees that are engaged only with council matters and have delegated decision-making powers relating specifically to the legislature. These are permanent committees that deal with council matters and include: petitions and public participation, municipal public accounts, audit, programming, ethics and rules.

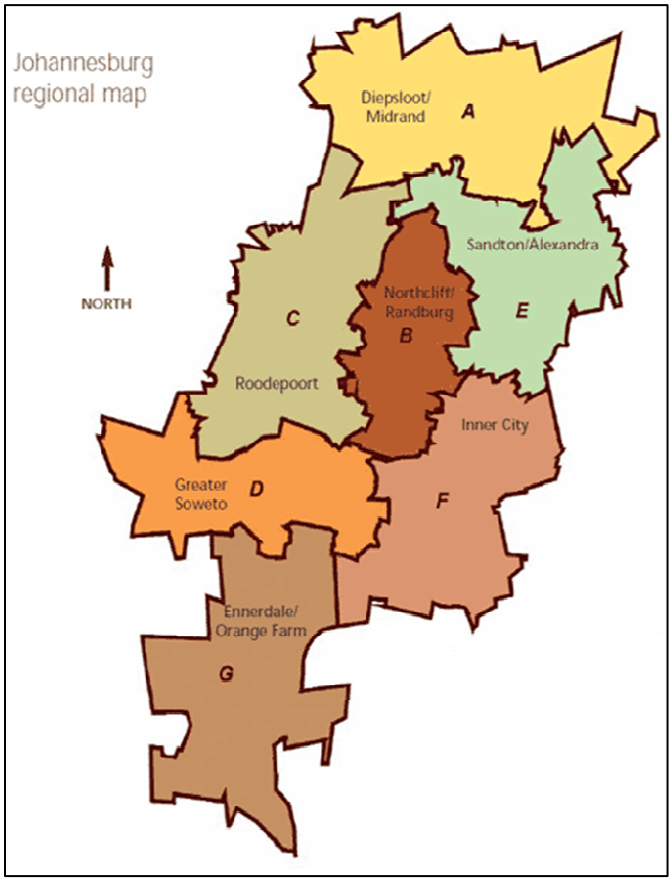


Figure 10: The Regions of the Johannesburg Metropolitan Municipality

At the ward level, councillors act as the mediators between the local government, local political parties and the constituencies. They "are responsible for building community involvement, with ward committees playing an important role in providing information on the needs and interests of local communities and ensuring that public voices are heard" (City of Johannesburg, 2012). Ward councillors establish and chair ward committees, comprised of ten local residents, with the support of PR councillors who can substitute for them if they are unable to attend.

From the administrative side the City is headed by the City Manager who sits in the office of the Executive Mayor. The City Manager is responsible for employing staff and co-ordinating them to implement all programmes approved by the council. The City is then further divided geographically into seven regions (see Figure 10) which are managed by seven Executive Directors, with offices located in their regions. The City Manager is supported by 13 executive directors, each of whom is in charge of a separate department. The 13 Departments are joined by a further 15 entities, owned by the City, and include City Power, Johannesburg Water, Jo'burg Theatre, Jo'burg Tourism Company and City Parks. Municipal-owned entities provide basic services to all communities such as electricity, water and sanitation for all households; installing storm water systems; providing refuse removal services; fire fighting; health services; and taking decisions around land use.

4.2.3 Ward Committees: a site for the people in Delhi and Johannesburg?

As mentioned, both Delhi and Johannesburg have ward systems of representative democracy. Ideally, in such systems, citizens should be able to access their elected officials and have their issues heard and represented within their cities' decision-making structures. However, in both contexts these forms of representation are generally inaccessible and profoundly dysfunctional, the following section explores some of the reasons why this is the case.

Challenges of representation

In Delhi, there are a number of concerns around wards and councillor (known as corporators) representation. The councillor system in Delhi is a relatively new addition to urban government and was a result of the 73rd and 74th Constitutional Amendments of 1992 that provided for the decentralisation of power and the establishment of local democratic and representative structures, including ward committees (Tawa Lama-Rewal, 2007). Technically, ward committees in Delhi should represent 1-3 wards and should be constituted of ward councillors and MLAs as ex-officio members. Moreover, ward committees should hold meetings at which local people can express their needs. However, according to Professor Sachin Chaudry of the Institute of Public Administration in Delhi, in many parts of India ward committees only exist on paper (Pers. Comm., 2010). Where they do exist, they are often controlled by the MLAs and are generally limited spaces of engagement for constituents. Studies conducted by Tawa Lama-Rewal (2007: 6) expose a further limitation for participation as ward "committees do not include representatives of civil society, but only the councillors selected from the wards in the Zone, and representatives of the various municipal departments".

The sheer scale of the population adds a further dimension of difficulty to the intended representative process. In 2001 Delhi was estimated to have a population of over 14 million people (although some estimates put it as high as 19 million) and 230 elected officials, each of whom was responsible for anywhere between 50 000-70 000 residents (NCT, 2006) and Tawa Lama-Rewal, (2007) has calculated the figure as 73 264 people in each ward based on the 2001 Census. Since the ward is the smallest representative unit within Delhi's governance system, the ability of a councillor to actually

hear all of the voices within his/her ward and to respond was extremely limited and according to Chakrabarti (2008; 99) “In many neighbourhoods, especially in higher-income areas, residents do not even know their local municipal councillor”.

Johannesburg, although a much smaller city, with a population of only 3.8 million people does not suffer from the same ratios of representativity or their associated problems. Benit-Gbaffou (2008: 5), mentions that there are about 15 000 registered voters per elected councillor. However, despite the far more manageable ratio the participatory and representative mechanisms within the city have also been seen as failing (Benit-Gbaffou, 2008). The problem is not in the existence of ward committees or meetings as is the case in many parts of India, and in a 2005 study it was reported that ward committee meetings were generally taking place and were most often run by the relevant councillor (Planact, 2005). However, attendance at these meetings, membership and retention were generally very low. Ward committees have also been constrained by councillors wishing to maintain power and control and have refused to allow ward committees to have portfolio meetings without them. As a result, meetings and engagements between ward committees and residents are infrequent and when they are held, they are large general community meetings, which have to address a wide-range of issues (Planact, 2005).

Moreover, the political structure of party politics and the dominance of the ANC within local structures creates, as Winkler (2011: 9) puts it, “A centralized approach to policy making”, and “a dominant party system [that] rewards loyalty to the party above all [else]”. Benit-Gbaffou, (2008:11) adds “The limited accountability of ward councillors to constituencies, due to the municipal structure itself and to the electoral system, as well as (to a lesser extent) the novelty of the whole ward system as only partially understood and used by residents”. Accountability then tends to flow toward party structures and not to residents, regardless of established ward committee structures (Friedman 2001; Heller 2001; Bond 2008). Pieterse thinks “that the transformative potential of these [participatory] instruments is real, but is being squeezed out by the imperatives of stability, technical predictability and… the vicissitudes of interparty and intraparty politics also seem to weaken robust political debate ...” (2006: 287-288). The end result, and one which may explain the lack of consistent attendance at ward committee meetings, is that residents do not engage with ward committees as they are seen as puppets of the ruling party rather than representatives of citizens’ needs (Ballard 2008; Piper and Deacon 2008; Meth, 2010). A later section will briefly describe some of the other modes of engagement that communities have constructed in order to represent their needs to those in power.

The limited power of councillors: unable and unwilling

Aside from issues of accessibility and participation there are problems with the actual ward system and the ability of elected representatives to take their matters to the higher levels of government and influence the executive. Benit-Gbaffou (2007 and 2008) argues that the limitations of councillors’ power within the CoJ, is due “to a strong centralisation of decision-making and policy orientation (which also allows one-party domination to prevail)” (Benit-Gbaffou, 2008:11). Mattes (2002: 25) sees

the inability of councillors to respond to local need as a reflection of a wider national politics of centralism:

> "Over the past five years, this constitutional and electoral landscape has resulted in several worrisome tendencies. First of all, there has been a trend toward centralism within the ANC. National party structures have increasingly extended their powers at the provincial and local levels; candidates for provincial premierships and local mayoralties are now nominated by a central committee rather than by provincial or local branches. Several provincial party structures have simply been dissolved and reformed by the national party, ostensibly because of "disunity" or "ill-discipline," but critics have viewed these actions as attempts to head off grassroots movements critical of the president. The national party machinery has also deposed several provincial premiers, some of whom have been popular leaders widely seen as future challengers for party leadership".

Notwithstanding the political landscape, the structure of the council does not encourage or really allow for participation and the reflection of constituencies' needs to the council. As mentioned in the previous section, the City has numerous standing committees, which are thematic rather than geographic and headed by members of the Mayoral Committees. They have no decision-making or policy-making ability but deal to some degree with oversight, implementation and the day-to-day running of projects that fall under their thematic area (Benit-Gbaffou, 2007). Due to this rather unwieldy structure, councillors may sit on committees that have little or no bearing on their constituencies whilst not being able to access committees, which have direct relevance for their communities.

There are a few further issues, which ensure the powerlessness of councillors both within council and at the community level. As previously mentioned there are two types of councillors: ward councillors and PR councillors. PR councillors are appointed by their political party and according to the Paralegal Advice Handbook, "The party can remove a PR councillor at any time, and replace her or him with someone else" (Black Sash and ETU, 2008: webpage). Pieterse (2006: 295) cautions that the SA system of proportional representation threatens the potential construction of a more democratic city when it is combined with the electoral dominance of the African National Congress (ANC):

> "The human rights-based South African Constitution and the local government dispensation provide a strong footing for the emergence of participatory, radical democracy in South African cities. However, this is not nearly enough, not least because of the incentives of the proportional electoral system in a context where the African National Congress party dominates the political landscape. The formula seems to breed party loyalty and political intolerance more than citizen responsiveness".

Unlike Johannesburg's elected representatives, Delhi's councillors and MLAs are not entirely dependent on council disbursements and have access to significant budgets, which they can use for their constituencies (Chakrabarti, 2008). However, despite this financial control, Tawa Lama-Rewal has observed that "Delhi is characterised by the fact that the city has long been ruled by bureaucrats" (2008: 6) and councillors apparently constantly struggle to assert their authority over the officials who decide whether to implement the councillors' requests or not. This is in part because councillors are a relatively new addition to Delhi's local government and there is a strong sentiment that the MCD has historically functioned perfectly well without an elected wing. Given the councillors' very limited powers, they can and do resort to using their "relationship with higher placed party members to threaten officials with transfer" to dead-end jobs or demotion in order to leverage responses from the bureaucrats of the MCD (Tawa Lama-Rewal, 2008: 8).

Within the MCD, the councillors are also engaged in a "turf" war with their MLAs. The Speaker of the Assembly nominates 15 MLAs to sit on the MCD but they are ex-officio members and cannot vote, therefore the MLAs are generally unable to represent their constituencies at the local level. The situation is further compounded by the party politics involved and Tawa Lama-Rewal cites the situation between MLAs and elected councillors as "Individually, the collaboration between MLAs and councillors catering to the same territory appears to be the exception: If they belong to different parties, they will clash at the party level; if they belong to the same party, they will clash at the individual level…" (2008:8) as politicians vie for power within the same party.

4.2.4 Experiences of exclusion from city-making processes

The lack of representation and engagement as well as the institutional challenges has meant that many citizens and residents are unable to participate in city-making activities in Delhi and Johannesburg. In the Sealings and Olivia Road Cases, three of the main actors, the RWAs, the San Jose residents and the traders, had experiences of being excluded from city making processes, although at vastly different scales. The San Jose residents had attempted to participate in the CoJ's Inner City Regeneration Scheme through the Bad Buildings Programme (BBP) but were eventually excluded from the process and then evicted—which will be discussed in detail slightly later in this chapter). In Delhi, it would seem that most citizens had been excluded from the major city-making process, which was the design of the city's Master Plan. By the time of the Sealings Case, most litigants had experienced two masterplanning processes: the 2001 Master Plan and the Delhi 2021 Master Plan. The Delhi 2021 Master Plan was developed in two parts: the initial stage preceded the Sealings Case and in many ways contributed to it; the second part followed the SCI sealings decision and was heavily influenced by the case and will be explored in later chapters.

The Delhi Master Plan is the overarching legislation governing spatial development within Delhi and declares what activities can take place, where and in what manner. It defines land-use, height restrictions and is intended to guide development in the city for a 20-year period, after which it is revised and a new plan is promulgated. At the time of the trial in 2006, the city was working under the

Master Plan 2001 that had been developed for the period 1981-2001, although the plan had only been passed and come into effect in 1990 (Mahashabdey, DDA's Director of Masterplanning, Pers. Comm., 2010). By 2001 a new Master Plan was due and the relevant authority, in this case the DDA, had begun work on drafting Master Plan 2021 using many of the same methods that they had utilised in the design of previous Master Plans. Mahashabdey remembered:

> *'Actually… a lot of information was available with various departments. So we followed an approach: we constituted 12 sub-groups each group dealing with specific aspect of master plan like residential aspect, commercial, industries, transportation and whichever experts are available in the field and they were all got into that.'* (Mahashabdey, Pers. Comm., 2010).

AK Jain who headed up the masterplanning unit at the DDA provides a similar account:

> *'So, in 2003 this work [developing the new Master Plan] was started; again most of the planners and talented people and other people were taken into the DDA committees for various subjects, like environment. There was a committee on environment, committee on transportation, committee on housing, committee on land use, [and] committee on infrastructure ... various committees where all the concerned departments [and] concerned experts were involved. And then this was put into a state of a draft master plan and it was notified in 2005 inviting the objection and suggestions from the public'* (Pers. Comm., 2010).

According to Dhillon, also of the DDA, a sample survey of randomly chosen areas was undertaken, using a standardised questionnaire.[37] The questions concerned issues of service delivery and asked what people thought was still needed. The questionnaire was directed at the head of the household, generally a man. According to Dhillon this is because men have '*awareness more than women'* as women are considered to be the homemakers and less engaged with the city (Pers. Comm., 2010).

Once the Master Plan had been prepared, it was put up in various places, e.g. the DDA municipal offices and sub-branches. The local Hindi and English papers also publicised where the draft Master Plan was available for viewing. Objections, comments and suggestions were submitted to the DDA in writing. According to statutory guidelines, all comments had to have the name and address of the individual/group objecting. Once all of the comments were received, certain objectors were then invited to present their comments to a hearing comprised of a panel of 15 people, who were experts and elected or government officials. The panel questioned the individual or group representative about their comment/objection and generally requested further details or clarification. After the discussion, the objector was not informed of the decision and was not provided with any feedback from the panel. Once all of the objections had been heard, they were summarised and together with the outcome of the hearing and sent to the DDA for inclusion in the Master Plan.

[37] I asked for a copy and was refused.

Aside from the panel, the DDA also claimed to have had a series of public engagements with the Delhi residents. However, most of the councillors and RWAs who were interviewed said that they had never been invited to such meetings. Romy Thavan of the Defense Colony RWA said: *'I don't remember that stage at all. I don't know, if they say they went through it, [but] not that we are aware of'*. One of the RWAs said that they had been invited to a community meeting but had not been told that it concerned the Master Plan,

> *'… one day I got a call that some politician and MPs are coming for a meeting for DDA work so you are requested to please come and meet them. Give your suggestions. We go there without preparation. We actually don't know. They called all the RWA people area-wise then committee came in, for your suggestion on DDA. They don't, they [never] told us that it is on master plan presentation.* (Agrawal, URJA representative, Pers. Comm., 2011)

Agrawal, of the United Residents Joint Action of Delhi (URJA)**,** a confederation of RWAs, also suggests that from what he heard from his fellow RWAs his experience of participation was more than most residents.

There were very limited opportunities for residents and citizens to engage with the local government about the Master Plan and when engagement was facilitated, it was done in an extremely intimidating manner and without any real feedback or communication. Engagement with the Delhi Master Plan was also dependent on the ability of people to be able to read and understand the technical language of the material, which would restrict it to the educated and literate few. Public meetings and participatory fora around the Master Plan were clearly limited, top-down and disempowering for the average Delhi resident. Section 4.3.3 will discuss similar exclusions for poorer inner-city residents in Johannesburg.

4.3 Contesting or consolidating elite capture of democracy

The previous section has demonstrated some of the structural and institutional issues that faced urban actors, including the litigants of the two cases. The following section looks at how urban governance takes place through a range of relationships, coalitions and networks and shows how they differ substantially for each group. It begins by looking at Urban Regimes and Growth Machine approaches in order to unpack the nature of governance in Delhi and Johannesburg and demonstrates how these coalitions are engaged in hegemonic projects, following which it details the nature of the growth regime in Johannesburg, which drove the world class city vision, and catalysed the San Jose eviction. The section then compares the coalition in Johannesburg to the middle-class/Supreme Court alliance and shared hegemonic vision that had been in place in Delhi, which led to the Sealings Case. However, the section also explores the allegations of converging interests where judges have been accused of supporting and pursuing the Sealings Case in order to benefit themselves and their connections

4.3.1 Urban Regimes and Growth Machines: ways of understanding governance

The Urban Regime and Growth Machine approaches posit that there are networks and coalitions of groups and individuals, who sit inside and outside of the state and are able to influence and shape public policy and decision-making. I have briefly explored both of them to see which one is more applicable to the situations in Delhi and Johannesburg.

In these conceptualisations of governance, the private and public sector are essential to governance as both "possess resources needed to govern - legitimacy and policy-making authority, for example, in the case of government, and capital that generates jobs, tax revenues, and financing, in the case of business" (Mossberger and Stoker, 2001: 812). Despite sharing this basic premise, the two approaches provide different theoretical ways of understanding the nature and intention of these relationships.

Box 3: Mossberger and Stoker's Key Aspects of Urban Regimes

1. A regime is "an informal yet relatively stable group *with access to institutional resources* that enable it to have a sustained role in making governing decisions" (Stone 1989, 4). Collaboration is achieved not only through formal institutions but also through informal networks.
2. Regimes bridge the divide between popular control of government and private control of economic resources. Beyond the inclusion of local government and businesses, participants in regimes may vary, including neighbourhood organizations or organizations representing middle-class African-Americans, for example.
3. Cooperation is not taken as a given but has to be achieved. Regimes cannot be assumed to exist in all cities (see also DeLeon 1992; Orr and Stoker 1994).
4. Regimes are relatively stable arrangements that can span a number of administrations. For example, Stone (1989) discussed the development regime in Atlanta from 1946 to 1988. Regime change is therefore not synonymous with changes in city administrations. Whether electoral turnover represents regime change is an empirical question.
5. Distinctive policy agendas can be identified (i.e. development regimes or middle-class progressive regimes) that are influenced by the participants in the governing coalition, the nature of the relationship between participants, and the resources they bring to the coalition (Stone 1993)
6. Consensus is formed on the basis of interaction and the structuring of resources. This is achieved through selective incentives and small opportunities.
7. Regimes may not feature complete agreement over beliefs and values, but a history of collaboration would tend to produce consensus over policy.

(Source: Mossberger and Stoker, 2001: 813-814)

According to Mossberger and Stoker, (2001: 829), Urban Regimes have some core features (see Box 3) which include "long-standing co-operation" and "identifiable policy agendas" that can be related to the composition of the participants in the coalition. Urban Regimes persist despite changes in the main actors, players or stakeholders, which means that certain goals and policy decisions are maintained even if different parties come into or go out of power (Dowding, 2001). Stone identified different types of urban regimes, namely:

- Maintenance or caretaker regimes, which focus on routine service delivery and low taxes;
- Development regimes that are concerned with changing land use to promote growth;

- Middle-class progressive regimes, which include aims such as environmental protection, historic preservation, affordable housing, and linkage funds;
- And, lower class opportunity expansion regimes that emphasize human investment policy and widened access to employment and ownership" (quoted in Mossberger and Stoker, 2001: 813).

Development Regimes are considered the most dominant and stable of the regimes that have been identified. Apparently they survive because they normalise the sense that it is through private sector growth that cities will flourish, thus generation after generation of political leaders align themselves "… for the good of the city (and their own electoral survival and perceived success as mayor), with business" and their projects (Dowding (2001: 12).

According to Molotch (1976), Growth Machines are driven by a coalition of political groups, land owning elites and corporations who "are oriented toward exchange values" (Rodgers, 2009: 49) and are in opposition to residents (which is a fairly ambiguous category) whose interests in land lie in its "use-value", i.e., as a space for social life. The coalitions undertake actions to ensure that their properties gain value when development takes place. At the core of the Growth Machine are structural speculators who are responsible for driving growth as they:

> "… do not merely estimate future land values, but intervene in the wider sphere of decision-making, regulation, and investment outside of their direct control yet affecting their holdings. They seek to produce a particular set of conditions and relationships to increase the value of their property. These place entrepreneurs, often embodied by more complex organizations, make specific and targeted efforts at influencing an array of relevant decision-makers. At the same time, these modern rentiers are most likely to form the core of broader political coalitions seeking to encourage a more general objective: urban growth" (Rodgers, 2009: 50).

Development Regimes and Growth Machines favour development and see a landed middle-class and corporate investment as the tools by which to ensure urban growth, which leads to groups of interested parties developing policies, urban "brands" and spatial projects that support their project (Imbroscio, 1997). The concern around regimes and growth is that those least able to contribute or leverage political support also have the smallest capacity to influence and change policy or to effectively contribute and benefit from a specific regime. Thus, the ultimate effect of Urban Regimes and Growth Machines is the ability of a small minority to control a large amount of resources and to influence urban policy and decision-making in such a way as to ensure their continued and sustained use over time. They are able to accomplish these ends whilst making it appear as if their activities were being undertaken for the good of all urban residents and make the idea of growth seem consistently desirable.

These projects are also able to “naturalize[s] growth goals” to the point that they become simply “… a background assumption of civic life” (Molotch, 1999: 316). Logan and Molotch (1987) discuss how the groups engaged in trying to push for higher exchange values of land are able to ensure “buy-in” or the lessening of resistance by local communities through using what Boyle (1999:55) calls Urban Propaganda Projects. These are “value-free projects” whereby large capital investments in the city are presented as being able to improve the quality of life of all residents, city-users and corporate entities. The general argument is that through investment the tax base is improved; and thus more welfare, utilities and better public facilities are possible. Alternatively, approval is ensured through the manipulation of sources of “civic pride” and local identity by the coalitions who appropriates and then channels them into “activities that are consistent with growth goals” (Logan and Molotch, 1987: 62). Similarly, work on Urban Regimes demonstrates how towns and cities have undertaken projects that have attempted to differentiate and promote themselves to encourage a sense of local pride and ‘boosterism’ (Hiller, 2000: 450).

Some scholars have expressed concern around how policy and, in turn, resources are heavily skewed towards a small and non-representative portion of urban actors who share the specific agenda of urban growth with the local authorities (Collinge and Hall, 1997). These agendas pay little real attention to participation and merely offer lip service to the commitments that the state has made to participatory governance (Dowding, 2001). As a result these Urban Regimes have “regressive distributional effects” and reinforce and extend an extreme level of material deprivation among certain citizens” (Imbroscio, 1997: 10). It can also be seen how development regimes could be closely associated with competitive city projects such as that of the world class city.

Development Regimes, Growth Machines and hegemonic projects

Despite a number of similarities between Development Regimes and Growth Machines, I would argue that in the Indian and South African cases the Urban Regime approach has significantly greater explanatory power. The Growth Machine understands coalitions to be comprised of a strong affiliation between place entrepreneurs, the local media, local politicians and utilities (Rodgers, 2009) but provides very little room for the empirical reality that social movements and citizen groups are, according to theorists such as Cornwall (2002), inventing spaces for themselves in which they insert their participation into local governance. In addition, the role of alternative spaces and institutions, such as the courts, are not easily applied to the concept.

Urban regimes include a far broader cross-section of society than the Growth Machine model and the motivation for colluding has broader (and possibly deeper) motivations, than just growth (Kennedy, 2009). According to Dowding (2001: 8):

> ‘”Regime analysis also places great weight upon development as the major urban issue. However, it is not as deterministic in its approach to urban politics as the growth machine model because it places great weight upon the need for politicians to develop coalitions of interests in order to promote development. These

> coalitions are not simply coalitions of elected politicians in loose-knit party support, but coalitions of the elected, business and other pressure organizations, and may include important bureaucratic and professional groups. In recognizing the broader base of potential coalition partners it has expanded the range of possible coalitions to encompass regimes which are not bound together by growth issues".

Furthermore, according to Kasner (1982: 185), urban regimes can be seen as a "set of principles, rules, norms, and decision-making procedures around which actors' expectations converge in a given issue area". In addition, "over time regimes tend to subdue differences and reshape the outlook of participants" (Mossberger and Stoker, 2001: 813). These characteristics are significantly reminiscent of hegemonic practices which seek to institute rules and norms and which are able to subvert contestation and bring a range of dissenting views into the fold. I would argue that urban regimes are attempting to actualise a specific urban vision through policy, the distribution of taxes, by-laws and incentives. Development Regimes and their projects are also justified in terms of how growth and development will benefit the larger urban community and utilise market-based logics to gain acceptance and support.

4.3.2 The Hegemony of world class cities

Mega-event studies and theories have understood the close ties between development coalitions, 'civic boosterism' and hegemonic projects (Ley and Olds, 1988; Hiller, 2000; Waitt, 2001). Waitt (2001:249) observed: "hallmark events are an instrument of hegemonic power, conceived to generate feelings of enthusiasm for community and national pride". However, what has not been sufficiently considered is that other kinds of urban projects can be profoundly hegemonic endeavours. Analysing urban development through a hegemonic lens, allowed me to understand how the values of elite groups (development coalitions or groups of aligned interests) are naturalised and made manifest on the cityscape. Urban regeneration and urban re-shaping can be guided by socio-spatial visions of what spaces should look like. Once these visions are embedded as normal and desirable, a range of urban actors but especially those in decision-making positions, i.e., planners, municipal officials and politicians, internalise the image and propel policy, practise, and investment to make the vision into reality (Ghertner, 2011).

This section unpacks the idea of world class cities as hegemonic and describes how a development coalition in Johannesburg, constituted of the City of Johannesburg and a group of inner-city actors, and the convergence of interests of Delhi RWAs, and the Supreme Court of India (SCI) drove projects and politics in order to embed the world class city vision onto their landscapes.

The world class city: an elite vision and value

A "world class city" is commonly seen as an economic and development driven model of urban growth, and falls under the general banner of urban competitiveness in which cities vie with each

other to attract and retain international capital (Turok, 2004). According to Huchzermeyer (2011: 47) "This requires investment in both a high level of transport and communications infrastructure and high-quality living environments that ensure the attraction and retention of appropriately skilled people". Competitive cities seek to function more like large firms than governments and utilise neo-liberal approaches of cost-recovery models, efficiency and centralised decision-making. Spatially, competitive cities are characterised by the prioritisation of certain spaces at the expense of others and the investment into mega-projects and mega-events (Huchzermeyer, 2011). In such environments, local governments "devote scarce public resources to economic growth through global investment" and turn "attention away from the environment, social welfare and other social concerns" (Douglass, 2002: 58).

Although competitive and world class cities are primarily promoted as economic models, Paul (2004) argues that what is at work is actually a larger hegemonic project in which "the dreams of a particular social group advance[e] a particular political ideology" and:

> "… urban elites promote a particular set of values and goals through an ''international'' or ''globally'' themed built environment and spectacle. In offering a broad vision for the city's physical, economic and even moral development, world city projects are in their essence the pursuit of an ideal, a vision of the city's identity as much as its levels of capital investment, employment or income" (Paul, 2004: 576).

In such a conceptualisation, a world class city is a hegemonic project, in which a specific social, cultural and economic vision in the interests of an elite is promoted and normalised in order to gain widespread acceptance. It is through such a project that a city is spatially configured and reconfigured to not only entice capital but also to also promise a certain kind of home for a certain set of citizens. These citizens wish to live in an internationalised and globalised urban space that offers all of the amenities and features of a London, Paris or Tokyo. World class cities also "establish clear aesthetic criteria for self-evaluation; that is, a socially-produced aesthetic". The aesthetic norms produce a set of binaries instituting and embedding what is beautiful/ugly, visible/invisible, legal/illegal and thus normalises what is and is not acceptable in a world class city (Ghertner, 2011; no page number). There is thus the promotion of a set of values based on how the city should look, who should live in it and what activities should take place there.

Huchzermeyer (2011: 52) states that "In the 'developing' world, where city decision-makers' aspirations to urban competitiveness through modernity are constantly challenged by the visual presence of informal trade and informal settlements, social control is translated into mass evictions and demolitions." Slums, informal trades, illegal or off-register activities are not desirable for cities that are attempting to join the modern globalised competition for capital and highly skilled people. The normative aesthetic requires that these people and activities are moved out of sight to the peripheries of cities or stopped altogether. World class cities are therefore modern, clean, organised, and home to

urbane, educated and middle-class citizens. It is this vision that elite constituencies drive and which they present as being in the best interests of all residents. According to Paul (2009:575),

> "Those behind such projects are able to wield political power through them by imposing their vision upon space (Zukin, 1997) and cultivating it in the minds and actions of urban residents, increasingly a vision of cosmopolitan values, global connectivity, and wealth embodied in transnational capital."

In such a hegemonic project there is limited, if any, space for confusion, poverty, disorder, or people and spaces that represent such things to the middle-classes (Bhan, 2009; Ghertner, 2011).

The two court cases were both part of these larger hegemonic projects to re-shape Johannesburg and Delhi into world class cities that attract international investment and cater for a skilled middle-class labour pool whilst pushing the poor and what is considered undesirable to the edges of the cities. However, these were not just economic projects but a way of the economic and political elite spatially reproducing their own visions of the world to ensure that their normative-spatial ideology was accepted by the wider group. In later sections, I will demonstrate the development of the world class city hegemonies in Johannesburg and Delhi, how they were evolved and, in turn, how they led to litigation. I also argue that Johannesburg was in the grip of a powerful coalition of actors who were dedicated to pursuing a world class city vision for the City, whereas in Delhi there was a strong alignment between the SCI and the RWAs to instil a similar vision but no evidence of a coalition or intentional network of groups and people.

4.3.3 Johannesburg's Development Regime driving a world class city hegemony

When looking at Box 3 and the definition of a development regime, Johannesburg seems to epitomise the type: there were clear networks and relationships between the private sector, politicians and city officials all of whom negotiated policies to drive a shared vision to "revive" the inner-city; create a functional inner-city property market and remove people from unsafe and unsanitary conditions. However, as CALS argued during the court case and as will be demonstrated, the underlying reasons had more to do with the desire for world class cityness. This vision required the eviction of the poor and marginalised from the inner-city to make it more planned, controlled and sanitised and thus more in keeping with the middle-class vision and aesthetic. It was these forces that over about five years evicted almost 67 000 people from their homes in the inner-city.[38]

The evolution of Johannesburg as a world class city

The Johannesburg inner-city has historically been the prime site of White, local, national and international capital within the municipality (Beavon, 2004; Bremner, 2000). However, by the mid-1990s, due to political, social and economic changes, which have been extensively dealt with elsewhere (Beall, *et al.*, 2000 and 2002; Bremner, 2000; Beavon, 2004; Murray, 2008 and 2011;

[38] Constitutional Court of South Africa, 2008: Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street Johannesburg, v City of Johannesburg *et al.*, 2008 Case CCT 24/07 ZACC 1 judgement.

Huchzermeyer, 2011), there were large numbers of people coming into the inner-city as residents and users and scores of buildings which were in massive debt to the CoJ. Many of these buildings were in poor condition and a number had no water, electricity or solid waste systems in place. Furthermore, a number of '*the owners left… just gave up their flats, [which] did create a management vacuum in the flats*…' (Miller, owner of Ithemba Property, Pers. Comm., 2010). In some buildings, management issues were due to the inexperience of new sectional title owners and in rare cases, building hijacking.[39] The City of Johannesburg at that time was also unable to cope with the situation in the inner-city as it was facing its own internal problems and

> '*between 1996 and 2000, that time was really spent in trying to sort out… political issues and … there was actually what I would call a political vacuum or political paralysis in relation to the Inner-city altogether*' (Fraser, key figure in inner-city development in Johannesburg, Pers. Comm., 2010).

The result was that the inner-city and its close surrounds were in decline with a degrading infrastructure, large urban migration, and at the city level an atmosphere of distrust between councillors and officials. In 1997, the situation was compounded by a serious financial crisis: years of rent boycotts, non-payment of rates and municipal taxes and financial mismanagement by the previous council meant that the CoJ was facing huge debt and arrears to the tune of some R130 million a month (Beall, *et al*., 2002).

The initial driving force behind inner-city regeneration was the private sector, which in this case included multi-national corporations with large property portfolios, building owners and small-scale landlords in partnership with the local government. These groups were keen not to have to write off their large capital investments in the inner-city (Gotz, Pers. Com., 2010) and had been involved in inner-city revitalisation attempts since 1992 when they established the Central Johannesburg Partnership (CJP) (Beall, *et al*., 2002). The CJP was an initiative driven by a collection of inner-city property owners and developers, the City of Johannesburg and, to a very small extent, inner-city residents. In 1995, the drive towards inner-city regeneration intensified as the CoJ attempted to put in place a turn-around strategy called the *Inner-city Ivukile*. One of the intentions of this strategy was to establish a business coalition consisting of organisations that were already members of the CJP, such as the Johannesburg Chamber of Commerce and Industry, the Johannesburgse Afrikaanse Sakekamer and the South African Property Owner's Association (SAPOA). The aim of this business coalition was to provide a space of interaction and engagement between the business community and the public sector.[40]

[39] Building hijacking is the process whereby either through persuasion or coercion individuals or syndicates convinced tenants to stop paying rent to the rightful owner and to start paying rent to them instead. Hijackers rarely pass on the monies paid for services to the relevant utilities and generally do not look after the condition of the building, often leading to the degradation and dilapidation of the building.

[40] City of Johannesburg, 1995: *Inner-city Ivukile! Johannesburg Inner-city Urban Renewal Strategy*, May 1995 and The Johannesburg Inner-city Coalition, 1995: *Blueprint for Johannesburg*, Johannesburg

The coalition did far more than that and in 1996 they presented the Gauteng Provincial Government, the Johannesburg Transitional Metropolitan Council (which was the municipal authority at the time), and the Johannesburg Inner-city Community Forum (a civil society body) with a proposal "to develop a strategic, economic vision and action plan for the city". The proposal was in principle agreed to and accepted by the council. As a result, the various partners embarked on a "visioning" process around the inner-city, which resulted in the *Golden Heartbeat of Africa* policy document. Graeme Reid, who was the head of the first Inner-city Office (ICO), noted that "Although the vision can be criticized for its broadness, and its failure to articulate a distinctive advantage of the inner-city, the process served to create and cement a partnership for urban renewal, particularly between business and government that had not existed before" (2012: 158).

Subsequently the City, in conversation with the private sector, developed a range of strategies, such as the *Gateway to Africa* and *Igoli 2030* to guide urban development in Johannesburg (Bremner, 2000; Preston, 2006). Although each one had slightly different focus they all held to the same basic principles: portraying Johannesburg as the "Tokyo or New York of Africa" (Wright, 1992: 13). The vision was epitomised in the *Igoli 2030* strategy:

> *'By 2030 Johannesburg will be a world class city with service deliverables and efficiencies that meet world best practice. Its economy and labour force will specialise in the service sector and will be strongly outwardly oriented such that the City economy operates on a global scale. The result of this competitive behaviour will be strong economic growth that will drive up City tax revenue, private sector profits and individual disposable income levels such that the standard of living and quality of life of all the City's inhabitants will increase in a sustainable manner'.*[41]

Beall, *et al*., (2002) argue that the City's strategies, mentioned above, chose to focus on "improving the economic viability of central Johannesburg". According to Tomlinson *et al.* (1995), the CoJ strategy and policy documents emphasised property-led development and marketed the city as a site of international cultural and sporting events. They followed the precepts that "the world is agreed on a common 'vision' for a world-class city: all citizens should have an increased standard of living and improved quality of life" based on the idea that "to achieve economic growth is the only sustainable road to increased quality of life" (Lowitt, 2002: 7). The City of Johannesburg saw the attainment of world class cityness as a strategy that would bring investment and, in turn, ensure an improved standard of living for all of its citizens, increase its rates base and guarantee that the city could compete on a global stage. However, the cost was acknowledged by some and "a senior strategist for the Johannesburg municipality has suggested that serving the inner-city areas, which are now largely black and poor, is a lower priority than turning Johannesburg into a 'world class city'" (quoted in Friedman, 2005: 761). Thus, the CoJ's response to inner-city regeneration and the implementation of the world class city vision was a commercial response which required the eviction of lower-income

[41] GJMC, 2002: *Joburg 2030*, Greater Johannesburg Metropolitan Council, Johannesburg

residents in order to construct a viable property market within the inner-city (Beall, *et al.*, 2000 and 2002). It also clearly had all of the hallmarks of development regime driven by a growth coalition.

The Bad/Better Buildings Programme's role in the world class city

In 1998, the world class city trajectory of the CJP and the CoJ eventually birthed the Inner City Office (ICO) as the administrative unit that could take care of the inner-city and further their vision. A year later, they developed the Bad Buildings Programme (BBP). The BBP had a number of formulations between 1999 and 2002 but it basically encapsulated the property-led and market-based vision of urban renewal: the idea was that in order to regenerate the Johannesburg inner-city there would have to be a functional property market led by a partnership between the local authorities and the inner-city property owners and developers. Originally, the programme was workshopped with a number of partners in May 1999. The workshop's attendance register reveals that government officials, elected leaders and the private sector were present; however, there do not seem to have been any inner-city residents or civil society organisations present at the design workshop.[42]

By the early 2000s, the BBP moved to the Johannesburg Property Company (JPC) and renamed the Better Buildings Programme. At the JPC, it had its own dedicated team, headed by Geoff Mendelowitz, and a significant budget. It also enjoyed substantial political and institutional support and Sol Cowan, who was the ANC councillor with the inner-city portfolio, at the time, stated that the job of the councillors and the CJP was to make sure

> *"There was easy access to decision-makers, we opened doors… Well, I was one of them… the problem with council is so much red tape… we had a meeting with the mayor and the mayor instructed the officials to interact and involve themselves [with inner-city redevelopment]"* (Pers. Comm., 2010).

The programme intended that the City would take ownership of "bad" building through sale or expropriation in order to write off the arrears and offset the costs that the building owed the city. It would then on-sell the building to pre-selected private-sector developers who would refurbish the buildings and rent out the units. In short, the BBP was intended to meet the '*dual objectives of securing the whole or portion of the arrears and rejuvenation of the buildings in the inner-city*'.[43]

At the time, there was a clear discourse around the dangers that these buildings posed, which were used to justify the BBP and the eviction of the residents. According to the City of Johannesburg's website:

> *'A [bad] building is one that has deteriorated to such an extent that its market value is below the outstanding debt owed. Living conditions in the building have become extremely harmful to the occupants, with sewerage running down*

[42] GJMC, 1999: *Inner-city Office, Report on the Bad Buildings Programme Workshop*, 10th May 1999.
[43] Patel E, 1998: *Comment and Review on 'Proposed Policy on "bad" residential and other building areas in the Johannesburg inner-city*, prepared for the Greater Johannesburg Transitional Metropolitan Council, 9 November 1998.

> *stairways and garbage accumulating around the entrances. The buildings are usually controlled by slumlords, who overfill the flats, charge exorbitant rents and allow the buildings to become rundown… neglect to pay the rates over to the City, and electricity and water are terminated, further jeopardising the quality of life of the tenants'.*[44]

There was a fear that the buildings, due to their lack of sanitation, would result in illness and their poor condition would threaten residents' lives. In many ways these were not unfounded fears and the buildings certainly exhibited slum-like conditions, including a lack of running water and adequate sanitation (Satterthwaite, *et al*., 2007). Brian Miller of Ithemba Properties describes his experience of "Bad Buildings: '*I walked into the buildings and things moved under my feet, it's wonderful! I said; listen, one day when the plague breaks out in Joburg [because of the conditions in these buildings]. (Pers. Comm., 2010).* There was also the fear of fire and the deaths that could result:

> '*a lot of buildings look bad because they are covered in dirt and rubbish and faeces and G-d knows what else, but the real danger is fire danger. The real, real problem with an* inner-city *building is the ability of people to escape in the event of a fire'* (Vermaak, Lawyer for Moodie and Roberts who represented the CoJ, Pers. Comm., 2010).

Aside from the lack of water, sanitation and electricity, there was a further concern over the physical integrity of the buildings:

> *'What we found when we went into the basements*[45] *to check them out… urine has acid in it and it was leaching the lime out of the mortar in the concrete. So the structural stability of buildings was going to be effected' (*Povall, Lawyer for Moodie and Roberts who represented the CoJ, Pers. Comm., 2010).

Given the situation described above, the CoJ's project to rehabilitate the inner-city with the help of the private-sector property owners and developers was seen as perfectly justified. Thus, the world class city project and the BBP were presented as common-sensical approaches and solutions to the problems of inner-city dereliction from which all of Johannesburg residents would benefit.

4.3.4 Coalitions: who is in?

The following section traces how, as Imbruscio feared, the development coalition excluded poorer inner-city communities and civil society organisations from their discussions, plans and implementation of the Bad/Better Building Programme. It goes on to argue that these exclusions significantly contributed to the San Jose residents' decision to litigate, as they were not able to access

[44] Davie, L., 2004: 'Bad' buildings await better days" http://www.joburgnews.co.za/2004/nov/nov17_buildings.stm accessed 22.09.2011.

[45] Due to sewerage pumps no longer working either because they were electrical and the electricity had been cut off or because of lack of maintenance, basements, which was where all the sewerage pipes in the buildings led to, often filled with raw sewerage from the residents. The situation was compounded by a lack of refuse removal and many of the inner-city residents also used the basements as sites to dump their domestic waste.

and contribute to the policy-making processes or programmes that directly affected their lives in any other way.

Tracing the Bad/Better Buildings Programme

The private-sector developers, who were the potential new owners and who had significant influence in designing the programme, were able to demand that the buildings were empty before they were taken over. The CoJ agreed and said that they would evict the tenants before on-selling. According to some of the lawyers who were initially involved in the evictions, the commitment was made out of ignorance as there was a complete under-estimation of the inner-city population. Originally, it was thought that the BBP would involve the eviction of a few hundred people and early evictions in the inner-city saw people '*off the streets by nightfall'* (Povall, Pers. Comm., 2010). The programme thus was not designed to consider what would happen to people after the evictions:

> *'So there was this I think ad hoc type of thing. It [the BBP] was, it was reactive. It didn't have a long term vision, so it was this Better Building Project it was very good on paper. Take that buildings, get them vacant. So we moved the people then give these buildings to investors and upgrade the Inner-city. It's a good idea. But it became difficult to make it really work because there was no long term plan and vision as to what to do with the people'* (Brits, Director of the City of Johannesburg's Legal and Compliance Department, Pers. Comm., 2010).

There were, in fact, a number of problems with the BBP: the Provincial Department of Housing was supposed to institute a Transitional Housing programme to help accommodate the evicted residents:

> *'We had thought to try and introduce a decanting process, where what we wanted to do is say, okay, we will link this better buildings project to the transitional housing programme which had just been started… which intended to help people who would otherwise be on the streets… get some accommodation, training and skills so that they could then move up and then they would be able to get jobs and then be able to move into the new affordable housing developments… It's such a lovely theory isn't it? Firstly… there was never enough money for transitional housing and secondly, they [the Provincial Department of Housing] kind of abandoned the scheme'* (Reid, Pers. Comm., 2010).

An official at the Provincial Department verified the story and explained that the plans for the programme were called off after a new head of department came in and redirected provincial energy and resources to other programmes (Anonymous Provincial Housing Official, Pers. Comm., 2010). Simone (2004: 418) also noted that at the time "The complicity of some police officers and customs and immigration officials, as well as the enormous costs of continuous and targeted regulation, limit[ed] the efficacy of these interventions".

A further issue with the BBP was the lack of space given to representation of the people living in the inner-city. Beall, *et al.*, (2002: 110) argue that "[the bias towards the commercial] has worked against the interests of ordinary inner-city residents and has precipitated the view that "community" in the inner-city is dead". Leading up to the BBP, Harrison, the ex-CoJ City Manager, typified the municipality's attitude to the inner-city as '*quite crude in its approach'* and '*One could even say that it was quite militaristic. Even the ICO, the Inner-city Office, was staffed with people who had a safety and security background*' (Harrison, Pers. Comm., 2010). Thus, the overarching attitude was governed by two approaches, a commercial reinterpretation of the inner-city and a concern with safety and security, both of which had little space for engagement. Brits acknowledges this issue:

> *'[w]here we failed, was to have a mechanism for people to make their presentation, for people to come and talk to us. Whereas normally when you pay your bill in the normal course of events, you would get a notice before your water is or your service is cut. In this particular case, obviously not… But people didn't have access to going in and talk to someone and explaining their own particular circumstances'* (Brits, Pers. Comm., 2010).

This may be explained by the City's lack of experience in engaging with inner-city residents, where there are few functional ward structures, NGOs, *quangos* and so on. The City was also ill-equipped to engage with inner-city residents as it was not a coherent community and according to Tissington, who is a housing and human rights expert and had been working at CALS at the time, the officials just had '*no idea how to deal with residents*' (Tissington, Pers. Comm., 2010). In addition, many of the original housing activists had been subsumed into the City's official structures as councillors or officials (Fraser, Pers. Comm., 2010).

Excluded from the BBP

The inner-city residents were not only excluded from the design of the BBP, but also from participating in the programme. Before the case went to trial, the San Jose residents attempted to gain ownership of their building. They knew that eviction would be a probability at some point in the future due to the fact that they had been consistently harassed by the police and had previously been threatened with eviction. They were also well aware of the evictions that had been taking place throughout the inner-city. Therefore, they decided to proactively try and gain control of their building so that they would not be evicted and could secure their homes.

The residents initially approached the CoJ about ownership of their building. Through engagement with officials they were told that transfer of ownership would indeed be possible. However, after some time (the exact period is unclear):

> *'The City was liaising with us, they were sending letters to us and we [were] responding until they told us that they can't speak to us because we are individuals… they asked us to register a Section 21 company and only then would*

they be able to speak, they wanted to speak to a company not individuals' (Mahlobo, 2010, Pers. Comm.).

According to a letter dated October 2002, to Councillor Ralegoma, who was the Member of the Mayoral Council (MMC) for Public Safety at the time, the residents were told that if they registered as a Section 21 company, they would then '*be in line with the requirements towards securing ownership of the building…*'.[46] As such, the San Jose residents registered Sonke Financial Administrators as Section 21 company in January 2002 and stated on their documentation that their main functions would be '*building management, administration and all related aspects'*.[47] The residents understood that they would have to wait for the building to be transferred to the City and then they would be able to buy the building through the BBP using the provincial government's Institutional Subsidy. It would seem that the residents were reassured that this process would work and they would eventually own their building (Khetani, Pers. Comm., 2010). The Gauteng Department of Housing issued the residents with a G-Number, which is an acknowledgement of application for an Institutional Subsidy, on the 8th October 2002.[48] The acknowledgment seemed tacit support of the residents' application. This sense was reinforced by the fact that the provincial government paid the fees of an independent consultant, Innocent Gwisai, whose '*services will be made available to the Sonke Financial Administrators at any time they may require them*'[49] to support their application and subsequent work.

Although the province seems to have been supportive, they only had very limited authority since the BBP was hosted at the City level in the Johannesburg Property Company (JPC) at the time. The JPC, however, was not at all sympathetic to this project. Officials in charge of the BBP met with the San Jose residents and apparently told them,

> '*The City of Johannesburg as a whole has no agreement whatsoever with Sonke Financial Administrators concerning San Jose building or any other building in the area of its jurisdiction*' and furthermore, '*No preferential treatment will be afforded to Sonke Financial Administrators in any way; before, during or after the submission of applications as required by the Better Buildings Programme*'.[50]

The JPC also attempted to auction off some of the units in San Jose during this time, much to the residents surprise.

Finally, the residents faced two blows from which the transfer process could not recover: the first was that the CoJ officials whom the residents had been dealing with suddenly refused to engage with

[46] Letter to Councillor Ralegoma, MMC Public Safety in the City of Johannesburg from Wilfred Mphahlele, CEO Sonke Financial Administrators, October 2002, CALS archives.
[47] Memorandum and Articles of Association, Sonke Financial Administrators, 23rd January 2002, CALS archives.
[48] Letter from Lesiba Sekele, Gauteng Department of Housing, to Wilfred Mphahlele, 8th October 2002, CALS archives.
[49] Letter from Innocent Gwisai, International Housing Consultant contracted to the Gauteng Department of Housing, not stated who it is addressed to but seems to be the Johannesburg Property Company who was in charge of the BBP at the time, 19th March 2004, CALS archive.
[50] Letter from Martin New, Inner-city Manager, City of Johannesburg to Wilfred Mphahlele, Sonke Financial Administrators, 9th November 2003, as a summary of the meeting held between the various parties, CALS archives.

them:

> *'… they weren't willing to discuss anything further with us because we are illegally in the building, they claimed that we hijacked the building and we were amazed at how do you liaise with illegals? Firstly, why were they corresponding, sending correspondents to us if we were illegal? Why were they allowing us even to sit down and talk to them if we were illegal? What really surprised us is why were they deeming us illegal now that we brought the company that they advised us to register*' (Mahlobo, Pers. Comm., 2010).

As a result, Gauteng Province began to also pull out of negotiations, stating that unless the residents could prove that Sonke Financial Services owned the building, they could not provide the subsidies,[51] which effectively created a catch-22 situation for the residents. Although the timelines lack absolute clarity, it would seem that by June 2003 the application procedure had drawn to a halt and the residents wrote to their councillor to ask for assistance. There is no record of any assistance or even a response from the councillor. Mahlobo (Pers. Comm., 2010) remembered that throughout the negotiations the residents never received any help at all from the councillors:

> *'… if one comes to you with his cries he [the councillor] don't know what to say, he don't know where to start... We went to the councillors and they couldn't help, he was against us, instead of helping he was against [us] because he was blank'*.

The second blow fell in mid-2004: the residents submitted an application to the JPC as part of the BBP to secure ownership of the building.[52] However, in May of the same year, the San Jose building was provisionally awarded to Ithemba Property Trust, a private-sector property developer.[53] There was one condition of transfer that '*In the case of occupied buildings – the approach and resolution of occupants'* issues',[54] which was a euphemism for evicting all tenants living in the building. It was this award that resulted in the attempted eviction and initiated the court case.

The BBP represents an instrument of a larger hegemonic project that was pushed by a coalition of private and public individuals who sought to turn Johannesburg into a "world class city". Poorer residents were excluded from the design and implementation of the BBP, which meant that they did not have any substantive opportunities for engagement. When the San Jose residents attempted to invent their own forms of engagement with the City around the BBP in order to protect their home and right to shelter, they were "blocked" and unable to participate in the growth coalition. As a result, when they were forced into litigation they took the opportunity as it was the only platform for any kind of engagement with the state that was available to them at the time.

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[51] Letter from Barbara Monareng, Administration Officer, Gauteng Department of Housing, to Wilfred Mphahlele, Sonke Financial Administrators, un-dated, CALS archive.
[52] Letter addressed to Johannesburg Property Company from Wilfred Mphahlele, Sonke Financial Administrators, accompanying an application for ownership, 18th March 2004, CALS archive.
[53] Ithemba Property Trust was and still is run by Brian Miller who has been a key figure in inner-city regeneration since the early 1990s.
[54] E-mail from Nicole Hodnett, Assistant Programme Manager, Better Buildings Programme, JPC, to all provisionally appointed developers, 12th May 2004, CALS archive.

4.3.5 The place of the court in hegemonic projects

The following section also examines the nature of urban governance in Delhi and the networks of interests, which re-reordered the city. The section begins with a scan of the key socio-economic rights cases over the past three decades and demonstrates that the Indian courts have been "selectively captured" by the middle-classes. My findings demonstrate that the SCI has found consistently for the middle-classes when the case has been about reshaping urban space, but when the cases have concerned other SERs, such as water, education or labour rights, the SCI has often found for more marginalised groups. I would argue that this particular pattern is because, similarly to Johannesburg, Delhi has also attempted to establish itself as a world class city. Unlike the Johannesburg case, the networks of individuals and groups who have designed and instituted a specific shared vision have found a convergence of interests with the courts. The convergence is based on a strong alignment between the vision of the RWAs and that of the courts. Furthermore, I would argue that the middle-classes have turned to the courts to pursue this project both because it legitimates their hegemonic vision but also because they have been excluded from other modes of engagement in Delhi and have found a sympathetic ear in the court. These motivations are all inter-related and entangled and will be unpacked in the following sections. After these discussions, I will again engage in comparisons and analyse the situation in South Africa and contrast the Constitutional Court's decisions and jurisprudence against the SCI to demonstrate how the SA apex Court has chosen a more progressive and hands-off trajectory than its Indian counterpart.

India: a converging set of interests

In India there has been a transition from using Public Interest Litigation (PIL) and the courts as mechanisms of judicial activism "to safeguard individual liberties" and protect the poorest and most marginalised (D'Souza, 2005) to a position where PIL has been taken over by unintended constituencies, such as the middle-classes, the state and large corporates. They have been able to use the more liberal procedures associated with PIL to exclude the poor and the marginalised from the city and in some cases to deprive them of their basic rights (Dupont and Ramanathan, 2004). However, when looking at the decisions over time, what becomes clear is that the middle-class has "incompletely" or "selectively" been able to capture the courts and many of the Court's decisions which have not dealt with urban space have been extremely progressive (see Table 2). The following discussion looks at the trajectory of "urban" and "non-urban" decisions to test the narrative of "capture" that exists in much of the literature on Indian court action.

The *Olga Tellis vs. Bombay Municipal Corporation (BMC)* case is considered to be a seminal moment in Indian litigation. The case took place in 1981 and adjudicated the BMC's actions when it decided, for a range of rather opaque reasons, to evict all pavement and slum dwellers and return them to their points of origin. The plan would have affected 50% of the city's population. The Supreme Court of India judged that to evict the populace was to deny the informal dwellers of their livelihoods and their

right to life, which is expressly mentioned in the Indian Constitution (Ramanathan, 2005). However, the SCI was only willing to protect the pavements dwellers rights in limited ways and stated:

> "No one has the right to make use of a public property for a private purpose without requisite authorisation and, therefore, it is erroneous to contend that pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon… If a person puts up a dwelling on the pavement, whatever may be the economic compulsions behind such an act, his use of the pavement would become unauthorised" (quoted in Muralidhar, 2000: webpage).

Table 2: Key issues/cases in Indian socio-economic rights urban jurisprudence[55]

Court Case	Date	Right/Issue of Concern	Court	Outcome
Olga Tellis *vs. Bombay Municipal Corporation*	1981	Housing/eviction	SCI	Right to livelihood acknowledged but not right to public space
Francis Coralie vs. The Union Territory of Delhi, 1 SCC 608	1981	Housing/eviction	SCI	Right to live with human dignity was translated into a right to shelter
Chandru vs. State of Tamil Nadu	1985	Housing/eviction	SCI	Found that alternative accommodation needs to be in place prior to evictions.
In *Municipal Corporation of Delhi vs. Gurnam Kaur*	1989	Livelihood/street trading	SCI	Eviction and removal
Sodan Singh vs. NDMC	1989	Livelihood/street trading	SCI	Eviction and removal
Shantistar Builders vs. Naryan Khimalal Totome & Others	1990	Housing Eviction	SCI	"reasonable residence is an indispensable Necessity and part of the 'right to life'.
Chameli Singh and others vs. State of Uttar Pradesh48	1996	Housing Eviction	SCI	Fortified the right to shelter as a fundamental right
M.C. Mehta vs. *Union of India*, 4 SCC 750	1996	Pollution/Health	SCI	Removal of hazardous industries to periphery
Ahmedabad Municipal Corporation vs. Nawab Khan Gulab Khan,	1997	Housing and eviction	SCI	Right to stay and be taken care of by the state.
Almitra Patel vs. Union of India,	2000	Sanitation/pollution	SCI	Cleaning up rubbish and waste but also SCI orders to clean up slums
Compressed natural gas /M.C. Mehta vs. Union of India,	2001	Pollution/health	SCI	Insistence of Compressed natural gas in public transport in Delhi
Okhla Factory Owners' Association vs. Government of NCT of Delhi	2003	Housing/eviction	HC	Removal and relocation of slum dwellers squatting on government land.
M.C. Mehta vs. Union of India	2004	Pollution/ Master Plan	SCI	Removal of industries to the periphery
New Delhi Street vendors	2006	Livelihood/street trading	SCI	Removal of street traders

For some time the Olga Tellis judgement influenced much of the thinking around urban livelihoods and in *Municipal Corporation of Delhi vs. Gurnam Kaur* and the *Sodan Singh vs. NDMC,* whilst the

[55] Sources: Muralidhar, 2000; Verma, 2005: Dupont, 2008; Te Lintelo, 2009a and b.

court consistently recognised the right to earn a livelihood "the court held that the Municipal Corporation of Delhi had no legal obligation to provide pavement squatters alternative shops for rehabilitation as the squatters had no legal enforceable right" (Muralidhar, 2000: webpage).

In *K Chandru vs. State of Tamil Nadu* (1985), there was still some evidence of the more pro-poor thinking that had shaped the PIL and Bhan (2009: 134-135) reports:

> "… the court argued that alternative accommodation must be provided before evictions can take place. The judges further hoped that "… the government will continue to evince the same dynamic interest in the welfare of pavement dwellers and slum dwellers."

This is a sentiment which continued into the mid-1990s in the *Ahmedabad Municipal Corporation vs. Nawab Khan Gulab Khan* (1996) case in Ahmedabad city where the SCI refused an application to evict a community of very poor people. They acknowledged:

> "Though no person has a right to encroach and erect structures or otherwise on footpaths, pavements or public streets or any other place reserved or earmarked for a public purpose, the State has the constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over their heads to make the right to life meaningful". (quoted in Muralidhar, 2000: webpage).

However, within a few years the judicial landscape had changed completely. In the *Almitra H Patel vs. Union of India* (2000) case concerning evictions, settlement on public land and the issue of alternative accommodation Justice BN Kirpal concluded in his judgement that "rewarding an encroacher on public land with a free alternate site is like giving a reward to a pickpocket" (quoted in Joseph and Goodman, 2008: 21). Bhan (2009: 135) also notes that an important and troubling distinction introduced in *Dhar vs. Government of Delhi* in 2002, where "the court differentiated between the justice deserved by slum dwellers who are "unscrupulous citizens" and the "honest citizens who have to pay for land or a flat". This sentiment was continued in in the 2003 *Okhla Factory Owners' Association vs. Government of National Capital Territory of Delhi Case*, where the court ruled that '*encroachments [are an] injury to public property (and in that description, constituting a criminal offence)*'.[56]

There were also a succession of cases that affected Delhi directly: beginning with the Compressed Natural Gas (CNG) case, which resulted in a series of judgements: the first, in 1994, mandated the phasing out of lead from all fuel in India's four largest cities - Delhi, Mumbai, Calcutta, and Madras. Then two years later the SCI ruled that all government vehicles in Delhi had to be converted to CNG, and in 1998 the Court, on its own motion, mandated that all buses in the city had to be adapted from diesel fuel to CNG by March 31, 2001 (Rosencranz and Jackson, 2003; Balakrishnan, 2008). In 2000,

[56] Okhla Factory Owners' Association vs GNCTD 2003 (108) DLT 517, Delhi High Court.

the Supreme Court ordered the closure and relocation of all "nonconforming industries" operating in the urban area of Delhi to the periphery (Bentinck and Chikara, 2001). The case took several years and a range of court orders and in combination with the 1996 MC Mehta case on the removal of "hazardous activities" managed to remove a significant number of industrial activities to the peripheries and outskirts of the city. Additionally, Te Lintelo (2009b: 69) notes that in "March 2006, the Supreme Court ordered the police and MCD to cleanse street vendors from the highly commercial Chadni Chowk area, following complaints by a local business association".

However, the courts have also issued a large number of rulings on the constitutional rights to health care, education, housing, the environment, nutrition, and labour, many of which have had significant effects on social policies (Fredman, 2008; Shankar and Mehta, 2008; Khosla, 2009; Gauri, 2011). Court rulings have affected both child- and bonded-labour and attempted to promulgate healthy working environments for Indian workers (Rao, 2000). In 1995, the Government of India also promulgated the Legal Services Authority Act, which attempted to make free legal aid available to the poorest and most marginalised members of society (ibid.). Gauri and Brink (2012) argue that in terms of health and education rulings the SCI has been pro-poor and made significant changes to policy and programmes. Moreover, Winkler (2008: webpage) argues that in the Indian jurisprudence despite the lack of a Constitutional right to water "… the Indian Supreme Court and High Courts have developed a sophisticated case law on the right to water and similar issues around Art. 12 of the Indian Constitution which guarantees the right to life". It has been this expanded interpretation of the right to life that has enabled the Indian Courts to overcome objections regarding the justiciability of socio-economic rights (Winkler, 2008). In addition:

> "The impact of the right to food litigation is the sum of impacts on school attendance and on nutritional well-being… We estimate that over 7 million students benefited from the program's nutritional effects. Similar calculations for other cases… shows that the share of disadvantaged beneficiaries in India is about 83%, consistent with the expectations when the legal system permits abstract policy review and cases focus on regulation" (Gauri and Brinks, 2012: 33).

Thus, the anti-poor decisions seem to have largely revolved around urban space and its reshaping and redesign. The following section explore the reasons for this particular pattern of decision-making and posits that the motivations lie in Delhi's hegemonic world class city vision that was promoted and fought for by the middle-class coalitions is in clear alignment with the courts.

A shared vision…

Batra (2010: 17) argues that "the transformation of major metropolitan cities into 'world class' cities has increasingly come to be the very *raison d'etre* of urban development policy in India". Although local government programmes have not always been articulated as world class city projects, a close reading of official documents demonstrates that the various programmes and policies have consistently attempted to reshape the city in ways that align quite clearly with notions of "worlding".

The Delhi Development Authority (DDA) pronounced in their 1996-1997 Annual Report[57] that they wanted to make the city "world-class" through promoting an efficient land market and converting the "under-utilised" public land occupied by slum dwellers into commercially exploitable private property (Ghertner, 2011). Moreover, Delhi's public finances "in the early 2000s were gradually shifted away from education, public housing, healthcare, and food subsidies toward large, highly visible and "modern" infrastructure developments like the Delhi Metro Rail; more than 25 new flyovers; two new toll roads to Delhi's posh, satellite cities; and the Commonwealth Games Village" (Ghertner, 2011: 2).

Furthermore, "Between 1990 and 2003, 51 461 houses were demolished in Delhi under "slum clearance" schemes. Between 2004 and 2007 alone, however, at least 45,000 homes were demolished" (Bhan, 2009: 127). These were part of the Union Minister of Urban Development, Shri. Jagmohan's, vision of creating a "world-class", and clean and green capital through "beautification drives" that entailed widespread demolition of unauthorised constructions and slums and the forced removal of many street vendors "encroaching" from public land (Te Lintelo, 2009a: 13). Bhan (2009: 140) also noted that:

> "Since Delhi won the bid to host the Commonwealth Games in 2010, the city has seen the launch of sustained massive media campaigns by leading newspapers and by the city government, speaking of Delhi's arrival as a "world class city". The Games have made visible the aestheticization of city space and the vital importance of how the city is seen and consumed by a global audience. The removal of the slums from the city's central areas is only one of many policies that are, arguably, part of transforming its aesthetic to bring it into line with the image of a 'world class city'; private developers increasingly fight height restrictions in the city and promote upper-class residential enclaves, and the city has also recently announced a ban on rickshaws in the walled old city of Shahjahanabad in north Delhi and a ban on street food vendors and hawkers on major south Delhi roads".

The urban restructuring and reshaping has been led by the middle classes who are envisaging an internationalised city to match their new internationalised and modern identities. What Bhan refers to as the "…new ideal citizen-subject in the making: an aspirational middle-class consumer citizen, ideally primed to live in a "world class city" (Bhan, 2009: 141). The middle classes are able to bring about this vision because they

> "are the new "moral majority" (Deshpande 2006): even though they are far from being the most numerous socio-economic category in India, they occupy a hegemonic position insofar as they represent what India wants to be in the twenty first century: educated, upwardly mobile, with a westernized consumption pattern (but not necessarily westernized values)" (Mooij and Tawa Lama-Rewal, 2009: 83).

[57] DDA (1997) *Delhi Development Authority Annual Report, 1996-1997*. Delhi Development Authority, New Delhi.

They are the "right" citizens for these spaces. Thus, there is a need for middle-class groups to align their external world with this burgeoning identity, which takes the form of what Purcell (2001: 178) calls "homeowner activism", where a RWA is: "designed to defend and proactively realize their spatial vision in the material space of their neighbourhoods… [so] that it attempts to reshape concrete surroundings… [into] a normative spatial vision… about what those surroundings should be like". Furthermore, Purcell proposes that where there is "a constant spatial mismatch between the geography homeowners want and the geography they actually experience [it] spurs them to take action" (Purcell, 2001: 180). In India, the RWAs and their members were unhappy with the appearance of their residential colonies, and their "Cities are thus reshaped around middle- and upper-class values that emphasize cleanliness, purity, order (Kaviraj, 1997), aesthetics, leisure, safety and health (Baviskar, 2003)" (Te Lintelo: 2009b:73).

Furthermore, in order to manifest this lifestyle there is a nexus of interests between the middle-class vision and the private sector developers, who carry out their vision and the state, and which act in unison to revision and reshape Delhi:

> "The private sector creates consumers' appetites, and tailors development to the requirements and the buoyant purchasing power of the middle classes. In the retail sector, shopping malls have mushroomed spectacularly in the last 10 years, harbouring cineplex halls, supermarkets and food courts, with the latter serving sanitised versions of street food" (Te Lintelo: 2009b:73).

Delhi's world class city vision as articulated by the authorities and middle-classes is once again presented as normative spatial ideology and justified as a programme that is beneficial to all Delhiites. It is an elite hegemonic project that has sought widespread acceptance through the benefits and advantages that it proposes for its residents and for the country as a whole. There is thus an accumulation of urban change, which is aimed at satisfying the demands of an increasingly wealthy and growing middle class and increasing collusion between various urban agents.

According to Paul (2004: 578):

> "The new middle class wields political power through the ballot and economic power through their consumption patterns. They are the most likely to benefit in the long-run from the heightened presence of TNCs and to value the symbolic benefits of ''world'' status. As a popular base for global imagineering, their political support of the world city project is essential, and thus urban elites will be particularly interested in cultivating the support of this class in the political struggle over its vision for the city".

However, currently the Indian middle-classes are not as politically powerful as other voting blocks. Tawa Lama-Rewal (2007: 7) demonstrates that middle-class modes of political engagement do not lie in the conventional mechanisms of representative democracy: "the middle classes are precisely the

category that votes the least, especially in municipal elections" and are the least likely to use political connections to attain their ends (Harriss, 2005). Chatterjee (2004) argues that members of the middle-class are able to claim rights and utilise the formal and official institutions of the state to access those in power and influence decision-making. Whilst poor and marginalised groups are never given the fullness of their citizenship and thus are unable to leverage their rights in order to attain the satisfaction of their needs or to be fully able to participate in the processes of government. Instead, the poor leverage access through "political society". Political society is described by Corbridge, *et al.*, (2005: 186) as

> ''that loose community of recognized political parties and their operatives, local political brokers and councillors, and perhaps even lower-level public servants (that) bridges between the government and the public in a manner that often refuses the optimism of civil society models''.

It also equates to accessing local politicians, "big men", pradhan[58] or brokers in order to achieve social, community or political goals (Chakrabarti, 2008; Te Lintelo, 2009).

Given a situation in which the middle classes are considered legitimate rights-bearing citizens who able to leverage their rights and who do not participate in the informalities of "political society" it is not surprising that the "… judicial processes [have] gained prominence" in the political lives of the middle-income groups, thus:

> "environmental and consumer rights groups pursue public interest litigation (PIL) to reshape Delhi's cityscape by the removal of thousands of polluting industries and the relocation of numerous slum settlements (Baviskar, 2003; Veron, 2006). Although PIL is by no means a 'guaranteed road to relief' and exposed to judicial inefficiency, weak technical competence, limited trust, corruption and uncertain implementation (Dembowski, 2001: 62), these cases succeeded, and testified to a gradually revised role for the higher judiciary: from a protector of the poor to a supporter of middle-class concerns (Chatterjee, 2004; Ramanathan, 2006)" (Te Lintelo: 2009b:73).

The court has consistently allowed the PILs into their courtrooms and the evidence suggests that the Supreme Court of India has progressively become more sympathetic and supportive of the world class city project. The proposition is that the PILs, especially those concerning the urban environment, align with the SCI's own attitudes and visions. Baxi (1993), along with a host of other authors, (Ramanathan and Dupont, 2005; Dupont, 2008; Bhan, 2009), "believes that [this is because] the interests of global economic elites now colour the thinking of the Indian judiciary, resulting in rulings that benefit those global elites…". Gauri (2009:7) argues that it is not just a case of "elite capture" but that the "Indian courts have adopted the statist and development mind-sets associated with the Indian state itself, and

[58] The *pradhan* is the person who gathers support for politicians by boosting attendance at rallies and assuring votes. They are not generally elected but have some standing in the local communities and often exchange their services as intermediaries between the local party structures and the local communities for favours, funding or status (Harriss, 2005).

that the universal privileging of civil and political rights over socioeconomic rights has affected the thinking of the Indian judiciary". The alignment in Delhi has been especially apparent, where Te Lintelo (2009b: 73) observes, "that the 1990s witnessed an organized middle class attempt to reclaim public space from the urban poor through judicial rather than political routes… " and the middle-classes have utilised PIL "to reshape Delhi's cityscape". The courts have been specifically sympathetic to these projects as they see Delhi as "a show window to the world of our culture, heritage, traditions and way of life. It cannot be allowed to degenerate and decay" (quoted in Bhan, 2009: 128). Baviskar (2004: 90) further points out that the courts have adopted the viewpoint that "Delhi *matters* because very important people live and visit there; its image reflects the image of the nation-state". Thus, there does seem to have been clear alignment between the how the SCI and Delhi middle-class RWAs saw the future of the city; its shape, layout and citizenry, which ensured a close alliance between these two parties.

The RWAs' reasons for sealing

The reasons for the RWAs pursuing sealings clearly followed the same trajectory and reveal the same concerns for ensuring a specific socio-normative vision which, as will be seen in the next chapter, were picked up and echoed by the SCI during the Sealings Case. According to the RWAs, lawyers and officials that I interviewed, litigation was driven by a form of home-owner activism (Purcell, 2001) against the changes that the traders had brought to the middle-class colonies:

> *'… they [the traders] had encroached upon lane by lane, street and so on and so forth. Where actually the inside roads… are meant for the people to walk over, the children to walk over. So either that or entire illegal construction the even there is distinct had been encroached upon and there was hardly any passage where one could even walk over… Children found it difficult to walk over, the elderly to walk over. So then people had encroached on street, lane and by lane'* (Sharma, lawyer who was part of the initial petition to the court, Pers. Comm., 2011).

There were also concerns over the introduction of strangers who were not generally of the same class or caste into these spaces:

> *'so when I or my children the ladies or anyone steps out and your neighbour is there you smile and say hello! But if it is a stranger, those are prying eyes, it is not a very comfortable sight. And in such scenarios when you start minding every aspect of your life'* (Kakria, Greater Kailash Colony RWA, Pers. Comm., 2010).

And:

> *'[The] the social fabric is disturb[ed]… you see you are sitting in my house, if there is shop, hotel, restaurant, bar, whatever is next door and another shop, restaurant, hotel whatever next door I have a house, I have a family, you have seen my daughters, you have met my wife, they go out of the house, what kind of feeling, there are strangers lurking. Is that a nice healthy environment you would want to*

live in with eyes prying on you? (Kakria, Greater Kailash Colony RWA, Pers. Comm., 2010)

Many of the residents also felt that the activities posed some kind of threat to the residents' quality of life:

> *'The residents wanted to stop the activities as they caused more traffic and caused issues with parking. They also said that the activities were noisy and disrupted the area. Some of the ground floors had been converted into restaurants, which were very noisy and residents approached the councillor saying that they were disturbing their children and their children's ability to study'* (Pawar, Councillor for Greater Kailash, Pers. Comm., 2011).

And:

> *'… if these are shops obviously, the goods and products will have to come. Now when would they come, not during the daytime, they will come at night. And when do residents get to sleep, at night. So you have a whole lot of trucks, tempos, goods carriers, labour others floating around'* (Kakria, Pers. Comm., 2010)

Or threat of physical dangers:

> *'Say for instance the welding shop. If somebody is operating a welding shop in the residential areas, it will cause harm to the people residing there. So, such activities, which create pollution, will not be permitted in the residential areas'.* (Lal, Pers. Comm., 2010).

The above quotes demonstrate that the RWAs took issue with commercialisation of residential space because of the "mismatch" that Purcell (2001) discusses between the residents' vision and the daily reality of their homes. The RWAs also engaged in litigation because the Court has historically been sympathetic and receptive to the middle-class petitions and, as has been shown, very often ruled in their favour. Thus, the shared vision of the judges and the middle-classes has established a useful convergence of interests from both sides which is able to mutually reinforce their visions. The RWAs provide the courts with a set of PILs and cases which they can take up and use for their own ends, whilst the middle-class who have been excluded from political society have found a powerful ally who can drive and legitimise their shared vision.

More than just convergence?

The Sealings Case, although originating as a PIL, was eventually taken up and pursued by the SCI and does seem to be in keeping with their larger vision of the city, and their alignment and belief in the world class city concept. However, alleged evidence came to light after the case which indicates that there may have been more nefarious reasons why the courts pursued the Sealings Case. It was

argued in the media there were vested interests between of the judges and property developers that pushed the Supreme Court's decision.



Figure 11: *Mid-Day* Newspaper front page May 2007

After the Sealings Case ended, accusations of corruption and speculation were levelled at Judge Sabharwal, who was the Indian Chief Justice, and Judge Jain, a High Court judge. The media alleged that two of Judge Sabharwal's sons had made a great deal of money speculating on land that was bought and zoned as commercial space as a result of the case. In May 2007 the *Mid-Day* newspaper (see Figure 11) came out with a series of reports and a highly explicit cartoon (see Figure 12) on the suspected collusion between Judge Sabharwal's two sons who owned some commercial properties and larger property developers, all of whom benefitted from the sealings drive.[59]

Further accusations came from members of the Society for Protection of Culture Heritage Environment Traditions and Promotion of National Awareness (CHETNA), a public accountability NGO. They stated that the sealings took place because of the lack of interest and the low occupancy in the newly developed shopping malls on the city's peripheries that the Sabharwal and Jain families had interests in (Pers. Comm., 2010).

CHETNA and the press argued that the sealings were an attempt to move the traders out of the residential areas and into the shopping malls so that the traders could take up these leases and the developers could make a return. CHETNA speculated that since Sabharwal had interests in commercial land, he used his authority when he "called for and dealt with the sealing of commercial property cases in March 2005, though it was not assigned to him."[60]

[59] Oberoi, V. and Tayal, M.K., 2007: Subharwal's Shop Talk, *Mid-Day*, 26th June, 6 http://bp2.blogger.com/_eUfQsEAg4uY/Rvd2yp0brDI/AAAAAAAAACI/eErt44-6uME/s1600-h/injustice+14.jpg accessed 27.09.2011.

[60] Roy, A., 2007: Scandal in the Palace, *Outlook Magazine*, http://www.outlookindia.com/article.aspx?235689, accessed 27.09.2011.

There does seem to be a case to answer, as the sealing of commercial property effectively pushed up demand for spaces in malls and the price of commercially zoned land. Speculators apparently made a great deal of money out of the exercise (Senior Official, MCD Engineering Department, Pers.Com, 2011). A senior official at the MCD also speculated that this was why there had been so much resistance from the Supreme Court bench to listen to any protests/petitions against sealing. However, Rajeev Dhavan, human rights lawyer and legal commentator, did not believe that the Judge or judges set the up the whole elaborate case for their own benefit. He thinks that the family members who benefitted were astute business people who saw the trend and took advantage of it (Pers. comm., 2010).



Figure 12: *Mid-Day* Cartoon of the Judge Sabharwal [61]

Whatever the case, in September 2007 four journalists and a cartoonist from the *Mid-Day* newspaper who wrote and exposed the supposed collusion of interests were arrested and jailed for "contempt of Court". The High Court stated in their judgement: '*We feel, in this peculiar case, the contemptors have tarnished the image of the highest court and the sentence of four months' imprisonment would serve justice.*'[62] In their defence, Vitusha Oberoi, the *Mid-Day* editor, argued in her High Court affidavit:

> *'There was no malicious intention on our part to bring down the reputation of the judiciary. However, the facts discovered by us presented a disturbing picture of judicial impropriety in a particular case which we felt, needed to be brought to the attention of the people since it involves matter of enormous public interest'[63].*

Despite these protestations and amidst vast public outcry and some severe criticism of the court, the journalists served their time. These implications are considered in further detail in later chapters.

[61] Source: Mid-Day, 2007: 18th May 2007, 4, http://www.cartoonsbyirfan.com/mid_day.php, accessed 21.09.2010.
[62] High Court of Delhi Criminal Contempt Case No. 7/2007
[63] Oberoi, V., Affidavit in reply on behalf of Mrs. Vitusha Oberoi, Criminal Contempt Case No. 7/2007, in the High Court of Delhi.

However, it was not just the judges who were accused of being complicit in unethical practices. There was a perception in Delhi at the time that the traders were conspiring with the Municipal Corporation of Delhi:

> '*Municipal people and architect[s], the police all these people were colluding… And they were constructing all illegal buildings. They were not only constructing illegal buildings but they were constructing commercial buildings*' (Sharma, Pers. Comm., 2011).

The idea of complicity and corruption was a key theme that evolved throughout the Delhi Sealings Case.

The convergence of interests between the RWAs and the courts, especially the SCI, made litigation the logical option for the RWAs. In turn, the case was a typical example of the kind of issues that the SCI has picked up and pursued over the last few years as it involves the beautification and modernisation of the city. However, the case also revealed the potential ease with which the judiciary could pursue more corrupt practices and the ability of judges to further and then defend their own interests through the judiciaries' institutional mechanisms.

SA: any sign of alignment?

The following section investigates the trajectory of the SA Constitutional Court in order to highlight some of the key contrasts in the nature of litigation, judicial decision-making and the use of the courts in SA against its Indian counterpart. Unlike the Indian situation, the South African apex court has not demonstrated a convergence of interests with other actors. However, a scan of the apex court's path since the end of Apartheid indicates that the court has been a key site of representation for the urban poor to whom it has been willing to listen and engage. Furthermore, their path indicates a consistent dedication to a "reasonableness"[64] rather than a minimum core standard approach[65] and an unswerving refusal to "overstep" into the realms of the other branches of the state. Similar to the SCI, the SA Constitutional Court has dealt significantly with issues of eviction and housing.However, unlike the Indian courts, the reasons subsist in the nature of the housing right itself rather than in a commitment to a specific urban vision.

[64] The reasonableness approach asks the questions of any case as whether: "…the legislative or other government action [was] comprehensive and well-coordinated; was there appropriate division of political and expert authority in its formulation; can it facilitate realization of the right in question; is it balanced and flexible to the extent necessary; and does it include all significant segments of society and take into account those persons in the most dire need?". In essence, "reasonableness" requires a broad policy-based programme with particular attention paid to those who are most vulnerable and implementation that includes "all reasonable steps necessary to initiate and sustain" a successful programme to advance the social right (Christiansen, 2007: 375-376).

[65] The minimum core "… imposes on states (in the Committee's formulation) a ' minimum core obligation to ensure the satisfaction of, at the very least, minimum levels of each of the rights' in question… the Constitutional Court has declined to accept that the South African Constitution's socio-economic rights provisions entail a minimum core obligation on government" (Cameron, 2007: 5).

Modes of engagement in urban governance

Pieterse (2006: 287) notes that in the post-Apartheid context:

> "Those who benefit from the status quo are generally comfortable and unperturbed by the new democratic dispensation, except for the ritualised complaints about unfair municipal rates and decline in services standards and levels. There is virtually nothing in the way cities function and are constructed in symbolic terms in the public sphere (especially the media) that can penetrate the cocoon of privilege that characterises middle-class existence in South African cities".

The SA middle-classes, like their Indian contemporaries, seem to be the least politically engaged of South Africa's sectors and work by Mattes (2008) finds that the wealthier and more professionalised groups are least likely to protest or join in to SA political life. Rather it is the urban poor who have sought and found insurgent modes of engagement, most notably through direct action and litigation. Pieterse discerns that "there has been an undeniable upsurge in militant direct action in poor areas in recent years" (2006: 287). Pernegger (2012) has studied the range and number of public protests and notes that it is the poor in South Africa who are most likely to engage in public action. This is especially true of social movements which have taken over the representation of the poor and use protest and public action as one tactic within larger strategic arsenals of mobilisation and leverage to publicise their dissatisfaction (Miraftab, 2006; Friedman, 2012). Public action such as protests and demonstrations are considered by the poor as a legitimate mechanism to put pressure on the ruling party to advance their claims for services (Booysen, 2007). Mattes (2002: 33) further points out that South Africa has one of the highest rates of participation in protest action in the region, which he argues "rules out any notion of an inherent "culture" of apathy or passivity. South Africans participate at low rates between elections because the system offers them few incentives do to so". Thus, in the face of failing participatory government and "Given the executive's stranglehold over the legislature, citizens increasingly look to the judiciary to ensure executive accountability and for the protection of their basic interests" (Pieterse, 2004: 388). However, unlike India, the citizens who have mostly engaged in litigation have been poorer and more marginalised South Africans. Table 3 is an indicative list of cases that have concerned urban goods such as housing, eviction, property rights and the distribution of services[66] and signals that the overall trajectory of the Constitutional Court decisions leading up to the Olivia Road Case had built a progressive jurisprudence and a space of mobilisation for poor litigants around socio-economic rights issues.

[66] Thus the very important TAC and Soobramany Health cases are not addressed here.

Table 3: Seminal cases pertaining to urban issues in South Africa[67]

Court Case	Date	Right/ Issue of Concern	Court	Outcome
Pretoria City Council vs. Walker	1998	Unequal service costs	CC	Ruled in favour and proposed the equal rating of urban dwellers.
Republic of SA vs. Grootboom	2001	Housing/ Eviction	CC	Ruled the state housing programme was invalid and needed to provide temporary accommodation
Port Elizabeth Municipality vs. Various Occupiers	2004	Housing/ Eviction	CC	Eviction was denied and the more general finding was that there is an unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed or a household evicted unless alternative accommodation or land is made available.
Victoria and Alfred Waterfront vs. Police Commissioner, Western Cape	2004	Public Space	CC	Found in favour of identifying the waterfront as public space and denied access control, which meant that anyone including those begging could access and use the space.
Mkontwana vs. Nelson Mandela Metropolitan Municipality	2005	Municipal Bills	CC	Judgement held that the owner was responsible for all outstanding amounts regarding consumption charges.
Mazibuko vs. City of Johannesburg	2005	Water	CC	Dismissed by the Constitutional Court
Jaftha vs. Schoeman	2005	Housing/ Eviction	CC	Lack of judicial oversight meant that eviction was unconstitutional, therefore eviction was denied
Modderklip	2005	Housing/Eviction	CC	Remain *in situ* until alternatives were made possible and the payment of damages in restitution to the land owners on which the community was living.
Occupiers of 51 Olivia Road and Berea Township vs. City of Johannesburg	2008	Housing/ Eviction	CC	Judgement of negotiated agreement around relocation and the process of relocation and reiterated both the alternative accommodation and meaningful engagement judgements.

The course that the Constitutional Court has taken began in 2001 with the Grootboom Case, which was the first in a string of housing eviction cases and is still considered by many to be the most important Constitutional Court decision on the topic (Wesson, 2004, Wilson, 2009). The Grootboom case concerned a poor community of informal dwellers who were being evicted by the Cape Town City council from the piece of private land on which they had managed to settle (Wilson, 2009). Initially the High Court granted the informal dwellers shelter through the unqualified right of the community's children to basic nutrition, shelter, basic health care and social services (ibid.). The government appealed against the decision in the Constitutional Court and argued that they had met their constitutional obligations by putting in place legislation and programmes to progressively realise the provision of permanent accommodation.

The Constitutional Court was able to rule on the more substantive and wide-ranging aspects of the case because, according to Wilson "By the time the Constitutional Court handed down judgement, the immediate plight of the Grootboom community had been alleviated through a settlement agreement reached between the parties" (Wilson, 2009: 274). The Constitutional Court found that the state housing programme was invalid (Wesson, 2004) because if the state "was to meet its constitutional obligations, its housing programme would have to be modified so as to include a component catering

[67] Sources: Jagwanth, 2000; Wesson, 2004; Christiansen, 2007; Wilson, 2009; Coggin and Pieterse, 2011

to those in immediate and desperate need, even if doing so detracted from the state's long-term goals, or decreased the rate at which permanent houses could be constructed" (Wesson, 2004: 288). How that was to happen in both programmatic and budgeting terms was left up to the government, although the Constitutional Court did stipulate that the budget would have to be reasonable and the programme should be implemented with due urgency. The longer term impact of the judgement was that in certain situations and circumstances of dire emergency the right to housing could be the "grounds for shelter on demand" (Wilson, 2009: 275), which was later formalised into legislation and regulation as Chapter 12 of the 2009 Housing Code regarding *Housing Assistance in Emergency Circumstances.*

The next few cases around housing and evictions continued in a similar vein: *the Port Elizabeth Municipality vs. Joe Slovo* case was seen to

> "adequately capture the tensions between the interests of local government and private capital in dictating the terms of urban regeneration on the one hand, and those of inner-city inhabitants in maintaining their livelihoods…" (Coggin and Pieterse, 2011: webpage).

The Court found in favour of the household that was being evicted and reinforced the notion of the provision of alternative housing in circumstances in which eviction would result in homelessness. Wilson, (2009: 279) defines the PE municipality case as the '*locus classicus'* for the enforcement and interpretation of the Prevention of Illegal Evictions Act (*aka* PIE Act) and identifies the case as defining the "nature, adequacy and extent of the performance of the state on its housing obligations in considerations of justice and equity in eviction proceedings". The case gave what Wilson deemed to be guidance to the courts about how to deal with evictions, clearly outlining: the "unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available" (cited in Wilson, 2009: 280). It also extended the remit of courts to look into the reasonableness of the state's housing programme before granting an eviction order.

Modderklip, a further case contesting property and shelter rights, continued the trend of looking after the rights of people who would be made homeless by eviction. The judgement stated that

> "the only appropriate relief was to allow the occupiers to remain on the land until alternative land or accommodation was made available to them by the state and to require the state to pay constitutional damages to Modderklip for the violation of its constitutionally entrenched property rights" (Wilson, 2009: 278).

Van der Walt (2005: 159) offers an analysis of the case:

> "Property interests - in this case landownership - are still recognized and protected, but a certain measure of patience and empathy towards the homeless is required from owners and from courts *in* enforcing property rights to make sure

> that other, weaker or more marginalized members of society are not treated unfairly in the process".

The Jaftha case examined the question of whether a house could be sold in execution of debt on another property, if such a sale resulted in homelessness. "The Court concluded that the lack of judicial oversight for the forced sale procedure made the action an unconstitutional violation of Section 26" and thus would deprive a household of their shelter (Christiansen, 2007: 372).

However, despite gains in the realms of housing and eviction in the Constitutional Court there have been losses around other SERs. *The Mazibuko vs. City of Johannesburg* case contested the amount of free water that was provided by the local authority and disputed that the CoJ's policy that

> "allowed for discontinuation of water supply without adequate procedural safeguards and that it discriminated unfairly between township residents and those in wealthier suburbs where uninterrupted water was provided through a consumer-credit system" (Coggin and Pieterse, 2011, webpage).

In this case, the Constitutional Court refused to engage with the question of sufficiency, deeming it to be a matter for the municipality to decide. As a result, they only dealt with the reasonableness of Johannesburg's water management policy and found the policy to be reasonable and non-discriminatory.

The success of housing and evictions for poorer people seems to lie in the nature of the constitutional clause dealing with the Right to Housing, which states:

> "1. Everyone has the right to have access to adequate housing.
> 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
> 3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions" (SA Constitution, 1996: Section 26).

Parts 1 and 2 are considered positive rights, i.e., what the state is obliged to do under certain circumstances, whilst Part 3 is considered a negative right, i.e., what the state or any other actor should refrain from doing. Wilson and Dugard (2011: 665) argue that "The Constitutional Court ("the Court") has yet to develop a substantive account of the positive obligations socio-economic rights place[d] on the state" and has significantly focussed on the negative aspect of the right, which is the assurance that people are not arbitrarily deprived of their shelter. Furthermore, the court has attended to the procedural aspect of South African justice and in housing cases has often insisted on some form of engagement. Thus, the Constitutional Court has been comfortable with enforcing the procedural and negative features of the housing right, which is why there has been significant emphasis and progress in this arena. However, other rights such as that of water have been less

successful as they require the Constitutional Court to decide on the content of various rights, which they have felt sits in the hands of the other branches of the state (Smith and Rubin, forthcoming).

A further facet of SA litigation should be acknowledged: certain cases do not make it to the Constitutional Court and are decided in the lower courts or settled out of court. Huchzermeyer (2003) points out in her comparison of the Grootboom, Bredell and the Alexandra Renewal cases that, "there is little consistency in the outcome of the route of access to the city through the judiciary" (Huchzermeyer, 2003: 80). She demonstrated that in Bredell and Alexandra the courts refused to intervene where there had been issues of procedural inconsistency and argues that there was collusion between "government departments and, in the case of Bredell, the courts were at pains to discourage any future legal challenges on grounds of unlawful eviction" (2003: 102). Winkler (2008) identifies a further two water cases, the *Bon Vista Mansions Case*, in 2001 and the *Manqele vs. Durban Transitional Metropolitan Council* in 2002 and demonstrates the inconsistency of lower court decisions whereby in two cases of equally poor households one disconnection was upheld whilst in the other the judge ordered the restoration of the supply. The role of the High Courts in local city-making practice is certainly an area that requires further investigation.

There are some general features of the SA apex court that are similar to the Indian case, whereby the San Jose residents were assured that their case would at least have a sympathetic hearing and that there was significant precedent in terms housing and evictions cases to make the court a reasonable and optimistic site for litigation. However, unlike the Indian case, the outcome of the case was far less assured, although there was significant precedent to indicate that the Constitutional Court would engage with matters of procedural justice rather than content.

4.4 "Triggers" and opportunities for alternate hegemonies

The RWAs and the City of Johannesburg engaged in litigation to leverage the hegemonic power of the courts and so legitimise and promote their desired vision of the world. However, it soon became apparent that these "world class cities" visions excluded the urban poor of Johannesburg and the poorer sections of the Indian middle class. As such, the traders and the San Jose residents went to court or exploited the opportunity in order to present alternative visions of their cities, which ensured that their own interests were looked after. The Sealings Case also exposed some of the fractures within the Indian middle-class and surfaced tensions between different income groups of people who have been conflated into one homogenous "class". The following section reveals how the Delhi traders and San Jose residents did not "buy into" the normalising visions of the world class city coalitions and wanted to counter them by extending and adding content to the existing rights regimes. In addition, both the San Jose residents and the Delhi traders were looking to move the emphasis away from a market-driven logic into a more inclusive idea of access and rights to the city.

However, there are also some very pragmatic reasons as to why actors proceeded with litigation: the necessity of fighting in court and access to lawyers and advocates who were willing to take on the

cases. The various parties would never have been able to take the cases to court or to defend themselves without legal assistance. In the Olivia Road Case, the lawyers also took up the matter because there was a strong convergence of interests: the San Jose residents' need for shelter and housing resonated with CALS' larger counter-hegemonic project and their quest to add content to the existing canon of socio-economic rights. These arguments are explored in more detail in the following section.

4.4.1 Legal triggers and counter-hegemonic convergence

In the Olivia Road Case, the trial was "triggered" by legal action and thus the terrain of contestation was already determined by the legal framework. Jackie Dugard, a lawyer, originally from the Centre for Applied Legal Studies (CALS), points out that in South Africa:

> *'when an eviction is involved it's a different trigger mechanism… probably both in South Africa and India, and in many countries where the courts have become involved in eviction rights, evictions is the most common one, because it's an automatic trigger …you don't have to be that mobilised, you don't have to really have these debates about should we be approaching our councillor, or should we be going to the courts, you're pushed into a realm of legal, a legal realm and you have to respond to it, if you're able to…'* (Dugard, Pers. Comm., 2010).

Dugard makes the point that the decision to go to the court for social movements is often a difficult one and can be part of a considered strategic response. However, when it comes to evictions, no choice needs to be made, because the case is already in the courts and the litigants have to respond within the legal mechanisms, which is effectively what happened in the San Jose Case.

The City of Johannesburg had no option but to go to the court to secure an eviction order in order to remove the residents from the San building. Since '… *the matter was in the high court…the application for eviction was in the high court, so that was where it [the San Jose residents' contestations] was initially heard'* (Moray Hathorn, Pers. Comm., 2010). Wilson (2011a: 137) is careful to emphasise that the turn to litigation was not a real choice for the San Jose residents:

> "It is misleading to call the turn to law amongst the inner-city poor a real 'choice', in the sense that a single agent freely and carefully deliberated between competing alternatives. Firstly, the inner-city poor are not represented by, and do not constitute, a single agent, except to the extent that the challenge to inner-city evictions was eventually brought as a class action under s 38(c) of the Constitution. Secondly, the City was obliged by s 26(3) to approach a court to obtain orders to give effect to its eviction programme. In that sense, the terrain of struggle was already chosen for both parties by the Constitution. No matter how effective a grassroots campaign of direct action or political protest would have been, it seems unlikely that the occupiers of 'bad' buildings would have been able to resist their removal without engaging in litigation, unless they could have

> prevented eviction orders being sought in the first place. Without a voice in the policy-making and administrative processes leading to a decision to seek an eviction order and prosecute an application to evict (which occupiers of 'bad' buildings did not have), this seems unlikely".

I would argue that when the court case presented itself, it also gave the residents the opportunity to contest the BBP and to demonstrate that it would not benefit the inner-city residents. Nelson Khetani, who was the head of the San Jose Tenants committee, remembered:

> *'… we didn't want to be evicted and have to go to the street, because the street [is] not safer than the building that we are staying in, because we had a roof over our head, street, hey [the] street it's something else'* (Pers. Comm., 2010).

In addition, Isaiah Mahlobo, the Secretary of the Committee, noted that the programme would affect the residents' ability to earn a livelihood:

> *'…we are people who aren't formally employed, most of us depend on, with informal trading, others made cushions, others wash taxi's you know, all those activities that enable us to earn here in the city, so I have to stay in close proximity of the city so I can be able to get work…'* (Pers. Comm., 2010).

Thus, the San Jose residents were trying to mobilise their right to housing and ensure that they were not evicted. In order to do so and to respond to the "trigger" of eviction, the San Jose residents initially approached Weber Wentzel *Pro Bono* unit headed by Moray Hathorn, but they were already involved in a similar case and could not represent the residents, so Hathorn approached the Centre for Applied Legal Studies (CALS) for help (Mahlobo, Pers. Comm., 2010). Khetani remembers the hiring process slightly differently: he says that the residents approached the Law Society and CALS directly for legal assistance. When asked how they knew to do this, Khetani says, that the residents were aware of *'… where can we get help. Like if you have got toothache you don't have money to take them out, to go to the dentist, doctors, you have to go to WITS [University] to those doctors there, you see something like that'* (Pers. Comm., 2010). It would seem that the University of the Witwatersrand (WITS) had a reputation in the inner-city as an organisation that could provide help. This is borne out by Dugard who says that CALS was '*working in areas and communities already - so when things come up they are already there on the ground, with background knowledge and a commitment already in place'* (Pers. Comm., 2010).

Furthermore, the Centre for Applied Legal Studies' (CALS) larger project aligned with the goals of the San Jose residents. CALS, like most human rights lawyers, actively seeks cases that will: challenge the existing rights situation; add content and, where possible, add new rights to the existing canon. Thus, their work can be seen as a counter-hegemonic project, in the sense that they are trying to change the emphasis of the existing legal environment and shift it to a more equitable and inclusive worldview. However, in order to do so these organisations need cases that are clearly able to expose

contestations around specific rights. As such, legal organisations are strategic about the cases that they choose. According to Dugard:

> *'what they're [the legal organisation] is trying to do is maximise bang for [their] buck, so to speak, so you can't take on every single case, because you just don't have the resources and reach, so you try to look for those cases that are going to have a big impact. So this is where the strategic thing comes in and it's certainly not an exact science, and with Olivia Road it was simply… we became aware of this particular situation and it looked very clearly like a big issue that would have a lot of impact' (*Pers. Comm., 2010).

Hathorn of Webber Wentzel's *Pro Bono* department agrees and says that it was clear that the San Jose Case:

> *"was a live issue. From the onset the potential; public importance of this case was clear that in fact one might be bringing a challenge to the conduct of the city of Johannesburg in terms of its clearing of bad buildings… and here I was starting a new department altogether looking for collaboration with others".*

Thus the Olivia Road Case was catalysed by the "trigger" of eviction but the interests and needs of the tenants also resonated with the projects of CALS and Webber Wentzel who were looking for an opportunity to take a case like this to court in order to challenge the existing conceptualisation of housing rights. Both the residents' desire to stay in the inner-city and the lawyers' larger projects countered the development coalition's vision as their values saw a more equitable space which was home to a range of residents, not just a globalised elite.

4.4.2 Cracks in the Indian "middle-class"

In Delhi, the traders and RWAs had very different experiences of accessing legal support in order to pursue their projects. The RWAs initiated the case and were able to mobilise legal assistance for all of their high court cases and their Supreme Court petitions, although according to Rajiv Kakria of the Greater Kailash RWA, it was not a simple process:

> '*We had a tough time hiring lawyers; some of the lawyers were very good they fought our cases free, absolutely gratis so that was very nice of the lawyers. We would try and get them and honour them but very frankly they could have done without our honours. They could have made a better buck*' (Pers. Comm., 2010).

The traders were not originally part of the court proceedings and they had been made aware that the decision was forthcoming through the media and a variety of sources (Khanderwal, Pers. Com., 2010). It was only once the first Supreme Court judgement had been passed and made public that the traders were given leave to engage with the court and even then in a very limited manner. However, their initial experiences of litigation were very similar to that of the San Jose residents: Ramesh Khanna, heads of the Delhi Branch of the CAIT, stated the reason they went to court was simply

because: '*The case was already in the court. We became a party to that*' (Pers. Comm., 2011) and in doing so the traders seemed to have significant support from the legal community:

> '*We had plenty of lawyers. We had Soli Sorabjee; we had Mr. Arun Jaitley; we had Mr. Mukul Rohatgi; we had Fali Nariman. The legal luminaries of India were our advocates*' (Khanderwal, Pers. Com., 2010).

In Delhi, the lawyers sided with the groups with whom they felt the greatest sympathy and as a result, in some, although not all, instances provided their services for free. RP Sharma felt so strongly about the matter that he was one of the first lawyers to take up the cause of the RWAs and even agreed to be a part of a team of three lawyers who surveyed illegal construction and misuse and reported to the High Court. Mahendra Rana, by comparison, represented a number of traders and trading organisation including CAIT, New Delhi Federation of Traders as well as a series of individuals.

However, just like the Olivia Road Case, the traders took up litigation in order to countermand the RWAs project and in doing so they revealed some of the fractures within the Indian middle-class. According to Ogden (2012: 29), the Indian middle-class is "[m]ade up of a variety of entrepreneurs, businesspeople, traders and small indigenous manufacturers…" but Lemanski and Lama-Rewal (2013: 91) draw attention to fact that "Depending on the criteria used, India's middle classes are estimated at between six per cent and 54 per cent of India's total population (Nijman 2006; Sridharan 2004)". Other authors (Deshpande 2006; Fernandes 2006; Mawdsley *et al*., 2009; Ranganathan 2011) have also noted that the term middle-class conflates and inadequately represents the disparities between the different income groups that constitute the Indian middle class. My analysis reiterates this argument and concentrates on the inadequately researched traders known as the "intermediate classes" (Harriss-White 2003; Jha 1980) or bazaar (literally market/marketing) networks who are also seen to form part of the Indian middle-class. According to Mehra, the bazaar class is composed of "shops operating on different scales (individual corner shop, medium-sized specialty shop, large showroom, franchisees, chains); shops selling a huge range of commodities from food to shoes, stationary to hardware and construction material, along with numerous "intermediate" service providers". Furthermore, traders are generally "self-employed, self-financed, and often "family"-based" [and] exist in circumstances of quasi-legality having some tax certificates and licences allowing them to operate but many did not know their legal status in terms of by-laws and zoning law" (Mehra, 2012: 80).

The Sealings Case demonstrated where the cracks lie within this conflated definition and shows how the wealthier members of the middle-class wanted to embed the world class city vision and all the spatial, economic and aesthetic trappings associated with it but which clearly held little benefit for the Delhi traders. For the elite of Delhi the sealings matter was one of constructing and making acceptable an internationalised vision, whereas for the Delhi traders:

> *'this [sealings] is a matter related to the bread and butter of my children. This is a matter related to the education of my children. I am the head of the family. If I am*

not earning, how I will provide food to my children? So if the government is destroying my bread and butter I will fight' (Khanna, CAIT, Pers. Comm., 2011).

Khanderwal of CAIT argued that *'I am guaranteed under Constitution of India I have right to earn, right to livelihood'* (Pers. Comm., 2010) so what the traders wanted was for their Right to Livelihood to be acknowledged and endorsed by the courts and in doing so, guarantee the traders access to the city and urban space in Delhi, which clearly contested the RWAs and their coalitions vision for Delhi's future.

The court cases offered moments in which it became clear that the hegemonic projects that the RWAs and the CoJ were driving were not for everyone's benefit. The traders and the San Jose residents wanted to counter these visions and expose them. Therefore, when the opportunity for litigation appeared, it was clear that the court could provide a useful site for counter-hegemonic movements. Furthermore, the legal rights organisations became involved not just because they have a strong belief in the rights that they were fighting for but also because this specific case clearly allowed them to further their own alternative hegemonic projects. There was a clear alignment between the vision of the San Jose residents and that of their legal representatives. In Delhi, the traders and RWAs were able to mobilise legal support from people who were concerned with their issues and engaged with their larger project. However, as will be seen in the next chapter, despite their access to legal support, the traders were given extremely limited access to the court and had to find alternative modes of engagement in order to defend themselves from the Supreme Court decision.

4.5 Conclusions

Murray (2008: 14) points out that "the urban landscape is always a contested terrain, where the propertied, privileged and powerful seek to establish one set of rules governing the use of urban space that is compatible with their city vision, and, conversely, the propertyless, underprivileged, and powerless make use of whatever means are at their disposal to challenge the status quo". However, it is not just the propertyless and the underprivileged who make use of whatever means, nor just the propertied, privileged and powerful who seek to establish one set of rules governing the use of urban space. Rather, all urban actors undertake these actions, which is why some groups choose to use the courts and others take advantage of litigation when it is presented. Thus, when groups or individuals are excluded from one or more channels of political engagement they seek recourse in other spaces. Just as when some groups find accomplices or allies that share their vision, they utilise those relationships in an attempt to further their own interests.

This chapter has demonstrated that the primary set of reasons why the various actors sought litigation was due to their "place" within the processes of urban governance. Their inclusion or exclusion from the powerful urban coalitions and decision-making procedures influenced their decision to seek litigation or exploit it when the opportunity arose. Furthermore, the various parties understood the

symbolic power of the court as an institution that could legitimate their specific urban vision and hegemonic projects and sought to leverage it.

The combination of factors differed for each of the litigants (See Figure 13). The RWAs have had little access to either the administrative arm of the local government, due both to institutional complexity and confusion, or the executive arm, for whom the RWAs are not numerically significant. The RWAs did not see their cases as a rights issue but rather as promoting a vision of their homes. As such, the RWAs had few other options and in their view nowhere else to go but to the courts, where they saw larger class and hegemonic alignment. There was also significant precedent and the RWAs and the courts have enjoyed a special relationship over the last few years. I would argue that this "special relationship" was the key deciding factor in the RWAs choice to litigate. The SCI's choice to take up the case resided in the fact that it provided one more legal excuse for a form of judicial activism that was aimed at reshaping the city of Delhi (more of which will be said in the next few chapters).

The City of Johannesburg was forced to use the courts in order to attain their world class city vision of Johannesburg. Unlike the RWAs, there was no apparent alignment of interests between the court and the city. Rather, there was a state agency that together with a set of private sector actors was dedicated to a specific vision of their city and thus engaged with the courts in order to attain it. Litigation was also a procedural necessity rather than a strategic decision although they did see that there was clearly a symbolic legitimation of their project by going to court. By comparison, the San Jose residents and the Delhi traders were prompted to use the courts by the "trigger" of litigation; although the reasons why they decided to exploit the opportunity are more interesting. In both cases, the legal representatives were dedicated to the issues that the cases raised, even though the support of lawyers was far more pronounced and influential in the South African case. CALS was already concerned with inner-city evictions and their human rights consequences and was looking for a case that they could take forward to challenge the status quo. Thus, there was a strong coalition of interests between the two groups.

Access was only one of the many motives for litigation: all parties had tried other routes to access their rights, engage with the state and have their voices heard but had met with little success. The civil society actors were also excluded from the city-making processes: in Delhi, the RWAs and the traders were unable to participate in the masterplanning of their city. The process was limited to "experts" and a few small spaces of engagement. In Johannesburg, the inner-city residents were also excluded from the city-making processes and coalitions that formulated the Inner City Regeneration Scheme and the Bad Buildings Programme. The institutional and political dynamics of Delhi and Johannesburg limited the traders and residents (both RWAS and San Jose) access to government officials. The San Jose residents had also attempted to engage with the City and Provincial officials, a process that had finally resulted in failure and further threats to their tenure security. The San Jose residents, ironically similarly to the RWAs, had not been able to access their local elected representative at all and Nelson Khetani, chair of the San Jose residents association, stated:

'[We] went to the Councillor and she could not help then CALS came. The politicians? There is nothing they can do, nothing they can help, they just want your vote for them. There was no other way [but litigation]' (Pers. Comm., 2012).

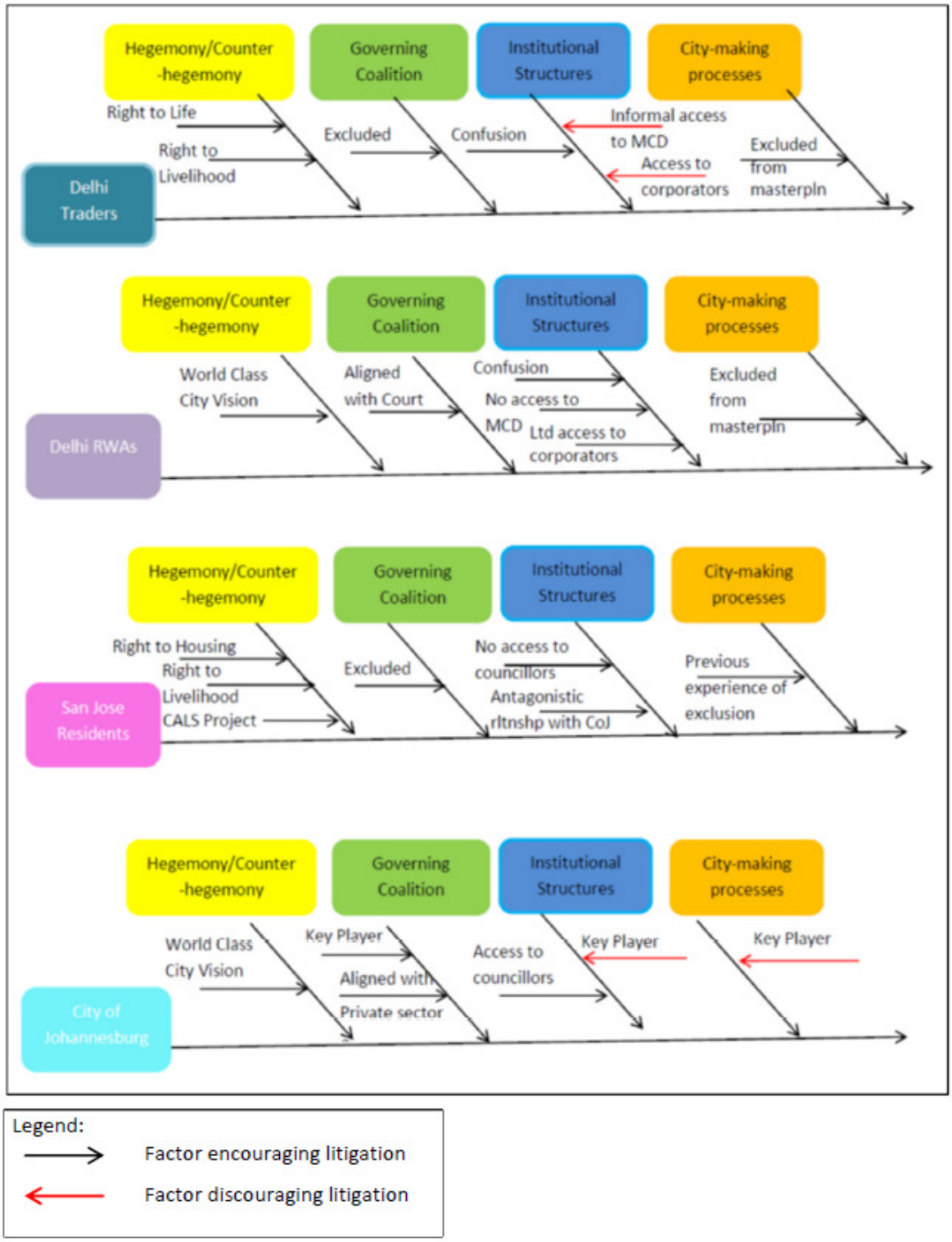


Figure 13: Combinations and configurations of factors encouraging/discouraging litigation

Thus, the traders and the San Jose residents went to court to extend and expand their rights and to try force the state to be accountable to them and have their voices heard as other mechanisms of representation had failed. Furthermore, the traders, the San Jose residents and their lawyers used litigation and courts to offer rights-based, counter-hegemonic visions of their respective cities and in doing so defend their rights to livelihoods and shelter. Unlike the CoJ officials, where the legal framework forced litigation, or the RWAs where convergences of interests made litigation the best option, the traders and San Jose residents were forced into litigation. However, the concatenation of exclusion had a cumulative effect which eventually led the traders and residents to use the opportunity for litigation when it arrived.

The chapter has argued why the various actors chose to litigate and in doing so gives a sense of the context and background that led up to the actual court cases. The next chapter describes and explores the next phase in the cases, which is what happened once the cases began and what happened in the courts. Additionally, it asks questions around what type of space the courts offers to urban actors and how it differs or aligns with other kinds of spaces of politics and power.

Chapter Five: The Court as a "Public Sphere": possibilities and problems of legal engagement

5.1 Introduction

The previous chapter contended that much of the motivation for engaging in litigation was because the litigants had been denied access to other channels of representations and had limited opportunities to "voice" their needs to those in power. Furthermore, the desire to use the court as a site to challenge or drive a specific hegemonic vision encouraged the actors to litigate. The assumption was that the court would be able to provide such a space and, in addition, offer a site of recourse not just around the content of rights but also in terms of the processes and procedures of interaction between the state and its citizens. The following chapter analyses and evaluates whether the court is actually able to satisfy these needs and act, as Dembowski (2001: 3) proposes, as "the location of a rudimentary 'public sphere', defined here as the arena in which civil society and state interact in a rational, critical and rule-bound rather than merely hierarchical discourse". However, it should be remembered that courts are highly controlled and Bazemore (1998: online page 1) describes trials as spaces in which "Judges act as gatekeepers, and exert critical influence over procedures, court management, adjudication, decision-making and dispositional priorities and protocols" throughout the entire trial in order to achieve specific policy goals (Epstein and Knight, 2004). They "set the agenda" by selecting what cases come to trial, and determine who is able to enter the court as a litigant, and what evidence is allowed and in what format. They can also sway the direction of a case by asking specific questions or focussing on particular points during trials. Given these conflicting factors, the question is what kind of space of interaction does the court offer? In addition, is the court somehow different to other spaces of engagement that exist within the urban political landscape?

The chapter is also inspired by Ballard (2008: 169), who argues that

> "participation can be thought of as a way of allowing citizens to contribute to a debate on the best mechanisms for meeting social need. Not only are people consulted on *what* they want but they engage on more political questions of *how* needs should be met".

He also asks five questions about the role of participation in democracy.[68] Thus, the chapter not only unpacks whether the court provides a site of consultation on what citizens want and how their needs

[68] Ballard's five questions are: "First, what benefits and pitfalls are linked to participation?... Second, does a particular participatory regime facilitate deliberation about major policy choices amongst citizens?…Third, how do scales of participation and scales of decision-making intersect with one another?... Fourth, whose agendas are represented in ward level meetings? Finally, are dissenting grassroots voices seen to be valid?" (Ballard, 2008:170-171).

should be met but extends the analysis by asking questions of what kind of "public sphere" the court does offer. The chapter is therefore structured around five key questions:

a) Access: who decides on access to the courts and what does that mean if a group or individual cannot access the court?
b) Mandate: What is the mandate of the court? What can and cannot be decided there? What is it legitimately able to decide on? What is and is not within its power?
c) What are the protocols and requirements of interaction in the court and what are their implications for voice and expression?
d) Who defines the agenda and can it be negotiated?
e) What if any is the ability to challenge/engage with those in control? This point will not be discussed on its own but rather forms a theme that runs through the other sections.

Although these questions are presented separately, the discussions are not discrete and the sections "answer" to many of the same questions at the same time. Following a discussion of these points the chapter goes on to interrogate whether the courts are similar or different to other spaces of engagement and if so, why and how, and - importantly - what does that mean, if anything, for the people who choose to engage in litigation and their overall projects?

5.2 Gatekeeping the trials: access and exclusion

In the two case studies, one of the first and most important issues was whether all of the litigants were equally able to access the courts in order to plead their cases and have their stories heard. The question of access in law and society studies has generally revolved around people's ability to physically gain admittance to the courts or access legal representation (Hirschl, 2004; Decker, *et al.*, 2006). However, in the Sealings and Olivia Road Cases, the issue of access was not about physical distance or access to legal assistance (as demonstrated in the previous chapter), rather it was a question of "gatekeeping". In the Olivia Road Case there was no problem of the Constitutional Court barring the way for litigants or even most *amici curiae*. However, the Supreme Court of India expressed their role as the gatekeeper and actively controlled who accessed the courts and who did not. Furthermore, by taking over of this case *suo motu,* the SCI was able to drive the case in a specific direction and act as both "player" and "referee". The next few sections explore the issue of access and gatekeeping and begin to make the argument, which is continued in the next chapter, that the Delhi traders were excluded from the Supreme Court and, as a result, used other strategies and spaces to express a counter-narrative.

5.2.1 SCI Gatekeeping, deciding on what's in and what's out

There are a number of moments in which judges are able to "gatekeep", the first of which is actually admitting the case to the court for a hearing. According to KG Balakrishnan, Chief Justice of India "Since [PILs] are filed straightaway at the level of the Supreme Court or the High Court, the parties do not have a meaningful opportunity to present evidence on record before the start of the court proceeding" (Balakrishnan, 2009: 5). As such, affected parties have to petition the court to be heard

and hearings are not automatically granted in the Indian legal system. In the Sealings Case, most of the parties were able to engage with the courts: the Union and Capital territory government and the Residents' Welfare Associations (RWAs) were all able, at least initially, to petition the Supreme Court of India (SCI) through their lawyers. The Municipal Corporation of Delhi (MCD) petitioned the court on several occasions but by all accounts worked more closely with the Supreme Court Monitoring Committee (SCMC) to whom they had to report. In contrast, according to BK Jain, the Delhi Development Agency (DDA) was barely involved in the court case and only really engaged with the Court about the development of the Master Plan 2021 (Pers. Comm., 2010). However, the traders had grave difficulties in accessing the SCI and were generally excluded from petitioning it directly. The next section looks in detail at how the various litigants were included or excluded from the space of the court.

The RWAs: an excess of access; the Traders: "no-entry"

The Sealings Case continued the longer trend of the RWAs and the middle-classes using the courts to accomplish their shared vision of Delhi as a world class city (Ramanathan, 2005 and 2006; Zerah, 2007a and b; Ghertner, 2008 and 2011). As a result, the RWAs were given a far more sympathetic ear than the traders, not only by admitting the case but also by hearing almost all of the RWAs' petitions associated with the sealings matter. The alliance was so strong that the SCI even publicly defended the RWAs' use of the SCI and were cited in the national press stating, *'Obviously traders can form a group show their strength and exert pressure on the government. What about the poor*[69] *residents? Can they come out on the street?'*[70]

Prior to the sealings litigation there had been numerous High and SCI cases in which the RWAs had been petitioning the courts over illegal constructions and commercial land use in Delhi's colonies. The 16th February 2006 Supreme Court judgement, which initiated the sealing, lists a series of affidavits and petitions on these issues that date back to 1990. The President of the Green Park Extension RWA was quoted as saying that within in his area alone '*We've been fighting against commercialisation for over seven years'*.[71] Thus, after the many years of litigation the RWAs felt that the SCI's original decision to seal commercial properties was a victory for them and their middle-class way of life and fully endorsed the sealing. Arthi Arora, a resident of Hauz Khas, a very expensive area of Delhi, explained '*The [Supreme Court] order will make a world of difference. We bought properties in residential areas to live in peace. Commercial activities in the locality have made life very difficult for us…'*.[72] In many ways, the Sealings Case was the culmination of this long-term alignment and shared project.

[69] In this case, "poor" refers to pitiable rather poverty stricken and almost all of the RWAs were from middle-income and wealthy areas.
[70] Mahapatra, D, 2006: To fix 20-year-old problem SC walks the Middle Path ,*The Times of India*, 2nd August, 2, NIUA Archive
[71] Verma, R, 2006: RWAs say they can breathe easy now, *The Times of India,* http://articles.timesofindia.indiatimes.com/2006-02-17/delhi/27800597_1_rwas-residential-areas-commercialisation accessed 28.12.2011.
[72] Ibid.

The traders' access and use of the courts was entirely different. Mehra's (2012) recent article on the sealing drive in Delhi argues that "Having progressively witnessed the mass eviction of Delhi's slum dwellers across the city, CAIT avoided going to court, not wanting an "up or down" decision on trader eviction, but a negotiated settlement with elected representatives". She further writes:

> "For even as the traders pushed their visibility on the street, legally they sought to remain invisible, both because there was no clarity on what would happen to properties once sealed or when they would be reopened, and also because sealing would legally bring them into the Court case, and thus subject to only the court's decision on their fate" (Mehra, 2012: 86).

However, I would argue that there is far greater evidence that throughout the case there was a definite sense that the traders wanted to go to court in order to respond to the RWAs' and SCI's allegations, counter their representation and get some kind of resolution but were consistently excluded.

Satender Jain, Joint Secretary General of the Confederation of All Indian Traders (CAIT), lamented during the trial that:

> '*[t]here are no platforms to hear us, we are not even made parties to judicial process and yet we are made to suffer without being heard. By any stroke of luck if we do get small opportunity of being heard, our pleadings are summarily dismissed'*.[73]

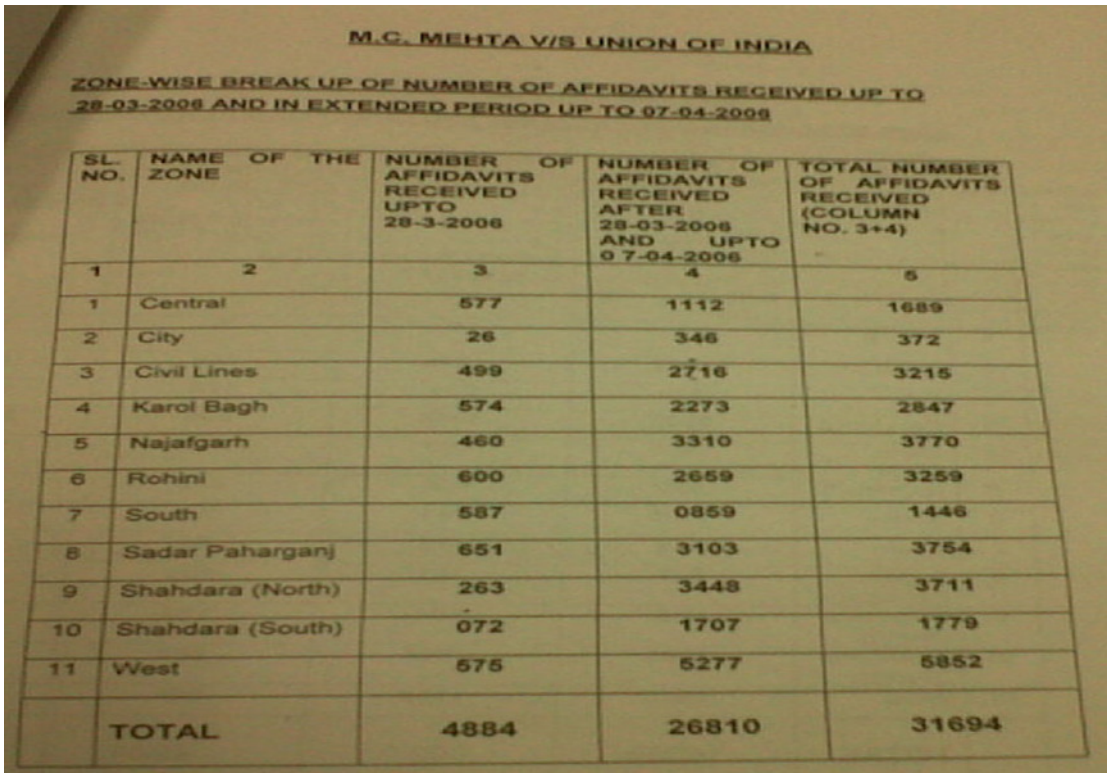
Praveen Khanderwal, Secretary General of CAIT agreed and remembered, *'we did try to intervene in the [sealings] matter in the honourable Supreme Court but honourable court did not allow'* (Pers. Comm., 2010). There were very rare cases when the traders were allowed to approach the SCI. Mahendra Rana, a High and Supreme Court advocate, represented some of the traders, and recalled that when these trials did occur they were *'very arbitrary and mechanical'*. In most cases, traders were seen as infringers who had no rights to hearings, no right to explanations and no rights to defence (Rana, Pers. Comm., 2010). Due to their exclusion the traders engaged with the court through the mediation of the Supreme Court Monitoring Committee (SCMC), the Union Government and ironically, eventually the RWAs. The following section articulates the different moments of access and denial that the main protagonists experienced.

From the first, the primary points of contact between the traders and the SCI was through the official affidavits that traders and property owners were forced to sign and submit. The affidavits were intended to provide the SCI with a guarantee that the trader or owner of the premises would stop the misuse, remove any business-related equipment and vacate the premises by a certain date. The

[73] CAIT Press Release, 20th September 2006, CAIT Archive.

formulation was highly prescribed and standardised with little room for self-expression or the particulars of each case.

Vast numbers of traders were directly affected by the initial decision (an estimated 42 000 traders) to seal premises that were harbouring "illegal" commercial activities and it is estimated that the SCI received just under 32 000 affidavits in less than four months (Figure 14). According to Bhure Lal, one of the three members of the SCMC, once an affidavit had been filed and the equipment removed '*The aggrieved person is supposed to apply for permanent de-sealing saying that the premises has been vacated, the misuse has been put to an end and that he should be permitted to use the premises for bona fide regular use'* (Lal, Pers. Comm., 2010).



M.C. MEHTA V/S UNION OF INDIA

ZONE-WISE BREAK UP OF NUMBER OF AFFIDAVITS RECEIVED UP TO 28-03-2006 AND IN EXTENDED PERIOD UP TO 07-04-2006

SL. NO.	NAME OF THE ZONE	NUMBER OF AFFIDAVITS RECEIVED UPTO 28-3-2006	NUMBER OF AFFIDAVITS RECEIVED AFTER 28-03-2006 AND UPTO 07-04-2006	TOTAL NUMBER OF AFFIDAVITS RECEIVED (COLUMN NO. 3+4)
1	2	3	4	5
1	Central	577	1112	1689
2	City	26	346	372
3	Civil Lines	499	2716	3215
4	Karol Bagh	574	2273	2847
5	Najafgarh	460	3310	3770
6	Rohini	600	2659	3259
7	South	587	0859	1446
8	Sadar Paharganj	651	3103	3754
9	Shahdara (North)	263	3448	3711
10	Shahdara (South)	072	1707	1779
11	West	575	5277	5852
	TOTAL	4884	26810	31694

Figure 14: Affidavits by traders, February until April 2006.[74]

The affidavits process was handled as a technocratic procedure and it was the SCMC who felt that there was a need to provide some type of platform for engagement with the traders. They established an appeals process, where 'a*nybody feeling aggrieved, if he wants to give some representation or he wants to put forward his point of view. We give him time, we listen to him. We are not depriving anybody [of] the natural process of law. The principle of natural justice we are adhering to*' (Lal, Pers. Comm., 2010). Jhingon and Rao (Pers. Comm., 2010), the other two members of the SCMC, confirmed Lal's contention:

> *'we are normally accessible and this is something which is not laid down by the Supreme Court. This is what we decided. That we will allow the public to interact with us… So we decided, that is our own will not on the Supreme Court directive'*.

[74] Source: MCD Archives, Delhi.

The members of the Monitoring Committee made (and continue to make) themselves available to the public for two mornings a week and encouraged traders to come and talk to them. They in turn took matters to the SCI on behalf of individual cases. This did, however, still mean that the traders only had mediated access to the court and were not afforded the same legal opportunities as other affected parties.

The SCMC was not the only body to act on behalf of the traders; the Union Government played a dual role as they accessed the SCI on their own behalf where they were often called before the Supreme Court to defend their actions, and they were also the envoy of the traders to the SCI. Khanderwal recalls

> *'we also submitted our representations through Government of India carrying the same issues which we were intending to submit to honourable Supreme Court and Government of India took many of our suggestion to honourable court…*' (Pers. Comm., 2010).

How and why the government acted on the traders' behalf will be discussed in the following chapters. However it is important to mention that in August 2006, the Union Government attempted to pass the Delhi Laws (Special Provisions) 2006 which would give a year-long moratorium on sealing. It was at this point that the RWAs returned to the SCI. Various RWAs, including the Citizens' Voice, a consortium of Delhi RWAs, Delhi Welfare Residents Association Joint Front, the Delhi Pradesh Citizen Council, the Federation of Naraina Vihar Residents Welfare Associations[75], filed PILs against the new legislation. The RWAs argued that the Delhi Special Laws were unconstitutional, contradicted a Supreme Court ruling, and *'were politically motivated keeping [in] view the coming municipal elections in the city and it should be declared as ultra vires of the Constitution as it violates the fundamental rights of the law abiding citizens'.*[76] The Supreme Court took these PILs very seriously and seemingly heard all of the petitions from the RWAs and their representatives. Part of the reason for the openness to the RWAs was due to a further point of alignment with the RWAs: the SCI was enraged by the Delhi Special Laws and welcomed external criticism to legitimate their own censure. The RWAs' petitions also allowed the SCI to focus on the matter and throughout July and August 2006, the SCI spent much of its time lambasting the Union Government for the promulgation of this legislation. The SCI eventually announced to the media that the Delhi Laws were *'null and void'*[77] and potentially unconstitutional, as the RWAs had said.[78] In what was to become a repeated pattern the

[75] Times of India, 2006: SC poser on law stalling drives, *The Times of India*, 24th May, http://articles.timesofindia.indiatimes.com/2006-05-24/delhi/27807234_1_sc-poser-illegal-structures-sealing, accessed 3.11.2011 and The Hindu, 2006: Supreme Court stays Govt. notification on de-sealing, *The Hindu,* 11th August, NIUA Archive.
[76] Ultra Vires means "beyond the power" and refers in this instance to the idea that the Union government went beyond its powers in promulgating the Delhi Special Provisions and also behaved in a manner in which it applied its discretionary powers in an irrational or wrong way.
[77] Shukla, A., 2006: Govt readies reply after SC whip, *Hindustani Times*, 20th July, NIUA Archive.
[78] Ibid.

Supreme Court then ordered the resealing of 5 000 properties that had just been unsealed. They also ordered the MCD to continue with the sealing of a further 44 000 premises.

It was at this point that there was a break in the united front of the RWAs and in the general alignment between the SCI and the RWAs. Some of the RWAs welcomed the Supreme Court's decision to return to sealing and stated that it was a *'victory of an institution over politics'* and that the *'there should be no mercy as the order has been kind enough to those who deserved it.'*[79] There had also been more moderate voices within the United Residents Joint Action of Delhi (URJA) since the first SCI judgement calling on the RWAs to see the traders first as fellow residents and then as traders.[80] As the case dragged on, many of the RWAs and their members softened considerably in their attitudes to the traders and some were even providing traders with "*no objection*" letters with which to try and fend off the MCD.[81] Other RWAs felt that the traders had been unjustly treated and blamed the SCI's harsh judgement on the government who they felt had not done their job. A representative of the Defence Colony RWA mentioned *'I have full sympathy for the trader community who are paying for the false promises made by politicians and MCD officials'* and the President of the Rohini RWA that the tension and unhappiness had been due to the fact that *'political bigwigs kept playing games'.*[82]

Furthermore, because of some of the RWAs' more supportive approach, the traders were able to gain access to the SCI and present some of their concerns, although in the final analysis the new configuration of RWA/trader alignment proved unsuccessful for both constituencies. In September 2006, the traders petitioned the SCI for a stay of sealing but the court once again refused access, saying that it was not inclined to hear the traders' petition. The SCI did offer the traders a token and said that they could, however, express their views by impleading with one of the main petitioners. As a result, CAIT and a number of its affiliates, some RWAs and residents met under the banner of the People's Action at a conference that led to in a joint petition to the Chief Justice.[83] The petition was a combined request for relief from the '*chaos and uncertainty'* that had engulfed Delhi. It was also an appeal to stop sealing until the new Master Plan had been promulgated.[84]

However, the RWAs who joined the combined petition were seen as "turncoats" by the resident associations that continued to support the sealing and by much of the English-speaking press. They accused those sympathetic to the traders of colluding with the building mafia and alleged that the traders were intimidating RWA members in order to pressure them into supporting the joint petition.[85] In the end, the alignment between the traders and RWAs did not help either party: the joint petition seems to have shut the door on the RWAs for a time as the SCI for the first time during the case did

[79] The Times of India, 2006: RWAs say order a victory, *The Times of India*, 11th August, NIUA Archive.
[80] URJA Newsletters, 21st March 2006, http://urja-delhi.in/newsletters/newsltr_21_03_06.html accessed 06.11.2011
[81] Kumar, D., 2006: Resealing of properties from today, *The Pioneer*, 1st September, 3, NIUA Archives
[82] Ibid.
[83] Legal Correspondent, 2006: Supreme Court rejects traders' plea on sealing, *The Hindu*, 9th September, NIUA Archive.
[84] Outlook India, 2006: Traders, RWAs submit appeal to Chief Justice on sealing issue, http://news.outlookindia.com/items.aspx?artid=418127 accessed 03.11.2011
[85] Anand, N., 2006: RWAs 'turncoats'? *The Pioneer*, 1st September, 3, NIUA Archives

not even acknowledge the content of the petition; and chose to continue sealings. URJA noted that the *'last order of the Court did not accede…'* to their petition.[86] After this point, neither the URJA newsletters nor the press report on the RWAs engaging directly any further with the sealing issue, the traders or petitions, joint or otherwise, in the court.

Thus, these events surfaced fractures within the RWA and middle-class movement and demonstrated the power of the SCI to act as a gatekeeper. The judges' ability to gatekeep meant that they were plainly able to decide which cases came to court, who accessed the courts and who had their ear and who did not. It was quite clear that the SCI judges did not really want to engage with the traders outside of the technical petition procedures that they had established. As a result, the traders were forced to use mediators, initially the SCMC, and the government and later the RWAs in order to have a "voice" in court. The RWAs were given access so long as their agenda aligned with that of the courts and supported the larger project. However, when the RWAs were seen to be divided on the issue and detoured from the shared path, the court suddenly no longer acknowledged their petition. The ability of the judges to act as a gatekeeper is a very powerful mechanism of silencing some voices and worldviews whilst enhancing others, particularly those that support their own projects.

5.2.2 All aboard for the Olivia Road Case

In the Olivia Road Case, the two main protagonists, the San Jose residents and the City of Johannesburg, were given far more equal access than those in the Sealing Case. As was described in the previous chapter, the San Jose residents were able to access the courts through the various *pro bono* and human rights organisations that were working in Johannesburg at the time. The San Jose residents were initially a bit nervous of being able to access the courts and being given a fair trial. Nelson Khetani, a San Jose resident and head of the residents' committee, recalled that he was worried about one of the Supreme Court of Appeal (SCA) judges. The residents knew that the judge in question had been a member of the judiciary under the Apartheid regime and were worried that he would be racist and unfairly biased against them. However, that was not the case and the residents were pleasantly surprised by the even-handedness and equality that they experienced during the trial, especially at the Constitutional Court:

> *'when you get there you really feel that this is the last Court in the land, Constitutional Court and what is important is even if you win, even if you lose, you lose fairly, you win fairly, I am telling you. So even if you lose you go out and say okay I may have lost but I am happy'.* (Khetani, Pers. Comm., 2010).

Thus, there was a sentiment that not only could all parties access the courts and be included in the processes but that in doing so, they would have a fair trial. The only moment of exclusion was when the City of Johannesburg was denied the opportunity to include the other spheres of government as respondents. Naidu (Pers. Comm., 2010) of the CoJ Housing Department remembered that in Olivia Road and other cases *'we wanted the Province to be joined in, [but] the Courts have refused them*

[86] URJA Newsletter, 30th November 2006, http://urja-delhi.in/newsletters/newsltr_30_11_06.html accessed 06.11.2011.

being joined in'. As a result, the CoJ was forced to be the only respondent from the state. This decision had far-reaching effects on the implementation of the Constitutional Court's judgement, which is discussed in later chapters.

5.3 Court mandate bounding the discussions

The previous sections discussed what happens prior to the actual case, such as access and gatekeeping. The following three sections analyse the inner workings of the court: first, its mandate and what can legitimately be raised and decided in this space; second, the "rules" that guide and determine behaviour and their impact on the litigants; and last, who decides what can and cannot be discussed and put onto the agenda for a decision.

In general, all spaces of engagement are limited in terms of their social and statutory mandate. They are bounded in terms of what their function and intention is, and as long as these spaces obey the written and/or unwritten rules governing their purpose, the decisions that emanate from these spaces are considered legitimate. However, should they venture into realms that are not considered to be under their purview, then the decisions may be challenged and, in some cases, justifiably overturned or ignored. As will be in investigated in further detail in forthcoming chapters, the mandate of the court is an enormous bone of contention between the various branches of the state and civil society. However, what is not in dispute is the court's function as the arbiter of what is, and what is not, legal. This section discusses the legal questions that circumscribed the two cases and describes just how far beyond the legal questions the cases actually went. It was, in many ways, debates over the Courts' action, too far in the case of the SCI and too little for the SA Constitutional Court, which later led to contestation and conflict over some aspects of their judgements.

In all court cases, the matters put before them must concern issues of jurisprudence, otherwise the court would not be the appropriate site. As mentioned in earlier chapters, the Sealings Case actually went far beyond its original brief, which was to answer:

> *A. Whether MCD under the DMC Act has power to seal the premises in case of its misuser? B. Whether DDA, under the Delhi Development Act, has also similar power of sealing or not? C. Directions to be issued in respect of residential properties used illegally for commercial purposes. In these matters, we are considering only the issue of misuser. We are not considering the issue of unauthorized constructions."*[87]

The point of law became incidental to the larger matters that engulfed the case and provided a further opportunity for the SCI to engage in the judicial activism for which they have become internationally renowned and locally notorious. The case gave the SCI the opportunity and the excuse to push its own agenda.

[87] Indian Supreme Court Judgement Interlocutory Application No. 22 in Writ Petition (Civil) No. 4677 of 1985, M C Mehta versus the Union of India and Others, 16th February 2006.

The SA Constitutional Court remained far closer to the original legal matter than their Indian counterparts but they too pushed their own agenda through the case. According to Judge Yacoob, the legal points that the Court had to decide were:

> *'[First] whether the Supreme Court of Appeal was right when it granted an order for the ejectment of all the occupiers... [and whether] section 12 of the Act is inconsistent with the Constitution because it provides for arbitrary evictions and evictions without a court order. Second, the occupiers attacked the constitutional validity of the decision by the City to evict them as being unfair because it had been taken without giving them a hearing. [Third] … the administrative decision to evict them was not reasonable in all the circumstances because in particular the City did not take into account that the occupiers would be homeless after the eviction. Fourthly, it was contended that section 26(3) of the Constitution precluded their eviction. The final argument made was that the standards set by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) was applicable to these evictions' and the last point of law was around the Constitutionality of 'section 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 (the Act).*[88]

The courts were also being asked to adjudicate between competing rights. In the San Jose Case, there were three main areas of contention: the right to property versus the right to shelter; the right to self-determination versus the mandate of the CoJ to protect its citizens; and lastly the contention between the judiciary and the CoJ as to who had the right to define policy for the inner-city of Johannesburg. In Delhi, despite the claim that the case was about legal authority, it was far more about who constituted a legitimate rights-bearing citizen in Delhi and who did not, as well as the question of whether the RWAs' right to determine the vision for their own space outweighed the traders' right to earn a livelihood. The narratives and discussions that took place in the courts were largely in service to these competing claims and will be presented in detail in later sections of this chapter.

5.4 The requirements of court protocols and their implications for voice and expression

Courts are not neutral sites and are imbued with what Sinwell (2009: 16) calls "discursive power". Discursive power "determines what is acceptable or unacceptable (the rules, values and norms) and, therefore, what can be said and done within specific social spaces". In the case of the court, the rules are written down and formally codified. "The trial is presented as the site of legality, a carefully orchestrated contest through which aggregations of persons, words, stories, and material are legitimately transformed into facts of intention, causality, responsibility, or property" (Sibley, 2005:

[88] Constitutional Court of South Africa, 2008: Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street Johannesburg, v City of Johannesburg, *et al*, 2008 Case CCT 24/07 ZACC 1 judgement

331-332). The following section describes how the litigants and their stories are transformed by legal protocol so that they are acceptable, "consumable" and hopefully victorious. There are a number of moments of transformation in court cases: the appropriate packaging of information into evidence; the transformation of stories into legal narrative strategies that aim to present a winning worldview; and the transmogrification of litigants into universalised figures, whose cases are simultaneously specific and generalisable. All of this takes place in a site that is half gladiatorial arena, half theatre but always a spectacle. The following section explores these processes and the narratives that were constructed, their conventions and intentions, and then considers the implications for notions of "voice" and representation.

5.4.1 The transformative powers of process and protocol

All courts, irrespective of their legal system, require that information is packaged for them and delivered in specific ways. However, "[a]nalysis of the form as well as the content of small claims narratives reveals the powerful effect of the evidentiary constraints found in ordinary litigation" (O'Barr and Conley, 1985: 662). Court documents such as petitions, writs and affidavits, each have a specified function within court cases and must subscribe to specific templates. These evidentiary requirements mean that information, stories and issues have to be reconfigured so that they are acceptable to the courts. There is no doubt that within this transformative or, as Backer (1998) calls it, "transmogrifying" process, individual stories are reshaped or aspects are silenced in the process of making the narrative appropriate for the court (Krishnan, 2003).

In both countries, the long litany of court protocol begins with a "Notice of Motion", which has a Founding Affidavit attached to it to provide content and justification. The opposition then supplies Answering Affidavits and either side can add supporting affidavits. Once these documents have been filed, replying affidavits and further replying affidavits may be filed with the court, all of which require formulation in specific templates. Officially, in the South African legal system evidence that is submitted in the High Court and Supreme Court of Appeal cannot be added to in the Constitutional Court without appeal. Generally, the content is re-worked into slightly different documentation and arguments for the Constitutional Court case. The Indian Supreme Court addresses constitutional and rights issues and can be appealed to directly and first but follows the same general principles sketched out above. Furthermore, Figure 15 below is an extract from a three page check-list and indicates the substantial requirements for filing a case and the labyrinthine procedural and protocol required by the SCI. Successfully navigating the court requires professional training, experience and knowledge of its internal workings. As such, attorneys, lawyers and advocates advise their clients in particular ways and present their stories in specific modes in order to try to win their cases. The next sections discuss some these requirements and demonstrate how legal narratives are constructed to satisfy these legal demands.

MODIFIED CHECK LIST

1.	(i) Whether SLP (Civil) has been filed in Form No. 28 with certificate as per Notification dated 17.6.1997? (ii) Whether the prescribed court fee has been paid?	Yes/No Yes/No
2.	(i) Whether proper and required number of paper-books (1+3) have been filed? (ii) Whether brief list of dates/ events has been filed? (iii) Whether paragraphs and pages of paper books have been numbered consecutively and correctly noted in Index?	Yes/No Yes/No Yes/No
3.	Whether the contents of the petition/appeal, applications and accompanying documents are clear, legible and typed in double space on one side of the paper?	Yes/No
4.	Whether the petition and the application bear the signatures of the counsel/In- person?	Yes/No
5.	Whether an affidavit of the petitioner in support of the petition/appeal/application has been filed, properly attested and identified?	Yes/No

Figure 15: Extract of a check-list from the Supreme Court of India Rules and Guideline Document

5.4.2 Narrative requirements of the court.

As mentioned in the previous section, the primary convention that the court narratives must obey is that they are compelled to address questions of law. However, that is only the first narrative requirements. In order to try and win, legal narratives must also be framed in specific ways so that they resonate with thoughts, and instincts that are embedded in the judges' belief-systems and elicits from them an almost intuitive agreement (Jackson, 1988; Yovel, 2004). In addition, court cases address the specific situations and injustices of a particular group but they also attempt to resolve wider societal issues of people in similar situations. In order for cases to move from the specific to the more general, individuals are transformed into archetypes (Mendelson, 2010). Put slightly differently, the stories that are told about the individuals should "hook[s] its images into coherent forms that derive from known story-telling genres, familiar stereotypes, and deeply rooted cultural myths" (Sherwin, 1993-1994: 708). Thus, the intention of legal narratives is to win by ensuring that the litigants are seen as representative of a wider class and through resonating with the judges' pre-existing beliefs and worldviews (Ahmad, 2009). The following section unpacks how the litigants and their stories, in both cases, were "transformed" to satisfy these requirements.

Transmogrified traders and re-represented residents

During the course of the Olivia Road Case, the San Jose residents became all of Johannesburg's poor inner-city inhabitants and the San Jose building became a kind of synecdoche for the whole of the inner-city. This point is made clear in various court documents: in a High Court replying affidavit the building is referred to as San Jose *'or indeed "bad" buildings in the inner-city generally'*, thus making San Jose interchangeable with any other inner-city building.[89] In the applicants' Heads of Argument which were submitted to the Constitutional Court the relationship between the specific and

[89] Poto, M., 34th and 92nd Respondents' replying affidavit in the counter-application. Johannesburg High Court, 2007, Case Number: 2004/13835.

the general becomes even more explicit, *'This matter concerns the constitutional rights of the applicants, and the broader class on whose behalf they act…'*.[90]

In the Olivia Road Case, the actual legal specifications of the affidavits contributed to the residents' "transmogrification". The documents sent to the High Court followed a very strictly laid out template: they just had the residents' names, the duration of their tenure in San Jose, if they were owners or renters, their ability to earn an income and some general comments on the quality of the San Jose building. All of them ended with:

> *'[w]hilst San Jose is not the best of the buildings in the Berea/Hillbrow area it is nevertheless habitable and does provide shelter for those occupying same. I am at this stage unable to comment on the technical points of safety as raised by the applicant'.*[91]

The founding affidavit for the CoJ was even sparser in its details of the people involved. Each respondent (both resident and non-resident) was reduced to a few lines including their name and ownership details.[92] A random example taken from the City's founding affidavit states:

> *'The 49th Resident is Maria Sisinyana Mabaso, an adult female whose full and further particulars are to the Applicant unknown… who is the owner of Unit 54 in the Sectional Title Scheme known as San Jose, Building Number SS29/1982 which scheme is situated at stand 1348, Berea'.*

Similarly, the Applicants' (the San Jose residents, *et al.*) Head of Argument to the Constitutional Court provides short narratives of some of the residents of San Jose. Each vignette offered the same narrative as the High Court documents: where people were born, what hardships they faced (poverty, unemployment, disability) and how they had experienced homelessness and will experience it again if they are evicted[93] (see Box 4).

Similarly, the traders were homogenised through the submissions of their affidavits to the SCI and were reduced to a set of numbers reported to the SCI by the monitoring committee (see Figure 14). The RWAs on the other hand and their concerns were generalised by the SCI to the point where they were constructed as the "public" and as all citizens of Delhi. Initially, in the 16th February 2006 Supreme Court judgement, the concerns of the RWAs were described as:

> *'Few residents of a residential colony by the name of Green Park Extension, making averments about large scale unauthorized constructions and… complaining about the illegal and unauthorized constructions and misuser and consequent violation of Master Plan etc.'.*

[90] Constitutional Court, 2008: Applicants Head of Argument, Case No. CCT 24/07
[91] Mashigo, T.E., 34th Respondents replying affidavit in the counter-application. Johannesburg High Court, 2007, Case Number: 2004/13835.
[92] Coetser, M E, Assistant Director of Legal Services, City of Johannesburg Founding Affidavit, Johannesburg High Court, 2007, Case Number: 2004/13835.
[93] Constitutional Court, 2008: Applicants Head of Argument, Case No. CCT 24/07

Box 4: Presentations of the San Jose residents in the Constitutional Court documents

31. A large proportion of the households on the properties are headed by women. Juliet Zondi lives in flat 305, San Jose. She supports her three children on the R500.00 a month she earns as an informal trader in the inner-city. She moved into flat 305 in January 2005 because it was vacant and she had nowhere else to live.

32. Priscilla Sotomela lives in flat 409, San Jose. She supports her two school going children on the R500.00 a month she earns doing part time domestic work in Orange Grove. Her children's school is in the inner-city and her place of work is in close proximity to where she lives. Living in San Jose means that she saves on transport costs. This enables her to pay her children's school fees and buy food and clothes with the income she earns each month. Priscilla first moved into San Jose in August 1982, 25 years ago. She was evicted from the building in the late 1980s. After a few months she moved back in. She and her children have been there ever since.

33. A number of the applicants are disabled. Elizabeth Dzhivhuvho who lives in flat 301 in San Jose is one of these. Elizabeth lives with her daughters Susan and Tiny, aged 14 and 26; her son Christopher, aged 18, and her granddaughter. Susan attends school. Tiny and Christopher are unemployed and have no income.

40. Many of the applicants have been in occupation of the properties for a substantial period of time, many for 10 years, some for over 15 years. Priscilla Sotomela has lived in San Jose since 1982. Nigi Khumalo and her partner Nkosinathi Mbatha have lived in San Jose for 16 years. Thlanthla Mothlabane has lived in the Zinns building for nine years. Before this Thlanthla had been homeless for six years.

(Source: Constitutional Court, 2008: Applicants Head of Argument, Case No. CCT 24/07 extracts from pages 15-17)

However, as the judgement proceeded the terms "residents" and "RWAs" began to disappear and the descriptions of the litigants took on a more universal aspect as the extracts below demonstrate:

> *'Y.K.Sabharwal, CJ noticed that the unauthorised constructions and unauthorised user of residential building for commercial purposes in Delhi had gained alarming proportions and crossed all limits. It was said that these activities are <u>against the interests of the society at large</u> and need to be dealt with firmly and that <u>the public interest demands</u> that the court should not come to the aid of those who break the law with immunity…'*

And

> *'Everyone has to be told that such unauthorised activities are against <u>public interest.'</u>*

And

> "*Therefore, action is also necessary to check corruption, nepotism and total apathy towards the <u>rights of the citizens".</u>* (all emphasis added).

Thus, the residents of the colonies and their specific issues with misuse were translated by the SCI into being representative of all of Delhi and the residents were transformed into "society at large" and the "public interest". It was also only their rights that were deemed to be the "rights of the citizens" and the rights and claims of the traders were ignored throughout the judgements. Thus, the SCI

transmogrified a relatively small group of individuals and their specific interests into universal figures that typified Delhi's society.

The court's understanding of who possessed rights supports Chatterjee's (2004) claims that it is the middle-classes that are able to leverage their demands through rights-based claims. Chatterjee also argues that it is the elite who are able to access and utilise the institutions of civil society, in this case the courts, to have their needs met and their voices heard. The Sealings Case demonstrates Chatterjee's assertion and shows that for the civil society institution of the court it is only the elite few that fall under the heading of "citizen" and who thus constitute rights-bearing society. Individuals and groups who fell outside of this category were not seen by the court as able to make the same claims and were therefore excluded from litigation. The Sealings Case, in some ways, typifies the duality that Chatterjee discusses. Although later chapters will also demonstrate and critique some of Chatterjee's work by discussing how marginalised and poorer residents have also internalised and used the rights-based discourse and eventually accessed "civil society".

The untransformed experts

However, winning a case does not require that all legal actors are made into generalised archetypes. In fact, according to O'Barr and Conley (1985: 670)

> "Except in the case of expert witnesses, the law of evidence expresses a strong preference for concrete descriptive testimony. Lay opinions and conclusions are not necessarily impermissible, but they are frequently restricted".

The implication is that experts and those who understand court procedure are better suited to speaking in their own voices than lay-people and ordinary litigants.[94] In the two cases, the voices of the experts were given significantly more space and weight within the legal proceedings than the individual stories of the residents. In contrast to the homogenised and summarised descriptions of the San Jose residents, the supporting affidavits of inner-city experts and the *amici curiae* were complete documents in the first person narrative. Lauren Royston from Development Works, Nellie Agingu of Planact and Stuart Wilson of CALS were all called on as experts in the original High Court case. Each one established their professional qualifications, and then in quite some detail, made comment on San Jose and offered a set of thoughts and opinions. Royston commented on the nature of demand for affordable accommodation within the inner-city and its lack[95]. She stated: '*The cheapest private rental accommodation at scale in the* inner-city *costs about R850 per month, for a single room with cooking facilities and bathroom… Realistically only a household with an income of about R3200 per month could afford to stay in such a room'*. Royston then went on to outline the income levels of most inner-city residents (below R3200 per month) and emphasized the lack of alternatives within the inner-city. Agingu provided testimony comparing San Jose to an informal settlement in Kliptown, Soweto, concluding that *'generally speaking the conditions in which the occupiers of San Jose are*

[94] Constitutional Court, 2008: Amici Curiae Head of Argument, Case No. CCT 24/07
[95] Royston, L, supporting affidavit High Court Case, 2007, case number 04/13835

living are no more or less unhealthy or unsafe than the conditions in which the residents of Kliptown live'.[96] Stuart Wilson, a lawyer at CALS, also provided a supporting affidavit in his capacity as a research officer for the Centre. In the affidavit Wilson concluded, based on a large and in depth study[97], *'… that the City of Johannesburg's Inner-City Regeneration Strategy fails to give adequate attention to the needs of the people living in the "bad" buildings that are earmarked for closure'*.

Two new groups were given permission to appear as *amici curiae*[98] in the Constitutional Court, the Community Law Centre and the Centre for Housing Rights and Evictions (COHRE). Both applied for leave and were allowed to submit affidavits demonstrating their concerns, their points of view and their desired outcomes of the trial. The two centres are run by lawyers and the cases that they made and their arguments were very much in the language of the courts.[99] Their affidavits consisted of clear, cogent and coherent legal arguments referring to the relevant laws, statutes and Constitutional Court decisions but had very little in the way of personal details.

Since I did not have access to the full court records of the Indian case, detailing what was said is not possible. However, the SCI judgement did use "expert" testimony in the form of the previous Master Plans to justify their actions. They stated:

> *'Keeping future needs in view, experts prepare Master Plans. Perusal of the Delhi Master Plan, 1962 and 2001 shows what were plan projections. At the time of planning, the experts in the field of town planning, take into account various aspects, such as, healthy living, environment, lung space need, land use intensity, areas where the residential houses to be built and where the commercial buildings to be located, need of household industries etc.... Master Plan contemplates shops in District Centres, Community Centres, Local Shopping Centres etc. and not in residential areas. Be that as it may, for the present, we are not considering the cases of small shops opened in residential houses.., but are considering large-scale conversion, in flagrant violation of laws, of residential premises for commercial use.*[100]

The SCI further defended their actions by saying that they were just following the directions of the Master Plans, which are '*prepared by expert planners*' and that '*A perusal of the Master Plan shows that the public purpose behind it is based on historic facts guided by expert opinion.'*[101] Their narrative

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[96] Agingu, N, supporting affidavit case number, High Court Case, 2007, case number 04/13835
[97] Du Plessis, J and Wilson, S., 2005: *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa* , COHRE, Geneva and Durban
[98] *Amici Curiae* literally means "Friends of the Court" and is a group or individual who is someone, not a party to a case i.e. not a litigant, who volunteers to offer information to assist a court in deciding a matter before it. The information provided may be a legal opinion in the form of a legal brief, i.e,.an *amicus* brief, testimony that has not been solicited by any of the parties, or a learned treatise on a matter that has bearing on the case. The decision on whether to admit the information lies at the discretion of the court (adapted from Durhaime Legal Dictionary, 2012)
[99] Wilson, S, supporting affidavit High Court Case, 2007, case number 04/13835
[100] Indian Supreme Court Judgement Interlocutory Application No. 22 in Writ Petition (Civil) No. 4677 of 1985, M C Mehta versus the Union of India and Others, 16th February 2006
[101] Ibid.

displayed a clear bias towards "professionals" whose work they could use to rationalise their actions and who they could quote in order to make the pursuit of their vision seem to be "good sense".

The representations of the various parties indicate important aspects of the space of the courts, namely who is universalised versus who remains an individual as well as how stories or information from some sources is more "valuable" or has greater weight than from others. The end result is the sense that certain groups either should not or are unable to express themselves and need to rely on intermediation. The marginality that many poor people experience in their everyday lives is thus echoed in the courts where their voices are modified, mediated or silenced (Ewick and Sibley, 1995).

5.4.3 Gladiatorial stadia: theatres of antagonism and spectacle

Court narrative transactions have a further requirement: they must be competitive. Each side presents an account that encapsulates its argument and a certain vision of the world. Their opposition's view is by its very nature contradictory and incompatible and the aim of the court case is for one side to lose and the other to win. This sets up the court as a space of struggle, contestation and antagonism as each side is not just fighting for a case but for the dominance of their worldview. Goodpaster (1987: 120) describes a trial as "a regulated storytelling contest between champions of competing, interpretive stories". The two sides are also engaged in a constant clash of attack and defence, a verbal and documented thrust and parry. Thus, courts are platforms in which two sides fight it out in front of an audience and judge, which brings to mind nothing as much as the gladiatorial arena.

However, the contest was slightly imbalanced in the SCI as the case was *suo motu*, and had been taken up and driven by the SCI, thus the court was both gladiator and judge. This situation did not, however, deter antagonistic relations between the various sides despite the fact that the SCI could hold people in contempt. The following excerpt between Additional Solicitor-General, Vikas Singh, representing the Urban Development Minister and a three bench Supreme Court demonstrates just how confrontational some of the interactions became between the various litigants:

> *'Vikas Singh: There is no application or petition seeking stoppage of commercial activities in unauthorised colonies… How can this court pass an order without hearing the affected parties or the Union of India? It is strange that the Union of India is not heard in this court. Your order will create a huge law and order problem as it concerns the livelihood of 40 lakh persons.*
>
> *Supreme Court of India: It is unfair to say that Government of India was not heard. You don't raise your voice. We are not accustomed to it. What you say is really contempt of court.*
>
> *Vikas Singh: I am not raising my voice. Only you [Justice Pasayat] are raising your voice. If it is contempt of court, haul me up for contempt. I am ready to face it.'*[102]

[102] Reported on http://www.delhisealing.org/2007/08/28/centre-takes-on-supreme-court-on-sealing-issue/delhi-sealing.html accessed 27.09. 2010

The documents of the Olivia Road Case and reports of the interactions during the negotiations for the settlement agreement reflect an equally adversarial situation. The Heads of Argument, which are summaries of each side's position and evidence presented in previous trials, are distinctly oppositional documents. The Applicants' (San Jose Residents') Head of Argument in the Constitutional Court case begins with the opening thrust of:

> *'This matter concerns approximately 67 000 people who live in so-called "bad buildings" in the inner-city of Johannesburg and who stand to be displaced by the first respondent's Inner-city Regeneration Strategy'.*[103]

It at once brings into question the City's overall conceptualisation of the inner-city "so-called" Bad Buildings and then lays the blame for "displacement" directly at their feet. The City was certainly not to be outdone and in more measured rhetoric challenges CALS' arguments by asking a series of questions about the City's roles and responsibilities: *'Is the City not entitled to determine that danger to life and health in identified instances requires the evacuation of a building irrespective of any other considerations?'*[104]

Even the meaningful engagement negotiations around the interim agreement were fraught and Royston (Pers. Comm., 2010) remembered that *'So ja, we just had to go through step by step what we were prepared to agree to… Ja, they were quite contentious and quite difficult sessions'.* Nelson Khetani (Pers. Comm., 2010) saw the negotiation as an adversarial process and an opportunity for confrontation:

> *'Margot Rubin: What was that like … sitting down opposite with the City?*
> *Nelson Khetani: With your enemy!...Well let's put it that way, because you know if it was not our enemy we were not going to go to Court to struggle, three Courts, that shows that the Government is our enemy, it is our poor people's enemy, that's why I am calling it an enemy you see. You cannot, the poor of the poor, the enemy to the poor of the poor yes… You keep behind your enemy always, it is very good to, don't run away from your enemy, it has to be in front of you always not far from your eyes, yes'.*

The negotiations literally took months and the parties twice requested extensions from the Constitutional Court. In the end, the negotiations were only able to go as far as providing for inter-rim services and temporary accommodation but were not able to agree to permanent housing solutions.

[103] Constitutional Court, 2008: Applicants Head of Argument, Case No. CCT 24/07
[104] Constitutional Court, 2008: Respondents Head of Argument, Case No. CCT 24/07



Figure 16: South African Constitutional Court Chamber

Courts also have long histories as spectacles, and Hay (1975) describes medieval trials in England in which whole communities would turn out to witness "the most visible and elaborate manifestation of state power to be seen in the countryside, apart from the presence of the regiment" (Hay 1975: 109).

Sibley argues that "In its symbolism, management of emotions, and psychic demands, the law's rituals performed much like religion and argues that court spectacles are like carnivals" (Sibley, 2005: 343). Thus, there is a performative quality to court cases. Narratives are not so much presented to the courts as they are to a large extent performed by the various actors and agents. Trials are highly dramatised spaces and the similarity between trials and performances has long been appreciated. The idea is that similarly to a play, "a trial has a protagonist, an antagonist, a proscenium and an audience, a story to be told and a problem to be resolved, all usually in three acts: plaintiff's case, defendant's case, and the third act, consisting of the summations, charge and rendering of the verdict" (Simonett, 1966: 1145).

In South Africa, the Constitutional Court was designed as a symbolic space with each of the features representing a specific idea or ideal (see **Error! Reference source not found.** and Figure 16). The court is a public space and the public is able to look down on the proceedings and watch the cases as they unfold. All of the legal professionals are robed in their ceremonial gowns and sit at their designated seats, each advocate has a set amount of time to speak and can be questioned by any of the judges at any point in the proceedings. Although there is a public gallery, there are no spaces for witnesses and most of the trial is conducted through the submission of documentation.

In comparison, the Supreme Court of India compound is extremely difficult to access as a member of the public and requires an appointment and the intervention of one the advocates' or court administrators' assistants to sign you through security, get a pass and then into the buildings.[105] The courtrooms are also generally prohibited to the public and only people directly involved in the court case are allowed into the courtroom. Advocates, lawyers, clerks and judges are robed according to their office and the judges sit on raised podiums far above the rest of the court. Although the Indian court does not have a public audience, the manner of interaction is still highly choreographed and each side plays its role in the language and costumes required by the court.

[105] This is taken from personal experience of visiting the Supreme Court in January 2010 and a subsequent discussion with Sunil Thomas, Registrar, Supreme Court of India, 05.02.10

Box 5: The Constitutional Court Chamber

The Court chamber, the heart of the Constitutional Court building was constructed on the site for the awaiting-trial block. Bricks salvaged from the old building were used to build the south wall of the room, creating a rough but striking surface.

The theme "justice under a tree" is evident in the Court chamber:

- The carpet design by Andrew Verster depicts sunlight through tress casting shadows on the ground. It reinforces a connection to the outside, to light and to time.
- A low-lying ribbon of glass emphasizes the transparency of the Court's proceedings.
- The judges' podium is decorated with Nguni cow-hides; the different patterns signifying the diversity of the bench. To dispel notions of hierarchy, the judges sit at eye-level to the lawyers as they present argument and are looked down upon from the public gallery.
- The South African flag is the only decorative piece in the Courtroom. It was made by a women's group of artisans, whose names are etched on the flag.

(Source: Extract from the Constitutional Court of South Africa, Visitors Brochure)

Thus, the protocols and discursive nature of the courts are also about measured and controlled but theatrical ways of competing, contesting and contradicting your opponent in direct and often forceful ways. The narratives take on a fixed and inflexible set of conventions. Just as the *Comedie del Arte* has a set cast with well-established characters and plots, so too does the court. The point for issues of voice and narrative is that the court forces each of the parties into playing very specific and highly adversarial roles, which can construct caricatures such as the "victim" or the "perpetrator" out of real people and therefore lose the nuances and specificities of the individuals and their stories.

5.5 Defining the agenda: a space for all parties

In the court cases, each of the litigants attempted to set the agenda for discussion by raising points intended to drive and embed their own hegemonic or counter-hegemonic project. In order to do so, the various actors, including the SCI, used specific narrative transactions and rhetorical devices to make their stories and thus their visions convincing. These narratives wove actions, motivations and consequences into coherent, cohesive and logical accounts (Brooks and Gerwitz, 1996). So long as the discussions were framed in legal terms and obeyed legal protocol there was significant openness to what could be said within the court.

The narratives that litigants use retell events in such a way that they exclude any troubling discontinuities, contradictions and provide a causative and logical story line (O'Barr and Conley, 1985). Legal narratives obey general narrative conventions but they also have a set of unique characteristics:

> "Chief among the poetic characteristics that lend legal narratives plausibility and credibility is coherence. At the very least this means two things: that the internal sequential arrangement of the narrative, its plot, must obey "unity" in that its various parts sit with each other; and that the narrative as a whole conforms to

> contextual presuppositions held by the interlocutors for which it is intended" (Yovel, 2004: 130).

Lucaites and Condit (1985: 94) argue that the "rhetorical narrative" is also highly prevalent in courts. This device is designed

> "to prepare an audience (originally the "judge" in a court of law) for the proof of an argument… Put otherwise, a rhetorical narrative is a story that serves as an interpretive lens through which the audience is asked to view and understand the verisimilitude of the propositions and proof before it".

Thus, the content and form of legal arguments are shaped by "the demands of the relationship between the specific audience to which it is addressed [the judges], the specific context in which it appears [the court and its protocols], and the specific gain toward which it strives" (Lucaites and Condit, 1985: 94). In other words, the narratives that are told in court have to deal explicitly with the issues of blame, responsibility and agency and need to be expressed in ways that resonate with the judges. The following section looks at the points that each of the litigants put on the agenda and how they were expressed through their legal narratives.

5.5.1 "We are the Poors":[106] narratives of persecution

CALS was able to use the space of the court to raise one of their vital concerns and put a key issue onto the agenda for discussion: the narrative of poor Black residents, being evicted and persecuted by the state. However, the traders were unable to present a similar narrative in the SCI and were left to find other spaces (how they were able to present themselves in the public realm considering this exclusion will be considered in the next chapter). In the Olivia Road Case, the state was represented as uncaring of the particularities of the residents' and traders' circumstances.

> *'The applicant [the City of Johannesburg] does not consider whether any alternative accommodation is available to the occupiers of the properties. Nor does the applicant make any effort to ascertain the special needs or vulnerabilities of any of the occupiers, such as the elderly, disabled and children'*.[107]

Section 27 of CALS' affidavit reinforced this narrative and argued that the residents of bad buildings '*are invariably desperately poor'* and '*without access to adequate legal representation'*. They also argued that the San Jose building was the only available shelter and residents would not have put up with these conditions if suitable alternatives existed. Moreover, Poto's replying affidavit pointed out that the residents of San Jose received eviction notices which were incomprehensible to many of them and outside of these orders the state refused *'to engage with the occupiers at all'*.[108]

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[106] Desai., A., 2002: *We are the Poors: community struggles in post-Apartheid South Africa*, Monthly Review Press, New York.
[107] Poto, M., 34th and 92nd Respondents' replying affidavit in the counter-application. Johannesburg High Court, 2007, Case Number: 2004/13835.
[108] Ibid.

The San Jose residents' Applicants' Heads of argument submitted to the Constitutional Court buttressed this overall narrative by adding a historical dimension. They placed the San Jose Building in the larger historical, political and social context of the inner-city by tracing eviction of poor Black people out of the inner-city of Johannesburg from 1886 and noting: *'The inner-city of Johannesburg was segregated and zoned exclusively for white residential and commercial activity'.*[109] The narrative strategies of the San Jose residents were able to hook into a specific historical meme, i.e., a feature of the Apartheid state was the forced removals of Black South Africans from their homes and the control that the state exerted over where people could and could not live. One of the areas of contention was always the Johannesburg inner-city, which has a record of poor Black people being removed for so-called health and safety reasons (Beavon, 2004). As such, the case took on a larger and longer resonance in which the San Jose eviction was presented as one more act of abuse of the state against the poor Black community of the inner-city.

5.5.2 Modified "Sanitation Syndrome": justifying "cleaning up" Delhi and Johannesburg

The Delhi RWAs and the City of Johannesburg were able to use the case to defend their reasons for embarking on the evictions of the residents and traders. Both parties worked from a similar premise, which was the perceived need to protect and defend certain spaces from "encroachment" by the working poor in order to ensure a very specific vision of these two cities. The world class city aesthetic, as described in the previous chapter, is exclusionary and requires the appearance of a lack of poverty and a sanitised urban environment. Such visions are in part achieved through the removal of the poor justified through the use of a modified "Sanitation Syndrome". Swanson (1977) first applied the idea to colonial South Africa but drew a number of comparisons with other colonised African cities. He posited that:

> "medical officials and other public authorities in South Africa at the turn of this century were imbued with the imagery of infectious disease as a societal metaphor, and that this metaphor powerfully interacted with British and South African racial attitudes to influence the policies and shape the institutions of segregation" (Swanson, 1977: 387).

The sanitation syndrome revolved around ideas of hygiene, infection and disease and was able to "shape perceptions and influence or justify behaviour" (Swanson, 1977: 388). However, as Lemanski (2004) points out, the sanitation syndrome was not really driven by a fear of hygiene or cleanliness, rather this was the "pretext for alternative motives, such as state power or economic interests …… racist fear of 'other' remains the salient motivation, whether disguised as spatial quarantine, political sovereignty, fear of commercial competition, protection of property prices or the securing of business land" (Lemanski, 2004: 103).

[109] Constitutional Court, 2008: Applicants Head of Argument, Case No. CCT 24/07

The RWAs, SCI and the CoJ brought narratives to the court that revolved around discourses of cleanlines:, physical, moral and spiritual; safety and order and control. The descriptions bore striking similarities to each other and "Sanitation Syndrome" of the Colonial period. The previous chapter described the prevailing thoughts and feelings of the officials and residents who brought the cases to court. These discourses on hygiene were expanded in the two court cases and were the justification for the RWAS, CoJ and SCI actions. However, the difficulty with this version of the sanitation syndrome is that there was some rational justification for the litigants' concerns around sanitation and the conditions in which people were forced to live. Thus, it was both a useful excuse as well as a genuine concern.

The first documents of the Olivia Road Case, the Notices of Motion and the Founding Affidavits by the CoJ, refer to the dangers that the building offered to the residents, as both a fire risk and health hazard.[110] These documents and the photographs appended to them, presented the conditions in the building: stagnant water and sewerage running through the building, dangerous electrical wires that were hanging loose and the illegal partitions, which contributed to the fire hazard.[111] The founding affidavit referred to San Jose as a *'death-trap'* and later in a replying affidavit stated '*The Building is in a shocking condition'* and *'not fit for human habitation'*. The same document lists the problems in the building and pointed to a parking garage filled with sewerage, refuse and faeces, as well as floors and lift shafts that were flooded.[112] A CoJ housing official remembered '*… Olivia Road, you could hear the stench a hundred meters away'* (Pers. Comm., 2010).

The San Jose residents and their lawyers did not stand idly by but contested these descriptions in their own court documents and provided counter-narratives to that of the City. Aside from the above-mentioned allegations, the City also stated that the building was overpopulated and illegally converted for residential purposes. The reality is that San Jose was always residential and that since the Resident's Committee took over, there were strict controls about who and how many people could stay there (Khetani, Pers. Comm., 2010). The City further claimed that '*The lack of fire safety is exacerbated by unsafe electrical wiring*', but the building had neither legal nor illegal electricity connections. In the court documents, the San Jose residents countered the CoJ's narrative and attempted to demonstrate that many of the City's points were either not true or exaggerated (see Table 4). However, their main aim was to show that despite the City's claim that the building was unliveable the residents were able to put up with these conditions in order to have some type of shelter. Nelson Khetani affirmed that was the case and recollected,

> '*So I [first] went there [to San Jose]… it is dark in San Jose, there is no lights, there is no water. I said no the place is okay, because I am village man, I am from*

[110] Notice of Motion, in terms of Section 12 (4) (b) of the National Building regulations and Building Standards Act 103 of 1977, dated 23rd June 2004.
[111] Coetser, M E, Assistant Director of Legal Services, City of Johannesburg Founding Affidavit, Johannesburg High Court, 2007, Case Number: 2004/13835.
[112] Sekgota, M., Applicants replying affidavit in the main application and answering affidavit in the counter application Johannesburg High Court, 2007, Case Number: 2004/13835.

the rural areas, so I know this life of darkness. I said no, that's fine for me' (Pers. Comm., 2010).

Table 4: A comparison between the City of Johannesburg's external narrative and San Jose residents' contestations

City of Johannesburg's Affidavit	San Jose Affidavit
All floors are flooded with sewer water	- The building's main entrance lobby is free of waste. - The communal passageways on all the occupied floors of the building are clean and tidy. - The interiors of the occupied units in the building are maintained to a high standard of cleanliness and tidiness.
Water courses through the building and spills out of the parking level on to the pavement.	There are some shallow puddles of standing water in the parking areas.
There are no fire extinguishers and the hose reels and hydrants are unusable.	We deny the contents of this paragraph. There are still many fire hydrants in the building, which would be capable of use if the applicant had not terminated the water supply to the property.
Waste water flows freely and stagnant water is evident in the building…Standing waste water provides a breeding ground for disease.	The courtyards, communal areas and passageways within the property are clean, tidy and free of waste.

Some of the lawyers and civil society organisations also argued that it was misleading of the City to justify their actions by claiming that the evictions were motivated by concerns over the residents' health and safety. In a joint media release, these groups argued that:

> *'On-going research by COHRE and CALS has clearly shown that the real motive behind evictions from "bad buildings" in the inner city is not the need to ensure the health and safety of the occupiers. It is, rather, to push the poor out of the inner city… and if the City was serious about addressing unsafe living conditions for the poor, it would take effective steps, in partnership with the poor, to ensure that the buildings in the inner city are brought under proper management, which would include adherence to safety regulations. To suggest that the only way to do achieve this is by forcibly evicting the occupants of the buildings in question onto the street, without alternatives, instead of calling the owners and management agencies of the buildings properly to account, and forcing them to comply with the relevant regulations and standards, is disingenuous…'*.[113]

In Delhi, the SCI was also quick to take up the narrative around health, safety and hygiene which had motivated the RWAs "homeowner activism" and justified their litigation. The SCI's original judgement resounds with accusations of traders contributing to a dangerous environment for "real" citizens of Delhi. The ruling refers to the *'plight'*[114] of the residents who are faced with the *'rising menace'* of commercialisation. The judges also mentioned the *'alarming nature'* of illegal activities which had *'…injurious effects on the health and well-being of those living in the neighbourhood …'* and '*These complexes are put up and spaces purchased for petty commercial consideration without any regard to the hardship and inconvenience of other citizens'*. The narrative is particularly harsh if one considers

[113] CALS/COHRE Media realease: 30th March 2006

[114] Indian Supreme Court Judgement Interlocutory Application No. 22 in Writ Petition (Civil) No. 4677 of 1985, M C Mehta versus the Union of India and Others, 16th February 2006.

that many of these "dangerous" activities included *'showrooms, commercial offices, shops, law institutions, gymnasia'*.[115] However, over time, the language of the "Sanitation Syndrome" disappeared from the SCI's judgements and paid greater attention to the deficiencies of the local authorities and the battle with the government over legislative supremacy.

The residents, the SCI and the City of Johannesburg were profoundly invested in their specific world class city visions of their cities and needed ways to justify the forced removals of the traders and low income residents. These groups were the physical reminders of what the RWAs, coalitions and SCI did not want to see in their cities as they directly contradicted the aesthetic that these groups were attempting to put in place. Issues of health and safety have the advantage of being rational and quite justifiable. It is reasonable to not want to live in, or not to want to allow your citizens to live in, situations that are dangerous to their health. It is this tension between acknowledging the dangers that these situations pose; how they are managed and at the same time realising how issues of health, hygiene and safety can be used to justify and legitimate relocation and forced removals and the normalisation and internalisation of these issues that makes this modified "Sanitation Syndrome" so difficult to combat.

5.5.3 The Blame Game: local authorities and liability

The previous examples demonstrated narratives that each of the litigants wanted to air in the sphere of the court. However, in both cases there was a shared desire from almost all litigants to publicise the failings of the local authorities. CALS and its team argued that it was due to the City's inability to provide housing and appropriate housing policy which led to people living in poor conditions. They quoted one of the City's replying affidavits against them to make the point:

> *'The [City] has adopted a housing implementation plan, a copy of which is attached hereto as annexure 'K.' It unfortunately does not cover the present situation [lack of adequate* inner-city *housing].'*

The San Jose legal team also stated that the dire conditions in San Jose were the direct result of *'… the City's total termination of the water supply to the property*'.[116] Thus, according to the residents' narrative the CoJ was responsible for creating the situation in which they found themselves.

[115] Ibid.
[116] Constitutional Court, 2008: Applicants Head of Argument, Case No. CCT 24/07

Box 6: Descriptions of the MCD and DDA by the Supreme Court

- Apathetic
- Corrupt
- Conniving
- Action is also necessary to check corruption, nepotism and total apathy towards the rights of the citizens.
- The officers failed to carry out their statutory duties in stopping such misuse.
- The officers were, in fact, encouraging or conniving with persons who were indulging in such misuse.
- Our attention has been drawn by learned counsel to para. 24 of the affidavit filed on behalf of the Government of India to demonstrate how the Government authorities, in particular Delhi Development Authority, were responsible for the mess that has been created.

Sources:
- Indian Supreme Court Judgement Interlocutory Application No. 22 in Writ Petition (Civil) No. 4677 of 1985, M C Mehta versus the Union of India and Others, 16th February 2006.
- M.C. Mehta vs Union Of India & Ors on 29 September, 2006 Author: S . Y.K. Bench: Y Sabharwal, C Thakker, R Raveendran CASE NO.: Writ Petition (civil) 4677 of 1985
- Delhi Pradesh Citizen Council vs Union Of India (UoI) And Anr. on 10 August, 2006 Equivalent citations: 131 (2006) DLT 189 SC, 2006 (8) SCALE 395 Bench: Y Sabharwal, C Thakker, P Balasubramanyan Order of the SC

In Delhi, the SCI picked up on a similar discourse and throughout their judgements berated the MCD and DDA for their apathy, incompetence and corruption. In their original judgement, the SCI blamed the commercialisation of residential space firmly on the MCD and stated: '*Such blatant misuse of properties at large scale cannot take place without connivance of the concerned officers. It is also a source of corruption'.*[117] A bone that the SCI continued to pick throughout almost all of its judgements (see Box 5), and in its 29 September 2006 ruling claimed that '*It is a common knowledge that these illegal activities are also one of the main sources of corruption… It was also observed that such large scale misuse cannot take place without the connivance of the [MCD] officers'*.[118] The SCI consistently argued that the cause was due to *'acts of omission and commission by the authorities … resulting in the environment in the residential colony being totally polluted and civic amenities jeopardised'*.

The Union Government suggested that the local authorities had been inefficient and incompetent and, therefore, the ordinary citizens (i.e., the traders) should not be blamed.[119] In one of their affidavits submitted to the SCI, they laid the culpability squarely at the feet of the DDA, MCD and other state agencies. They claimed that these authorities had not fulfilled their function since 1962, stating: *'how various civic agencies have miserably failed to properly implement the Master Plan - 1962 leading to the present civic mess'.* Their affidavit went further:

> '*It would be evident from the facts and circumstances of the case, … if notification of the mixed land use roads right from the time of the first MP for Delhi 1962… a large number of similarly placed roads have not been notified as eligible for mixed use activities, causing confusion in the minds of the residents as well as enforcement agencies*'.[120]

[117] Indian Supreme Court Judgement Interlocutory Application No. 22 in Writ Petition (Civil) No. 4677 of 1985, M C Mehta versus the Union of India and Others, 16th February 2006.
[118] M.C. Mehta vs. Union Of India & Ors on 29 September, 2006 Author: S . Y.K. Bench: Y Sabharwal, C Thakker, R Raveendran Writ Petition (civil) 4677 of 1985
[119] Union of India affidavit, to the Supreme Court of India, 2006
[120] Joshi, S., 2006: Centre blames civic agencies for the Capital mess, *The Hindu*, 24th April NIUA Archives

The affidavit even pointed out specific instances of lack of delivery: 75 District centres (commercial areas) should have been built but only nine were ever developed and, on average, 10% of what was planned, was built. The media termed the affidavit a *'conciliatory plea'* in which the Union Government conceded to *'… decades of negligence [by the local authorities], allowing the problem to acquire unmanageable proportions*'[121] and requested a six month moratorium on sealing. They then used that concession to recommend a partnership between the government and the SCI. The affidavit proposed that the SCI should assist in regularising the *status quo* and *'In exchange, it promises to work with the court to chart out changes in the Master Plan'*.[122] The SCI refused the appeal for a six-month postponement and carried on with its plan to seal the city.

These narratives typified the Union Government's overall strategy, which was to concede and agree with the SCI to maintain good relations and keep the door to the court open whilst simultaneously trying to maintain relations with the traders by publicly supporting them and casting them as victims

The MCD and the DDA were generally not able to defend themselves and did not attempt to construct a counter narrative inside the court. In fact, the DDA did not engage at all within the court and the MCD worked quietly with the Supreme Court Monitoring Committee, with the overarching attitude of: *'We are an implementing agency, and therefore, are bound by the court order... Even if we don't have the requisite staff, the court orders will have to be abided by'*.[123] The MCD only addressed the SCI directly when they had no other choice or when there was rather extreme call for it, such as fears for the safety and security of the City and for the MCD staff. It was on these occasions that the MCD requested delays or stopping of the sealing. However, their petitions and applications did little if anything to construct a counter-narrative to the narrative that had been established in Court through the testimony of other bodies. The City of Johannesburg, unlike its Indian colleagues, responded with a counter-narrative.

The City of Johannesburg countered the accusations of being uncaring and unable or unwilling to address the housing situation in the inner-city by casting itself in the role of protector and defender of the lives of its citizens (Weber, 1968). Part of this self-narrativisation stemmed from a very real concern around legal liability, as Karen Brits, Head of the City of Johannesburg's legal unit said, *'Now conceivably, the City could be sued by people for not taking action against the landlords, that allow those conditions to prevail in the buildings'* (Pers. Comm., 2010). It was also apparent that many of the City's actions were motivated by a completely sincere and profound concern with the conditions in which the residents were living in and honestly felt that eviction to anywhere else would be better and safer for the residents. Throughout their court documents, the CoJ makes the claim that the evictions are for the residents own good as they are living in dangerous and life-threatening conditions. They

[121] Singh MK and Mahaptra, 2006: DUD Ministry to move SC today, *The Times of India*, 12th April NIUA Archives
[122] Ibid.
[123] Mayor Farhad Suri quoted in Times News Network, 2006: MCD caught off-guard *The Times of India*, 11th August, 2, NIUA Archive.

presented the case that it was up to the authorities to behave in a responsible manner and protect citizens even from themselves.[124] They justified their actions by arguing that '*The City, acting under health and safety laws and its constitutional and public obligations, brought applications to evict various occupiers of buildings determined by the City to be unsafe - where the evacuation of the building was determined to be necessary for the sake of safety'.*[125].Such thinking is supported by the various building and health and safety regulations which set out the duties and powers of local authorities and put the onus on to the city to take *'reasonably practicable measures'* to protect residents from nuisance and danger.[126] Thus, the City countered the image of a heartless and anti-poor state with the evocative (and in many ways quite genuine) image of a caring and concerned institution doing its utmost to save the lives of its citizens.

5.5.4 The lone surviving protector of law and order

The SCI moved beyond being a gatekeeper and became another "player" who used the case as a site to construct their own narrative and to try and legitimate their own vision. However, the "playing field" was immediately uneven: as already discussed, the court was the gatekeeper and thus chose the terrain and controlled access but a further issue was that the court's narratives were immediately seen as legitimate given their status an institution or apparatus of hegemony, whilst the other litigants had to wait for judicial approval in order to gain legitimacy (Litowitz, 2000). The SCI used the case and its position to promote an image of itself within Indian society as the last space in Delhi that could be relied upon to uphold the law. Such an image meant that it could justify its decisions and actions as furthering the cause of law and justice and thus persuade Delhiites of the "rightness" of its actions. The following section describes the narratives that the SCI utilised in order to reinforce this vision.

The Sealings judgement held the state to account almost above all else. The reasons revolve around the vision that the Supreme Court had of itself and the hegemonic role that it was trying to reinforce. The SCI consistently represented itself as the last bastion of law and order in the City of Delhi and the only institution to uphold justice. As discussed earlier, it presented Delhi as beset by corrupt and incompetent local institutions, which were largely to blame for the chaos in the city. Throughout their judgements and statements, the SCI judges represented themselves as a refuge of legal rectitude, especially in the face of '*those who have been entrusted by law to protect these rights" who turned out to be the 'abettors and/or violators'* of the law.[127] They stated that the law must be upheld and that '*none has any right, human or fundamental, to violate the law with immunity'* and warned:

> *'It is dangerous trend if the people do not have either respect for or fear of law primarily due to non-enforcement of the law. It is something which causes us some concern and it would be appropriate if serious thought is given to this aspect at the highest quarters.'*

[124] Sekgota, M., Applicants replying affidavit in the main application and answering affidavit in the counter application.
[125] Constitutional Court, 2008: Respondents Head of Argument, Case No. CCT 24/07
[126] The National Building Regulations and Building Standards Act No. 103 of 1977; The Health Act, No. 63 of 1977 and the City of Johannesburg's Fire By-Laws based on the Fire Services Act No. 99 of 1987.
[127] Indian Supreme Court Judgement Interlocutory Application No. 22 in Writ Petition (Civil) No. 4677 of 1985, M C Mehta versus the Union of India and Others, 16th February 2006.

And

> *'If the laws are not enforced and the orders of the courts to enforce and implement the laws are ignored, the result can only be total lawlessness.'*[128]

The Supreme Court represented itself as having a constitutional duty to protect the fundamental rights of Indian citizens[129] and would not stand as a '*mute spectator'* whilst crimes were being committed. The SCI clearly set itself into the breach when it stated, *'The things cannot be permitted to go on in this manner forever' and* consistently argued '… *we are not trying to do anything new. We are only ensuring to make sure that what you have made is implemented'* (Rao and Jhingon, Pers. Comm., 2010). The Supreme Court was thus able to hold the moral high ground as they insisted that the MCD should do nothing more than implement the existing law. However, Manoj Mitta, a legal journalist, noted that:

> *'[The] Supreme Court… derived a lot of mileage out of making a very literal interpretation of the rules as they stood. So, they could always therefore say that look, we are going by the book. This is what the book says. Don't give us this justification that you know, you are being reasonable, I won't accept it. It is residential property and it's forbidden, therefore what you are doing is wrong and therefore it is liable to be sealed'* (Pers. Comm., 2010).

Furthermore, in the clash between the government and the SCI this narrative was extremely useful as it allowed the SCI to lay a series of accusations at the government's door:

> *'We talk so much about making the nation a developed country. You say that for the last two decades, the development has not taken place as per plans. Who is to be blamed for this? What is the parliament doing? Was it sleeping for 20 years?'*[130]

And

> *'...this kind of legislation has been passed only in this nation. It says all orders and the law or be obeyed by citizens are suspended… A former Lt Governor of Delhi PK Dave, has to come to this Court to challenge this act. It is unheard of. We are talking of good governance. Is this the way to do it?'*[131]

The SCI was thus able to promote their legitimacy as the protector of law and order against all disruptive forces, including the government. They then made a further a further leap and stated that the *'Rule of Law is the essence of a democracy'*, which then meant that SCI was not only the upholder of the law but also by extension the protector of Indian democracy. The court was able to use the case to further its own agenda and thus strengthen its self-defined role in Delhi's governance.

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[128] Ibid.
[129] Ibid.
[130] Mahapatra, D, 2006: To fix 20-year-old problem SC walks the Middle Path , *The Times of India*, 2nd August, 2, NIUA Archive
[131] Express News Service, 2006: SC admits plea against demolition freeze law, *The Indian Express,* 2nd August, NIUA Archive.

5.5.5 "Get off my turf"!

The Sealings Case also became an important site in the long-running battle for legislative supremacy between the state and the judiciary (Cassels, 1989; Baxi, 1993; Sripati, 1998). The SCI put the issue of supremacy on the agenda by making the claims it did about its role as the last bastion of law and order and thus the only institution competent to make and carry out decisions about Delhi. However, the SCI's narrative did not go unchallenged and the Union and Delhi Government used the case to contest the SCI's position and attempt to promote its vision of governance. The different spheres of government also tried to use the case to gain support from the traders, which they hoped to convert into votes in the upcoming election.

The Central Government did not come to the traders' aid immediately after the SCI's first judgement or after their initial protests. In March 2006, Khanderwal complained to the media, '… *no-one from the government has called us to know why we are on agitation and what material facts we are talking about*.[132] At the time the national government was led by the Indian National Congress (the Congress), which has historically been the party of Indian liberation, representing the ideals of a secular and inclusionary nation with a clear focus equality, plurality and tolerance (Brass, 1998). It has been seen as the party of the poorest parts of Indian society, namely the farmers, labourers and the unregulated or informal sector, whereas the Bharatiya Janata Party's (BJP) "domestic positioning" has been as the party of India's middle-class (Ogden, 2012: 24). Thus, the traders were not the Central Government's "natural" constituency and it was only through a series of threats and promises, which will be discussed in later chapters, that the traders eventually pressured the government into acting on their behalf. As a result, the government petitioned the Supreme Court on a number of different occasions on behalf of the traders and in defence of their own actions. It was thus through the government that the traders generally accessed the SCI.[133] The petitions that the state submitted were mostly requests for delays, postponements or the stoppage of sealing in Delhi. The government publicly claimed that it would *'...abide by whatever they [the SCI] say and will try and seek relief from them. This is an issue in which everybody has to work in complete harmony to retain the character of Delhi'*[134] and simultaneously claiming that it was opposing the sealing in the SCI on the traders' behalf and would do whatever was necessary in order to attain relief. The government publicly turned coat again after committing to the traders that there would be no more sealing and then being lambasted by the SCI, when they declared that '*the government won't spare major violators',*[135] which was a commitment to continue sealing in Delhi. Thus, in their attempt to maintain power they tried to become "all things to all people" which in the end served them very badly and ensured that they lost the 2007 election.

[132] Tribune News Service, 2006: Traders demand regularisation of shops in residential areas, *The Tribune,* 18th March http://www.tribuneindia.com/2006/20060319/delhi.htm accessed 01.11. 2011
[133] The Hindu, 2006: Supreme Court stays Govt. notification on de-sealing, *The Hindu,* 11th August, NIUA Archive.
[134]Mehududia, S., 2006: New master plan within three months, *The Hindu*, 15th March, 4., NIUA Archives
[135] Staff Reporter, 2006: UDM's middle path: partial demolition, *The Pioneer,* 10th August, NIUA Archives

Aside from attempting to protect the traders, the government also contested the SCI's assertions that the courts were the legitimate lawmakers and the SCI's intrusion into what they felt was their constitutionally mandated terrain. Vikas Singh, a Supreme Court advocate, was hired by the Union Government Ministry of Urban Development as an Additional Solicitor General of the Government of India to represent them during the Sealings and Delhi Pradesh Citizens' Council case.[136] Singh argues that the reasons why the Union Government responded in Court were because:

> '*Courts get into the jurisdiction of the executive and executive rightly had a right to protest and say that "look her,e this is my turf, don't get into my turf"'*

And

> *'So he [Minister of Urban Development] put me in this case and he wanted me to tell the court that these are policy issues, which the government has to handle looking at the larger urban problem that is being faced by the city and court can't just take a, you know, you can't use one brush and take one view in the matter'* (Singh, Pers. Com., 2011).

The SCI provided the government with the perfect platform to oppose the court and to construct narratives about its own legitimacy. The state passed numerous notifications and promulgated the Delhi Special Provisions, all of which challenged the SCI's authority by finding ways around their decisions on sealing. These notifications were also intended to maintain their legislative legitimacy and prove that they could and should make the laws.

When the Delhi Special Provisions were promulgated, the SCI was incensed by the government's behaviour and struck back by mobilising their power of judicial review and examining the constitutionality and legality of the various notifications and the Delhi Special Laws. They stated in their judgements:

> *'It is vehemently contended that no law can permit or ask the instrumentalities of the State to disobey or disregard the directions of a court. The contention is that the aforesaid two directions have the effect of overruling the directions of this Court and asking the authorities to act contrary thereto'*.[137]

The above ruling meant that the government's notifications could not nullify what the SCI had already decided and demonstrated the SCI's power by negating everything that the government's notification had done and promised:

> *'This order of stay will mean that the properties which were sealed under the directions of this Court (5006 as per the report of the Monitoring Committee) shall*

[136] This was the case that contested the Constitutionality of the Delhi Special provisions and formed a key part of the larger Sealings Case.
[137] Delhi Pradesh Citizen Council vs. Union Of India (Uoi) And Anr. on 10 August, 2006 Equivalent citations: 131 (2006) DLT 189 SC, 2006 (8) SCALE 395 Bench: Y Sabharwal, C Thakker, P Balasubramanyan, Order

have to be resealed. It will also mean revival of the undertakings given to cease the misuser by 30th June, 2006'.[138]

The government's inability to completely implement the Special Provisions did not stop it from trying to thwart the SCI in other ways and it passed further notifications which were intended to protect the traders. These notifications made a number of roads into "mixed-use" areas, which were safe from sealing and extended the deadlines for submitting affidavits and closing commercial activities. The SCI did not tolerate such "interference" and once again laid claim to its territory:

'There cannot be any doubt that the Legislature would lack competence to extend the time granted by this Court in the purported exercise of law making power. That would be virtually exercising judicial functions. Such functions do not vest in the Legislature. In fact, those who gave undertakings are already in breach of the undertakings by not stopping misuser by 30th June, 2006'.[139]

The government's attempt to re-establish its authority was torn down by the SCI's consistent rulings against the legitimacy of their laws and notifications and then forcing the MCD and the police to carry out their judgements. Thus, the court became a site in which the government was able to bring the fight right into the space of the court and to force a confrontation between the two parties. By claiming that space, the Central Government claimed the right to speak and have its voice heard and present a counter-narrative to the Supreme Court's claim to executive supremacy. However, aside from a desire to gain votes and protect its "turf", the government did not really present a very strong or coherent counter-narrative. As a result, the government lost the trust of the traders and, thus, the next election, and made little serious headway in its conflict with the SCI.

5.5.6 Arguing a vision for Delhi

The appropriate vision of Delhi was a key issue that was raised in the Court. The SCI used the case to not only define its vision of itself as the legal bastion and legitimate lawmaker, it also used its position of legitimacy to promote its vision for the City of Delhi. According to Ghertner, (2008) and Ramanathan (2006), the point of the SCI's judgements and activism are intended to reconstruct Delhi as an exclusive middle-class, world class city. As mentioned earlier, the sealings judgement continued in the same vein and the SCI undertook the Sealings Case to consciously pursue this trajectory. In their initial judgement, the SCI clearly stated this intention:

'*Environmental Laws have been engaging the attention of this Court for number of years… Directions were issued in respect of shifting of hazardous and noxious industries out of Delhi'* and '*shifting of large industries… polluting industries'* out of the city and in to the surrounding areas[140]… *In a way, this judgment is in*

[138] Ibid.
[139] M.C. Mehta vs. Union Of India & Ors on 29 September, 2006 Author: S . Y.K. Bench: Y Sabharwal, C Thakker, R Raveendran CASE NO.: Writ Petition (civil) 4677 of 1985
[140] Indian Supreme Court Judgement Interlocutory Application No. 22 in Writ Petition (Civil) No. 4677 of 1985, M C Mehta versus the Union of India and Others, 16th February 2006.

continuation of the judgment dated 7th May, 2004 [removal of *industries] with the difference that now we have taken up the issue of large scale misuse of residential premises for commercial use*'.[141]

The world class city vision of Delhi was also pursued, although less overtly, through its other judgements during the case and what the SCI allowed in residential colonies and what it forbade. In September 2006, the SCMC recommended to the SCI that it should consider allowing activities in colonies that offered the '*daily necessities of life'* (Pers. Comm., Lal, 2010). As a result,

> '26 *categories of small shops. Not extending more than 20m^2… were permitted in residential areas which were completely non-polluting and which were the necessity services'* (ibid.).

The total list (see Table 5) included all services necessary for leading a middle-class life, including bakeries, confectioners, cable TV/DTH operations, dry-cleaners, bookshops and cyber cafes. The list of activities that the SCI banned were far more extensive and included any activity that was noisy, noxious or that the SCI thought might cause dirt or messiness, such as junk shops, automobile or rickshaw repair shops. Many of their choices were completely aesthetic and driven by a sense that these activities did not belong in residential areas, such as the sale of '*bulky materials'* e.g. firewood, timber and marble and '*storage and warehousing'*.

However, there were also activities that the SCI seemed to have a moral objection to, such as liquor shops and banquet halls. In addition, it forbade activities that did not pose any of these dangers such as gymnasia, retail activities and crèches on anything other than the ground floor. Furthermore, the SCI disallowed a number of professional activities but gave permission for architects, chartered accountants, doctors and lawyers to work from residential colonies. However, they laid down the condition that these professionals could not use more than 50% of their homes and had to be the actual residents of the premises. An application by a group of IT experts asking for exemptions for other categories of professionals such as management consultants, web designers, designers and software professionals was turned down by the SCI.[142] The professionals felt that it was because '*the current law is based in old times when there were limited professional options*…'. Alternatively, the SCI did not see these professions as being of high enough status to be allowed in the residential colonies, which they were plainly protecting from activities and people that threatened their vision of the City.

[141] Ibid.
[142] Bansal, A., 2006: SC says no to techies, consultants, *The Indian Express*, 30th September , 3, NIUA Archive

Table 5: SCI forbidden and approved activities for Delhi's residential colonies[143]

Permitted Activities	Forbidden Activities
i. Vegetables/fruits/flowers; ii. Bakery items/confectionary items; iii. Kirana/General stores; iv. Dairy products; v. Stationery/Books/Gifts/Book binding; vi. Photostat/Fax/STD/PCO; vii. Cyber cafe/Call phone booths; viii. LPG Booking office/Show room without LPG cylinders; ix. Atta chakki; x. Meat/Poultry and Fish shop; xi. Pan shop; xii.Barber shop/Hair dressing salon/Beauty parlour; xiii. Laundry/Dry cleaning/ironing; xiv.Sweet shops/Tea stall without sitting arrangements; xv. Chemist shops; xvi. Optical shops; xvii. Tailoring shops; xviii. Electrical/Electronic repair shop; and xix. Photo studio xx. Cable TV/DTH Operations xxi. Hosiery/Ready-made Garments/Cloth shops xxii. ATM	1. Banquet halls. 2. Any trade or activity involving any kind of obnoxious, hazardous, inflammable, non-compatible and polluting substance or process. 3. Retail shops of the following kind: a) building materials (timber, marble, iron and steel and sand), firewood, coal and any fire hazardous and other bulky materials; b) repair shops of automobiles repair and workshop, cycle rickshaw repair, tyre resoling and re-treading, and battery charging; c) Storage, godown and warehousing; d) Junk shop; e) Liquor shop; f) Printing, dyeing and varnishing. 4. Retail shops on floors other than ground floor except 5. Professional activities will not be permissible except by Architects, Chartered Accountants, Doctors and Lawyers. Even by these professionals, professional activity will not be carried on in excess of 50% permissible coverage in residential premises and by anyone who is not a resident in such premises. 6. Banks and Nursing Homes operating on plots of less than 200 sqm in the case of residential plotted development and more than 1000 sqm, except those operating on master Plan and Zonal Plan roads. 7. Guest Houses operating on plots of less than 200 sqm in the case of residential plotted development and more than 1000 sqm, except those operating in special areas or on Master Plan and Zonal Plan roads. 8. Pre-primary Schools, fitness centres and gyms operating on floors other than ground floor. 7. The protection of the Act would not be available in respect of the following unauthorized development: a) Any construction that is over 15 m. in height in residential plotted development and regularised colonies; b) Any construction beyond Ground +3 floors in residential plotted development and regularised colonies.

The Supreme Court attempted to inculcate their vision of Delhi through their rulings. They offered quite clear narratives of what they believed to be the appropriate aesthetic vision of Delhi through their negative representations of traders and the mess and chaos that they created. They also presented a vision of what Delhi should look like through guiding which aspects of the existing Master Plan should be implemented and which ones could be exempted. The court further used its legitimisation of protecting law and order and its position as "the appropriate law maker" to justify, legitimate and thus embed its vision in the minds of most Delhiites. This is a classical hegemonic project, where a group of elites, in this case the alliance of the RWAs and the SCI, who were able to promote and generalise a specific worldview make it appear commonly acceptable and desirable for all citizens and to do so in subtly persuasive ways.

[143] Source: M.C. Mehta vs. Union Of India & Ors on 29 September, 2006 Author: S. Y.K. Bench: Y Sabharwal, C Thakker, R Raveendran CASE NO.: Writ Petition (civil) 4677 of 1985

I originally suspected that due to the tightly gate-kept nature of the courts, the judges would have been able to restrict and set the agenda in its totality. However, it is clear that the courts were only able to limit the discussion through denying some groups access but during the case all of the litigants were able to drive their own agendas within the court. Even the traders, who were mostly excluded from the legal proceedings, were able to put their issues and concerns onto the court's agenda through the mediation of the government and the RWAs. It is also evident that out of all of the actors, the SCI was best able to leverage its position to promote the "rightness" of its vision. This finding does indicate that the court is an unequal site, not for agenda setting, but for different groups to publicise, justify and inculcate their agenda.

5.6 Prospects for the margins: what kind of site does the court offer?

The previous sections have discussed the nature of the space that the courts offer along five axes: access; mandate; protocol and control; agenda setting; and the ability to challenge those in positions of authority. The next section asks the question: what kind of site does the court offer for engagement between urban actors? The question is especially relevant when compared to the invited/invented spaces commonly associated with state/civil society interactions. Furthermore, what does litigation mean for questions of voice, empowerment and access to decision-makers if litigants have limited/gatekept access; require universalised narratives; and, are institutions of hegemony and/or are allied with groups or coalitions that have specific urban visions? The following section discusses these questions, beginning with a brief overview of the invited/invented space opposition.

5.6.1 The court: an invited or invented space?

I have used the invited/invented space schema because I once again agree with Ballard (2008: 170), who argues that "Dichotomies are useful for stimulating conceptual discussions… [where] [t]he value of mapping crude models lies in being able to provoke discussions…". The invented/invited space duality is a heuristic device that gives me two end points on a continuum, and allows me to try understand where along that line (if it all) the court sits as a site of state/civil society engagement.

Recent literature on governance divides sites of engagement into invited and invented spaces where "Initiated by the local state, invited spaces typically look to draw local communities into processes of consultation, deliberation and sometimes joint decision-making on key local issues" (Piper and Nadvi, 2010: 213). Invited spaces are generally developed by state officials, who define the agenda, mandate and very often the rules of engagement. As a result, Miraftab (2006: 195) argues "that actions taken by the poor within the invited spaces of citizenship, however innovative, aim to cope with systems of hardship and are sanctioned by donors and government interventions…". Silver *et al.*, (2010: 455) are more critical and contend "States use participatory forums to offload public responsibilities, defuse protest, co-opt opponents, impose social control and mobilize communities behind a neoliberal agenda" (Silver, *et al.*, 2010: 455).

Invited spaces can be categorised into those run by "regularised institutions", which act as "interfaces between the people and authorities of various kinds" (Cornwall, 2002: 18). These are intended and aimed at in some way enhancing the state's performance through making officials more accountable, ensuring better delivery and are used for consultation and co-management of local projects. However, their mandate, agenda and goals are generally not open for negotiation or review by those who participate in these spaces. The ability of these sites to effect change, either policy change or practice, is variable and depends on their statutory position. Furthermore, their ability to act as sites of extensive consultation and interaction, where many different voices can be heard, is circumscribed by the fact that they utilise representatives, rather than engaging the entire community. Other types of invited spaces are more transitory and do not look for a sustained engagement but rather one-off events that are intended to "open up deliberation over policies or service delivery, rather than making decisions" (Cornwall, 2002: 19).

Invented spaces by comparison are "bottom-up" organic, devised and determined by citizens and citizen groups, with common interests and goals. For Miraftab (2006: 195) invented spaces, "are characterized by defiance that resists the status quo" where strategies are mounted to change the existing state of affairs. They are spaces in which citizens and residents act "without the state but simultaneously on it" (Cornwall, 2002: 20). These spaces "can be 'sites of radical possibility' but may also be deeply conservative, maintaining, dominant exclusions, norms and values" (Cornwall, 2002: 20-21). The organisations that constitute invented spaces are seen as "the voice" of civil society and gain legitimacy by presentations of community representativity and consensus. However, they are reliant on individuals wanting to be a part of them and identifying with them in some way. Individuals who do not or cannot identify with the group are excluded. Cornwall (2002) and Cornwall and Coelho, (2007) identify a further group engaged in invented spaces, which are social movements that rely on an oppositional stance to the state for their existence. The state and other civil society structures may seek to delegitimise them as they are not the preferred channel of engagement because they sit outside of the controlled and controllable spaces of those in power. The following section will examine the nature of the court to see, how, if at all, courts fit into this schema.

5.6.2 The "Dangers" of legal narratives

The hypothetical superiority, neutrality and illustriousness of the court and those associated with it mean that legal narratives and texts are seen as having greater integrity than other accounts and what is presented in court comes to be seen as the "Truth" (Cunliffe, 2007). However, court documents and legal narratives are "polluted with authority' - their existence and contents are oriented towards their institutional function" (Roberts cited in Cunliffe, 2007: 82-83). Thus, legal rhetoric can exclude certain voices, stories and in some cases, transform events or people in order to make larger points but because of their position and the "mythical legitimacy" (Barzilai, 1998:16), this aspect of the court is often not recognised or ignored (Ewick and Sibley, 1995).

In the Olivia Road Case, the City of Johannesburg's desire for a coherent narrative constructed an image of the San Jose building that failed to represent reality and the Applicants (San Jose residents) Heads of Argument pointed out that:

> *'The City's eviction applications are in the nature of standard form applications in which the description of the relevant property is simply inserted. Thus applications contain allegations of "illegal partitioning constructed of combustible material" and "the proliferation of unsafe electrical wiring" even where these conditions do not exist on a particular property. The claim that properties are "unfit for human habitation" is also a standard form allegation.'*[144]

The narratives also cast the inner-city residents as contributing to the overall decline of the city rather than as legitimate residents. Similarly, the Supreme Court's narrative constructed traders as dangerous to "real" citizens and formulated the interests of the RWAs and residents as the concerns of all of Delhi and as constituting the "public".

Thus, narratives told in court as opposed to other types of spaces, hold "dangers" in the sense that testimony in court is assumed to be the truth, especially when it is upheld by judicial sanction. The suspicion with which we treat other kinds of narrative transactions is often missing when analysing legal narratives and has in India an SA ignored the political agenda that may underlie what is said. Furthermore, because what is said in court is seen as "truth" or at the very least "truthful", it can be more damaging to individuals and groups than what is said in other kinds of spaces of interaction.

5.6.3 Contorted voices and invisible people

The traders' and the residents' voices were mediated and contorted to conform to the requirements of both narrative strategies and court protocol. The individual stories and the opportunity to tell them lacked in both cases and as such the litigants were unintentionally denied the liberating effect of being able to tell their own stories. Isaiah Mahlobo mentioned that during the High Court Case:

> *'As you sit in the High Court and listen to them talking, you want to jump up and say "Hey you!", [you] want to be given a chance to go to the front and… explain it so the whole court should know the truth. But you aren't given that opportunity. Truly… it feels like if I could have a chance to tell about the one issue… but it's only the advocates who have the right to stand up… and speak'* (Pers. Comm., 2010).

Those in authority listened to sanitised, modified and processed voices, which raises Ewick and Sibley's (1995: 205) concern that:

> "In fact, the dominance of the narrative form in most social situations invites us to consider the extent to which narratives may actually be complicit in constructing

[144] Applicants Heads of Argument Constitutional Court, Case No: CCT 24/07

and sustaining the very patterns of silencing and oppression that some narrative scholars seek to reveal through the use of narrative method".

As well as Chandoke's (2003) contention that

> "Strategic interpretation on the part of well-meaning intermediaries may… overshadow authentic communication and leave the subaltern no less silenced than before. Mobilization may bring marginalized actors into participatory spaces, but not necessarily equip them with the skills to communicate effectively with the others that they meet there" (cited in Cornwall and Coelho, 2007: 13).

Gabel and Harris (1982-1983: 392) concur and add a further dimension whereby

> "the lawyer is defined as the professional who "handles" all legal aspects of the case without client participation. By treating the client as someone who cannot understand the conduct of her own trial, the traditional approach increases the client's sense of powerlessness in the face of the intimidating spectacle going on in the courtroom".

Residents and traders were thus "told" that within the space of the courts, their voices had limited value. As such, they were denied what could have been a truly progressive space for engagement between the various urban actors. Legal narrative transaction may therefore ensure that the courts, more so than other spaces, are able to silence the marginalised even further through their protocols and narrative requirements. In their worst formulation, they may be profoundly misleading by providing the appearance of giving voice to the subaltern, and offering the facade of real communication, whilst concealing the domination that is actually playing out behind the scenes.

5.6.4 Liberating effect of the courts

However, court cases are not only dehumanising and disempowering sites for litigants and O'Barr and Conley (1985), in their study of small claims courts, cite how the process of litigants telling their own stories to a person in authority seemed to have a liberating effect on the individuals concerned. A finding borne out by the concern with narrative studies over the last few decades, which argue that "By allowing the silenced to speak, by refusing the flattening and distorting effects of traditional logico-scientific methods and dissertative modes of representation, narrative scholarship participates in rewriting social life in ways that are, or can be, liberatory" (Ewick and Sibley, 1995: 199).

The court cases did not provide spaces for the majority of the stakeholders to tell their stories to those in authority. Even though certain groups such as the RWAs and the government in the sealing case had better access than some of the others, these groups still told their stories in mediated ways through lawyers, affidavits or the Supreme Court Monitoring Committee. However, there were moments in which the court cases provided the litigants with opportunities to tell their truths to those in power. During the High Court trial, the presiding Judge, Judge Jabhjay, visited San Jose and spoke

to the residents, he *'… walked into building that was like San Jose, dark, couldn't see properly, the stench from the blocked drains but he didn't mind he still went in, quite a few floors up and spoke to people. He didn't rush out!'* (Mahlobo, Pers. Comm., 2010). The importance of the judge's engagement with the residents and the place in which they lived should not be underestimated. For the tenants, it meant that they were being taken seriously by those in power and that they were being heard for the first time, *'Seeing a judge in our building, it was like we had already won'* (Mahlobo, Pers. Comm., 2010). The second moment was during the negotiations between the residents and the City of Johannesburg which had been ordered by the Constitutional Court. The negotiations allowed the residents to engage directly with the City to speak and be heard and to engage on an equal footing with an institution that had, up until that point, been a relatively nameless and faceless bureaucratic establishment. There is a sense that the right to engage with those in power and negotiate their own future and sign an agreement about what that would entail went beyond a simple agreement and held greater significance for all concerned.

A further point, and something that was denied to a large degree to the traders, was the recognition of citizenship and humanity that appearing in a court offers. Khanderwal argued that *'The traders whose businesses are being sealed have been reduced to the status of beggars. Even refugees from Bangladesh were given better treatment.'*[145] By calling on the evocative imagery of the partition and the denial of rights by the British Government, Khanderwal was effectively arguing that the traders had stopped being recognised as citizens by their own legal system. CAIT went a step further in arguing '*that even a person convicted for a death sentence has a right to plead for condoning the sentence to the president… [the] trader[s] in Delhi are [treated] worst than criminals?'*[146] In contrast, the access that the San Jose residents made the litigants feel like they counted and *'made us feel proud'* (Mahlobo, Pers. Comm., 2010). *'Us being in those courts made us feel that we were standing up for ourselves'* in the face of an uncaring city that was more concerned with the middle class-and its issues. It gave the residents a sense that they, too, mattered and that they stood a fighting chance in a vast and scary system, *'No matter how small [I felt in the courts] I may have a big punch... what came to mind is that an elephant can be killed by an ant… what I came here for might actually materialise'* (Mahlobo, Pers. Comm., 2010). Being in the court, able to have their case presented, gave the litigants a sense of hope and that they too were rights-bearing citizens who had both the opportunity and the right to stand up for themselves.

5.7 Conclusions

Some of the spaces in which the litigants engaged can be categorised as invited or invented; RWAs are certainly invented spaces but they are conservative and elitist rather than progressive spaces of politics. The Confederation of All Indian Traders is a special interest group that offers its members an invented space in which to engage the state. Although it, too, is "bottom-up", it is also deliberately

[145] Singh. O., 2006: Traders to protest Delhi sealing drive, *Rediff India Abroad*, 19th September, http://www.rediff.com/news/2006/sep/19onkar.htm accessed 01.11. 2011
[146] Ramesh Khanna quoted in CAIT Press Release, 11th August 2006, CAIT Archive.

exclusive, representing only traders who operate out of formal premises and their interests and has an apparent gender bias that requires further investigation. The San Jose residents and their resident association could be considered a highly localised and specialised invented space. The City of Johannesburg, the Municipal Corporation of Delhi and the Delhi Development Authority as has been demonstrated in the last two chapters, provided very few spaces of engagement.

Courts are not designed as spaces of engagement. However, they do seem to be an increasingly important site that is bringing civil society and the state together as "political claims are phrased in terms of rights and pursued through judicial rather than majoritarian channels" (Butt, 2006: 1) and as other sites of representation continue to fail. Despite the court being a branch of the state, it does not fall comfortably into the invited/invented categorisation but seems to offer a different site of interaction, one that is potentially very powerful in catalysing change. Unlike other spaces of engagement, though, the interaction between the parties is mediated through court protocol and the intervention of lawyers and judges. Miraftab (2006) proposes that invited spaces seek to build consensus, gain policy approval or help marginalised groups "cope". My findings suggest that courts can and do undertake some, but not all, of these activities: judges do have hegemonic projects that they seek to embed through setting policy and developing precedent in law, and in more progressive courts the aim certainly seems to be about providing voice and assistance to certain kinds of claims from marginalised groups. However, the court is not an invented space as it is certainly not constructed from "the bottom-up" or the "grassroots", but it can be used to influence policy and policy-makers. It can definitely put across the special interests of specific groups and it is quite able, under certain circumstances, to "resist the *status quo*" and promote counter-hegemonic movements and shifts. Courts can also be "conduits for negotiation" and the various actors bring "divergent agendas" to the courts but they are not designed nor intended as sites of participation.

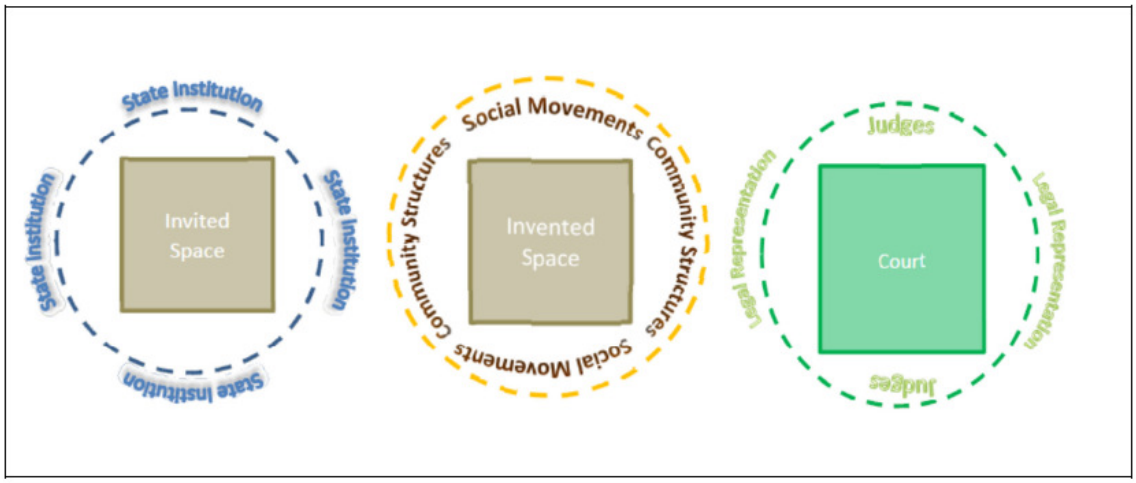


Figure 17: Gatekeeping and access to invited, invented spaces and the court

Similarly, when comparing courts to other spaces of engagement against the defined axes, the results are quite mixed: all spaces of engagement are controlled by some type of gatekeeper. Invited spaces are regulated by the state who decides on who their appropriate "partners" are. Whereas in invited

spaces there are processes of exclusion as social movements and communities can and do decide who is a member and who is not (see Figure 17). In addition, all spaces have defined protocols but where the court is different is in the requirements and implications of its protocols (see Figure 18). The requirements of legal procedures mean that narratives, individuals and groups can be transmogrified into generic archetypes and, thus, lose their identity and the ability to tell their own stories to those in power.

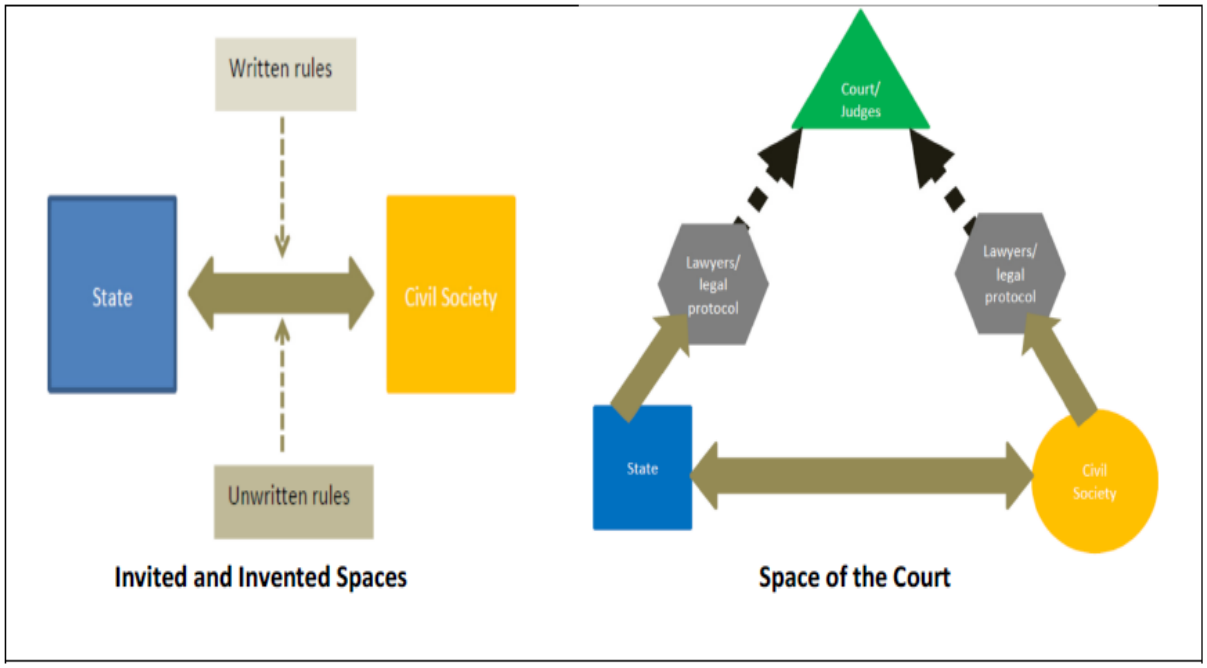


Figure 18: The Impact of discursive practices on engagement between actors: invited/invented spaces compared to courts

Despite these controls there seem to be few restrictions on what can be raised or said within the court. All parties seem to be able to raise, discuss and defend their own agendas. However, in the SCI, the judges used their position to privilege their own agenda. Other spaces of engagement can be far more restrictive and it is often the facilitators or community leaders who define and delineate issues of discussion (see Figure 19).

Courts also have a range of unique characteristics: they are institutions of hegemony and able to legitimate and ratify visions and worldviews and to cast testimony and documentation as “truth”. They are also simultaneously and confusingly spaces where litigants are disempowered by not being able to “voice” their own stories and highly liberating moments in which a sense of citizenship is activated. Thus, courts do not sit comfortably into the invited/invented space dichotomy nor are they definitively “participatory” spaces of civil society/state interaction. They are paradoxical spaces which can be liberating and intensely important sites allowing people to manifest their rights and claims as citizens, whilst also being profoundly disempowering spaces of being silenced and further marginalised.

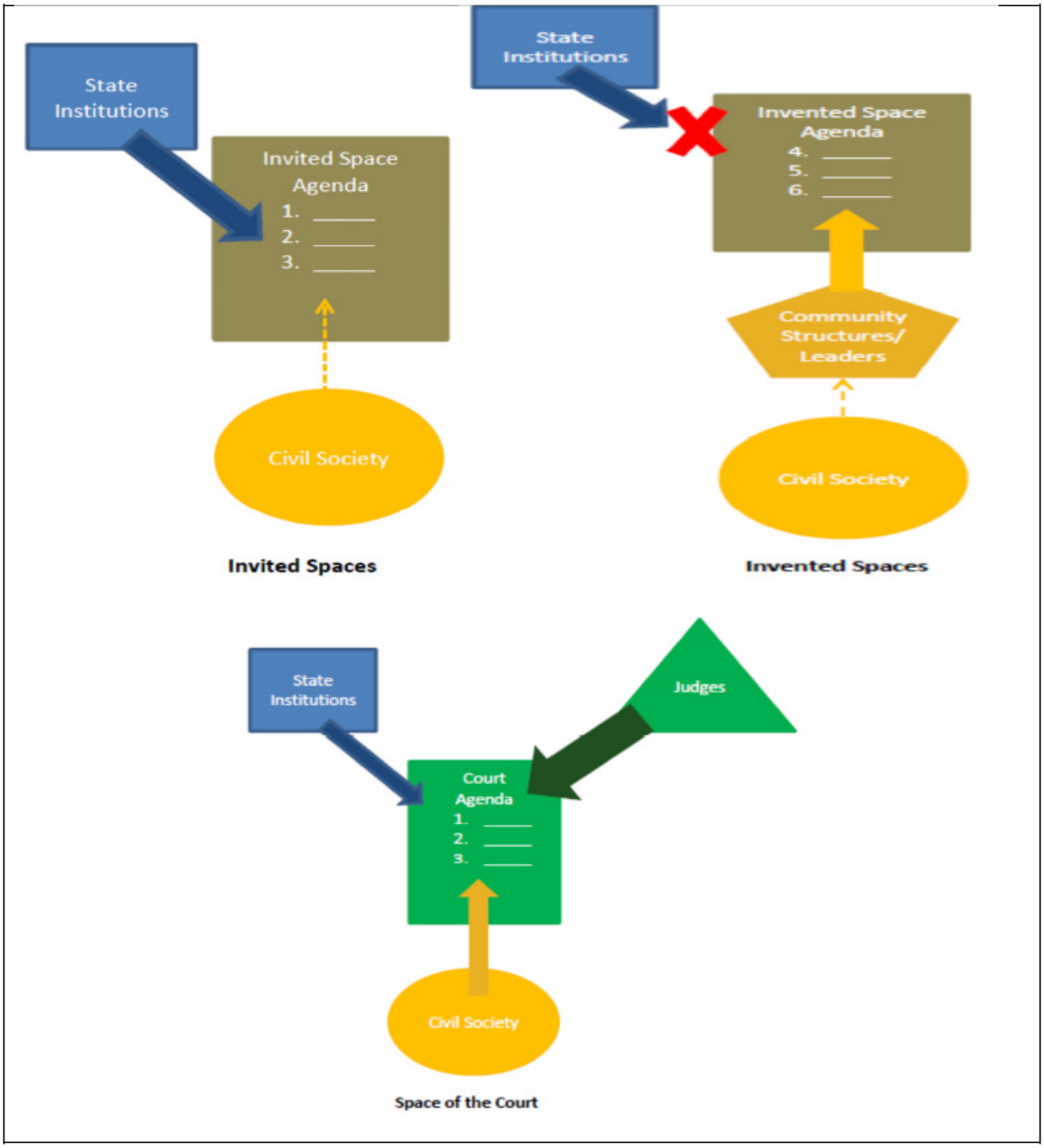


Figure 19: Agenda setting in invited, invented spaces and the courts

The following chapter explores and deliberates on questions of exceptional treatment and political society and looks at the different modes of access that the traders and San Jose residents used in order to try access decision-makers to have their voices heard and influence policy. The chapter compares the use of meaningful engagement and public action in order to make comment in the penultimate chapter about their usefulness and political utility.

Chapter Six: Access to exception: protests, politicians and private engagements

6.1 Introduction

Miraftab (2006: 200) argues that:

> "When formal channels fail, they [social movements/residents] innovate to create alternative channels and spaces for active citizenship to assert their rights and negotiate their wants. They use formal spaces when they are advantageous, and defy them when they prove unjust and limiting. They combine displays of force and solidarity through spontaneous, cooperative action with the power of conviction displayed in informal, persuasive negotiation."

The traders, excluded from the Supreme Court of India (SCI), did exactly as Miraftab describes; they looked for alternative sites to assert their citizenship and new channels to access the public and political realms to counter the way they had been represented in court. These actions were not necessary in the South African case owing to the consistent access and legal support that the San Jose residents received. This chapter follows the traders' mobilisations and explores how they accessed those in power and, simultaneously, how they constructed a public counter-narrative. In addition, the San Jose residents' use of court-constructed spaces of engagement to access exceptional treatment is contrasted against the traders' use of public action and political intermediaries. In order to undertake this analysis, I have used Chatterjee's schema of "civil" and "political" society to demonstrate how those who are excluded from the formal channels of engagement utilise other mechanisms in order to ensure 'exceptional treatment', i.e., finding better treatment or access to urban resources than those in similar circumstances. However, the chapter also demonstrates how some of the findings from the cases challenge aspects of Chatterjee's binary and proposes alternative motivations and explanations for the use of different channels and mechanisms of engagement.

6.2 Introducing Chatterjee to the Sealings and Olivia Road Cases

According to Chatterjee, within post-Colonial contexts not everyone who lives within a nation-state is regarded by the institutions of government as a citizen. As has already been discussed, Chatterjee posits that in point of fact only a very few, the bourgeois elite, are full citizens and thus benefit from the formal rights-recognising organisations of the state. Chatterjee argues that the urban capitalist, modern elites, inhabit civil society and the formal economy, and exercise considerable influence over governments through the bureaucracy, media, judiciary and independent regulatory bodies (Chatterjee, 2004). According to Chatterjee, when access to "civil society" and all that it entails has been denied, communities and individuals are forced into becoming "denizens" of "political society"

(Chatterjee, 2004; Harriss, 2011). This status means that the poor are excluded from direct access to the formal and official mechanisms of the state such as the courts (Harriss, 2011).

As a result, of the exclusion from civil society these groups need to find other ways of making claims. However, their claims are often grounded in violations of the law, i.e., occupied private or government land for housing; or, transgressing by-laws through informal trade (Chatterjee, 2004). The consequence is a form of mediation in which the marginalised make claims through "bending and stretching the rules" and applying the "right pressure at the right places in the government machinery" (Chatterjee, 2004: 66). Their claims are made through "local political leaders or those who head informal organisations" and are able to take the matters to the appropriate state instrument and lobby on their behalf (Harriss, 2011: 165). Furthermore,

> "[t]hose in political society make their claims on government, and in turn are governed, not within the framework of stable constitutionally defined rights and laws, but rather through temporary, contextual and unstable arrangements arrived at through direct political negotiations" (Chatterjee: 2008: 57).

However, Chatterjee's account argues that there are positive implications in the use of political society, suggesting that it is the way poorer people "bring into the hallways and corridors of power some of the squalor, ugliness and violence of popular life" (Chatterjee, 2004: 74) that could otherwise be ignored. The use of political society and forms of insurgent citizenship also mean that certain groups are able to access exceptional treatment by the state (Holston, 2008).

The Sealings Case in many ways typifies the distinction between civil and political society: the RWAs as legal middle-class entities and rights-bearing citizens accessed the courts and mobilised around certain ideas of citizenship and rights that the courts reinforced. The traders, however, excluded from civil society, applied pressure through other means, most particularly public action, which in turn gave them access to the mediation of politicians. Part of their claim was rights-based, which they sought to mobilise and enforce through their activities. It is here that I disagree with Chatterjee and argue that the rights-based discourse is embedded and extremely powerful in the imaginaries of marginal groups.

The Olivia Road Case provides a further counter to Chatterjee's duality as the San Jose residents successfully utilised a rights-based approach situated in the heart of civil society, i.e., the courts. The residents did not engage in other forms of mobilisation or mediation, and as previously discussed, they were unable to access highly placed politicians or officials, which may be seen as a denial of access to political society. However, I would argue that the meaningful engagement, which did take place, forced by the Constitutional Court, was a form of mediation. I would also further contend that the nature of Delhi's politics allowed the traders to exploit "political society" by playing one party off against the other in order to force action and "push buttons", which - given Johannesburg's one party

dominance - was not an option for the San Jose residents. The following chapter explores these issues and concludes with a critique of Chatterjee's dichotomy.

6.3 Choosing modes of public action

In the San Jose Case, there was no public protest and little use of the media, almost all of the narrativisation and presentation of their case happened within the courts. In the Sealings Case the RWAs, as Harriss (2011) and Chatterjee (2004) have discussed in other contexts and I have already raised in previous chapters, followed the established path of the Indian middle-classes and did not use public protest as a form of mobilisation, preferring to use litigation to get their voices heard. Rajiv Kakria, of the Greater Kailash RWA, recalled that the members of his RWA were reluctant to engage in public protests:

> '*So now the traders got together and they took the city by storm. They could organise and they could, you know, just say "Drop shutters and come" and there would be hundreds swarming and for us: "Guys can you come? Can you come?" 200 phone calls and only eight guys coming'* (Pers. Comm., 2010).

It is clear from the quote that in addition to the court/RWA alignment, which ensured that the RWAs primarily choose litigation, there is recognition that small-scale demonstrations and protests do not have the same visual effect or cause the same spectacle as large numbers of people taking to the street. It is this understanding which reinforced the RWAs decision not to engage in public action.

Thus, both of these groups were more than adequately represented in the courts and were able to present their narratives and counter-narratives in the SCI and Constitutional Courts. The traders, however, as has been discussed, were excluded from the court and had to find alternative channels to counter the SCI's and RWAs' narratives. The following section briefly summarises the images that the traders had to counter and points out how these images were reinforced in the English-medium press. Getting to grips with these narratives and their exclusion from the courts helps to explain why the traders engaged in certain types of public action, with specific themes and content, which is discussed in the following sections.

6.3.1 Media and court representations of the traders: narratives in need of countering

Over time, the SCI had been able to construct a narrative in which the RWAs were the rights-bearing citizens of Delhi who could legitimately leverage their rights to call on the courts to defend their way of life from the "encroachment" of traders and slum dwellers. This is a theme that was extended in the Sealings Case, where the traders were represented in and by the SCI as a group that was contributing to the crime and grime of Delhi, making the residential colonies unsafe. Furthermore, they were portrayed as actively colluding with the incompetent and corrupt local authorities in order to perpetuate their illegal activities. Once the protests began, the traders not only had to contend with

the narratives constructed in the court but also had to counter some of the SCI comments and images that were broadcast in the English-medium newspapers.

The SCI had a powerful voice in the media and continued to promote their identity, as the saviour of law and order that they had constructed in the court case. The SCI was able to create an image of the traders as law-breakers and extortionists holding innocent citizens to ransom and themselves as rising above such practices by publicly stating: '*The Government is not powerless to control the situation and none can be permitted to put a dagger on the neck of the authorities…*'.They further maintained that '*The Government should ensure that there is no breach of law and order situation. "No one can be permitted to hold the city and the law abiding citizens to ransom and then seek relief*.'[147]

Aside from the SCI's public representations of the traders, the press also had a few images that they consistently rolled out. They often presented the traders as an influential body in Delhi who were able to leverage political support through their numbers. The press offered an account which called the traders '*a powerful lobby*'[148] both locally and nationally that was able to bend the politicians to their will: '*Once again traders… succeeded in getting the government to enact the Delhi Laws (Special Provisions) Act ….*'[149] The ability of the traders' to mobilise across the country was also presented in the paper and Khanderwal was quoted as saying, '"*We have been in touch with the traders of several cities and they have come forward in our support", adding that around 500 trading bodies had come forward in Delhi alone'*.[150] In a few articles the traders were also presented as intimidating the City stating

> *'If the government does not present our case before the court and the sealing drive is not stopped, we will start a non-cooperation movement against the government and we will stop paying taxes to express our anger.*'[151]

In the English-speaking press, which caters to the middle-class, it was unsurprising that the RWAs rather than the traders were portrayed as victims. The papers reported that '[c]*ommercialisation [is] said to be "wrecking [the] lives" of residents…'* [152] and argued that the RWAs were ignored by those in power '*because the residents were a silent majority and not making noise on the issue like the traders, they should not be allowed to suffer'.*[153] The RWAs also felt that the traders portrayed their concerns as trivial and their actions as malicious:

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[147] Indo-Asian News Service, 2006: "SC says Delhi sealings to continue", *IBN Live*, 6th November, http://continue - India News - IBNLive.mht accessed 28.12.2011.
[148] Mahapatra, D., 2006: SC may get bulldozers rolling again, *The Times of India*, 2nd August, 2, NIUA Archive.
[149] Ibid.
[150] Indo-Asian News Service, 2006: Traders plan action if verdict is against them, *Hindustan Times*, 6th November, http://www.hindustantimes.com/StoryPage/Print/169450.aspx accessed 28.12.2011
[151] Roy, S. and Shukla, A., 2006: Traders Stir against sealing, *The Hindu*, 26th October, 1, NIUA Archive and Indo-Asian News Service, 2006: "SC says Delhi sealings to continue", *IBN Live*, 6th November, http://continue - India News - IBNLive.mht accessed 28.12.2011.
[152] Roy, S., 2007: Case in point: Lajpat Nagar, *Hindustan Times,* 5th February, 2, NIUA Archive.
[153] Our Correspondent, 2006: MCD halts sealing, top court verdict on Sept 29, *The Asian Age*, 26th September, 13, NIUA Archive.

> '*What kind of morons are you?" "What security are you talking about?" "What quality of life you are talking about?" "What is a few hours of noise at night for you to sleep?" "What is this nonsense about?" "There is a whole set of countrymen who need to make a livelihood!" so you suddenly become a villain'* (Kakria, Pers. Comm., 2010).

Given the manner in which the traders were presented, in and out of the courtroom, and their exclusion from litigation, they had to find other ways of articulating and promoting their own counter-narrative. As such, they staged public events to try to ensure that both the public and the media received their counter-narrative. They used well-rehearsed memes and signs to counter the legal narratives and media representations that the SCI and the RWAs had constructed about them and their role in Delhi. The SCI and the RWA had effectively diminished the traders' status as citizens of the city with rights to earning a livelihood and having a presence in Delhi. They had also presented a specific vision of Delhi, which excluded the traders. By taking to the streets, the traders fought to make themselves visible and create a newsworthy event in the City, with their very presence demanding recognition as being both in, and of, Delhi with the right to contribute to the making and shaping of the City. Their actions also had to assert their importance to Delhi and fellow Delhiites. Thus, by blocking streets, highways and closing their business, they concretely affirmed the role that they play in the city and the scale of their input. Furthermore, the use of cultural and social memes, performed in public spaces and on religious holidays, was a way of deploying identity politics that lessened the space between "us" as traders and "them" as residents and instead presented a shared cultural and religious heritage. Thus, it was through performing certain types of protest with various themes and of varying scales that the traders were able to embed their counter-narratives into the public realm and access important political decision-makers. The different forms of protest with their specific narratives are discussed in the following section.

6.3.2 The streets as a site of struggle and counter-narrative

In contrast to both the RWAs and the San Jose residents, the Delhi traders utilised public protest extensively during the sealings trial. According to Gabel and Harris (1982-3: 386) this is in part due to fact that when hegemonic stakes are high in a court case, the litigants and their supporters will mobilise through other channels in order to gain as much support as possible for their counter-narrative project:

> "When a case with… political potential reaches the appellate level, the most important element of a counter-hegemonic strategy is to expand the base of liberating and oppositional energy generated by the case's public exposure. This means doing more than writing a brief on legal doctrine and making a ten minute argument in an empty room. It may mean, for example, attempting to organize meetings around the country with progressive high school teachers and student groups, developing support protests, and actively seeking media coverage which gives a progressive analysis of the underlying issues".

The traders followed exactly this strategy: they invented spaces in which to express their views to those in power and attempted to seek media coverage because they had been excluded from litigation. The traders' public protest, like all public action, was also set to demonstrate their

> "grievance, a conviction of wrong or injustice; the protestors are unable to correct the condition directly by their own efforts; the action is intended to draw attention to the grievances; the action is further meant to provoke ameliorative steps by some target group; and the protestors depend upon some combination of sympathy and fear to move the target group…" (Turner, 1969: 816).

According to Turner, the narratives that are constructed through public protest need to conform to a particular set of criteria in order to gain support and legitimacy within the public realm. Public protests rely less on rhetorical transactions and more on credibility and maintaining a fine balance between threat, performance and spectacle. What the protestors are fighting for must seem to carry some type of moral weight provoked by an "injustice" that needs to be addressed (Turner, 1969), otherwise they are just seen as threatening and a public nuisance. Similar to court narratives, however, public protests also need to be universally resonant and make it plausible that anyone in the same situation would behave in the same way. Thus, the protestors become the public voice of all people in the same or similar position. The threatening aspect is also important because it gives the authorities a sense of the consequencs that would follow if the demonstrators are ignored.

Furthermore, public action is what Holston would call a "space of insurgent citizenship" (Holston, 2008). These spaces are defined as opportunities, and activities from which subaltern groups can disrupt and challenge normative, ideological and exclusionary accounts of society and citizenship (ibid.). Brounlow (2007) also identifies public action as the performative aspect of insurgency, which is the embodiment of "revolutionary praxis" (quoted in Houston and Pulido, 2002:403). Direct action such as protest and demonstration is "enacted in specific historical and geographical contexts … to expose the dynamics of power and exploitation." "Performance", they continue, "operates simultaneously as a space of possibility and becoming, and as a mechanism for working through existing social contradictions [and injustices] by making them visible," (Houston and Pulido, 2002: 406). Thus, public action, similar to courts cases, is able to disrupt the existing hegemonic order by surfacing the moments of exploitation and exposing the fact that the hegemonic project is not in everyone's best interests. "In this regard, performativity is not about what one is… but is rather about what one does, or more specifically it is about what is rendered visible in the act of doing" (Houston and Pulido, 2002: 403).

Public action can offer an alternative vision and put a counter-hegemony in place of that which it is disrupting. These public acts are intended to expose the gaps, weaknesses and self-interest of the dominant hegemony and to persuade "society" that there is little that is "normal" or "natural" about the worldview of the dominant groups. Additionally, "workers' theatricalized protest serve[] to perform, imagine, and bring into being an alternative configuration of social justice. The workers and activists

were thus able to assert their presence as social agents, and in doing so (re)inscribe racial and class politics onto the social and material landscape ... " (Paulido and Houston, 2002: 406). In order to achieve these moments of disruption and a re-inscription of a new worldview, public protests must have a large degree of both ritual and drama to them.

The traders thus "performed" their counter-narratives on the streets of Delhi using different types of public action, which included planned dharnas, yatras, bandhs, and hunger strikes, as well as petitions, and the burning of effigies (see Box 6 and Figure 20). Throughout the phases of protest and within all of the different types of public action the traders attempted to drive some very clear counter-narratives into the public sphere. They had a few main themes, which they repeated throughout their protests, in order to provide an alternative vision of the City and themselves (see Table 6). Their protests countered the idea of traders as law-breakers and a danger to health and safety and rather presented them as contributing citizens of Delhi whose rights to try and make living had been contravened.



Figure 20: Traders and shopkeepers of Karol Bagh burn an effigy representing the government to protest against the sealing of shops in the Capital.[154]

Box 7: A Lexicon of Protest in the Sealings Case

The following terms are just the forms of public action that took place during the Sealings Case. There are a number of other forms of public action that are commonly in use in India but were not mobilised in this specific case.

Bandhs: a protest that shuts down normal activity. It may be peaceful or violent; it may or may not involve industrial and service organizations: it tends to be anti-government, but may be in support of government.

Chakka Jams: causing intentional traffic jams

Dharna: a generic term for a protest, often involving a sit-in.

Hunger strike: fasting and refusing food as a form of protest and with a specific political objective in mind.

Jail Bharo: Public action where many people court arrest.

Relay hunger strike: a form of protest in which a number of persons go without food by turns

Mahapanchayat: group of communal leaders who guide and direct public action (has older historical roots)

Yatra: a journey, procession, or pilgrimage that may be used for political purposes with stops along the way, speeches, and people joining it for portions of the trip. A padayatra is a "foot" yatra, though much of it may be by other means.

(Sources: McHenry, 2006: 189; Harper Collins Dictionary, On-line version, 2003)

[154] Photograph by Rajeev Tyagi, *The Tribune,* 15th March 2006 http://www.tribuneindia.com/2006/20060315/delhi.htm accessed 02.07.2012.

They also presented themselves as the victims of, firstly, the sealing and, secondly, the government's callous disregard.[155] The narratives were also public statements about the effects of sealing and how they felt about the actions of the state. As such, the protests included anti-government sentiments and slogans in which they presented the state, especially the MCD and Union Ministries, as uncaring and not looking after the traders' best interests. The narratives were also not entirely coherent and the traders represented themselves as being both victims of injustice and evil, and also as a powerful voting lobby that could threaten the stability of Delhi and could also make or break political parties.

Table 6: Public actions themes and typologies of the Delhi Traders

Discourse	Rights: right to livelihood and rights to justice	Legitimate Citizens of Delhi society/fellow human beings	Political Agents/force to be reckoned with	Victims of government/SCI	Right to know/demand for clarity
Type of public action	Public Protest	• Family Demonstrations • Trade Mahapanchayat	• Inviting politicians to events • Vast rallies of thousands of people	• Beggars Rallies • Diwali/festival/Dus serha Festival	• Hunger strikes • Demonstrations
Slogan	• '*to demand justice and protection'* • '*Their right to livelihood.'*[156] • The law was '*against the principle of natural justice'*.[157]			• *'Step-motherly treatment they were being subjected to under the Master Plan'*[158] • *Become either beggars or criminals,'*[159] • '*sealing Delhi is as cruel as [the] mentality of Rawan'*.[160] • '*Why does the government do us this wrong'*	• '*Demand clear cut policy from Union government around regularisation and sought intervention from president.'*[161]
Action/ Activity	• Formed a human chain • Media releases	• Door-to-door petitions • Leaders from 300 trade bodies publicly demonstrated	• Publicising meetings with politicians • Threatening politicians that if they do not attend they will not be voted for • CAIT publicising that the traders would act as a votebank • Bringing Delhi to a standstill • Slow-run motor car parade -	• Burn effigies of the government and government officials • Tableaus woes depicting suffering of traders on sealing" • Singing patriotic songs • Sending no-Diwali cards to politicians • Signature petition • Mock funeral of Sheila Dixit	

[155] Staff Reporter, MCD squads seal 458 illegal shops, *The Hindu*, 6th April, http://www.hindu.com/2006/04/06/stories/2006040624090300.htm, accessed 16.02.2012
[156] Times of India, 2007: Shut shops in illegal colonies, *The Times of India*, 20th January, 6, NIUA Archive.
[157] The Asian Age, 2006: Traders begin three-day dharna, *The Asian Age*, 2nd September, 13, NIUA Archive.
[158] Express News Service, 2007: Students protest MCD's sealing drive as Capital coaching centres face action, *The Indian Express*, 8th January, 3, NIUA Archive.
[159] CAIT Press Release, 4th March 2006, CAIT Archive.
[160] CAIT Press Release, 2nd October 2006, CAIT Archive.
[161] Tribune News Service, 2006: Traders demand regularisation of shops in residential areas, *The Tribune*, 18th March http://www.tribuneindia.com/2006/20060319/delhi.htm accessed 01.11.2011.

			holding up traffic • March to Ajay Maken's home		
Location	National Human Rights commission HQ	In areas surrounding where the traders worked/had their shops	Jantar Mantar Zamrudpur Parliament Street	Karol Bagh Welcome area, Shahdara North and Karol Bagh Greater Kailash Market	Jantar Mantar

As will be shown, through their choice of slogans and songs the traders' use of the religio-cultural images and the threats of self-immolation with coloured water, all actions were intended to sensationalise their cause. The traders assumed cultural and religious idioms in order to cast themselves in particular ways and in certain roles. The beggars rally and the fake "funeral" of Sheila Dixit were moments of pure drama. These were not narratives of high rhetoric but rather able to appeal to the basic and visceral understandings and cultural memes of Delhi society, using well-known and loved symbols of good and evil; life and death. By casting the narrative in simple, absolute and culturally relevant terms, the traders were able to construct their own narrative of good and evil and gain public support through their actions. Such narrative constructions are no less sophisticated than those used in the courts but were aimed at a different audience with a different intention.

The traders also engaged in fasts and hunger strikes, which have a long history in India with both political and religious overtones and histories. According to "which ascetic self-denial is mobilised as a moral weapon" (Copeman, 2012: no page). The workers not only believed that the fast was an effective publicity and organising tool, but also recognised the personal and spiritual benefits it generated for the fasters and the larger community (Paulido and Houston, 2002: 417). The performance of fasting also linked the traders' cause to larger histories of resistance such as the Gandhian anti-colonial protests (Copeman, 2012). Symbolically the traders, through the performance of fasting in public, hooked themselves into longer and larger struggles against repression and injustice.

There were also spontaneous demonstrations of anti-sealing sentiments when MCD officials tried to seal commercial establishments. These often led to traders responding aggressively by setting fire to MCD vehicles, throwing stones at officials and facing off against police lathi-charges.[162] Ironically these hostile responses of the traders were quite successful and often because of these actions the '*MCD's sealings teams developed cold feet and disappeared*'.[163] The following section demonstrates the wide variety of themes and typologies of public action and shows how the traders' innovative approach yielded results and were effective in getting the traders access to politicians and decision-makers.

[162] Lathi is a type of police baton.
[163] Times of India, 2006: Delhi traders protest against shop-sealing, *Times of India*, 30th March, http://articles.timesofindia.indiatimes.com/2006-03-30/india/27793874_1_sealing-traders-indefinite-bandh, accessed 28.10.2011.

6.3.3 Theatres of protest: choices of protest

The traders' immediate response to the Supreme Court judgement was to take to the streets and protest against the decision. The traders held 53 days of protest, demonstration or convention of some kind over the period of the trial, which averages at about one form of public action a week for the duration of the case (Table 7). Figure 21, Figure 22 and Table 7 indicate the scale, location and frequency of the public protests and shows that the public actions peaked in March-April and in September 2006. As can be seen and will be discussed in detail, protests and public action were often in response to the SCI's pronouncements or due to the lack of response by the government. The following section also looks at the repertoires of protest that were used in Delhi to capture the public's sympathy and imagination. In doing so I have followed McHenry (2006) and have attempted to understand the socio-cultural meaning and resonance of public action India:

> "It appeared that the word "strike" at times meant something different than a strike as defined by Western scholars. And a vast array of other terms were commonly used to refer to different types of protest action. To pull all of these protest actions into "riot", "strike" or "demonstration" deprived the actions of their meaning. That meaning is not only culturally determined, but situationally determined, too" (McHenry, 2006: 188).

Thus, the following sections not only describe the various forms of public action but also try and differentiate between the typologies in order to unpack why those forms were chosen and what they were attempting to communicate to the wider public.

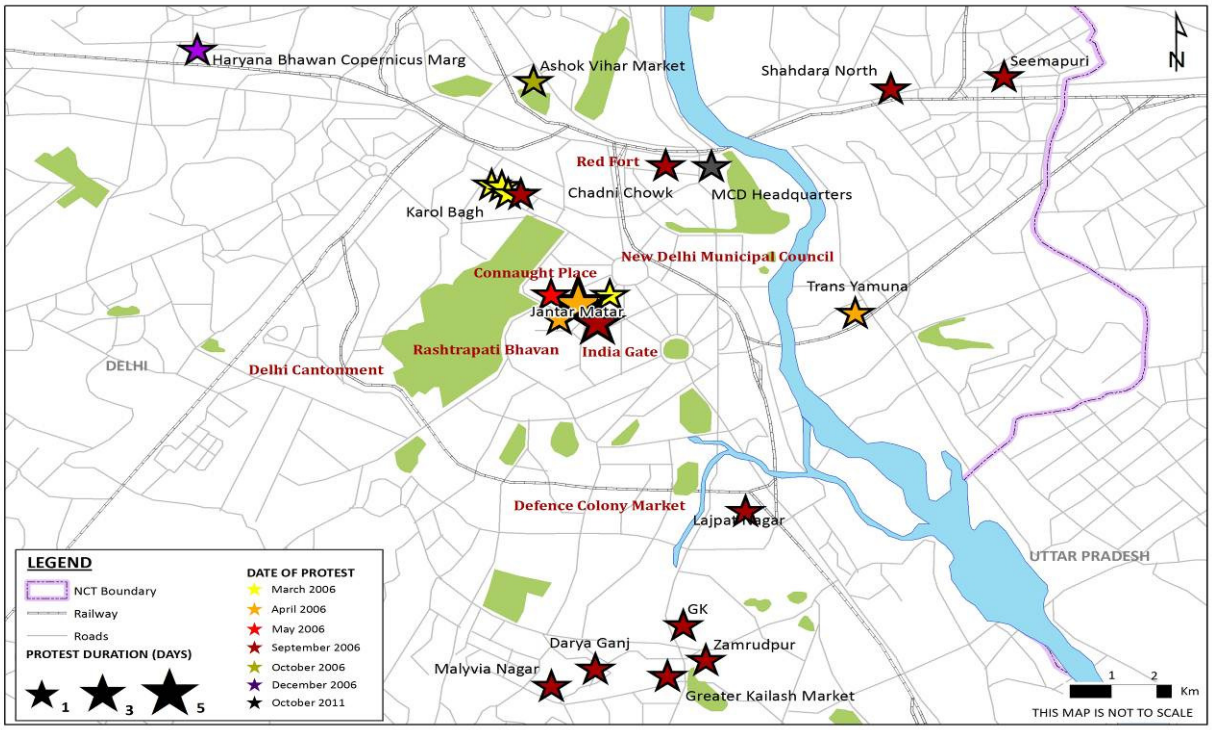


Figure 21: Distribution and location of traders' protests, February 2006-January 2007[164]

[164] Map constructed by Miriam Maina of the School of Architecture and Planning, Wits University.

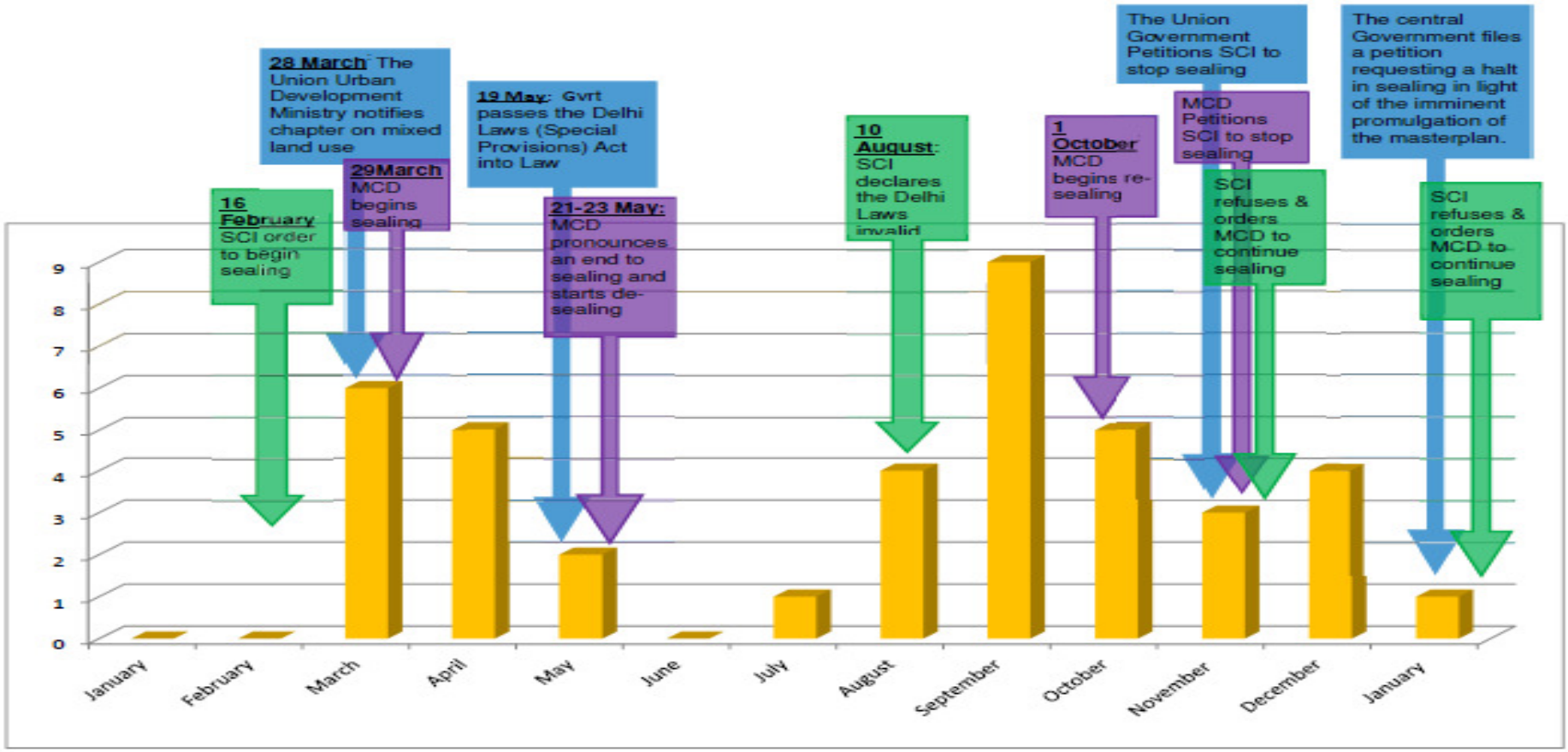


Figure 22: Number of demonstrations between January 2006 and February 2007 in Delhi

Table 7: Timeline of events in Delhi

Colour	Significance
	CAIT/Traders' submission to the Supreme Court of India
	Meeting with politicians/political leaders
	Public action

Date	Activity
18 Feb 2006	CAIT meet Shri Advani, Leader of the Opposition in Lok Sabha[165]
4 March 2006	Beggars Rally in Karol Bagh and surrounds
6 March 2006	i. Protest Dharna, against suicide at Arya Samaj Road, Karol Bagh ii. Demonstration from Jantar Mantar to Parliament
13 March 2006	Meeting with Union Urban Development Minister, Jaipal Reddy, memo to demand traders protection[166]
17 March 2006	"Slow run motor car protest" in various parts of Delhi and Dharna in Karol Bagh[167]
18 March 2006	Traders protested against government not looking after their best interests. Demand clear policy on regularisation.
21 March 2006	Four lakh traders in a "Delhi Bandh" kept businesses closed Accompanied by street protests and markets across Delhi
28 March 2006	Traders conference of trade leaders
29 March 2006	First day of sealing marked with strong protests in markets across Delhi
29 March 2006	Trying to meet with Lt. Governor and MCD Commissioner and demand that Dixit meets with Prime Minister to gain resolution.
7 April 2006	Hunger strike in Jantar Mantar to release trader leaders and demand ordinance on shop sealing[168]
10 April 2006	CAIT *et al* met President of India A P J Abdul Kalam and submitted memo requesting intervention[169]
12 April 2006	Met Union Urban Development Minister S. Jaipal Reddy and asked him to resolve the crisis.[170]
13 April 2006	Pleaded for mixed use citing internal best practice of 35% and stated that proper amendment to the MP will ensure that here is legal construction and land use. The decision to approach the apex court came after a meeting between Dixit, Maken, Reddy Delhi Lt Governor BL Joshi and PM Manmohan Singh[171].
15 April 2006	Gathering of traders at Trans Yamuna
15 April 2006	Invited politicians to join them at the Dharna
16 April 2006	Beginning of 5 day protest Dharna from 17th April staged at Jantar Mantar
17 April 2006	Day 2 of protest
18 April 2006	Day 3 of protest
18 April 2006	Letter sent to CM Sheila Dixit
19 April 2006	Day 4 of protest
19 April 2006	Local politicians and MLAs joined the Dharna
20 April 2006	Day 5 of protest – protest ended
23 April 2006	Signature petition against sealing
23-27th April 2006	Announced relay hunger strike from 23rd-27th April in different markets in Delhi
7 May 2006	Met with BJP deputy leader of the Lok Sabha Dr V K Malhotra[172]
11 May 2006	Planned Bandh 11th May 2006 – "Mammoth Sangharsh Rally" – Jantar Mantar

[165] CAIT Press Release, 18th February 2006, CAIT Archive.
[166] CAIT Press Release, 13th March 2006, CAIT Archive.
[167] The Tribune, 2006: Traders demand regularisation of shops in residential areas, *The Tribune,* 18th March, NIUA Archive
[168] CAIT Press Release, 7th April 2006, CAIT Archive.
[169] CAIT Press Release, 10th April 2006, CAIT Archive.
[170] The Asian Age, 2006: Centre approaches top court, *The Asian Age,* 13th April, NIUA Archive.
[171] Our Correspondent, 2006: Centre approaches top court, *The Asian Age*, 13th April, NIUA Archive.
[172] CAIT Press Release, 7th May 2006, CAIT Archive.

16 May 2006	Met with State Minister of Urban Development Ajay Maken[173]
22 May 2006	Met with Urban Development Minister S Jaipal Reddy, State Urban Development Minister Ajay Maken and Deputy leader of the opposition in Lok Sabha Vijay Kumar Malhotra[174]
23 May 2006	Meeting of all trade leaders
20-21 July 2011	Two day traders conference on FDI/VAT and consolidation of traders into a votebank
11 August 2006	Trade leaders met on 11th August to take stock
13 August 2006	Trade bodies across Delhi meeting with MLAs and corporators[175]
14 August 2006	Traders meeting on 14th August to discuss issues and strategy
27 August 2006	Traders meeting to decide to take to the streets
28 August 2006	Hold protests all week as a warning week[176]
1 September 2006	Three-day sit in at Jantar Mantar[177]
1 September 2006	CAIT has moved SC to stop sealings, say that sealing and demolition will cause hardships to people and it will also lead to large scale unemployment. Also asked to consider that the actions will make people jobless and homeless.[178]
2 September	One day protest by female members of traders families in Chadni Chowk[179]
2 September 2006	Have submitted a memorandum to the SCMC who said they would bring the matter to the SC's attention.[180]
3 September	Sporadic protests across the city and residents protesting in Zamrudpur stopping traffic and not letting MCD to gain access.[181]
5 September	Protests in GK, Malyvia Nagar, Lajpat Nagar, Seelampur and Darya Ganj.[182]
6September	Protests in Welcome area, Shahdara North and Karol Bagh protests, threw stones and shouted slogans against the Centre and Delhi government.[183]
7 September	Protests at Greater Kailash market organised by CAIT, nearly 50-60 traders, seven people said that they would immolate themselves as they were being discriminated against. It was discovered that the fluid that they were going to immolate themselves with was water not kerosene.[184]
19 September	Protest Dharna at 100 different markets of Delhi

[173] CAIT Press Release, 16th May 2006, CAIT Archive.
[174] CAIT Press Release, 22nd May 2006, CAIT Archive.
[175] CAIT Press Release, 13th August 2006, CAIT Archive.
[176] Times News Network, 2006: Re-sealing: Re-sealing: Traders to hit the streets again, *The Times of India*, 28th August, 4, NIUA Archive.
[177] Our Correspondent, 2006: Traders begin three-day dharna, *The Asian Age*, 2nd September, 13, NIUA Archive.
[178] One India, 2006: Sealing: Delhi traders move Supreme Court, *OneIndia.*, 1st September, http://news.oniendia.in/2006/06/01/sealing-delhi-traders-move-sc-115710445.html.html, accessed 15.12.2011
[179] Our Correspondent, 2006: Traders begin three-day dharna, *The Asian Age*, 2nd September, 13, NIUA Archive.
[180] Shukla, A., 2006: Neighbourhood LPG dealers may have to shut shop, *Hindustani Times*, 2nd September, 3, NIUA Archive.
[181] Our Correspondent, 2006: Sealing continues amidst protests, *The Asian Age*, 3rd September, 13, NIUA Archive.
[182] Staff Reporter, 2006: Sealing drive continues in Delhi, *The Hindu*, 5th September, 3, NIUA Archive.
[183] Staff Reporter, 2006: Delhi sealing drive triggers protests and violence, *The Hindu,* 6th September, 1, NIUA Archive.
[184] Express News Service, 2006: More protests meet sealing drive, *The Indian Express,* 7th September, 11, NIUA Archive.

20 September 2006	Trade Bandh hundreds of people onto streets of Delhi to demand justice, protection, and seven lakh traders closed their shops and stage sit ins at different markets. Traders also closed roads and caused "chakka jams"(traffic jams) at different points in the city
21 September 2006	Met with Union Home Minister Shivraj Patel and Delhi Lieutenant Governor B Joshi, Sheila Dixit, Union Minister of State for Urban Development, Ajay Maken, Delhi Chief Secretary S Raghunathan and MCD Commissioner A K Nigam.[185]
24 September 2006	Trade Mahapanchayat to state that the traders will not be treated as illegal business. Had leaders from 300 trade bodies with the intention to resolve sealing issue once and for all.
25 September 2006	Traders and RWAs joined hands to submit a joint appeal to the SC seeking relief from "chaos" and uncertainty. [186]
30 September 2006	Met Union Minister Shivraj Patil, Delhi Police Commissioner Dr K K Paul and MCD Commissioner A K Nigam[187]
2 October 2006	Used the Dusserha Festival to burn effigies of sealing alongside traditional religious symbols at call from CAIT
2 October 2006	Trade bodies meeting their respective MLAs and MPs[188]
5 October 2011	Staged "massive dharna" also October outside the MCD headquarters and were joined by doctors and other professionals.[189]
5 October 2011	Met with GoM[190]
15 October 2006	"Sealing Sangram Yatra" in different parts of Delhi, included 1000s of people with several tableaus depicting "woes and suffering of traders on sealing" as well as bands reciting patriotic songs and anti-sealing slogans.
16 October 2006	"No Diwali celebrations" cards sent to a number of Delhi citizens" and all members of parliament, Delhi MLAs, MCD members and political leaders of all major political parties, leading citizens. Also CAIT protest in Ashok Vihar Market [191]
16 October 2006	Met with Union Urban Development Minister Jaipal Reddy and handed over "No Diwali celebrations" Card
27 October 2006	CAIT met with CM Sheila Dixit[192]
29 October 2006	Day 1 of CAIT's closure of all commercial activities in Delhi[193]
30 October 2006	Day 2 of CAIT's closure of all commercial activities in Delhi[194]
31 October 2006	Day 3 of CAIT's closure of all commercial activities in Delhi[195]
1st November 2006	Mock funeral for Sheila Dixit[196]
6th November 2006	CAIT meeting with GoM[197]
13th November 2006	Traders march to Ajay Maken's residence led by BJP's leader in the Municipal Corporation of Delhi (MCD) Subhash Arya[198]

[185] CAIT Press Release, 21st September 2006, CAIT Archive.
[186] Outlook India, 2006: Traders, RWAs submit appeal to Chief Justice on sealing issue, *Outlook India*, 25th September http://news.outlookindia.com/items.aspx?artid=418127.html accessed 03.11.2011
[187] CAIT Press Release, 30th September 2006, CAIT Archive.
[188] CAIT Press Release, 2nd October 2006, CAIT Archive.
[189] CAIT Press Release, 4th October 2006, CAIT Archive.
[190] CAIT Press Release, 4th October 2006, CAIT Archive.
[191] Staff Report, 2006: Traders protest against sealing, *The Hindu,* 16th October, 4, NIUA archive.
[192] Kumar Singh, M., and Pandit, A., 2006: MCD puts up hands in front of SC panel, *The Times of India,* 29th October, NIUA archive; Indo-Asian News Service, 2006: SC says Delhi sealings to continue, IBN Live, 6th November, NIUA Archive.
[193] IBN Live, 2006: Traders put Delhi on Edge, 7th November, http://ibnlive.in.com/news/traders-body-call-for-delhi-bandh-schools-shut/25573-3.html accessed 02.07.2012
[194] Ibid.
[195] Ibid.
[196] Photograph of 1st November protest by Rajeev Tyagi, *The Tribune,* 2nd November, http://www.tribuneindia.com/2006/20061102/delhi.htm, accessed 02.07.2012
[197] OneIndia, 2006: 'Delhi Bandh' tomorrow to protest SC verdict, *One India,* 6th November, http://news.oneindia.in/2006/11/06/delhi-bandh-tomorrow-protest-sc-verdict.html, accessed 02.07.2012
[198] The Times of India, 2006: Delhi sealing resumes amid protests, *The Times of India*, 13th November, http://articles.timesofindia.indiatimes.com/2006-11-13/india/27785954_1_delhi-sealing-unauthorised-commercial-establishments-court-ordered-drive accessed 10.01.2012.

6th December 2006	Sealing Chetna – Week of protests across Delhi
11th December 2006	Anti-sealings protest outside the National Human Rights' Commission Head Quarters – formed a human chain[199]
17th December 2006	'Sangharsh Sankalp Rally" Anti-sealing and anti-conversion charges rally[200]
29th December 2006	Traders to stage protest at Haryana Bhawan Copernicus Marg where DDA was supposed to finalise the master plan[201]
8th January 2007	Protest of school children and students under the Education Forum which is a member of CAIT, protested the closing of tuition centres across Delhi from Barakhamba Road to Jantar Mantar, protesting the "step-motherly treatment they were being subjected to under the Master Plan".[202]

There were distinct phases within the traders' public actions and within each phase a multitude of tactics and counter-narratives were used. The first phase of protest from February until the middle of May 2006 established the pattern for the rest of the trial: the SCI would make a decision, the traders would approach the government who would attempt to stay sealing, generally fail and then the traders would protest.

The second phase began in the middle of May 2006, following the promulgation of the Delhi Special Provisions, and heralded a period of confusion. The status of these Laws and the future of the traders were uncertain and as a result, few sealings or protests took place until August 2006 when the SCI nullified the Delhi Special Laws.

The third phase was a response to the nullification of the Delhi Special laws and found the traders increasing their protests and threats in Delhi. It was also during this phase that the traders brought the city to its knees through their public action and caused a major "threat" to law and order. Protests and public action continued until January 2007 when it became clear that the promulgation of the Master Plan was imminent and with it relief for the traders.

Phase One: Setting the pattern

The Supreme Court order to start sealing was given on 16th February 2006 and according to Vijender Gupta, who at the time of the court case was the Chairman of a Standing Committee of the MCD, elicited an immediate reaction:

> '*… the Supreme Court in January 2006 and when the Supreme Court has passed the order immediately there was a big hue and cry everything, everybody was in the agitational mode and the city was, you know, like on flames and agitations and protests and media hype and everything and when the corporation went there to take action against the misuse of the property as per the supreme courts orders there was huge hue and cry. Everybody at that time was on hot as a hot…*' (Pers. Comm., 2010).

[199] Hindustani Times, 2006: Traders form task force, *Hindustani Times*¸ 10th December, 3, NIUA Archive.
[200] Hindustani Times, 2006: Slash conversion charges, say traders, *Hindustani Times*, 18the December, 7, NIUA Archive
[201] Times News Network, 2006: Traders to stage Dharna, *The Times of India*, 29th December, 4, NIUA Archive.
[202] Express News Service, 2007: Students protest MCD's sealing drive as Capital coaching centres face action, *The Indian Express*, 8th January, 3, NIUA Archive.

The traders wasted no time in mobilising and nor did the opposition parties and just two days after the SCI ruling was made the Confederation of All Indian Traders (CAIT) met with LK Advani, Leader of the opposition party, the BJP, in order to put forward their grievances.[203] However, this was not CAIT's only opening gambit and by the 4th March, the Karol Bagh Traders Federation under the banner of CAIT had organised a "Beggars Rally". Traders went through Karol Bagh, an older industrial area in northern Delhi and surrounding areas with begging bowls to demonstrate what the sealings would mean for the traders and their families.[204] CAIT claimed that the sealing would make traders *'Become either beggars or criminals*'.[205] On the 13th March 2006, in a pattern that would become all too familiar, the traders met with a senior politician, Union Urban Development Minister, Jaipal Reddy, and handed him a memorandum to demand protection.[206] The Urban Development Minister was not able to stop sealing immediately and, as a result, the traders demonstrated throughout March and April 2006 (See Figure 22) in which they mobilised thousands of traders in markets all over Delhi.

The marches were also in response to the battle that was raging between the various institutions of the state, which were proving to be unsuccessful in gaining the traders any kind of sustained relief. On the 3rd April 2006, the SCI refused to stay sealing at the Union Government's request but did extend the deadline to allow more traders time to file their affidavits. In response, CAIT traders went on a hunger strike to protest the sealing, and demand clear ordinance[207] on the status of the various buildings act activities. They also met with senior officials and politicians such as President of India APJ Abdul Kalam[208] and Union Urban Development Minister Jaipal Reddy[209] to whom they submitted memoranda requesting intervention and that they resolve the crisis. The Union Government did attempt to satisfy the traders' request and submitted an application to the court to delay sealing for six months whilst they completed a set of zonal plans for the City that would determine which areas were mixed-use and thus safe from sealing. The SCI refused, once again to stay the sealing but asked their monitoring committee to look at the application in more detail and report back to the SCI.[210]

However, *'[w]hen the Application along with the report of the Monitoring Committee came up for consideration before this Court, the same was withdrawn by the Government of India on 11th May, 2006*'.[211] The SCI was enraged by the withdrawal and thought that the application by the government had been submitted in bad faith and as a distraction whilst the government tried to find other ways of getting around the SCI. The traders were angered by the government's withdrawal of the application and felt betrayed by being left to the not so tender mercies of the court. They did not simply sit back

[203] CAIT Press Release, 18th February 2006, CAIT Archive.
[204] CAIT Press Release, 4th March 2006, CAIT Archive.
[205] CAIT Press Release, 4th March 2006, CAIT Archive.
[206] CAIT Press Release, 13th March 2006, CAIT Archive.
[207] CAIT Press Release, 7th April 2006, CAIT Archive.
[208] CAIT Press Release, 10th April 2006, CAIT Archive.
[209] The Asian Age, 2006: Centre approaches top court, *The Asian Age,* 13th April, NIUA Archive
[210] M.C. Mehta vs. Union Of India & Ors on 29 September, 2006 Author: S. Y.K. Bench: Y Sabharwal, C Thakker, R Raveendran CASE NO.: Writ Petition (civil) 4677 of 1985)
[211] Ibid.

and wait and CAIT began an intense mobilisation driven and coordinated by Ramesh Khanna of CAIT who remembered:

> *'When this order came from Supreme Court, we were present there, so all of a sudden. That was a very, very dangerous bad order for traders. Then there we took the stand that we will go around Delhi and we will gather the people and we will start agitation against the government. Then on 11th of May there was an agitation on Parliament Street approximately 100,000 gathered over there. That was a historical agitation organised by us. That was only because of our Sangarsh Yatra. For ten days. So over all we organised Sangarsh Yatra for 10 days …here was a temperature of 46 degrees in Delhi [when] I started the Sangarsh Yatra… I started [by] connecting each and every market in the fold of our agitation. So I travelled more than 500 km in one week… in Delhi in May and June. My skin was all burned'* (Khanna, Pers. Comm., 2011).

These large protests were successful in getting the ear of the politicians in both parties. The traders met with Union Urban Development Minister Ajay Maken and Urban Development Minister S Jaipal Reddy soon after the protests[212]. The protests also gained the traders access to the opposition leaders who were eager to regain Delhi after they had lost the 2002 MCD elections, largely:

> *'in reaction to the fact that the then Urban Development Minister Jagmohan had initiated a sweeping drive to remove unauthorised constructions (partly, also due to some unpopular tax measures in the Budget). While that made Jagmohan popular with sections of the middle classes, the stratum, which votes in the MCD polls summarily rejected the BJP in the 134-member municipal body. The Congress swept that poll with 110 councillors, while the BJP managed only 18, with the rest going to independents'.*[213]

Thus, the BJP was desperate to win the election the following year and `tried to make much political hay out of the traders' mobilisations and were seen at numerous sites burning effigies of Sheila Dixit, the Chief Minister, and Ajay Maken, the Union Urban Development Minister, both of whom were Congress Party members.[214] They also met with the traders throughout the case (see Table 7: Timeline of events in Delhi) and on the 7th May 2006, following some of the larger protests, BJP deputy leader of the Lok Sabha Dr. VK Malhotra promised the traders:

> *'The BJP will strongly raise issue of sealing of shops in ensuing session of parliament commencing from the 10th May and will not allow any other matter till a Bill is introduced regularizing as business establishments of Delhi.'*[215]

[212] CAIT Press Releases, 16th May 2006 and 22nd May 2006, CAIT Archive.
[213] Hebbar, N., 2005: 2007 MCD elections stoke fears, *Business Standard,* 23rd December , http://www.business-standard.com/india/news/2007-mcd-elections-stoke-fears/227409/, accessed 10.12.2012
[214] Times of India, 2006: Delhi Traders protest against shop sealing, *The Times of India*, 30th March, http://articles.timesofindia.indiatimes.com/2006-03-30/india/277938 accessed 31.11.2011
[215] CAIT Press Release, 7th May 2006, CAIT Archive.

Ravinder Chaudry of the BJP mentioned that as a political leader he had mobilised traders in the Lajpat Nagar II and South Extension colonies. During our interview, he told me that he went into these colonies and began making speeches through a megaphone, telling the traders that the Congress and the government did not care. Chaudry claims that the crowd then came '*automatically*' and 500-600 traders began to march through these areas in a protest against their loss of livelihoods and the state not doing anything to protect its citizens (Pers. Comm., 2011). However, at this stage neither political party was able to affect change or halt the sealings.

Phase Two: The Delhi Special Laws: creating confusion

A day after the Delhi Special Laws had been promulgated on 19th May 2006, the state issued a Government Notification, which placed:

> *'a moratorium for a period of one year in respect of all notices issued by local authorities in respect of categories of unauthorized development. In exercise of powers conferred by Section 5 of the Delhi Laws (Special Provisions) Act, 2006 (22 of 2006), the Central Government directed local authorities to give effect to provisions of the said Act, namely, 1) the premises sealed by any local authority in pursuance of a judgment, order or decree of any court after the 1st day of January, 2006, shall be eligible to be restored, for a period of one year, with effect from 19th day of May, 2006, to the position as was obtaining as on 1st day of January, 2006. 2) All commercial establishments which are required to cease carrying out commercial activities at their premises by the 30th day of June, 2006, may continue such activities, as they were being carried out on the 1st day of January, 2006 for a period of one year …'.*[216]

By this time the SCMC reported that 40 814 affidavits had been filed by traders who had shut down their businesses and a further 5 006 properties had been sealed[217] but the promulgation of the Delhi Special Laws and the Notification created mass confusion, especially for the local authorities, because there was uncertainty as to exactly which areas they applied to and whether sealed businesses could be unsealed. Thus, the battle between the various branches of the state and the resultant orders to seal, de-seal, and reseal caused confusion and anxiety in the trading community. The traders were quoted in the press expressing their anxieties and calls for assistance:

> '*The traders who have been working since decades by investing their lifelong earnings are a worried [a]lot. To bring an end to such an atmosphere, the Union Government must announce firm steps to deal with the situation'.*[218]

[216] M.C. Mehta vs. Union Of India & Ors on 29 September, 2006 Author: S. Y.K. Bench: Y Sabharwal, C Thakker, R Raveendran CASE NO.: Writ Petition (civil) 4677 of 1985)
[217] Supreme Court of India, Delhi Pradesh Citizen Council vs. Union Of India (UOI) And Anr. on 10 August, 2006
[218] One India, 2006: CAIT urges Centre to spell out remedial measures against sealing, *OneIndia*. 15th August, http://news.oneindia.mobi/2006/08/15/517767.html accessed 28.10. 2011

As a result, many of the protests at this time were calls for clarity, as there was constant fear and uncertainty as to who was or was not going to be sealed. Some of the marches clearly articulated this request and on the 18th March 2006 the protest was to '*Demand clear cut policy from Union government around regularisation and sought intervention from president'.*[219] There were also a number of protests with request to bring about immediate legislative and regulatory change to save the traders' businesses. In one case, the traders undertook a hunger strike in Jantar Mantar to ask for the release of trader leaders and demand clear ordinance or legislation on shop sealing.[220,221].

The Supreme Court held the entire city on tenterhooks as it decided on the validity of the Special Laws and the notifications. At the beginning of August 2006 the Supreme Court admitted petitions against the Delhi Special Laws from a variety of stakeholders and noted that a '*serious challenge had been made to the constitutional validity of the Act [Delhi Special Laws]*' by the Delhi Pradesh Citizens.[222] In response to the petition, the SCI publicly blamed the DDA who they said '*were responsible for the mess*' and the Union government for causing confusion in the city, '*We are alive to the height of confusion created by these ad hoc legislations, notifications and notices*'.[223]

The SCI in an attempt to '*walk the middle path*'[224] provided a partial stay of the notification and the Special Laws. They rejected the clauses that allowed the government to de-seal and stop sealing and stated:

> '*This order of stay will mean that the properties which were sealed under the directions of this Court (5006 as per the report of the Monitoring Committee) shall have to be resealed. It will also mean revival of the undertakings given to cease the misuse by 30th June, 2006*'.[225]

The SCI also insisted that the Union Government, withdrew the public notice that had been issued on 20th May 2006 which promised de-sealing and a halt to further sealings.[226] This effectively meant that the majority of the traders were left in the same position as they had been months earlier, with the MCD poised to close their shops and no legal protection from the state.

Over the next two weeks, Delhi trade leaders met to take stock and discuss issues of strategy. They also engaged with MLAs and corporators to discuss the future of the traders in Delhi and the political support that they could receive from the elected officials.[227] By the 27th August 2007, the trade leaders announced that they would take to the streets, and the following day they began a week of protests as

[219] Tribune News Service, 2006: Traders demand regularisation of shops in residential areas, *The Tribune*, 18th March http://www.tribuneindia.com/2006/20060319/delhi.htm accessed 01.11. 2011
[220] CAIT Press Release, 7th April 2006, CAIT Archive.
[221] CAIT Press Release, 20th April 2006, CAIT Archive.
[222] Ibid.
[223] Thomas, A., 2006: SC wants 'middle path' on illegal construction, sealing, *The Pioneer*, 2nd August, 3, NIUA Archive.
[224] Mahapatra, D., 2006: SC may get bulldozers rolling again, *The Times of India*, 2nd August, 2, NIUA Archive.
[225] Supreme Court of India, Delhi Pradesh Citizen Council vs. Union Of India (Uoi) And Anr. on 10 August, 2006
[226] M.C. Mehta vs. Union Of India & Ors on 29 September, 2006 Author: S. Y.K. Bench: Y Sabharwal, C Thakker, R Raveendran CASE NO.: Writ Petition (civil) 4677 of 1985)
[227] CAIT Press Release, 13th August 2006, CAIT Archive.

a warning and reminder of what may happen if the sealings continued.[228] They indicated the power of the traders lobby and the potential that they had to bring Delhi to a standstill.

The government, however, continued to try and find some form of relief for the traders and at the same time as the protests public hearings were held around the new Master Plan and the state notifications. These events culminated in amendments to the 2001 Master Plan and a notification, which designated a number of roads as mixed-use and thus, saved then from being sealed.[229] However, the notification was not enough and it still left thousands of traders, who were not located on the notified roads, at the mercy of sealing, which set off a new wave of protests across the city in the following months.

Phase Three: Upping the ante: spectacle and threat in Delhi

The month of September 2006 saw the highest number of protests against sealing (see Figure 22). Beginning with a family member march on the 2nd September 2006 where the wives and families protested against sealing (see Figure 23). The march was intended to make the public aware of the impact of sealing on traders' families and show how they were being victimised.



Figure 23: Photograph of women protesting during the family members' march on 2nd September 2006.[230]

Over the next few days, there were spontaneous public actions throughout Delhi culminating on the 7th September 2006, in the largest gathering in Greater Kailash (GK), an upmarket colony in south Delhi. According to Rajiv Kakria, head of the GK RWA,

[228] Times News Network, 2006: Re-sealing: Re-sealing: Traders to hit the streets again, *The Times of India*, 28th August, 4, NIUA Archive.
[229] M.C. Mehta vs. Union Of India & Ors on 29 September, 2006 Author: S. Y.K. Bench: Y Sabharwal, C Thakker, R Raveendran CASE NO.: Writ Petition (civil) 4677 of 1985)
[230] The Tribune, 2006: Sealing drive picks up steam, *The Tribune* 2nd September http://www.tribuneindia.com/2006/20060903/delhi.htm, accessed 02.07.2012

> *'Greater Kailash became some sort of a boiling point because all the powerful showrooms, all the powerful guys they were connected, they were opening up shops there. And this opened up a permanent dharna. They just shut shop and sat there. They pitched a tent and they sat there. And people coming in and giving them and inciting them and whole lot of lectures and speeches so there was [a] lot happening'* (Pers. Comm., 2010).

Matters climaxed during this protest when '*the police were sent into a tizzy in the afternoon when some traders carrying liquid-filled bottles threatened to immolate themselves'*.[231] The liquid was immediately confiscated by the police and the would-be self-immolators were arrested, whereupon it was discovered that the liquid was only coloured water.

In September, the traders also began to focus on a lexicon of rights to indicate the '*woes and suffering of sealing on trader*[232] and demonstrated in order '*to demand justice and protection'.*[233]. This narrative was articulated around a set of interlocking and interweaving rights and ideas of justice. The traders felt that their universal human rights had been violated. Pritam Malhotra, a protesting trader, stated '*The sealing operations in Delhi are violative of the fundamental rights of the traders. Uprooting them without any relocation or rehabilitation is inhuman*'.[234] More specifically the traders voiced the concern that sealing would deprive traders of their right to earn a living[235] and '[t]*heir right to livelihood'.*[236] The traders also clearly articulated the contestation between the SCI's insistence on the importance of upholding the law and their right to livelihood, arguing: '*No law is above the life and livelihood of lakhs of people*'[237] and that the law was '*against the principle of natural justice'*.[238] Unfortunately for them, the SCI disagreed.

The traders were strategic in their approach and knew that they had to win over their fellow Delhiites if they wanted to achieve their ends. A few days after the mass rally in Greater Kailash, CAIT initiated a very different type of public engagement:

> '*Realising that it's easier to handle the residents on a one-to-one platform, the traders launched a signature campaign going from house to house soliciting support of the area residents to save their shops*'.[239]

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[231] Staff Reporter, 2006: Sealing goes on amid protests, *The Hindu,* 7th September, http://www.hindu.com/2006/09/07/stories/2006090723190300.htm accessed 10.01. 2012
[232] CAIT Press Release, 15th October 2006, CAIT Archive.
[233] CAIT Press Release 20th September 2006, CAIT Archive.
[234] Singh, O., 2006: Traders to protest Delhi sealing drive, *Rediff India*, 19th September http://www.rediff.com/news/2006/sep/19onkar.htm accessed 01.11.2011 and Hindustani Times, 2006: Traders form task force, *Hindustani Times*, 10th December, 3, NIUA Archive.
[235] The Asian Age, 2006: Traders begin three-day dharna, *The Asian Age*, 2nd September, 13, NIUA Archive
[236] Times of India, 2007: Shut shops in illegal colonies, *The Times of India*, 20th January, 6, NIUA Archive.
[237] The Asian Age, 2006: Traders begin three-day dharna, *The Asian Age*, 2nd September, 13, NIUA Archive.
[238] Ibid.
[239] Sharma, V., 2006: Green Park residents oppose unbridled powers to RWAs, *Hindustani Times*, 11th September, 6, NIUA Archive.

It was a well thought out form of mobilisation as it moved the traders from faceless threatening protestors to "real" people, where the actual effect of sealing could be seen at the individual level. As one of the residents, Praveen Vaid, reflected: '*It's really an awkward situation for us to say no to them individually - passing a resolution against them in a meeting is different*'.[240]

The situation intensified and the 20th September 2006 saw the largest and most violent protest, in Seelampur. During the conflict, four traders were killed and a 100 injured in clashes with the police. Following the violence there was a strong sense that the government was not doing enough to deal with the sealings. *The Pioneer,* stated,

> "Government has set up a Group of Ministers to look into the issues raised by the court orders and indicated that a special session of parliament may be held to sort them out. This is not the answer… Unless the problem is tackled in its totality, which will be possible only if a new Master Plan is put in place, it will continue to fester and lead to clashes similar to those witnessed on Wednesday [20th September]" (quoted in Jain, 2010: 13-14).

A day after the protests the traders met with Union Home Minister Shivraj Patel and Delhi Lieutenant Governor B Joshi, CM Sheila Dixit, Union Minister of State for Urban Development, Ajay Maken, Delhi Chief Secretary S Raghunathan and MCD Commissioner A K Nigam.[241] The protests and meetings with the politicians did have some effect and the MCD, DDA and Union Government all petitioned the SCI to extend the deadline and delay sealing. The Supreme Court provided two extensions for the traders but even in the face of the new Master Plan refused to stay the sealings completely. As a result, the protests continued and through the month of October, the traders mobilised a number of cultural and religious symbols and festivals in order to tell their story. They re-appropriated the Dusserha Festival, in which Rama triumphed over the Demon Rawan and the warrior Goddess beat the buffalo demon Mahishasura (Festivals of India, 2011). It is a festival that celebrates the triumph of good over evil. On the day of the festival, the traders burnt sealing in effigy in the same way that the demon Lord Rawan is burnt stating '*sealing Delhi is as cruel as [the] mentality of Rawan'*.[242] CAIT and the traders re-cast the narrative such that the traders were on the side of good and the sealings were likened to the evil of the Demon Lord. It was a very effective ploy in gaining public support as the argument was presented in absolute terms of good and evil. Sealing and those who supported it and carried it out were on the side of evil and the traders were victims on the side of good. Aside from the religious protests, the traders also staged a '*massive dharna'* outside the MCD headquarters where they were joined by doctors and other professionals who were also threatened by sealing.[243] The next day the traders met with the Group of Ministers (GoM), which had been established by the Central Government to deal with the sealings issue.[244]

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[240] Ibid.
[241] CAIT Press Release, 21st September 2006, CAIT Archive.
[242] CAIT Press Release, 2nd October 2006, CAIT Archive.
[243] CAIT Press Release, 4th October 2006, CAIT Archive.
[244] CAIT Press Release, 4th October 2006, CAIT Archive.

Later in the same month CAIT again mobilised around a set of religio-cultural images asking the public, '*How can traders celebrate Diwali with fervour and as such with heavy heart and lot of pain…*'. CAIT entreated its members to just do Diwali *pooja* [religious acts] but not to exchange gifts during the festival of Diwali. CAIT also sent "No celebrating Diwali" cards to all members of parliament, MLAs, MCD members and political leaders of all major political parties and lto eading citizens.[245] Diwali is one of the most important festivals in the Hindu calendar and symbolises the return of Rama and Sita to their kingdom after being forced out by evil connivances. It too is a celebration of good triumphing over evil and of prosperity and joy. Thus, for CAIT to state that they and their members could not celebrate Diwali has two symbolic meanings: the first was that the situation in Delhi was so dire that there was nothing to celebrate; and, the second was that evil (in the shape of sealing) was triumphing and thus they could not celebrate.

In late October 2006, having had little luck in stopping the sealings, the traders launched another signature campaign. The intention was to take the petition to locals MPs, MLAs and municipal corporators (councillors) and demand that the officials and their parties represent the traders' and stop the sealing.[246] Their cry, according to Jeshri Pawar, a Delhi corporator, was, '*Why does the government do us this wrong?'* (Pers. Comm., Pawar, 2011). At the end of October 2006, the SCI once again, against the traders' protests, ordered a resumption of the sealing from the 1st November 2006. The next day the traders met with Shivraj Patil, Union Home Minister, Sheila Dixit, Delhi Chief Minister, Ajay Maken, Union Minister of Urban Development and Ramesh Narayanaswamy, Delhi Chief Secretary and most importantly Sonia Gandhi, the Congress Party president. The traders submitted a four-point list of demands that would have the effect of regularising 1400 colonies to save them from being sealed[247] but the talks failed.[248]

As a result, CAIT organised a 72-hour mass action, stopping all commercial activities and marching through the centre of Delhi.[249] The march turned violent and traders burnt tyres, buses and blocked important roads throughout Delhi, stopping traffic and costing the city RS2000-RS2500 crore per day[250]. The march literally brought Delhi to a complete halt (Jain, 2010). The police responded with water cannons and lathi-charges.

[245] CAIT Press Release, 16th October 2006, CAIT Archive.
[246] The Tribune, 2006: CAIT to launch signature drive against sealing, *The Tribune,* 20th August, http://www.tribuneindia.com/2006/20060821/delhi.htm, accessed 28.10.2011.
[247] OneIndia news, 2006b: CAIT meets Patil on Sealing issue, *OneIndia News*, 21st September, http://news.oneindia.in/2006/09/21/cait-meets-patil-on-sealing-issue-1158849700.html accessed 28.10.2011
[248] India Daily, 2006a: Delhi stops for 72 hours, traders angry against sealing drive, *India Daily*, 30th October 2006, http://www.indiadaily.org/entry/delhi-stops-for-72-hours-traders-angry-against-sealing-drive/ accessed 28.10.2011.
[249] Dogra, B., 2006: Sealing drive to continue, focus on west Delhi, *Hindustan Times*, 17th November, http://www.highbeam.com/doc/1P3-1164205191.html accessed 02.10.2012
[250] OneIndia, 2006: CAIT meets Patil on Sealing issue, *OneIndia News*, 21st September, http://news.oneindia.in/2006/09/21/cait-meets-patil-on-sealing-issue-1158849700.html accessed 28.10.2011.



Figure 24: Traders in a symbolic funeral march with the mock 'body' of Delhi CM Sheila Dixit, at Karol Bagh.

The protests broke up but the next day the SCI ordered the resumption of the sealings and the traders in response held a mock funeral for Chief Minister Sheila Dixit (see Figure 24), no doubt wishing her dead. The protest actions were successful and after a four-hour long meeting of the Supreme Court Monitoring Committee, MCD, the Delhi Government and the Delhi Police '*They all decided to inform the court about their powerlessness to resume the sealing in Delhi as the situation may go violent'*.[251] Initially the SCI stated that they would not be held to ransom by the traders but heard the pleas of the various state institutions and agreed to postpone the Sealing until the situation calmed down.

The next few months saw the resumption and halting of sealing as the promulgation of the new Master Plan became imminent and with it the slow tailing-off of the protests. One last important protest occurred in December 2006. The public actions showed the rest of Delhi and the Supreme Court that the traders' had political support and Praveen Khanderwal described the protest as one in which:

> *'More than 500 trade bodies will participate in the protest programme throughout the week. Several meetings would be held in different markets in which political leaders of different parties would be invited to express their solidarity with our cause'*[252].

It would seem that the traders wanted to keep the pressure on, despite the impending promulgation of the new Master Plan and the protests acted as a reminder to all of the parties and urban actors of the power of the traders to both leverage large numbers of protestors and political support.

The traders utilised their large numbers and their ability to mobilise to get their message out into the public realm in the most direct manner possible. The protests were able to capture the public imagination, make news and bring Delhi to a standstill. All of which forced the government to hear and eventually engage with them. The following section provides some analysis of the political efficiency of the traders' protests and looks at the counter-hegemonic message that they were attempting to filter into the public realm.

[251] Ibid.
[252] Sharma, V., 2006: Traders back on war path today, *Hindustan Times*, 4th December, 3, NIUA Archive.

6.4 Political utility: political vs. civil society and public spheres

The following section looks at how useful the strategies of the traders and the San Jose residents were in actually gaining access and being heard by those in power. Thus, the meaningful engagement of the San Jose residents and the protests of the Delhi traders will be discussed to analyse the political utility of the different strategies. I use Chatterjee's (2004) notions of civil and political society and Cornwall (2002) and Miraftab's (2006) schema of invited and invented spaces to expose the differences in the strategies of the traders and San Jose residents. Using this analysis, the evidence suggests that meaningful engagement and public protests were both highly effective in leveraging differentiated treatment from the state. The reasons how and why are discussed in the following sections.

6.4.1 The carrots and sticks of political society

Chatterjee has argued that for populations inhabiting political society, accessing the state and making claims is about applying the "right pressure at the right places in the government machinery" (Chatterjee, 2004: 66). As mentioned earlier, the RWAs have historically had good access to the courts and have utilised litigation as their particular instrument of political power. In general, the RWAs have not been able to access decision-makers, brokers or what can be considered "political society", whilst those on the margins have utilised political connections, such as politicians, informal headmen/big men and those with powerful political connections to get what they needed. This pattern was maintained during the Sealings Case and Rajiv Kakria, head of the GK RWA, lamented the situation:

> *'The politicians are giving them [the traders] patient hearing. Yeah I know, what would you do, you children, you have old parents to look after, your children go to school, your daughters have to be married, your sons have to be given a livelihood and you know what a sob story! Wonderful! You poor you! But what about the poor us, who bought their residences in a peaceful environment?' (Pers. Comm., 2010).*

As the Sealings Case continued and the government began to look for ways to regularise the traders the RWAs increasingly felt that those in power had betrayed them:

> *'[RWAs] from various areas of Delhi strongly opposed the setting up of commercial complexes in residential areas and said that the introduction of any law to regularise such complexes would constitute a breach of trust by the Government. The majority of RWAs demanded ban on commercial use of residential premises'*[253].

[253] OneIndia, 2006: Court-appointed Monitoring committee on sealing submits report, *One India*, 4th May http://news.oneindia.in/2006/05/04/court-appointed-monitoring-committee-on-sealing-submits-report-1146744403.html accessed 02.11. 2011.

When the National Territory's Chief Minister, Sheila Dixit, approached the Union Government for relief on behalf of the traders, URJA expressed deep disillusionment with the politicians that they had voted for:

> *'RWAs, particularly those that had kept high expectation of the CM's [Chief Minister's] Bhagidari Scheme,*[254] *were terribly dismayed when the CM made a personal representation to the Prime Minister to seek the bill for obstructing the Supreme Court's order on sealings and demolitions. RWAs who had campaigned vigorously against illegal constructions in residential areas could not explain how the CM could go against the very RWAs that had supported her in the past. Our feeling is that, this is a classic example of political expediency: it works in our favour only as long as it is of advantage to them. If it hurts them politically, they will not care for us'*[255].

The RWAs felt that the politicians that they had helped to elect had abandoned them in favour of the more numerous traders. They also felt that the Bhagidari Scheme which the Chief Minister had launched with significant fanfare and which had promised so much to the RWAs in terms of better governance and access to decision-makers was just tossed aside in favour of the traders and the pressure that they could bring to bear.

The traders, by comparison, had no end of access to those in power and Khanderwal listed the politicians and decision-makers that they met during the trial:

> *'We liked many delegations to the government, to the opposition parties. At one point of time honourable Prime Minister of India and honourable leader of opposition both Mr. Manmohan Singh and L.K. Advani they both intervened in the matter when the matter was hotly debated in the parliament which is the supreme law-making authority and with the intervention of both honourable Prime Minister and honourable Mr. Advani and of course the cooperation of all the political parties irrespective of their political differences they out rightly support us and then we had long spells of consultations with honourable Minister of Urban Development Mr. Jaipal Reddy the then minister of state Mr. Ajay Maken the honourable of Chief Minister of Delhi Mrs Sheila Dixit as also the honourable leader of opposition like Mr. Arun Jaitly, Mrs Sushma Swaraj the then BJP president Mr. Rajnath Singh our local Delhi leader Mr. Vijay Kumar Malhotra and many other people' (Pers. Comm., 2010).*

[254] According to Harriss (2005: 1043) The Bhagidari Scheme., "… means something like 'Partnership Scheme' and it is said to be a mechanism for 'an active, effective and target-oriented citizen-government partnership'. Involving partnerships between Residents' Welfare Associations and Market Traders Associations and the Delhi Government, the Bhagidari Scheme is intended to develop 'joint ownership' by citizens and the government of 'the change process' in the city. In practice it involves Residents' Welfare Associations, in particular, in such tasks as securing payment and collection of water bills, electricity meter reading, house tax collection, the supervision of sanitation services, and the maintenance of community parks and community halls".

[255] URJA newsletter, 5th July 2006 http://urja-delhi.in/newsletters/newsltr_05_07_06.html accessed 06.11. 2011

According to the leaders of CAIT, Ramesh Khanna and Praveen Khanderwal, they were able to convince the government to act on their behalf, as they appealed to their better natures and the cause of '*natural justice*' (Pers. Comm., 2011). It is more likely that the traders were able to "push the right buttons", which was a combination of threats and promises or "sticks" and "carrots". The promise lay in the fact that the traders formed a large votebank (more than five million people in Delhi), which all of the parties wanted to capture. CAIT waved the promise of votes and the consequences for the lack of support constantly in the faces of the political parties. In one case CAIT invited 10 MPs, 70 MLAs and 134 members of the MCD to join the last day of a bandh on the 19th April 2006 and

> '*He [*Khanderwal*] made it amply clear that the traders have decided to support those politicians only who will support traders now.*'[256] Later in the year, trade leaders set up meetings with '*all MPs, MLAs, and corporators from Delhi and will make it clear that supporting traders and people at this crucial juncture shall be the only way of serving Delhi people*'.[257] The traders even '*made it clear that the sealing issue is much above political lines and as such all leaders of all shades should come forward to protect lives and livelihoods of lakhs of people in Delh*i'.[258]

The pressure that the traders were able to bring to bear on the politicians and the upcoming election gave them the leverage that they needed to influence the direction that politicians would take. It also helped that a position against the judiciary was precisely the stance that the government wanted to take, in its on-going battle for territory and realised that it could use the traders' needs as camouflage.

The traders brandished more "sticks" when they openly stated what they would do, should the sealings continue. Khanderwal specified that,

> '*If the government does not present our case before the court and the sealing drive is not stopped, we will start a non-cooperation movement against the government and we will stop paying taxes to express our anger.*'[259]

Further threats and promises revolved around protests and demonstrations. They stated that one of the first 48 hours strikes was '*just a warning and if the government is not taking note of the legitimate grievances, they will intensify their agitation in the coming days*'[260] The traders were also uncompromising in their demands and warned that unless mixed land use policy was officially notified and made into law, then the traders would maintain their agitation.[261]

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[256] CAIT Press Release, 19th April 2006, CAIT Archive.
[257] CAIT Press Release, 11th August 2006, CAIT Archive.
[258] CAIT Press Release, 2nd October 2006, CAIT Archive.
[259] Hindustan Times, 2006: Traders plan action if verdict is against them, *Hindustan Times*, 6th November, http://www.hindustantimes.com/StoryPage/Print/169450.aspx accessed 28.12.2011
[260] Express India, 2006: Shops down shutters against MCD sealing, *Express India*, 30th March, http://www.expressindia.com/news/fullstory.php?newsid=65195 accessed 28.10. 2011
[261] CAIT Press Release, 27th March 2006, CAIT Archive.

Part of the reason why the traders were also able to push the buttons was due to the nature of party-politics in Delhi (especially in comparison with Johannesburg). According to Harriss (2005: 1042), the party politics in Delhi have generally been contests between the BJP and Congress, and "The left parties have never had much of a presence in the capital". At the time that this study was carried out Congress was in office both nationally and locally and Mehra described the political situation in Delhi:

> "While the traders' leadership certainly favoured their traditional party, the BJP, for the most part, CAIT maintained a middling position between the two parties, aware of a larger political consensus on reshaping the city. Also, many traders were Congressmen, and negotiations would largely be with the Congress, as the party in power at the state and central level. Further, while the BJP actively supported the traders' protests, it was also rumoured that they had only to gain from increasing public confusion" (Mehra, 2012: 86).

Thus, the political contestations between the two parties and the upcoming election worked to the traders' advantage as they could and did play the two parties off against each other in an attempt to have their interests put forward. This was a scheme that both parties were very willing to go along with as it seemed to offer the possibility of large numbers of votes in the next election.

Although the traders had very limited access to the courts, it is clear that they were able to leverage access to those in powers and have their voices heard by key decision-makers. The ability of the traders to act as a voting block and then to be able to actively leverage that voting bloc in order to gain public goods is typical of the manner in which political society functions. The threat that they posed in terms of making the city seem ungovernable was also an effective "button" that assured that those in power were forced to listen to what the traders had to say.

6.4.2 Meaningful engagement and access to civil society

The San Jose residents did not have the ability to leverage political or official support in the same way as the traders. However, as has been demonstrated, they were able to access the state in two particular ways. The first was that they were able to access the court and engage in formal litigation with the state, which has been discussed in Chapter Four. The second was that through the court case they were able, for the first time, to engage with "civil society" in the form of the bureaucratic arm of the local authority. David Bilchitz, a human rights lawyer, described the situation as:

> *'What you have here is a government who was basically unresponsive to the people's needs and the court procedure in a way has provided them with the actual basis on which to participate with the government. In a way the courts enabled the people to have a voice and to actually come before them, and to actually be heard by them (Pers. Comm., 2011).*

Nelson Khetani, who was the Chair of the tenants' committee, agrees and remembers that the negotiations were *'a huge relief to us because before no-one would listen to us but through our Legal*

team and through constitutionally we forced them to come to the table to discuss whatsoever' (Pers. Comm., 2010). The interim Constitutional Court judgement stated that the two sides would have to sit and meaningfully engage with each other and come to a negotiated settlement that both sides agreed on. The Court refused to make a decision until interaction between the two parties had been concluded and as such forced not only engagement, but also engagement until a resolution could be reached. Isaiah Mahlobo of the residents' committee remembers that '*We sat with them in the mayor's chambers and spoke until eventually we had an agreement*' (Mahlobo, Pers. Comm., 2010).

The engagement between the City of Johannesburg, its legal advisors, the residents leaders and CALS seems to have been inclusive processes in which all of the parties were able to engage and express their views: '*sometimes Stuart [Wilson] is here giving me advice, sometimes I give advice if I hear something that is not I say no Stuart is here you have to say this*' (Nelson Khetani, Pers. Comm., 2012). Thus, the negotiations gave the residents the opportunity for the first time to actually engage with people who represented an institution that had become their "enemy". Where the officials could no longer hide behind letters and bureaucratic red tape but were there in the same room, forced to engage with each other as people.

The negotiations created a series of spaces for direct interaction between the City officials and the residents and one of the few opportunities for both sides to be able to tell their stories and highlight their own concerns. However, it was through the Constitutional Court that such access was gained. The Court provided the leverage to be able to access those in power and then added a further clout to the residents' ability to negotiate by stating that whatever was agreed would be enforceable as an order of the court. There is no question that had the Constitutional Court not intervened and put the full weight of its institution behind the residents, they would never have been able to engage with the officials in the way that they did.

6.4.3 Political efficiency: Invited/invented spaces

As mentioned previously Cornwall (2002) has argued that there are two main possibilities in engaging the state: 'invited spaces' which are state provided legitimate spaces for the participation and practice of citizenship; invented spaces, which are "occupied by the grassroots and claimed by their collective action, but directly confronting the authorities and the status quo" (Miraftab, 2006:1). Within this schema the San Jose residents' engagement with the City of Johannesburg can be classified as an 'invited space'. However, a slight nuancing is necessary when understanding the negotiations as an invited space as the "invitation" to engage was constructed, enforced and legitimised by the Constitutional Court's insistence on "engaging meaningfully". There was thus a significant difference between the branch/institution of the state that issued the invitation and the sphere of government and department who actually engaged in the space. This raises issues within the schema of how the state issues invitations and where the source of authority that is pushing engagement actually lies.

The traders' public actions were invented spaces constituted by insurgent modes of expression. These public actions were antagonistic and often brought the traders into direct confrontation with the state, generally in the form of the police and the defence force. What is interesting is how the construction of invented spaces seems to have led to access a set of "invited" spaces as politicians invited traders to meet or acquiesced to traders' requests and met with them.

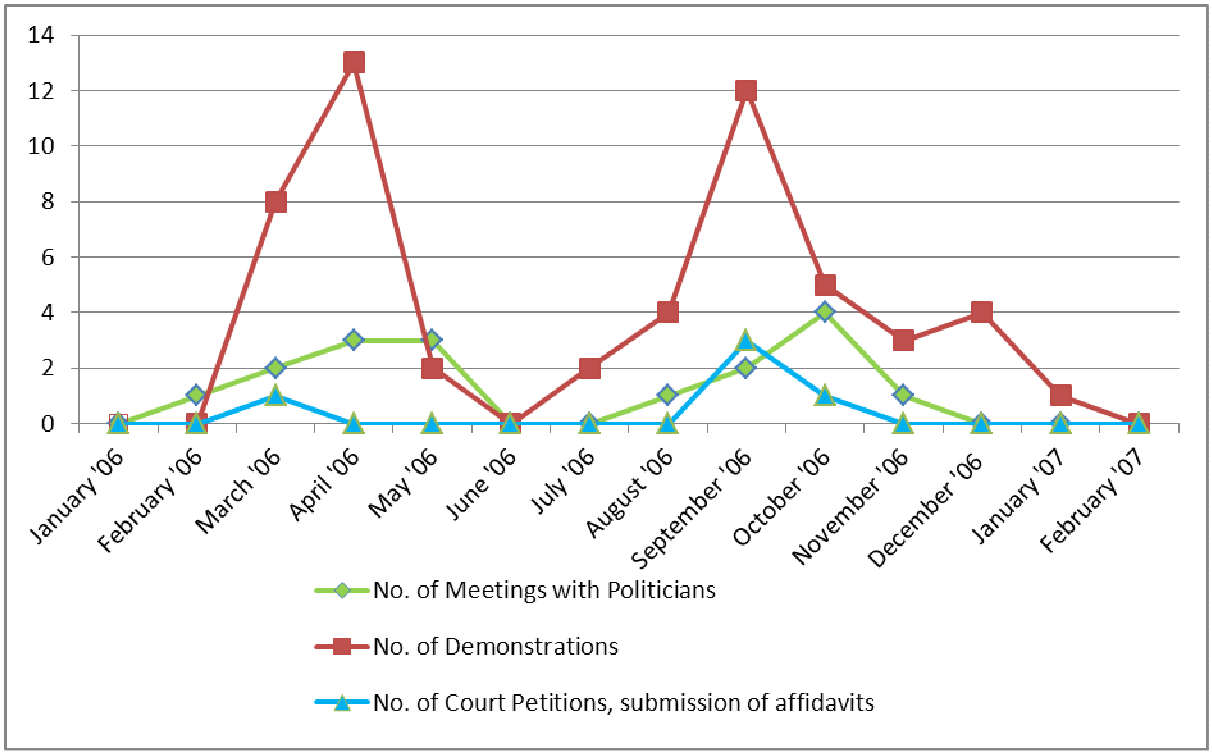


Figure 25: Trends of demonstration, court petitions and meetings with politicians

Figure 25 indicates some interesting trends in that court petitions and submissions are closely correlated with the peaks in demonstrations and public action, which indicates that the traders utilised both strategies simultaneously. This was because their experience had been one of exclusion from court processes and as such they did not rely on litigation. However, the peaks of when the traders met with the politicians are generally off-set, which means that the climax of public action was followed by access to the politicians and that public action was an effective means of accessing political and powerful figures in Delhi. If success can be measured by getting those in power to hear the voices of the marginalised and to engage with them directly, then the traders were extremely successful in getting their message into the public sphere and converting antagonistic invented spaces into invited spaces of negotiation.

6.5 Re-thinking Chatterjee: going beyond the polarisation

As described earlier, much of what happened in Delhi seems to comfortably conform to Chatterjee's conceptualisation of political versus civil society. There are also some important differences in understanding the traders within Delhi's political and governance arena. The traders, as described in earlier sections, are not the poorest, nor the most marginal members of Delhi society. Rather they

exist within a legal and spatial limbo, they are the commercial equivalent of Lemanski and Tawa Lama-Rewal's (2013) "missing middle": most of the traders operated at the time of the trial out of fixed formal addresses, not on the street or under temporary materials. The traders paid tax, rent and in some cases had bought and owned the spaces in which they operated. In the case of professionals, they were registered with the requisite professional bodies. The majority of the traders were not wealthy and certainly not middle-class but earned consistent salaries and employed workers (Mehra, 2012). The case hinged on the facts that the spaces in which they operated were illegal in the sense that they violated the by-laws: either they were the wrong activities in the wrong zones or the structure violated building codes. The traders thus existed in a semi-legal and semi-formal space.

Furthermore, the San Jose residents who, by any measure, were some of the poorest and most marginalised residents of Johannesburg and who were living in circumstances of multiple illegality, were clearly able to access the state, engage in litigation, and negotiate with the state for exceptional treatment, which are all well within the confines of civil society. Chatterjee would argue that the San Jose residents should inhabit political society but the Olivia Road Case offers insights into how marginal groups are able to access civil society or, more correctly, into some of the institutions of civil society. The powerful commitment to rights of a number of organisations, including the human rights lawyers and the South African Constitutional Court, has meant that access to civil society in the form of the courts is an important possibility, albeit a relatively small one, for marginal groups.

As such, I would agree with Mannathukkaren (2010: 298) that "the civil society/state binary is hardly sufficient to understand the politics of the 'Third World'. Chatterjee's recreation of a new binary in civil society/political society is also ridden with difficulties" and that the binaries that Chatterjee sets up, although useful in a number of ways, construct too polarised a view of urban governance and mobilisation. Unlike Chatterjee, I do not think that the deciding factor of who uses political mediators and who does not is linked to legality or illegality. Rather, I think that the choice of strategy is linked more closely to his points about voting blocks and banks. I suspect that the reasons to use litigation are profoundly connected to the lack of access to political networks and having little ability to leverage votes. Veron, *et al.*, (2003: 5) agree, stating that "but whereas Chatterjee suggests that political society works to ensure the representation of every interest group, we would insist that poverty and powerlessness are the fate of those who lack political connections and who cannot successfully break the law when required to do so". The traders' protests and threats were no doubt key factors in accessing the politically powerful and ensuring their representation at the top echelons of government. Furthermore, the relationship between "communities" and political actors is also a mutual one in which "communities" court political mediators but political mediators also woo communities. Consummation of the relationship lies in the fact that it is equally useful for both parties: political actors can gain legitimacy, votes and a powerbase, as well as, potentially money and assets, whilst "communities" ensure that their needs are heard and often satisfied. Given the political expediency and efficiency of political society, I would argue that it would be the option of choice for many if they

were able to push the right buttons. Civil society is often hemmed in by protocols and rule-making, whereas those in political society are always in a position of exceptionalism.

Moreover, I think that the aggregation of civil society to incorporate "characteristic institutions of modern associational life originating in Western societies that are based on equality, autonomy, freedom of entry and exit, contract, deliberative procedures of decision making, recognized rights and duties of members, and other such principles" (Chatterjee, 1998: 60) is too monolithic. Chatterjee presents these institutions as if they are static and ahistorical rather than dynamic, highly differentiated and profoundly embedded in their contexts. The various institutions and departments of the state and within the branches have vastly different capacities, tensions, goals and projects, which change over time. The Constitutional Court's insistence on meaningful engagement reflects a specific project of the court, which was distinctly at odds with what the City of Johannesburg focussed on.

Chatterjee also argues, "[c]ivil society is where corporate capital is hegemonic, whereas political society is the space of management of noncorporate capital . . . the logic of accumulation . . . holds sway over civil society—that is to say, over the urban middle classes". Mannathukkaren (2010: 300) disagrees, stating that "[w]hat is missing in Chatterjee is precisely the dialectical nature of civil society seen in Gramsci, that is as 'both [a] shaper and shaped, an agent of stabilization and reproduction, and a potential agent of transformation'. Once again, I agree with Mannathukkaren but think that he does not go far enough in pushing Chatterjee's definitions. Entering political society can be an intensely counter-hegemonic act. It is a powerful way of embedding a counter-narrative and a different worldview into political society as it is about contesting and challenging the *status quo*. It is the quest to make other residents into rights-bearing citizens with the ability to shape space in their own cities. The court cases provide moments of destabilisation when the "naturnalness" and normalcy of the existing hegemony was exposed for what it was - exploitative and exclusive; it is in these moments that a counter-narrative becomes possible. In the Delhi case, this was expressed through the use of political mediation and public action, whereas in South Africa, through the use of the Courts the residents were able to use the very institutions of power who were open to and encouraged this project, to offer a different rights-discourse and, thus, a different worldview to that of the City and the market.

6.6 Conclusion

The two cases have provided contrasting examples of how different groups can and do access exceptional treatment from those in power. The Delhi traders' engaged in a sustained project of public action, this is largely because they had been effectively excluded from the civil society institution of the court and as such had to find ways of accessing those in power. The traders did not just utilise one mode to get their voices heard but used a variety of strategies, which included public action, and continuously attempting to petition the court through political actors. The traders mobilised a variable repertoire of public demonstrations, utilising traditional and innovative modes of protest in order to push their own narratives into the public sphere and to counter-act what had been said in court. The

traders' protests and strikes were effective in raising their counter-narratives in the public sphere as well as inventing spaces that went on to construct invited spaces with key political figures. It was these meetings, which, in turn, gained the traders access to the corridors of power. The San Jose residents did not engage in public action, but rather accessed and utilised litigation with the support of human rights lawyers. It was through the Constitutional Court's insistence on meaningful engagement that provided the residents with access to an invited space: those in power, and a platform for engagement and the expression of their voice and narratives. The use of public action also makes clear some of the linkages between invited and invented spaces and how the one can be mobilised to access the other. In addition, the Olivia Road Case opens up the issue of who is doing the "inviting" in invited spaces and what that means.

Chatterjee would argue that the reasons for the specific modes of engagement are determined by their positions in society and their ability to be treated as citizens and populations and as such having their rights recognised by those in power. The cases seem to indicate that the distinction between those who inhabit political or civil society is not as clear-cut as Chatterjee has argued and that access to the different realms is partially determined by contextual factors. The ability to access those in power relies on a mutual recognition of reciprocation, such that constituencies exchange votes or assets for political access. Effectively, this means that not all marginal groups are equally able to access politicians and that issues of scale and economic capital play an important role in accessing those in power. Furthermore, marginalised groups can and do access civil society if there is a larger willingness to provide them with the required admittance and support. In addition, those who engage in political society recognise themselves and their battles as a fight over rights and shape their narratives in terms of rights-based discourse.

The chapter has attempted to look at the ways that the different groups have accessed the state and the modes through which they have achieved exceptional treatment by the state. The following chapter looks towards understanding the implications and consequences of the case for urban governance and seeks to unpack how the case changed or affected policy, practice and process in Delhi and Johannesburg.

Chapter Seven: Courts cases and Political efficiency, the many types of change

7.1 Introduction

The last few chapters have discussed the various forms of mobilisation and the wider strategies that each constituency took in attempting to have its voices heard and its needs met, each of which resulted in a different outcome, effect or impact. The following chapter looks at the "political utility"[262] and attempts to understand the changes that they wrought, the terrains that were contested and power that was won and lost. However, tying cause and effect directly together is extremely difficult as Kolb (2007: 1) noted, "[in] the context of movement outcomes, causal complexity refers to the fact that not only social movements but also interest groups, public opinion, mass media, political parties and many other factors are likely to exert causal influence on the process of social and political change". Kolb was referring to the work of social movements but the same is true of court cases. Thus, there may be a constellation of factors which influence the utility of a collection of actions and combine to contribute to a set of outcomes, but what is clear from the case studies is that the court cases become the catalyst, the locus or the so-called "final straw" which inspires change. The following chapter explores these changes and uses the social movement and law and society literature to describe some of the axes of change that are discussed.

Most of the research on the outcomes and consequences of public action and mobilisation has focussed on the efforts of social movements and their impact on public policies, largely to the exclusion of studying other types of consequences and impacts (della Porta and Diani, 1999; Giugni 1998; Earl 2000). However, there have been exceptional efforts from Gamson (1990), Rochon and Mazmanian (1993), Giuigni (1998) and Earl (2000) who have constructed taxonomies of change to measure the impact of social movements. Gamson (1990) has concentrated on two forms of change: changes in policy; and, changes in policy processes or the ability to add to or be included in the policy-making process. Rochon and Mazmanian (1993) added a further dimension: a change in values. Guigni (1998) recorded and reviewed the plethora of indicators that other authors have used and made the important observation that change is not an "either/or" proposition and that changes may be a matter of degree.

The law and society literature has engaged primarily on the impacts of litigation on policy, practice, enforcement and jurisprudence (Langford and Kahanowitz, 2010; Madlingozi, 2007; Mbazira, 2008). There are two directly opposed lines of argument in this literature: the first is that courts have a significant capacity to reshape and change society, and through the invocation of rights by courts "meaningful change" can be fashioned in social and economic relations (Bilchitz, 2002 and 2008). This is what Scheingold (1974) has termed the myth of rights and Hunt (1990: 309) describes as an

[262] The term was coined by Dr Claire Benit-Gbafffou

argument that offers a "...direct linking of litigation, rights, and remedies with social change". Those of the opposing view maintain that the existence of a set of rights and the securing of a legal remedy does not necessarily result in social change (Scheingold, 1974; Rosenberg, 1991). A middle way has been forged by other authors who state that the actual litigation may not directly promote change but could propel the wider goals of a movement. Usher (2008), for example, states that litigation can increase pressure on government bodies and help to highlight and publicise the issues that face many residents. Gloppen (2005) adds her voice to this position and proposes that the actual outcome of the case in terms of whether one wins or loses or even if the judgement is or is not complied with is less important than the "systemic impact" of the court case, by which she means the ability of the case to change thinking, discourse, and add to national and international SER jurisprudence.

I think there is much overlap between both bodies of work[263] and have adopted a mixed approach that looks at the impact of the cases across five axes of discussion:

- the change or impact on policy;
- changes in the ability to engage in or participate in the policy-making process;
- changes to values, which is understood to mean changing the perceptions and ideas of the general public and which I will extend to also include hegemonic and counter-hegemonic projects and,
- changes in practice, which includes changes to the roles and mandates of institutions and lastly change in power and power relations.
- In addition, some of the changes fit into a number of axes at the same time.

I have also adopted Rajagopal's (2005: 382-383) perspective that

> "the role of domestic institutions, especially that of the judiciary, cannot be taken for granted. This must be seen against the background of intense debates about whether domestic courts help or hinder social movements in which opinions tend to be cast in an either/or fashion. This seems problematic and it is likely that domestic courts can both help and hinder a movement".

As such, I take the point that certain strategies and mechanisms can have simultaneously contrary effects and impacts and can succeed or gain ground in one dimension but could be a failure and effect no action or harden attitudes and make the lives of certain groups even more difficult in another. I also acknowledge that the definition of what is a success or a failure is extremely difficult to delineate (Langford and Kahanowitz, 2010: Guigni, 1998). However, I do think that a set of actors who have realised the goal or goals that they set out to achieve could be considered successful, whereas failure could be considered the complete inability to change anything for the better or to somehow make the situation worse. Further than that, I think each change needs to be measured on its own merits.

[263] I am not a lawyer, and the legal issues and jurisprudence of the cases has been considered elsewhere (Ray, 2008, Tissington, 2008; Wilson, 2011a and b). Thus, these issues do not form part of my analysis.

The following chapter examines these five axes, looks at the changes that the cases affected under each category, the particular set of actions that led to a specific end, and provides some theorisation around each dimension.

7.2 A summary of the judgements

The court judgements have been mentioned elsewhere in my thesis but I thought it would be helpful to provide a summary of the two judgements in order to understand the ramifications of the court cases as well as the court judgements. It also allows for a distinction to be made throughout the chapter as to what changes were the results of judicial decisions and what resulted as part of the larger court cases and the actions and activities that were mobilised around them.

7.2.1 The Olivia Road Judgement: key points in brief

The Constitutional Court's Olivia Road judgement comprised of two parts: the ratification of the litigants' negotiated settlement into a court order, and then a final judgement. The final judgement had a number of sections, which included the Court's orders on meaningful engagement, alternative accommodation, decisions on the City's housing policy and elements of the National Building Regulations Act (NBRA), all of which have been considered important. The Constitutional Court's mandate to municipalities to "engage meaningfully" if evictions meant that residents would be made homeless, has been seen as seminal in SA litigation. The decision was careful to lay out some parameters for meaningful engagement, noting it should not just be a compliance-led activity but that the municipalities have a responsibility to try and sincerely engage with residents. The Constitutional Court also made a full record of engagement a requirement of any eviction proceeding, arguing that without it a court would be hard-pressed to know if an engagement had been meaningful or not. Importantly, the judgement also addressed the sections of the NBRA, which essentially allowed for eviction without a court order. The Court stated that evictions could not take place, irrespective of the situation, without judicial review and a just process.

Additionally, the Constitutional Court had been asked to consider '*the City's failure to formulate and implement a housing plan for the applicants and the class of persons on behalf of whom the current litigation was initiated…*'.[264] The Court ruled that there was no need for them to make judgement on the housing plan or its lack because '*There is no reason to think that future engagement will not be meaningful and will not lead to a reasonable result*'.[265] The court maintained that since a negotiated settlement process was now in place, a housing plan would not be necessary as each group would be able to negotiate its needs with the city as and when the situation arose. A further issue was that the City was accused of not implementing the Emergency Housing Programme as it was encapsulated in Chapter 12 of the Housing Code. This chapter, originating in the pivotal Grootboom Case, set out the

[264] Constitutional Court of South Africa, 2008: Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street Johannesburg, v City of Johannesburg *et al*, 2008 Case CCT 24/07 ZACC 1 judgement
[265] Ibid.

regulations for assistance to residents who had been evicted and required the state to provide temporary alternative accommodation of a basic standard (Chenwi and Tissington, 2010; Wilson, 2011a and b). The Constitutional Court provided a reading of the eviction orders and the right to access adequate housing as intertwined and decided that:

> *'It follows that the City must take into account the possibility of the homelessness of any resident consequent upon a section 12(4)(b) eviction in the process of making the decision as to whether or not to proceed with the eviction'.*[266]

Thus, the Constitutional Court reinforced the position that if an eviction were to make a household or individual homeless then they should be provided with alternative accommodation. The Constitutional Court decisions were very diverse: on some of the clauses of the NBRA they provided a specific and directed response. However, for the rest, the Constitutional Court left the judgements open to interpretation.

7.2.2 The Sealings Case: matters of law

Fundamentally, the Sealings Case resolved the issue of who had responsibility for sealing premises that contravened the city's 2001 Master Plan. The Supreme Court of India (SCI) found that the MCD was the responsible party. However, as mentioned previously, the SCI went far beyond the original legal matter and its judgement directed the MCD to '… *within 10 days give wide publicity in the leading newspapers directing major violations on main roads to stop misuse on their own, within the period of 30 days'*.[267] Within the same period, it commanded the MCD to put details of the violations and regulations for the different areas and different roads in Delhi onto the MCD's website. Furthermore, copies were to be sent to RWAs, *'which should be involved in the process of sealing of misuse*'.[268] The SCI also gave the owners and occupiers 30 days to file an affidavit stating that the misuse had been stopped. If, after 30 days, the misuse had not been stopped then the Supreme Court directed the MCD to seal the premises and cut off water and electricity. Following which, if the misuse had been stopped and the owner/occupier had given an undertaking that they would use the premises for their intended use, they could then approach the MCD Commissioner for removal of the seal. Besides the affidavits that the Court insisted on, no provision was made for engaging with the misusers, aside from the space that SCMC constructed.

Curiously, in the Sealings Case the issue was not one of forcing the DDA to update and complete a new Master Plan but was rather a question of forcing the relevant authorities to implement the existing legislation, which, by that stage, was already five years out of date and mostly inappropriate for the Delhi of 2006. The SCI characterised its actions by stating that '*The problem is not of the absence of law, but of its implementation'*.[269] The SCI attributed the lack of implementation to the '*apathy of a*

[266] Ibid.
[267] Indian Supreme Court Judgement Interlocutory Application No. 22 in Writ Petition (Civil) No. 4677 of 1985, M C Mehta versus the Union of India and Others, 16th February 2006.
[268] Ibid.
[269] Ibid

municipal body, which is constituted, amongst others, *to ensure compliance of the laws*' and that the '*officers were, in fact, encouraging or conniving with persons who were indulging in such misuse*'.[270] Thus, their judgement was an attempt to rectify the implementation of existing legislation. In doing so, they maintained a type of legislative supremacy, whereby the implementation of the law and holding the MCD to its legal obligations superseded other considerations. Procedural aspects of representation, hearing and engagement were disregarded in favour of ensuring that the provisions of the Master Plan were enforced, irrespective of the fact that the Master Plan 2001 was already irrelevant by the time the trial started.

7.3 Changes in policy

A change in policy is normally what is sought through forms of public action and is often considered the true measure of success. Rochon and Mazmanian (1993: 76) posit that the very reason "people join social movements [is] in order to change public policies". Social movements and litigants in socio-economic rights cases are generally aiming to change policy in their favour either because there has been a failure in the actual policy in some respect or because there has been a failure of implementation. Gamson (1990) has an expansive definition of policy change and sees it as the ability "to gain new advantages for the protesting group" (quoted in Rochon and Mazmanian, 1993: 76). I would offer a narrower understanding of policy changes, i.e., the change in official legislation, regulation and laws or documents, such as official strategies, that have legal or statutory sanction.

There were a number of moments in the two cases in which policy was changed. As a result, of the Olivia Road Case, the CoJ developed an inner-city housing strategy,[271] stopped the Inner City Regeneration Scheme and the Bad/Better Buildings Programme, began to engage meaningfully and looked towards the provision of alternative accommodation in certain circumstances. In the Sealings Case, the SCI judgement to seal was a decision to implement the old Master Plan and put its regulations into effect. However, the more substantial policy changes were the promulgation of the Delhi Special Provisions, various government notifications and the changes of local by-laws, which regulated land-use in Delhi, as well as the new Master Plan. All of which aimed to recognise mixed-use land use in the City of Delhi and provide relief for the traders. The decision may be seen as both a change in policy and a change in practice. The next section will look at not only the policy changes but also the various reactions to these changes.

7.3.1 Too vague for comfort…

In the Olivia Road Case, there was strong ambivalence from both sides to the court ruling - a sense that on the one hand the Constitutional Court was overstepping its mandate and, on the other, that the ruling was for too vague and made the officials' job far more difficult by not providing a clear

[270] *Amicus Curiae* filed IA No.1860/04 referring to aforesaid orders dated 31st July, 2001, 20th February 2002, 30th September, 2002 and 19th August, 2003
[271] Brits, K., 2007: First Respondent's Supplementary Affidavit, Constitutional Court, Case No. CCT 24/07
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mandate. There was unease around the Constitutional Court decision, which said that certain policies needed to be put in place and delivered but failed to give the officials sufficient direction as to what the policies should actually look like. Bilchitz, (Pers. Comm., 2010) reporting on his work with officials commented that they spend:

> '*a lot of the time avoiding giving concrete content to these rights on the basis that it is for the government to do, and that they [the Constitutional Court] deferring to government as a sort of an expression of democratic powers. What in fact we're finding is that often the government themselves… want the court to actually provide more content to the rights'*.

In this specific case, Povall (a lawyer working on the side of the City of Johannesburg) highlights that clarity would have helped all of the concerned parties:

> *'The Constitutional Court did not provide a decision - and you go to court to get a decision. All of the parties were looking for clarity from the court as to what their roles were and what they should be doing. For example, [the CoJ Department of] Housing had a plan and wanted to clarify what is reasonable and what is not but the court didn't address that issue, which was a problem for Housing. CALS was left in a similar position, all of the parties would have benefited from knowing exactly what could be done'* (Pers. Comm., 2010).

A senior official in the Inner-city Task Force agreed:

> *'You know, ja. the problem was that it wasn't tied down, the detail wasn't tied down. In this type of thing you've got to tie down the detail. What happens after? You move people, what happens with them after? How is it managed? How is the transition from that, from decant [temporary accommodation] to permanent? How is that handled?'* (Pers. Comm., 2010).

Some of the officials felt that by providing the judgement but not giving content, they were put in a position of uncertainty as they were not sure what they should, or could, do or not do. They found the situation disempowering as they were never certain if they were doing enough or too much, and if they might then be taken to court again, which they were very much afraid of. The confusion also surrounded exactly what constituted alternative accommodation and perhaps more importantly, meaningful engagement.

Alternative accommodation: a policy without parameters

In the case of alternative accommodation, the City and Province were both uncertain as to what defined alternative accommodation: who should be responsible for it, and which programme should it fall under? Clarity on these issues would define reporting lines, mandate and most importantly, budget. Furthermore, the officials felt that they did not know when they could say "no" to the San Jose

residents and their legal representatives' demands. Samantha Naidu, from the City of the Johannesburg, Department of Housing asked:

> 'Y*ou have to provide alternative accommodation, [so] what are the standards for that alternative accommodation, you know? If you look at the Emergency Housing Programme, it could be tents… And if you're saying temporary accommodation it could just be a big warehouse and you just have beds for people you know… so they [the Constitutional Court] didn't give us any direction as to say, okay if you're providing alternative accommodation this is what we expect you to do because CALS is dictating to us… But there's no – no document or whatever that tells us this is what is required…*'.

There was also uncertainty as to exactly how long the City had to accommodate the residents and whether it was 18 months or ten years or until a permanent housing solution could be agreed to. The Court decision left the City with the direct care of residents but with no real guidance as to the limits of their obligation. According to a Senior Housing Official in the CoJ what this actually meant was:

> *'… the alternative accommodation doesn't have a fixed period… So technically you actually end up with the results… where the Judge made a ruling that is correct but the results thereof is that he actually has adopted 140 adults that we must look after up until either you can give them a permanent solution, which you don't have an instrument to accommodate them on, or you house them there forever'* (Pers. Comm., 2010).

The decision to relocate the San Jose residents and around alternative accommodation raised the spectre of equity for the City. A key concern for any government department is the question of equitable distribution and procedural fairness. The San Jose residents and inner-city dwellers were soon accused of "queue jumping" or as Lael Bethlehem, who headed the Johannesburg Development Agency at the time, put it:

> '*In fact, the judgements offer "perverse incentives" whereby if you want free accommodation just invade a building and that the message the judgements seem to be sending out is that if you want to be at the front of a queue then invade a building*' (Pers. Comm., 2010).

A senior official from the City agreed,

> *'if that's now happening, the Court is now allowing people who are not even on a waiting list who recently come in to the City to jump and get accommodation way in front of people who've been waiting for eight and ten years to get accommodation… that is wrong* (Pers. Comm., 2010).

The official is referring to the Provincial Housing Waiting List, or Demand Database. People are supposed to register on this database if they require housing and meet certain criteria. Once on the

database, potential beneficiaries are supposed to wait until the Housing Department provides them with a "housing opportunity", which is a low-cost, free-standing unit of which the beneficiary is given full ownership. The demand database is the tool that the Department of Human Settlements uses for what it considers fair allocation. On average, people in South Africa wait seven years for an RDP/BNG unit, however people in certain projects or in emergency situations are housed more quickly (Rubin, 2011). The San Jose residents were not on the housing demand database and had not waited in the "queue" for their housing option, which is why the above-mentioned officials felt that the San Jose residents had been unfairly provided with accommodation, whilst people who had been waiting for longer and had followed due process were still not housed.

However, not all of officials felt that it was queue jumping. Leslie Magoro, CoJ Regional Manager for Housing, argues that it was a form of triage:

> *'Ok, I wouldn't actually call it queue jumping because some... you know sometimes you are dealing with a situation where there's a human being left to die, who is going to die and here is another human being, he still can live for a few days, now you have to ask yourself which one do you take care of, the critical patient or one that can still survive another day or two before being attended to*…' (Pers. Comm., 2010).

Magoro argues that the people living in the inner-city faced greater danger and thus had a greater claim than many others who were sitting on the database - therefore, it was justifiable to house them first. Bilchitz agrees with the sense of urgency that Magoro identifies but felt that such a view places an enormous, but justifiable responsibility on the state and wished that the court had been clearer about what residents, in these life-threatening situations, could demand:

> *'The first thing is that not everyone's in the same position. So if you don't assert unfairness and you have to assert that everyone is in the same position, the people in [the inner-city] will arguably live in life threatening danger of their lives in those buildings. So, arguably, dealing with their case, was a priority for any government …. And… there is an urgent level of entrance, the action we have to get, which is in my view, completely feasible in South Africa, within a reasonably short period of time and this is what I wished the court would have done with these rights, which is to give people a very basic minimum entitlement to be free from certain of the basic threats to their survival' (Pers. Comm., 2010).*

Lauren Royston, who had been intricately involved in the community facilitation aspects of the court case, articulated a different counter to the queue-jumping objection:

> *'[S]o I don't think the city can get away with the equity argument because its delivering so slowly and so inadequately on the other option that it keeps referring*

> *people to [RDP housing[272]]… so it's basically condemning people to wait for a very long time for another option elsewhere and what are people meant to do in the interim?… There's an assumption that the queue jumpers actually jump a queue that actually exists, I mean it exists but where it works is apparently quite corrupt and the supply is not happening at a sufficient pace for that argument to have merit... At this point what they did was highlight this particular building at this particular point in time and bring it to the attention of the Constitutional Court… So, where people could make a gain, why shouldn't they… '* (Pers. Comm., 2010).

A further equity objection was that the San Jose residents were supplied with much more than other people in similar situations. As Narsoo put it, the residents won the '*housing jackpot'* (Pers. Comm., 2010). They were the only residents to receive accommodation at hugely subsidised rentals and furthermore, that '*in informal settlements no-one is saying that the state has to house people for the rest of their lives*' (Bethlehem, Pers. Comm., 2010).

Bilchitz does not agree and argues that just because some people are able to receive more than others, does not mean that they should not get it. This follows former Constitutional Court Judge Albie Sachs' claim that "in equality law you get inequalities that can be eliminated either by levelling down (to the graveyard) or grading up (to the vineyard)" (Sachs, 2009: 250). The equality of the graveyard refers to a situation in which what is being provided is the lowest common denominator between all people, which taken to the extreme ends, is no-one receiving anything, hence the graveyard. Thus, just because the City of Johannesburg is not able to provide everyone with good rental housing and the possibility of permanent accommodation does not mean that this group should not be able to access it.

Inner-City Housing Policy: reacting to context

CALS and some of the other legal representatives would have preferred a clear response to the issue of the lack of an inner-city housing policy rather than the court having put their faith in the potential of the meaningful engagement clause. However, there does seem some justification for the Constitutional Court's willingness to let the CoJ carry on developing a housing policy. Before the Constitutional Court case was resolved, the City of Johannesburg had already begun the process of developing an inner-city housing plan which was intended to feed into the larger Inner City Charter. The Housing Action Plan (draft of 2007), when acknowledging the range of factors that led to its development, noted the importance of the Olivia Road Case and the High Court and Supreme Court of Appeal decisions. It stated that

[272] RDP housing refers to the SA government's public housing programme which supplies households earning below R3500/month with a free home, formal title deeds and service connections. Although the programme has been hailed as a success and has delivered over 3 million "housing opportunities" in 20 years, however, the estimated backlog, which refers to the number of people who still require housing, is a further 3 million households and is growing.

> '*Whatever the outcome of the case in the Constitutional Court, it is now clear that the context dictates that the problem of bad buildings cannot be fully solved outside of a framework of inner-city housing provision'* (emphasis in original).[273]

The final housing policy document submitted to the Constitutional Court stated that one of its key drivers was:

> '*The passage of the matter through the courts has inextricably tied the issue of how to deal with bad buildings to the issue of how to ensure the development of enough affordable accommodation for those who wish to live in the inner-city*'.[274]

Clinton Povall, a lawyer at Moodie and Roberts who worked for the City on housing-related matters, argued that:

> *'Basically I think the upshot… from a policy level, is that all of this litigation in fact and to my mind focussed people's attention on what the real issues were. Until then people saw things in a very insular way, just taking things on a micro-level. All these council departments would have the fire department going one day, health the next day, building control the next day. This caused the Task Team approach so that at that level there was level of a systematic approach and from there kind of got to a policy level'* (Pers. Comm., 2010)

Thus, the court case clearly created a context to which the City of Johannesburg had to respond and forced them to develop a housing plan just for the inner-city of Johannesburg. This is a little explored area in either the social movement or the law and society literature, which is the manner in which court cases change contexts and can force or catalyse policy change outside of the actual judicial decision. Therefore, the litigation was able to indirectly affect policy change for the larger class of people in Johannesburg by putting pressure on the municipality through the court cases but without needing to wait for a decision.

The end of the Bad Buildings programme: a constellation of factors

Prior to the Olivia Road Case, the Inner City Regeneration Scheme (ICRS) and the Better Buildings Programme (BBP) were the CoJ's policy responses to inner-city regeneration. The Constitutional Court's Olivia Road judgement, in many ways, put an end to the City's policy. A Senior Official in the Inner-city Task Force remembers:

> '*Up to that [the Olivia Road Case], up to that stage it had been fairly easy: the City would move in, we'd get an eviction order, we'd evict you and we'd seal up the building, brick it up, close it up, weld it closed so that nobody could get back into it. We'd then take that building and put it into the Better Buildings Programme. Get*

[273] City of Johannesburg, 2007: *Inner-city Housing Action Plan Draft for Consultation and Comment*, November 2007, Johannesburg.
[274] City of Johannesburg, 2007(unconfirmed): *Inner-city Housing Action Plan, Phase One, Executive Summary of Draft One*, http://www.leap.org.za/File_uploads/File/Inner_City_Housing_Action_Plan_Phase_1.pdf, accessed 08.08.2012.

rid of it to contractors and developers and they would redevelop the properties' (Pers. Comm., 2010).

The Olivia Road Case stopped the Inner City Regeneration Scheme and the Bad/Better Buildings Programme through putting a set of conditions on government evictions (Vermaak, Pers. Comm., 2010). A Senior Official agreed:

> *'The whole process got unstuck when the Constitutional Court came back and said, "Guys, you can't just evict people. You've got to make some sort of a provision for the… what do they call it… vulnerable groups. You know the vulnerable groups? The old ladies and mothers and kids without husbands and those ones. You've got to make some plan with them", number one. Number two, before you would go into an eviction process, negotiate what you – what you have to do. You have to have meaningful consultation'* (Pers. Comm., 2010).

However, according to Vermaak and Beckenstrater, the court case was not the only reason the programme was halted and there were institutional issues within the municipality that contributed to its demise:

> *'It [the BBP] was also frozen because there was an internal issue as to whether this would continue to be a JPC, Johannesburg Property Company, issue or not, so it still sits with the Johannesburg Property Company but the Mayor's office actually took over a further investigation in the matter and they have for several years been looking at what they call "up-scaling the project"'* (Pers. Comm., 2010).

Moreover, even before the Olivia Road Case, the courts were becoming less and less willing to give eviction orders and the High Court was becoming more critical of arguments that had worked in the past (Povall, Pers. Comm., 2010). Vermaak remembers that '*They [the High Court judges] started opposing these applications on the basis that … that the people in the buildings have got nowhere else to go*'. Thus, even before the Olivia Road Case went to trial, there was judicial concern over the situation in the inner-city and a slowing down in the number of evictions. In a sense, the Olivia Road Case, or something very much like it, was bound to happen in the inner-city; the tension had been building, the number of people who had been evicted was growing and the courts were beginning to realise that the BBP and its associated evictions were not a tenable legal position. Thus, although the Olivia Road Case was the final nail in the coffin for these policies, the end of the BBP and the Inner-city Regeneration Plan was not unexpected by the City of Johannesburg.

7.3.2 A powerful constituency: the traders' leveraging new policy

The Sealings Case resulted in several changes in policy: the first was in attempting to enforce the existing Master Plan of 2001 and the second was promulgation of the new laws: the Delhi Laws (Special Provisions) Act 2006 and 2021 Master Plan, which recognised and endorsed mixed land use in Delhi. The traders' combination of accessing political society and their ability to leverage public

action meant that they were radically successful in being able to influence and change policy, a feat that most social movements are generally not able to accomplish (Rochon and Mazmanian, 1993). The following section explores the policy changes that the traders' were able to effect in Delhi and argues that the traders were the most politically efficient of the actors in the two cases and that their mixed strategies of limited litigation, intense public action and leveraging political society was able to garner the best results.

The Delhi Special Provisions: new legislation

As has been discussed in earlier chapters, the government attempted to come to the rescue of the traders in a number of ways, including providing notifications and petitioning the SCI. Effectively, the government and the judiciary entered into a battle for supremacy with each side leveraging the weapons at their disposal. Thus, the government promulgated notifications and legislation and the SCI countered by exercising their right of legislative review. The Delhi Laws (Special Provisions) Act was promulgated in May 2006, and was an attempt by the government to maintain their executive supremacy. It was also an attempt by the Congress government (at both national and local level) to win a constituency that were not historically their supporters in the run-up to the 2007 elections. In comparison, the BJP supported the legislation in an attempt to publicise their support of their votebank and win votes in the upcoming election. The Act effectively put a moratorium on sealings and demolitions of illegal properties in Delhi for the period of a year and was promulgated because sealing and demolitions were "… causing avoidable hardship and irreparable loss to a large number of people" (cited in Ramanathan, 2006: 3197). Although the SCI rejected parts of the legislation, some of it ensured the protection of traders working in precarious situations.

There are two useful comparisons to be made about the traders' ability to leverage policy change: the first is when compared against the RWAs, which will be discussed in detail later in the chapter, and the second is the comparison that Ramanathan draws against the urban poor who have been evicted by court edict in Delhi. Both groups have been spectacularly unsuccessful in eliciting policy change and poor urban dwellers living in illegal circumstances have not received the same benefit of protection as the traders and have yet to benefit from relocation policies. The Delhi Special Laws have also had a significant legacy and have been extended every year since the 2006 promulgation. According to news reports '*It will basically be a political decision, especially in view of the impending MCD elections. To allow the act to lapse would be a political suicide and lead to outright chaos'*.[275] Furthermore, and unlike the South African situation, there is no policy to connect demolition and eviction to the obligation of alternative housing or land (Ramanathan, 2006). The synergy between the government's desires to assert its supremacy, coupled with the traders' numbers as a significant votebank, have meant that they have been able to partially ensure their protection from the court's larger vision of Delhi, whereas smaller and less powerful groups have not had the same success.

[275] Bagga, B., 2011: Bogey of sealing drive haunts Delhi, *India Today*, 8th September, http://indiatoday.intoday.in/story/bogey-of-sealing-drive-haunts-delhi/1/150520.html accessed 19.04.2012

Masterplanning: implementation of the old, construction of the new

The Supreme Court asserted that they were on the side of law and order, and this meant the implementation of the existing land use policy in Delhi, which according to Manoj Mitta, the Supreme Court Reporter for the *Times of India,* '*had outlived its life'* (Pers. Comm., 2010). Furthermore, the SCI only held MCD to the negative obligations of the Master Plan around halting misuse and removing illegal activities from residential areas. It did not adjudicate on the positive aspects of the Master Plan, whereby the '*Master Plan contemplates shops in District Centres, Community Centres, Local Shopping Centres etc'.*[276] In addition, the Supreme Court's preoccupation with the failure of the MCD to implement the provisions of the Master Plan around zoning seems somewhat bizarre in light of the MCD's lack of action on provisioning water, housing and proposed '*Extensive modifications… to cater for increasing population and changing requirements up to the year 2021'.*[277] The SCI's decision to implement an existing policy, and then only certain aspects of it, and not insist on a new one seems to be a reflection of it attempting to appease the RWAs. The SCI felt significant sympathy for the RWAs litigation, which was in keeping with the Court's own larger vision of the city, demonstrating the importance of alignment between agents and decision-makers when attempting to affect policy change or implementation.

The court case also spurred the promulgation of the new Master Plan. This was not as a result of the Court's decisions but rather the events surrounding the case, which '*gave an impetus for the government to, sort of, update the master plan, update the rules, and make them more realistic*' (Mitta, Pers. Comm., 2010). Mahendra Rana also argued that it was also owing to the very loud outcry of the traders that led to a situation in which the Master Plan, which had been in process for many years, was brought out '*very, very fast'.* BK Jain of the DDA, further stated '*We had already made the provisions of mixed use literally but by this court order… it had acted as a catalyst in the process'* (Pers. Com., 2010). Aside from the desire to appease the votebank, the Union Government must have been aware that the old Master Plan did not provide them with sufficient legal backing to support their resistance against the court and their desire to assure the re-shaping of Delhi according to their constituents' demands.

The new Master Plan was in accordance with what the traders wanted and

> *'… contained a special chapter for mixed land use and provides for a very liberalised regime of mixed land use. So, about that time it was calculated about 200 000 properties will be penalised if the master plan is not notified, and after the master plan was notified about 90% of the properties which were coming under irregular or illegal became regular' (AK Jain, Pers. Comm., 2010).*

[276] Mahashabdey, M., 2010: Master Plan for Delhi 2021, Presentation, DDA, 1st December 2010.
[277] Ibid.

The new policy clearly benefitted the traders and their desire for more commercial space in Delhi especially in residential colonies, and provided a completely different vision of the city, one with a far more commercial look and feel. According to PK Vohra, a professional planner and commentator on planning in Delhi, the Master Plan 2021 changed the actual character of Delhi when *'... they declared about 2200 roads in Delhi as commercial where you could have commercial activity legally'* (Pers. Comm., 2010). It also meant that the traders would be protected in the future from further sealings as under the new Master Plan they would not be contravening the city's by-laws.

Thus, there were policy changes due to the court cases. In Delhi, the RWAs who had taken the original case to court were able to implement the existing 2001 Master Plan. Moreover, the overall court case, which included protests, political pressure and state notifications, meant that the DDA had to finally promulgate the 2021 Master Plan, which was long overdue and which the DDA had been dragging its heels over for years. The traders, however, were also able to significantly contribute to the design of the new Master Plan whereas the RWAs were excluded form that process. This will be discussed in the section dedicated to the changes in the process that the court cases wrought. Furthermore, the changes in policy not only reflect the success of the various strategies and repertoires of action but also the importance of a sympathetic ear of those in power in order to ensure that a policy is promulgated or implemented. In Johannesburg, the court decisions were effective in driving policy change around meaningful engagement and alternative accommodation. In addition, the court cases constructed a context in which policy change was seen as imperative and helped to catalyse a revised inner-city housing action plan.

7.4 Changes in policy process

There is no question that changes in policy are important aims for social movements and wider litigation. However Gamson (1990) and Guigni (1998) point out that significant long-term gains can be made through inclusion in the decision-making processes. Modifications to the process of decision-making and policy-making can result in incremental changes to policy and success may be measured as:

> "the acceptance of the protesting group itself as a valid representative for social interests that are newly defined as legitimate. This is what we call change in the policy process, because the acceptance of new groups as having legitimate interests generally leads to an expansion of the consultation process that precedes the formulation of policy. These changes are typically signalled by the creation of new mechanisms for dialogue and collaboration between government and political organizations" (Rochon and Mazmanian,1993: 77).

As alluded to in the quote above, changes to the decision-making process may mean the construction of new invited spaces and new opportunities for engagement, input and the ability to make a real contribution to change. However, they may also be intended as tokens and spaces of pacification "to defuse protest with as little substantive change in policy as possible" for troublesome and overly

litigious groups and individuals (Rochon and Mazmanian, 1993: 78). Politicians may favour this approach as they can surrender

> "control over the policy process to bureaucratic agencies… can avoid responsibility for decisions in… no-win situations… [and] can also gain credit for involving citizens in the decision-making process" (Rochon and Mazmanian,1993: 79).

As such, politicians may be able to construct a situation in which participation becomes a "form of collusive behaviour" that allows politicians to "shirk responsibility for unpopular decisions while gaining credit for statesmanship" (ibid.). Therefore, changes in policy-making processes can ensure legitimacy and provide recognition of a group or individual, but they can also be a way of ensuring that a group is made part of the process, pacified and demobilised.

This axis of change resonates substantially with both cases in which the issue of who was a legitimate partner in engagement was significant and led to two very different forms of engagement. Through the Constitutional Court's insistence on meaningful engagement the San Jose residents became a legitimate community to engage with instead of occupiers illegally inhabiting a building. The traders, however, "lost" their legitimacy: they had been tolerated by the law up until the Sealings judgement when they were declared criminals. This meant that they stood outside the law and had to seek alternative ways of engaging with those in power. The irony is that the traders' exclusion from the courts meant that they used other mechanisms of engagement such as threat, the promise of votes and the media, all of which won them a highly influential place in the masterplanning process. It was during the development of the Master Plan that they were consulted extensively whereas the RWAs were excluded from the same process. In the Olivia Road judgement, the court set the precedent for meaningful engagement but left the details vague. The vagueness has garnered similar criticism to the alternative accommodation provision but it has also potentially opened up a radical new space for civil society[278] to be able to define the meaning of "meaningful engagement". These dimensions are explored in the following section.

7.4.1 San Jose Residents: finding legitimacy

Court judgements have the ability to reconfigure and to transmogrify individuals and groups. During the two cases the legal and social standing of the various actors were significantly changed: the Delhi traders went from a quasi-legal de facto acceptance by the local authorities to being designated as lawbreakers (which will be discussed in the next section). By comparison the San Jose residents made the opposite transition, they went from illegal inner-city "squatters" to legitimate residents. The MCD made a slightly different transition as it went from an autonomous institution entrenched in the governance structures of the NCT to effectively the implementation wing of the SCI, under the oversight of the Supreme Court Monitoring Committee.

[278] Civil society in this chapter is being used in the traditional, non-Chatterjean definition of that sector of society, which is comprised of ordinary citizens who are not part of the state or the private sector.

Meaningful Engagement: modifying residents and making citizens

The first part of the Constitutional Court judgement in the Olivia Road Case was the insistence of meaningful engagement through their Interim Court Order, which instructed the two parties to '*engage with each other meaningfully… in an effort to resolve the differences and difficulties aired in this application'*.[279] Previously there had been a situation in which inner-city residents were not seen as people with whom the state engaged, a Senior CoJ Official working in the inner-city noted that

> *'Well, when you used the word "citizens" that was the big issue, because many of our housing, not only housing, but enforcement officials had great problems expanding the definition to include users of the city, it was easier for me to say user of the city, the minute you say citizen here, it is an ID document and it is paperwork'* (Pers. Comm., 2010).

As such, the Court's insistence on engagement between the two parties elevated the San Jose residents from illegal building occupiers and "users of the city" to legitimate citizens. The Constitutional Court's willingness to endorse the negotiated settlement also gave the residents the power and leverage that they needed to be taken seriously by the officials. The settlement agreement affirmed that the City would make the building '*safer and more habitable in the interim*'[280]. Furthermore, the agreement confirmed that later in the process the residents would be integrally involved in the layout and design of their new homes in MBV and Old Perm, the state-owned buildings to which the residents would be moved, and would be able to make representation to their lawyers once they had seen the buildings. Thus, once engagement had begun it was continued throughout the rest of the case and the San Jose residents were included as partners all through the implementation of the court decisions. The residents' committee and the community facilitators therefore devised a participatory process which was highly consultative in order to allocate units in the new buildings:

> *'We established a set of… broadly phrased principles that were agreed with the community, we workshopped them with committee members at CALS and then we took it to the community and it was agreed to… So we had to get agreement to the principle first… and what was critical was one of the committee members… and I basically did the allocations together and he worked incredibly hard in the building asking people what worked for them'* (Royston, Pers. Comm., 2010).

In contrast, the City of Johannesburg still wanted to reject the consultative solution that had been agreed to in favour of a more technocratic approach, and Royston remembered:

> *'there was a point right at the end, when the allocation was to be finalised and [the City] said to me this doesn't make sense… just on a technical point of view there*

[279] Constitutional Court, 2007: *Interim Court Order*: CASE NO: CCT 24/07, 30th August 2007.
[280] Ibid.

> *was cells on an excel spread sheet and it looked like it could've worked better… made more efficient in a way but we were reluctant to agree to any changes at that point because of the process. It might not have looked ideal but it was in an incremental step way, people were being taken along…'* (Pers. Comm., 2010).

The community facilitators were able to convince the CoJ that the participatory model, which was perhaps not the most "efficient" system, had the greatest acceptance. Once the allocation had been agreed to, the occupiers were '*given an opportunity to visit the completed buildings and make representation, through their attorneys by an agreed deadline*'[281] (Mngomezulu, Pers. Comm., 2010).

The court case forced recognition of the residents as legitimate citizens who needed to be engaged with and whose needs, opinions, and thoughts needed to be considered in decisions that affected them and their families (Ballard. 2008). In the Olivia Road Case, there were "valiant attempts" to reach compromises, engage meaningfully with each other from both sides but as the above exchange indicates, the officials still did not totally appreciate that engagement was more important than efficiency.

Meaningful engagement: opening the door?

The Court also judged that prior to eviction meaningful engagement must take place, and in their judgement laid out the following in terms of what constitutes meaningful engagement:

> *'Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine: (a) what the consequences of the eviction might be; (b) whether the city could help in alleviating those dire consequences; (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period; (d) whether the city had any obligations to the occupiers in the prevailing circumstances; and (e) when and how the city could or would fulfil these obligations'.*[282]

Once again the Constitutional Court's judgement was met with mixed responses. There has been significant praise of the meaningful engagement process and its vagueness as an important way of opening up policy-making to a wider audience and allowing for an increased role for civil society. There has also been significant criticism of meaningful engagement as being too vague and as a result too difficult to implement. Both aspects will be explored in the following section.

According to Renier Erasmus, Director of Madulomoho Housing Association, which provides low income housing in the inner-city,

[281] Constitutional Court of South Africa, 2007: Settlement Agreement between the Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street Johannesburg, and City of Johannesburg *et al*, 30th October 2007.
[282] Constitutional Court of South Africa, 2008: Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street Johannesburg, v City of Johannesburg *et al*, 2008 Case CCT 24/07 ZACC 1 judgement

'*The main problem is that the court never explained what meaningful engagement actually is? The judgement is very weak [it] doesn't say what it actually means*'. The Constitutional Court also did not designate under what conditions or when meaningful engagement would be considered sufficient. Aside from saying that the city must make '*reasonable efforts to engage*… [and in turn]… t*he people who might be rendered homeless as a result of an order of eviction must, in their turn, not content themselves with an intransigent attitude or nullify the engagement process by making non-negotiable, unreasonable demands*' (Pers.Comm., 2010).

Thus, the judgement begs the question of: when would an engagement be deemed both meaningful and reasonable.

According to Sol Cowan, an ANC Councillor who held the inner-city portfolio in the early 2000s:

'*I think you need to define meaningful engagement. If it's meaningful engagement where both sides meet at the middle… a win-win situation. But if you go into a meeting and every time you put a proposal down… its shot down… that's not meaningful'*.

Graeme Reid felt that in order to engage there has to be something to engage about:

'*The real issue is how do you engage meaningfully around this issue when part of your obligation is to try and find alternate accommodation? If you don't have your alternative accommodation… can you engage meaningfully? If you don't have a plan… and if your plan says you don't have enough housing, then where is the meaningful engagement*?' (Pers. Comm., 2010).

Aside from the question of whether, there is something to engage over or not is the issue of whether each side is able to engage meaningfully and:

'whether committees themselves have sufficient expertise to engage meaningfully, because to engage meaningfully you need sufficient expertise. Not just legal expertise but the expertise of people in housing and town planning etc. because proposals might be put to you, which you might not be able to challenge because you don't have the expertise… [T]he downside of the Constitutional Court's approach, is that they will not prescribe policy; they will not prescribe a minimum core content to rights. They leave it there to meaningful engagement to resolve the issue. It might resolve the issue provided everybody is well resourced to engage properly. If people aren't, it might just be unjust, but this is the dilemma… the problem. I think that to engage meaningfully requires enormous skills on both sides' (Hathorn, Pers. Comm., 2010).

From the City's perspective, community facilitation is extremely time consuming, often requiring months of work and officials to sacrifice their own free time for community engagement:

> *'… if you look at the available resources within the institutions that are expected to provide that [meaningful engagement] it becomes practically impossible because as a Department we don't have really enough capacity to go to all these meetings with the residents that are never ending, it takes us alot as an individual. I have gone through it and you get to a point where you say: look I am just sick of advising, it is not getting me anywhere. [Moreover] because most of these meetings are in the evening, you will be sitting there and probably you have got two or three meetings a week and you come back and you are still where you started and the bad thing about it [is that] they end up pointing fingers at you as well, make you the bad person and I don't have to be in those meetings basically but because we want to help we go to these meetings and try and assist'* (Kubheka, Pers. Comm., 2010).

Although Reid argues that if the state does not have the ability to follow the Court's directives then it must plan and budget to include the costs for capacity and facilitation into the next budget.

> '*Tough, government must find the capacity… that's the problem… local government is fucked up… And if we only have capacity to deal with three buildings a year, well then that's [what the City must do]… and if you want to do more than that, you must [hire more staff]… and there's [already] a huge amount of capacity… actually there's huge numbers of community facilitators in this field'* (Pers. Comm., 2010).

Bilchitz saw the situations slightly differently:

> '*They [the state] had the capacity to pull off the World Cup. They can, and so, in my view, that's part of the problem and part of the problem with prioritising social rights provision, it is that its lack of capacity often reflects its view that this is not such an urgent priority, and so in my view, part of the role of the court is to actually test and insist on its priority status*' (Pers. Comm., 2010).

Meaningful engagement requires significant amounts of time spent in conversation and discussion and places substantial emphasis on aspects of procedural justice. The City, in contrast, especially the Department of Housing, has a delivery mandate: it is required to deliver a certain number of units per year and its budget and performance review is dependent on meeting those targets. Its performance is not measured by its engagement with beneficiaries and communities. Thus, the City and the Court were governed by different logics, which were not easily brought together.

The meaningful engagement remedy of Olivia Road has been used by the Constitutional Court in

subsequent rulings with greater and lesser success. Ray (2009) notes that in the Mamba Case,[283] the provincial government refused to engage or to listen to the needs and views of a group of migrants living in a temporary camp despite a Constitutional Court directive to engage. Ray (2009) characterised this case as one of "failed engagement". Meaningful engagement was also proposed by the Constitutional Court in the Joe Slovo case in Cape Town.[284] Similar to the Olivia Road Case, the Constitutional Court ordered the litigants to negotiate. However, dialogue broke down and no resolutions were reached. Subsequently, the Court ruled that the eviction could proceed, but they also decided that meaningful engagement should take place to discuss and define specifics such as "the exact time, manner and conditions" of each relocation and "the precise temporary residential accommodation units" allocated to each resident" (Ray, 2009: 19-17).

Contrary to the more negative readings and experiences of the meaningful engagement ruling and its vagueness, some legal commentators have argued that the meaningful engagement provides a "potentially powerful tool to civil society organizations" (Ray, 2009: 1). Others have seen the vagueness as an opportunity for civil society to define the contents of meaningful engagement in a way that is importantly and radically democratic. The vagueness has established a "gap" and facilitated the opportunity for an organisation or institution to take the lead about what meaningful engagement actually means. The City of Johannesburg seemed unable to capitalise on the opportunity but CALS and the *amici curiae* seem to have grasped the opportunity with both hands. They have stepped into the space that the judgements left and have attempted to provide content to both the housing judgement and the call for meaningful engagement. In doing so, they have become the arbiters of the narrative and the constructors of a certain set of norms around meaningful engagement. They were able to do so by entering into the public realm using a variety of tactics. In July 2009 and March 2010 they hosted a series of engagements with community organisations, other legal activists, and government institutions around meaningful engagement. The stated intention of these workshops was to facilitate *'Discussions that would help delineate the concept [meaningful engagement] and identify ways of making it effective'*[285].

The same group disseminated a booklet on meaningful engagement in English and Xhosa to social movements and community leaders as well as scholars, academics, government officials, and NGOs (Tissington, Pers. Comm., 2010). Wilson and Dugard, originally from CALS, have also written and published extensively and have presented the cases at legal and academic conferences[286] providing

[283] Mamba vs. Minister of Social Development, CCT 65/08 (2008); in which the Gauteng Provincial Government sought to close temporary refugee camps without consultation or plans for reintegration

[284] The case revolved around the eviction of 4000 households from Delft for the construction of the large N2 Gateway housing project.

[285] Socio-Economic Rights Project, SERI and the Community Law Centre, 2010: Report on the roundtable discussion on meaningful engagement in the realisation of socio-economic rights, 04 March 2010, www.communitylawcentre.org.za/projects/...in.../download accessed 13.07.2011

[286] Wilson and Dugard have published extensively on the case in journals and books:

- Wilson, S., and Dugard, J., forthcoming: Constitutional Jurisprudence: the first and second waves in M Langford, B Cousins, J Dugard and T Madlingozi (eds) *Symbols and Substance: The Role and Impact of Socio-Economic Rights Strategies in South Africa*, Cambridge University Press,

their understanding and interpretation of meaningful engagement. CALS and their partners have been able to dominate the public sphere and through modes or participation have been able to build consensus around their interpretation of the meaning of meaningful engagement, which according to Chenwi and Tissington's booklet:

> *'happens when communities and government talk and listen to each other, and try to understand each other's perspectives, so that they can achieve a particular goal. It is a 'neutral' space where people and the state can discuss and shape options and solutions to difficult issues… It should also be both individual and collective. It is not enough simply to consult with committees or community-based organisations (CBOs) claiming to represent communities. Nor is it enough to just consult individuals and households. The state must do both'.*[287]

Thus, the meaningful engagement clause of the Court judgement can be seen in a variety of ways: some see it as a mechanism for "relieving them [the Constitutional Court] of the responsibility for deciding the difficult substantive issues" of court cases (Ray, 2009:16); whilst other critics see it as a step back from the celebrated Grootboom Case and the Constitutional Court's willingness to add content to the right to Housing (Ray, 2008: 7). Alternatively, meaningful engagement can be seen as a potentially powerful weapon of engagement "to give back parties control over policy details after deciding the substantive issues" (Ray, 2009: 22). The meaningful engagement may also offer an interaction that:

> "rel[ies] on the political branches and citizens themselves not courts to develop the terms of the remedy. This transforms the process of constitutional enforcement into something that looks more like a political than a judicial process while still retaining a role for courts ensuring that constitutional values are enforced" (Ray, 2009: 22).

These spaces can offer a site that is a mediated or partially mediated space of engagement, which in some ways is invited (as it is at the hands of the court) but if properly facilitated may also be somewhat invented as there is the potential for civil society to reshape those spaces to their own ends. Ray (2008:7) points out that within the ruling "civil society groups are specifically empowered to act as facilitators in the process…". Thus, the situation described above in which meaningful engagement has taken place in some of its weakest formulations does not mean that the judicial precedent does not offer a potentially rich vein for more participatory urban governance. The ability to leverage and

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- Wilson, S., 2011. Litigating Housing Rights in Johannesburg's Inner-city: 2004-2008. *South African Journal on Human Rights on Public Interest Litigation*, 27, 127–151.
- Wilson, S., 2011: Planning for Inclusion in South Africa: The state's duty to prevent homelessness and the potential of meaningful engagement, *Urban Forum*, *Urban Forum*, 22 (3), 265-282.
- Dugard, J., 2009: Courts and the poor in South Africa: A critique of systemic judicial failures to advance transformative justice, *South African Journal on Human Rights,* 24(2), 214-238.
- Dugard, J., 2007: Judging the Judges: Towards an appropriate role for the judiciary in South Africa's transformation, *Leiden Journal of International Law*, 20(4), 237-253.

[287] Chenwi, L., and Tissington, K., 2010: *Engaging meaningfully with government on socio-economic rights: A focus on the right to housing*, Community Law Centre and the Socio-Economic Rights Centre, Cape Town and Johannesburg.

utilise meaningful engagement is a site of further research and action by civil society organisations.

7.4.2 Traders become criminals; RWAs become the "public"

Where the San Jose residents were recognised as citizens and partners through the court enforced "meaningful engagement" remedy, the traders made the opposite transition. The traders, in the eyes of the SCI and the RWAs, became "delegitimised". With the stroke of a pen, they moved from being acceptable but illegal business owners to criminals who had a month to shut their shops, file affidavits and move their operations elsewhere. Additionally, the traders stopped constituting part of the public or the public interest and their shops and businesses became less important than the RWAs' vision of their neighbourhoods and city. Later in the case, the traders also became a "threat" to the law and order situation in Delhi.

As was mentioned in previous chapters, one of the elements of the SCI's judgement very clearly lays out the idea that the traders and the MCD through connivance and ill-will acted in ways that damaged the "public interest". The Supreme Court argued that '*While interpreting municipal legislation framed in public interest, a strict constitutional approach must be adopted.*'[288] The implication seems to be that the traders through their contravention of zoning laws are criminals who are acting against the public. The SCI adjudicated for the "real" public or "public interest", which in this case was constituted by the middle-class RWAs. The lack of consideration of traders' rights to life or livelihood bolsters Chatterjee's notion of two distinct and exclusive groups: a rights-bearing community of middle-class residents and a non-rights bearing group of traders. The implication is that the residents were legitimate urban citizens with the right to access space and state institutions, whereas the traders were not. However, as will be discussed in the next section, not being rights-bearing claimants did not stop the traders from having significant access to the masterplanning process.

The masterplanning process: access to the process

As was described in the previous chapters, the traders had been excluded from the litigation processes and had responded by finding alternative ways of engaging in the debate and airing their views in the public sphere. Some of the protests did turn violent and the police and army were brought in.[289] The end result was a "law and order situation" in which, according the Union BJP President Harshvardhan's letter to President Singh, '*The capital is facing an emergency-like situation*'.[290] The Court continuously insisted that the traders were not a legitimate community with whom they should engage and even more so when the traders apparently "held a dagger" to Delhi's throat. However, outside of the court, the traders, due to the number of votes that they offered and the threat that they posed, were considered legitimate and desirable partners and were able to access politicians and

[288] Indian Supreme Court Judgement Interlocutory Application No. 22 in Writ Petition (Civil) No. 4677 of 1985, M C Mehta versus the Union of India and Others, 16th February 2006.
[289] The Times of India, 2006: Delhi Traders Protest against shop sealing, *The Times of India,* 30th March http://articles.timesof india.timesofindia.com/2006-03-30/india/27793874_1_sealing-Traders.htm accessed 01.11. 2011.
[290] Tribune News Service, 2006: MCD steps up drive to seal shops: Union Home Minister reviews law and order situation in Delhi, *The Tribune*, 1st April, http://www.tribune india.com/2006/20060402/delhi.htm, accessed 01.11. 2011.

political power in ways that Chatterjee suggests, as discussed in Chapter Six. Protests and political action were able to open up invited spaces of engagement with the state, not over the sealing but over the details of the new Master Plan and senior politicians insisted that the traders were given access to the masterplanning process but the RWAs were excluded. The following section looks at who was included and excluded from the second part of the masterplanning process and how being a legitimate partner in the eyes of the court eventually had very limited utility. The findings also resonate with Gamson's suggestion (1990) that when politicians are unwilling to change the policy, they often open up the policy-making environment in order to pacify the protestors and in some ways make them part of the process.

AK Jain mentioned that there was a larger inclusionary project at work, whereby the DDA tried to redress the lack of consultation in previous masterplanning processes. As such, the DDA claimed that

> '*When this Master Plan was published then again very extensive presentations were made to the Resident Welfare Associations, Chamber of Industry and Commerce, various interests groups like traders associations, industry associations and it was decentralised, it was not only at the DDA office or the central office but went on every place… and 7000 objections and suggestions were received in response to the plan'* (Pers. Comm.,2010) .

Out of an adult population of conservatively estimated at 10 million people, that means approximately 0.0007% of the population, responded to the new Master Plan, which is a tiny percentage by any standard and raises the question as to exactly how participatory the process was. It was however, the traders who were given special treatment and the best access to the masterplanning process over any of the other groups.

Ramesh Khanna of CAIT explained how access to the masterplanning process took place:

> *'We guided the bureaucrats and the minister [as to] what is the actual problem, so in making the master plan our role is very important, because Jaipal Reddy [Union Minister of Urban Development] as I said in the very beginning he was not in our favour. But slowly and slowly when we explained the actual position of Delhi then he was our biggest supporter… He called their [DDA] staff. He called us and we sit together and discuss the matter. There were some reservations with the DDA, we were certain problems practical problems with us. We explained our problem, they explained their reservations and we found a middle path, the practical approach that was the story and then only the master plan came out'* (Pers. Comm., 2011).

Praveen Khanderwal of CAIT proudly acknowledged:

> *'Based on our discussions and consultations… I am pleased to say that the Master Plan 2021, which says or carries many of our suggestions. Of course few suggestions have been left out for that we will efforts and we hope that sooner or*

later we would be able to sort out those issues which were so far which had not been incorporated in master plan 2021' (Pers. Comm., 2010).

The traders elicited special treatment and from the earlier discussion, it can be seen that many of their needs were accommodated and included in the final Master Plan. However, if it was intended to pacify them, it only partially worked as the traders' continued to protest, meet with politicians and engage in the masterplanning process whilst the Sealings Case continued. It would seem that they were "hedging their bets" and using any and all avenues to protect their interests.

Despite AK Jain's assurance that the process had been consultative and participatory, when I spoke to the various RWAs and their representative bodies it became apparent that the RWAs had not been consulted or had been insufficiently consulted. Chapter Four has already provided a discussion of their exclusion from the original masterplanning process. The RWAs' litigation eventually had very little effect in reshaping Delhi according to their vision and in many ways retarded their access to the invited spaces of engagement. It does lead me to speculate that the reason for their lack of engagement over the Master Plan was because the DDA knew that they would not endorse the regulations and were under enormous political pressure to rush the Master Plan through and for it to bear the imprint of the traders' needs. The traders' were able to directly influence the Master Plan and to ensure that their needs were incorporated and that they were effectively made part of the decision-making mechanisms. Although their engagement was not formalised into policy, participation was clearly a new feature of the masterplanning process, precedent has been set and it would be difficult to refuse the traders a role in the future masterplanning processes. However, I would be sceptical as to whether or not other social or political groups who do not have the numbers or the political sway of the traders would be able to exploit this new "invited" space.

7.5 Changes in practice: enforcement, political will and the hardening of attitudes

There has been much discussion of the ability of court decisions to effect social change, to enforce court decisions and to change practice on the ground. Just because a court makes a specific decision or set of decisions does not mean that the institutions or individuals charged with the tasks will necessarily carry them out. Gloppen (2005) nuances the debate by arguing that enforcement or changes in practice are a matter of degree rather than an "either/or" and can also be cumulative rather than one swift and immediate change. Enforcement and changes in practice are related to a number of other contextual factors, such as the ability of the court to ensure compliance, either through the position that it occupies in people's, minds, or by the threats and penalties it can enforce as well as the supervisory orders that it is willing to implement (Gloppen, 2005: Swart, 2005). Furthermore, enforcement is dependent on the political will of those in power as well as the ability of civil society and social movements to monitor and ensure enforcement (Guigni, 1998: 384). Gloppen (2005: 22) also points out that the likelihood of a decision being enforced is affected by the political

and bureaucratic elites and whether the remedy is "at cross purposes with the government's ideology and broader policy goals".

There is also the matter of interpretation. There are times when the implementers of court judgements, choose, for a variety of reasons, not to implement the decisions of those in authority, citing lack of budget, capacity, legal frameworks or law and order as sound reasons for their refusal to enact the court orders. Sometimes these reasons are sincere but at other times they are the excuses and justifications that are used by the authorities not to carry out court orders. However, it may also be that they see the world through a different lens and interpret and reinterpret decisions according to their own particular visions. Veron, *et al.,* (2003: 4) describe the situation in Delhi, where

> "No matter how hard New Delhi tried to build a developmental state which [sought] to relate to different sections of the population through the governmental function of welfare and by means of well-crafted and carefully targeted development programmes… the fact remained that these programmes were reinvented at the district and block levels by politicians and lower level bureaucrats who did not always share the worldviews of their English-educated metropolitan superiors".

All of these factors were apparent in the two cases in a variety of ways. The Olivia Road Case was intended to regulate and "humanise" evictions by the state and to extend the constitutionally defined right to housing. In effect though, the decision put an end to the Bad Buildings Programme and to some of the state-led evictions, and although the Constitutional Court has demanded that meaningful engagement take place, its implementation has been uneven. In Delhi, the SCI ordered the MCD to implement its decisions. However, the local authority found ways not to carry out the remedies. The following section investigates how those at the coalface put the decisions into practice.

7.5.1 Evictions and Meaningful Engagement at the coal face

As a Senior Official in the CoJ pointed out, *'[b]ureaucracies don't change as policy changes and so we hit our heads against operational issues…'* (Pers. Comm., 2010). Thus, whilst the officials recognised that they had obligations to provide alternative accommodation and to meaningfully engage before evicting, the reality was that in practice, evictions by the private sector and through other mechanisms still took place and meaningful engagement has been practised in a limited fashion that has followed the letter but perhaps not the spirit of the law. The same official revealed some of the City's thinking about meaningful engagement:

> '*this is what these cases have effectively done is they've taken that opportunity away from the City to deal with the problem effectively. We can't effectively deal with those buildings… The process is long, it's tedious. It doesn't always work. You have to use other methods…'* (Pers. Com., 2010).

Mary-Anne Munyembate who was with CALS and headed up litigation after Wilson left, describes some of these other methods:

'So now, the new type of eviction applications that are coming out, are mostly in the form of interdicts. The City interdicting the owner and the lawful occupiers, in the sense that they bring an eviction application saying, "Well, this building is in such a terrible state in terms of the health bylaws, fire bylaws, etc etc, it's dangerous, it's a hazard, on top of that these occupiers do not have water, electricity, basic services, and on top of that the place is filthy, it's dirty, etc etc, so these people need to move out of there because it's unsafe and the owner need to be interdicted from letting people into his building because it's just filthy". And then it places the obligation on the owner and/or the unlawful occupiers to get the building in a state that it's habitable. If not, the court should rule against them and have the building shut down' (Pers. Comm., 2010).

Jackie Dugard of SERI provides a further insight into the current practice of evictions:

'Well, we don't see that many state evictions anymore. I think that obviously evictions can go ahead, it's just when it's very poor people. I mean that's the question, "Can evictions of very poor people go ahead?" and probably not. Well, probably not, because there's no alternative accommodation, so that is, I think, a bit of a dead-end… So, I think that has been a very positive outcome. Of course, it's not entirely positive, because those, I mean, as we've always acknowledged, those buildings are, in many cases, very problematic and if the City is just thinking, "Okay, then we're just backing off and we're leaving people to live in horrendous situations," that's not ideal either' (Pers. Com., 2010).

The lack of explanation by the court as to what meaningful engagement actually involves has meant that officials define the process for themselves: according to a Senior Official from Region F, which includes the inner-city, meaningful engagement is about "communication":

'Leslie Magoro: [Meaningful engagement is] [n]ot actually negotiations, let me say, communication.

Margot Rubin: Communication?

Leslie Magoro: Because when you say negotiations obviously then there must be an agreement.

Margot Rubin: Alright, so there must be communication.

Leslie Magoro: Ja, there should be communication.

Margot Rubin: And what does that communication involve?

Leslie Magoro: Well, communication would involve like, please be aware that maybe the place, which you are living in is a health hazard, it needs to be brought down, please kindly find alternative accommodation. Because many instances, most of the people are illegally in those buildings' (Pers. Comm., 2010).

Another Official from another City of Johannesburg department described his version of meaningful engagement:

> *'[A]nd in lots of cases, the owners, the occupants would have some sort of a committee that supposedly runs the building… and that committee turns up here … maybe five or ten or 20 people turn up - we have a nice meeting, we sit and we chat and I threaten them a bit and they threaten me a bit... In some way or other we get to a stage where we can say okay guys, we agree that this is what is going to happen. In many cases we put it down [on paper] and we, keep minutes of all these meetings and all this stuff… We circulate all the minutes and if possible we put together some sort of a Statement of Undertaking between the parties which we can then sign'* (Senior Official in the Inner-city Task Force, Pers. Comm., 2010).

It is clear from the above quote that there is significant distrust between the various parties and an antagonistic relationship between the City and the Inner-city residents, which does raise questions as to the efficacy of meaningful engagement.

Officials argue that meaningful engagement is frustrating and lacks clarity around when sufficient engagement has taken place:

> '*I say, "Guys, stop it now! We've had consultations. We've had 50 consultations. CALS have been involved in 50 or more consultation, at night with all the people involved". [Instead they start eviction procedures and [W]e'll see what happens*' (Senior Official, Pers. Comm., 2010).

Thus, there is a sense that meaningful engagement is compliance led, a veritable "tick box", which does not always take place. When it does, it is a situation in which once officials feel that sufficient consultation or communication has taken place, then it is time to move on. Munyembate's experience of the CoJ and meaningful engagement is equally revealing:

> *'… I think it's a concept. I don't think it's something that is really working. I think the City in most cases is reluctant to, or unwilling. I don't know if it's because they feel as if that their hand is going to be forced, or that they'll only go that far if a court orders it, etcetera, but it's virtually non-existent. I mean we've tried. I know that we've tried… In other cases, you end up going to court and the court orders the City to file a report with regards to what steps it's taking, to find out a recommendation, what it has, etc etc, and they ignore the court order and just write a two-liner, "We have no alternative accommodation available, we have no financial resources available and that's their way of, "Well, we've communicated, we've engaged." That's where it stands'* (Pers. Comm., 2010).

There are a number of concerns with meaningful engagement in practice: the first is the issue of how it has been interpreted, i.e., as communication, information sharing or an opportunity for further threats and antagonism. There is also the strong sense that the Court has added another activity which needs to be complied with by the local authorities as quickly as possible but does not actually influence the outcome of any of the City's activities or plans. There is also no clarity of how many months or how many meetings are necessary and as a result, negotiations can drag on for months or years. The other issue is the suspicion that either side delays the negotiation so that they can either continue to stay in the buildings or because the CoJ has no real housing options for them. Thus, although meaningful engagement does seem to offer a potentially powerful tool, so far civil society has not adopted it as a way of negotiating for their needs. Nor has the CoJ really taken up meaningful engagement and where it has, it has been in keeping with the larger attitude of informing the public rather than engaging with them.

7.5.2 The MCD in an untenable position: The "Karma Sutra" of the courts

Similar to the CoJ's application of meaningful engagement, the MCD's implementation of sealing was uneven, which was largely because the SCI had put the local authorities of Delhi in an untenable position. The MCD was effectively caught in a three-way struggle between the Union Government, the Supreme Court and a clear recognition of the needs of Delhi traders. Therefore, the local authority developed a series of strategies to try and navigate safe passage between them.

As discussed earlier, what was at stake in the court case was a battle over turf and authority, in which the '*deadlock between the judiciary and the government, [meant that] the traders are unnecessarily being harassed*'.[291] The games of one-upmanship which the Court and the government engaged in meant that the MCD was asked to seal, de-seal and then reseal properties, causing mass confusion in Delhi. The MCD was caught in the middle. It was told by the SCI to seal and by the government not to seal or it was told to de-seal properties that the Court had explicitly told it to seal.[292] A lawyer who sat on the High Court Monitoring Committee remembered that:

> *'There the Lieutenant Governor says don't do this, and the Chief Minister says don't do this and [a] particular minister says don't do this. So, these poor chaps [the MCD]… got stuck into two things now. They were sandwiched between us and that means courts and their bosses. That was the limitation. In fact, I remember one particular case, a very bad case and I… asked him why don't you do the damn thing? So, he said "Sir, what do I do. On the one hand, produce me before the Chief Justice of Delhi High Court and I have to only beg for unconditional apology otherwise he will send me to the jail and my career will be finished, job will be finished; and on the other hand, is the Lieutenant Governor of*

[291] Times News Network, 2006: Sealing, desealing and now resealing? Traders upset, *The Times of India*, 11th August, 2, NIUA Archive.
[292] Hindustani Times, 2006: SC stays Centre's sop, de-sealed to be resealed, *Hindustani Times*, 11th August, NIUA Archive.

Delhi I am surviving he can also take action against me, suspend me, then what do I do?'" (Pers. Comm., 2011).

Ramesh Khanna of CAIT stated that the SCI and the Supreme Court Monitoring Committee were the only institutions that the MCD obeyed: *'… you know the bureaucracy that was totally helpless before the monitoring committee and monitoring committee was working as a dictator. Any action they want, government will do it* (Pers. Comm., 2011). This interpretation was largely due to the power that the SCI and the SCMC had over the officials. The majority of officials were afraid of the judiciary and the SCMC. By all accounts this was an intentional tactic of the Court to ensure compliance and Rao and Jhingon of the Supreme Court Monitoring Committee stated: '*In the beginning it went on as a fear of G-d, let me say, absolutely fear. The Supreme Court was very, very firm'* (Pers. Comm., 2010). The result, according to a Senior Official in the MCD, was that the '*the terror was too much'* as officials were afraid that if they did not obey the Supreme Court they would be arrested for contempt. Alternatively, they were afraid that the SCI would end their careers through unofficial channels whereby they would be removed and redeployed to dead-end jobs in other parts of the local authority. It was not just officials were under threat and who were jailed; elected officials were also not allowed to disobey the courts; Rao and Jhingon recall:

> '*They tried but court had said you know if anybody tries to stop the sealing he will be jailed. He will be hauled up for contempt of court. One councillor he had been jailed three months… He wanted to become a hero. Okay, the court said, you be jail[ed] for three months'* (Pers. Comm., 2010).

BP Mandal, a Delhi councillor, summed up the situation, as '*Everybody is afraid of the court. Everybody… financially or physically or anything, he is afraid of the court. Nobody can violate the verdict of the court*'. However, Vohra argues that intimidation is necessary evil in order to get anything done:

> '*The only thing that worked was fear. Fear of the Court and the Court's fear can be, you know, because the courts orders are final and everybody has to obey. Fortunately that is the last bastion, I don't know about your country but here, court's order are feared, respected, honoured, implemented*' (Pers. Comm., 2011).

The MCD was not, however, as helpless as the traders or Courts seemed to think and they were able to find ways to subvert the Court's orders. In some cases this meant using the very mechanisms of the judiciary against them. Vijender Gupta, President Bharatiya Janta Party, of Delhi State, remembers that the MCD would negotiate with the SCMC and if necessary would take the issue to the SCI for adjudication.

> *'[S]uppose monitoring committee passed an order to the MCD and directed to MCD to act upon and MCD rejected, not act upon or not acting on the direction of the monitoring committee then there is a conflict then both the agencies sat together and discussed the issue and if there is no conclusion out of it then we*

went to the court again and put up our view point in front of court and then court decided... It was happened [a] number of times' (Pers. Comm., 2010).

The MCD was also able to use the legal system to their advantage in other ways and according to a Senior MCD official who refused to be recorded or quoted directly, what the MCD would do when they disagreed with the orders of the Monitoring Committee was to file applications with the Supreme Court, which are a form of appeal. This meant that the MCD could stop taking action, as they had to wait for the outcome of the application. Therefore, on a host of issues (about 500 in total) the MCD were able to tie their own hands so that they could not carry out activities that they disagreed with. The applications had the added advantage that they were entirely legal and legitimate. In addition, when the SCMC used to threaten the officials with contempt, many MCD officials would lie and say that they had sealed the premises, thus foxing any attempt to keep accurate track of what actually had occurred (Senior Official in the MCD, Pers. Comm., 2010).

Bhure Lal, of the SCMC, noted that when they were confronted, the MCD provided '*Thousands of the excuses. Sometimes it was weather, sometimes it was lack of manpower, sometimes it was lack of police force, sometimes something else'* (Pers. Comm., 2010) as to why they could not implement the SCI or the Monitoring Committees' orders. A member of the High Court Monitoring Committee recalled similar experiences:

> '*Now [the MCD's] way of delaying is that we don't have manpower you have given us 100 complaints and we have only two people, which to some extent it was true. Also, secondly, when we were busy with more urgent [matters] we could not find time to go there. Third, is that you inform the fellow that you are coming to your house so you remove your encroachment or do what you like for this, I go and say that house is locked, I can't break open a house and take action against them and if it is a big fish or financial fish, MCD will not go without police help. So, police will say we don't have manpower today we are busy on law and order… we are looking after law and order and we cannot give police today and sometimes genuinely sometimes the political masters will tell the police you don't send the police today'* (Pers. Comm., 2010).

These tactics seem to have worked as Chief Justice of India Sabhrawal, in sheer frustration, stated in the press that when the SCI made an order '*Every time utmost resistance comes from those who have to implement the law*'.[293] Putting the MCD into this incredibly awkward position led to a very perverse outcome in which they used the very institutional mechanisms that had been established to subvert the sealings process. Thus, although sealing did take place, the MCD found ways "around" the court so that they could protect themselves and to some extent the traders from the Court orders.

[293] Our Correspondent, 2006: MCD halts sealing, top court verdict on sept, *The Asian Age*, 26th September, 13, NIUA Archive.

7.5.3 Attending to a domain they know nothing about…

One of the reasons that the officials in India and Johannesburg objected to the court rulings was that they felt that the courts had little sense of the realities which they faced and how they operated. They felt that the Courts were unaware of the practical implications of their decisions, which then forced the local authorities into untenable positions. A senior member of govenmen put it, '*So they got the legal decision and now they attend to a domain they know nothing about'* (Pers. Comm., 2010).

The SCI: Disconnected from daily realities

In the Indian case, there was the deep and real concern that the SCI was out of touch with the daily realities that most traders faced. There was a sense that the Supreme Court's focus on holding the state to account and maintaining their own position had effects on the traders which the SCI just did not consider or understand. Furthermore, the traders' believed that the Supreme Court simply did not care about them and would pursue their vision irrespective of who was harmed in the process (Dhavan, Pers. Comm., 2010). The main accusations were that '*You [The Supreme Court] are not supposed to give just orders, you have to understand the ground reality'* (Kakria, Pers. Comm., 2010). Vikas Singh who represented the Union Urban Development Ministry, stated that aside from questions of "turf" the Ministry was genuinely concerned that there *'are policy issues, which the government has to handle looking at the larger urban problem that is being faced by the city and [the] Court can't just… use one brush and take one view in the matter*' (Pers. Comm., 2011), which is that the law should be upheld irrespective of the wider consequences. Dhir Singh Kasana, a councillor from Delhi, agreed, saying that the Court does need to follow the law but doing so in such a blinkered fashion has consequences for ordinary citizens:

> '*Basically, Supreme Court and High Court [are] not understanding… any general people's problem. They follow rules and regulations. Honourable High Court and honourable Supreme Court they follow rules and regulations but general people say "Oh my children, my mother, father" but honourable High Court and honourable Supreme Court not answering to this type of people…*' (Pers. Comm., 2011).

Praveen Khanderwal agreed that the Court was unaware of what their decision would mean for the traders and that the decision '*deprived [me] of my bread and butter*.' (Pers. Comm., 2010).

The traders felt that the penalty far exceeded the crime and that the reason why the court decision was so harsh was because the judges were unaware of the potential impact of their decision. Dhavan supports the argument of the SCI being disconnected from poorer Delhiites' every-day realities. He mentioned that when people protested about the costs of moving and relocation, the SCI stated that '*they won't go into pricing'*. The cost of relocation was about 40 lakh rupees (RS4 000 000 or approximately R70 000), which the Supreme Court seemed to feel was an insignificant amount and did not want to be bothered by. They did not realise that such an amount constituted far more than the

average trader was earning in a month. In 2006, the per capita earning was pegged at RS26 642/month.[294] Thus, it would have taken the average trader about 12.5 years (if they used their entire earnings) to pay off the relocation costs. The discrepancy between the judges' view and the daily lives of the traders does tend to point to the vast chasm that existed between their realities.

The Constitutional Court letting people stay in poor conditions

In the Olivia Road Case, the City of Johannesburg was forced to be the sole respondent from the South African government's side as the Constitutional Court refused the City's application to include the other spheres of state as respondents. The Olivia Road judgement in conjunction with previous jurisprudence insisted that '*It follows that the City must take into account the possibility of the homelessness of any resident consequent upon a section 12(4)(b) eviction in the process of making the decision as to whether or not to proceed with the eviction',*[295] which effectively meant that in certain circumstances unless alternative accommodation can be found, residents cannot be evicted from their current homes. The alternative accommodation requirement was met with a number of concerns about the practicality of the decision.

Graeme Reid recalled that he '*was so angry… all you [CALS] are trying to do is stop an eviction, which will result in people continuing to live in poor conditions… who's the winner in that… it's a crock of shit what you trying to do…*' and thought that the decision would inevitably leave people in undignified and unhygienic situations. As was mentioned earlier in the chapter, some of the officials felt that the court judgement stopped urban regeneration in the inner-city through stopping evictions (Anonymous, Senior Official, Pers. Comm., 2010). However, the larger concerns were how the City could deliver on the Court's mandate considering:

> '*Housing isn't a local government competence, in terms of the constitution, it is national [and] provincial, the job [that] is manifested local government level and what the courts don't like hearing is it is not us, it is them. They say, you guys are all government, you are all state, but it is not quite true…*' (Vermaak, Pers. Comm., 2010).

The Court's requirement that the City rehouse evicted households was in the state's parlance an "unfunded mandate". A Senior Official, from the CoJ's Housing Department describes the situation as:

> *'So we are sitting with a responsibility and a mandate that is not ours and also the amount of the money for alternative, what is called emergency housing, you have to apply for it to the MEC of Housing at Province, and depending on funds availability you will get or you won't... And I must say [the] City of Johannesburg haven't received a cent since I have been here. We have applied a couple of times we always get told there is no money. So, we end up using the rate payers' money*

[294] Express India, 2008: Story Per capita income up by 14.2% in 2006-07, *Express India,* http://www.expressindia.com/latest-news/Per-capita-income-up-by-14-2-in-200607/267474/ accessed 17.02.2012
[295] Constitutional Court of South Africa, 2008: Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street Johannesburg, v City of Johannesburg *et al*, 2008 Case CCT 24/07 ZACC 1 judgement

> *to fulfil a mandate that we should not be taking out of the coffers. So, if you look at the strain of these Court judgements that it puts on Local Authorities little money that they have, it becomes huge because I mean your rate and tax money is not supposed to be money used for housing delivery'* (Pers. Comm., 2010).

Further practical issues include the sheer difficulty of preparing the property for alternative accommodation: according to Mpumi Kubheka of the Provincial Department of Housing**: '***… we don't really have properties as a Department that we can use immediately when there is an emergency*' (Pers. Comm., 2010). Renier Erasmus agreed and pointed to the difficulties of rehousing people in the inner-city:

> *'the problem is with that, now you have to move these people in, and you are going to have to move them to some place, but where is that some place, because every inch of this city is occupied. There is not an open building somewhere. So you can move them to Building A then you must evict those people in Building A'* (Pers. Comm., 2010).

Although there are serious issues of jurisdiction, mandate and funding, inner-city activists say that these reasons are used to delay the process, ensure that no decisions are made and no-one takes responsibility. Munyembate says that the response that they get from the City is that: '*Province must give us the money, National must allocate. So you're practically going back and forth, back and forth the whole time without actually moving forward*' (Pers. Comm., 2010). Thus, whilst the Constitutional Court seems to have ignored some of the issues of mandate, roles and responsibility and budget, the City and the province have also used these issues as excuses and reasons not to have delivered alternative accommodation.

The uneven implementation of the Constitutional Court's decision in this case is in keeping with the larger trend in South African jurisprudence. Langford and Kahanowitz (2010: 2) argue

> "all levels of the South African government have come under fire for ignoring completely their court-ordered obligations or for paying nominal 'lip service' to decisions. This has applied to all forms of remedies… and it has applied regardless of the strength of the order".

In India, the heavier hand of judicial monitoring and enforcement, as well as the fear that the institution instils, has meant that there is a greater likelihood of their decisions being implemented. However, it also means that the institutions that are most affected by the decisions and judgements may also find new and subversive ways of countering these orders if they disagree with them.

7.6 Changes in power/relations

An aspect that has not been extensively examined in the literature has been the impact of the court cases and the court decisions on the relationships, dynamics and coalitions which previously existed

but were somehow changed because of the case. Through the court cases groups, individuals, and institutions lost or gained power, legitimacy or authority during or after the trials. The effects on power and authority also took place at a range of scales from the micro-politics of the San Jose residents committee to the loss of face of the Supreme Court of India and the change of political party leadership in Delhi.

7.6.1 The Politics of disempowerment

The micro-politics of disempowerment

At the smallest scale, the Olivia Road court case in some ways pacified the San Jose residents and disempowered the residents' committee. The pacification took place in two ways: through granting the residents some of their demands by which the City had hoped to ensure that they would not be litigated against again; and through taking over control of the new building the City sought to disrupt the power of the residents' committee whom they saw as the ring-leaders.

The residents' committee held substantial power and authority over the residents both before and during the case. Monty Narsoo (Pers. Comm., 2010) who along with Lauren Royston facilitated much of the community engagement described a situation in which the residents committee coordinated a Sunday clean-up of the San Jose building. This was an activity that had been in operation before the case but during the court case the cleaning took on a different significance as the residents' committee was able to use the clean-up as a way to maintain power:

> *'Monty Narsoo: So we went there one morning and these guys with these broomsticks were banging on doors and there's mainly women there… and then they [the residents committee] counted them, like roll calling...and they say you do this...go clean up and so on...*
> *Margot Rubin: And what's the penalty if they say thank you very much [but] we'd rather go sleep, go to church...?*
> *Monty Narsoo: Well you might be excluded from the allocation... it's powerful...' (Pers. Comm., 2010).*

The residents committee had run the cleaning and security details in the San Jose building but

> '*what happened in this transition was that the authority that the committee had warded, it no longer had because it was understood because they were quite open to the idea of not having to do all that work and the City authority to take responsibility for stuff…*' (Royston, Pers. Comm., 2010).

The house rules that had initially governed behaviour and protocol in San Jose were rewritten for the MBV where the CoJ initially tried to impose a set of rules on to the residents. Narsoo (Pers. Comm., 2010) argues that in the fight about house rules, what was actually at stake was control over the building. Moving into the City's buildings meant that to some extent the collective bargaining of the

San Jose residents was diluted by taking away control of the buildings from the leaders who no longer had anything to use as leverage (Narsoo, Pers. Comm., 2010).

At the Local Level: authorities losing their authority

At the local government level, the MCD and the CoJ felt that they had in some way been disempowered by the courts' decisions. In the case of the CoJ this was in the sense that the Constitutional Court was directing budget and capacity in ways that the City had not agreed to or determined. Furthermore, the City objected to the Court overstepping into the policy-making arena

> *'as the City or as local government in general we had our own reservations because we cannot have a Constitutional Court actually playing a role of redefining policy because I mean any policy that is written is written in line with do we have the capital capacity to actually fund it number one and if resources to do what you are saying you will do. I mean we provided our own plans in terms of the next five year Housing plans where we think we are going to go, what is the approach, but the ruling was still that we must provide for accommodation'* (Senior Official CoJ Housing Department, Pers. Comm., 2010).

Similarly, the MCD was concerned about losing its self-determination and having confused and confusing reporting lines. In the Indian institutional structure, the various councils, committees and structures all report up the chain of command and eventually get to the MCD commissioner. In the Sealings Case, the Supreme Court established a Monitoring Committee because

> '[*T]hey [the Supreme Court] have issued those instructions but MCD was not implementing those orders. So they thought, you know, let us have a monitoring committee to oversee the law and also to see the implementation of the directions of the Supreme Court*' (Rao and Jhingon, Pers. Comm., 2010).

According to Bhure Lal, of the Supreme Court Monitoring Committee:

> *'They [the MCD] had to report to us the number of sealings carried out by them in particular areas and we were also ensuring that we had ordered sealing in particular areas whether those had been virtually sealed or not by paying a visit again. And any violation was to be reported to police because it amounts to disobeying the order of the Supreme Court'* (Pers. Comm., 2010).

Supervision, however, went far beyond monitoring and the Committee became involved in the day to day work of the MCD. Mamgain of the MCD remembers how that the Monitoring Committee's role changed over time:

> '*Yes, they don't have the authority directly but they had to watch the MCD activities and report to the Supreme Court about the seriousness about the action MCD is taking. They had to file the report but afterwards they directly took the law in their hand. They directly actively directed for demolition and sealing which was*

not their job. Theirs was just coordinating committee' (Mamgain, Pers. Comm., 2011).

The MCD's autonomy was eroded by the establishment of the monitoring committee (Anonymous, Pers. Comm., 2010). The SCMC's actions changed the MCD from a self-referential and internally reporting local authority to a body that effectively had to respond to the commands of the SCI and the daily management and interference of the Monitoring Committee.

The local authorities in Delhi and Johannesburg thus became concerned about the ability of an unelected and unmandated body making and implementing policy. In Johannesburg, Vermaak and Beckenstrater were concerned about the question of legitimacy:

'So the political question kind of divides into two. There's one, the court doesn't have the democratic legitimacy. No-one here is elected, and no-one here has a popular mandate ... and that's for good and functional reasons but... in this country if courts started taking on policy roles, you would piss off the executive basically and create political hazards for the independence of the judiciary. And actually ... if the courts started to take on powers of LAs [local authorities]… I think politicians would have actually good reason to start curtailing the court's powers. It wouldn't just be … a turf war, they actually have good separation of power reasons to reel in that kind of judiciary. So you'd create real hazards for the independence of the courts' (Pers. Comm., 2010).

Aside from the practical dangers that are possible when the Court intervenes in policy, Vikas Singh identified a series of further risks when the courts assign themselves as the last refuge of law and order:

'If you are not in a position to say that the judges are the holy cow and they are the only ones who are interested in the proper development of the country and everybody else is corrupt is where this problem arises. If you have black sheep within the judiciary there is absolutely no accountability. The judges never go to the people for any election. Once they get appointed they have a rather constitutional protection from being removed. The bigger problem is where the Supreme Court comes under criticism that's the time when they use this contempt power to throttle anybody who wants to criticise any of the actions of the Supreme Court' (Pers. Comm., 2010).

The SCI's position in India does raise concerns since it refused criticisms of its judgement and utilised fear to ensure obedience to the decisions that it has taken. The following quotes raise anxiety over the potential tyranny of the courts: BP Mandal, a Delhi corporator acknowledged:

'[W]e [corporators] will not speak against Supreme Court, we will speak against the government. Let the government approach the Supreme Court. We will not

> *speak… [because we are] afraid of the law. You can't criticise judiciary… Because it is just a law… Judiciary is considered to be an independent. So, whatever judiciary does that [they] does in our interest. It is in our interest'* (Pers. Comm., 2011).

Pawar, also a Delhi Councillor, clearly summarised the situation: '*The [supreme] court is respected, even when they are wrong*' (Pers. Comm., 2011). Even Praveen Khanderwal refused to critique the SCI, saying that he would not comment on the validity of the Supreme Court judgement as the SCI is supreme and whatever they say is the law (Pers. Comm., 2010).

The City of Johannesburg and the Municipal Corporation of Delhi were put in positions where the apex courts decided on their policy direction and, in the case of Delhi, had a hand in its implementation as well. Aside from raising the classical questions of separation of powers and the appropriate moment in which the courts can and should intervene, is the additional concern of what does it mean for a local authority when they have no recourse and their powers and abilities are taken away by an institution that is so powerful and terrifying.

7.6.2 Battling for the "public"

Changes at the national level occurred in India in ways that were not apparent in South Africa. The SCI and the Government continued their long-standing battle through this case. The BJP and the Congress Party also attempted to use the case to garner votes and favour among the public. Some commentators argue that it was the Sealings Case, which catalysed a change in the political party during the 2007 election. The next section briefly explores these aspects.

An excuse for a war…

To some degree the content of the case was almost completely irrelevant and what the Union Government was doing, inside and outside the Court, was fighting for supremacy. As demonstrated in earlier chapters, the Government of India and the SCI manoeuvred and countered each other through using the weapons that they each could wield. The Union Government in order to manifest their authority, as well as try and ensure their votebank, passed legislation and notifications to try nullify the SCI's order. They promulgated the Delhi Special Provisions and basically challenged the SCI's authority by finding ways around the Court and ensuring a moratorium on sealing even after the Court had refused. The SCI countered by invalidating some of their notifications and aspects of the Delhi Special Laws and countermanding the government's orders to the MCD. There was no clear winner in this battle, the *status quo* was maintained and the two institutions seemed to have been able to provide checks and balances to each other, which may be exactly the desired outcome of a democratic system.

A new party in town

As has been demonstrated in earlier chapters, sealing was a political football and was used by the various political parties to score points. According to Rajeev Dhavan, a human rights lawyer: '[The] *Delhi administration had to do something but they took their time and dragged their feet*…' (Pers. Com., 2011). Sheila Dixit, Chief Minister of Delhi was originally accused of supporting the SCI's decision and stating '*that if relief was provided to all the traders… Delhi would turn into a slum'.*[296] However, within a few months of the initial judgement, it became apparent that through their inaction the Congress '*would lose votes and the opposition was getting much more popularity on the ground'* (ibid). So eventually, as has already been described, the Congress did try and rescue the traders and take responsibility for the Delhi Special Laws and other provisions. Dixit was quick to publicise the Congress' newly found support of the traders and was quoted saying

> *'[we] sought a meeting with the PM [Prime Minister], and we are going to tell the PM about problems being faced by Delhiites due to the demolitions and sealings drives… [and]… we were the first to seek a Bill in the matter so that we could ease the panic among the people and there could be some relief for them'.*[297]

However, the RWAs felt profoundly betrayed by the Chief Minister's and the Congress' support of the traders, especially in light of the Bhagidari Scheme that they had instituted a few years before.

The BJP *'which has always been the party of the low/middle- income shopkeeper had to show some resistance' (Dhavan, Pers. Comm., 2010).* I would have thought that the BJP would have been caught in a difficult bind as it was effectively pitching one aspect of its constituency, i.e., the wealthier middle class, against its lower income constituency. However, there was no evidence from the media or from my interviews to indicate what should have been clear ruptures. Rather, the media reported on the BJPs consistent support of the traders and their constant criticism eventually resulting in '*the traders and the people of Delhi have lost faith in the Shiela Dikshit government and feel that given the present situation their future is not safe in the hands of the Delhi government'*.[298] Thus, the Sealing Case has been cited as a key reason why the Congress party lost the 2007 election to the BJP. Delhi BJP President Vijender Gupta, said of the 2007 elections '*sealing and demolition was an immediate and visible factor*', which allowed them to soundly win the Congress and win 144 wards against the Congress' 59.[299]

[296] The Hindu, 2006: All party meeting on sealing soon: Goel, *The Hindu,* 1st October , 3, NIUA Archive.
[297] The Statesman, 2006: Cong delegation meets PM: Manmohan promises Bill on sealings, The Statesman, 9th May, NIUA Archive
[298] Vijay Goel BJP President quoted in The Hindu, 2006: All party meeting on sealing soon: Goel, *The Hindu,* 1st October, 3 NIUA Archive.
[299] Hindustan Times, 2012: BJP keeps MCD, says price rise, graft big poll factors, *Hindustan Times*, 18th April , http://newindian.activeboard.com/t48776283/national-politics-bjp-congress/, accessed 10.12. 2012.

The court cases affected change in the political and power structures of Delhi and Johannesburg. In Delhi, a new party was elected into power as a consequence of the court case, whilst both local authorities lost their autonomy and ability to guide their own budget and mandate.

7.6.3 Unintended Outcomes…

The court case also backfired on the SCI to some extent: they had attempted to cast themselves as the last trustworthy bastion of law and order in Delhi. However, the majority of traders did not experience them in that way, which led to a sense of massive distrust in the SCI and its mechanisms, through which the court lost an inordinate amount of legitimacy in Delhi. In the SA case, the court case, combined with the antagonistic nature of the negotiations and the vagueness of the decision led to a situation in which the CoJ's attitude to the San Jose traders eventually hardened and in the longer term has made some negotiations with the City even more difficult.

A loss of trust

The SCI managed to compromise its position with the traders who felt that they could no longer trust the Court. Towards the latter part of 2006 the traders refused to submit affidavits to the SCMC stating:

> *'No-one from Karol Bagh is going to file any affidavit. The law-abiding traders who had filed affidavits earlier now have to empty their shops. What is the guarantee that those who file affidavits now, would not have to do the same?*[300]

Ramesh Khanna agreed and stated:

> *'The traders say it's a case of "once bitten twice shy". We were asked to file affidavits earlier. We did so hoping the authorities would help us. Instead, we were asked to close our shops. Now, they are asking us to register ourselves. Shopkeepers are wary of signing any legal document as it may turn against them'.*[301]

The uncertainty and confusion, which the court case had wrought in Delhi and the lack of clarity throughout the case, not all of which can be put at the door of the courts, meant that the traders eventually turned against the institution of the SCI. Thus, the SCI's intention to promote itself as the institution of law and order effectively backfired as the traders lost any faith in one of the key institutions of the state.

Hardening of attitudes

The CoJ had been forced to supply alternative accommodation for the San Jose residents, which was initially seen as a victory for progressive politics and inclusivity within the city. It was also a shift in the

[300] Roy, S., 2006: Once bitten, traders say no to affidavits, *Hindustani Times*, 15th October, 6, NIUA Archive.
[301] Express News Service, 2006: Deadline just 8 days away, but few traders have applied for registration, *The Indian Express* 23rd December, 2, NIUA Archive.

way in which poor inner-city residents were understood and engaged with. However, over time the officials began to feel that the residents and the lawyers had grown too powerful and the court had been "vague" and was now absent, which left them in a position where they did not know what they should or should not do. As a result, the City's attitude to the residents hardened and they began to refuse to respond or engage. The following section describes what happened after the residents moved into their new accommodation.

When the new building was first inhabited, both the City of Johannesburg and the residents felt that they had won a victory. The residents had moved into reasonable accommodation within the inner-city at realistic rentals and they had a formal commitment by the City to look for permanent accommodation solutions. In the CoJ, especially some of the more progressive personalities within the local authority, felt that many of the political and social commitments to inclusive citizenship had been achieved in this case:

> '[I]*t was the first time that you really believed that the policy shifts and everything were working, at last there was something meaningful, this wasn't a relocation, this was a moving of people and that to me was a fundamental change, also it was an extraordinarily emotional thing'* (Senior Official in the City of Johannesburg, Pers. Comm., 2010).

Isaiah Mahlobo remembers: '*Well when we moved in we were excited, ecstatic that we are moving into a better building: electricity, water and lifts and cleaning and all that'* (Pers. Comm., 2010). The tenants' initial delight at their new units and the City's pride in having engaged and delivered housing in an inclusive and participatory manner soon soured (see Figure 26):

> *'[A] few months down the line, the rude awakening. Rainy season starting, this thing here is leaking like nobody's business… And electrician wise, water comes from within this when it's raining, now tell me, that is dangerous... Up until today the rain season is coming, I haven't seen them fix it. When we moved in here, then they saw that wear and tear was happening too quickly on their things, the basins and the toilets were plastic, you know the toilet seats weren't properly installed, many things were wrong… they haven't renovated it up to scratch…'* (Mahlobo, Pers. Comm., 2010).

In addition, many of the services in the new building were not functioning, and security and cleaning were especially problematic. According to Royston,

> *'… basically cleaners who came in quite late and cooked in the kitchens and ate before they started cleaning really pissed people off and they didn't seem to clean very well. It was basically non-functioning building management and maintenance, and the big issue was cleaning, and the other big issue was security… but security guards were contracted but they were asleep on duty or leaving in the middle of the night and a thumbprint system that seemed to almost fail from the beginning.*

So, they shouldn't have been any illegals in the building but the system didn't seem to work, so suddenly people were living in an official building with unmonitored access, whereas that had never been the case at San Jose - access was closely monitored all the time' (Pers. Comm., 2010).



Figure 26: Images of the MBV building (Source: Daily Maverick, 2010: webpage)

The CoJ did respond to some of the residents' requests and the building was repainted, some plumbing was fixed and some the tenants were moved but not all of the problems were attended to. From the City's side they argued that the Court had left them in a position, which they just did not know how to handle:

'[I]n a way it should have been: "Look guys, I am terribly sorry we can't change this now" because when it came to it everyone wanted light plug and everyone wanted an electric plug and everybody wanted this. Somebody should have had the balls to stand up and say the cost implications are too high for the city Joburg, but they couldn't at that stage' (Senior Inner-city Official, Pers. Comm., 2010).

The City stopped responding to the residents' requests and complaints and by 2009 CALS had to step in once again and started to send lawyers' letters to the CoJ:

'*Things are just not working, ja, but we are sending letters of demand in terms of the settlement agreement you are responsible for doing A,B,C,D, you are not doing that, what do you want us to do about that, do you want us to get ugly or… it just takes forever to get something out of those guys, to sometimes get a response you have to write a letter copying the director of legal services and you will see some action'* (Mngomezulu, Pers. Comm., 2010).

However, to a large degree, the response that the letters engendered has been, '*We're not budging, we're not listening to you, the policy is there, it's clear, we're implementing as best we can and that's that*' (Munyembate, Pers. Comm., 2010). Tissington (Pers. Comm., 2010) thinks that it boils down to:

> '*I mean, it is kind of like, it just doesn't make any sense and it is that kind of very bureaucratic thinking and almost like well, fuck you, you sued us and we have had to do this and so I don't have to do this for you and actually I am not supposed to do it, so I am not going to do it …*'.

Furthermore, the alternative housing requirement has had some unintended consequences for poor people in the inner-city whereby:

> *'…we would push in our Housing Department and the Social Services Department. Social Workers and what have you. We push those groups into the buildings. The intention of that is to find out who is living in those buildings. To determine occupancy. Who are you? Are you from South Africa? Are you South African citizens? Try and get ID numbers, try and get information about the occupants. The reason for this is, when I have to look for alternative accommodation we have to now consider alternative accommodation… Now when you want to look for alternative accommodation, you want to know how – who must go and, and find accommodation for. We're not finding accommodation for foreigners* (Senior Official in the Inner-city Task Force, Pers. Comm., 2010).

Unexpected state expenditure: time and money

The court cases also had unexpected costs attached to them and it was reported in the media that the MCD spent RS40 lakh[302] (R634 920/$88 900) on what the press called '*a parallel administrative framework'* such as the SCMC during the period of the case.[303] According to the report the MCD spent RS8.25 lakh (R131 000/$18 333) on SCMC, RS6 lakh (R95 200/$13 300) on the High Monitoring Commission HCSC and another RS25.74 lakh (R408 500/$57 200) on nine court commissioners. The figures excluded the salaries of the secretarial staff and the necessary disbursements. Due to the case the MCD also had to retain legal advice with a cost *'… totalling RS 106 113 [R16 843/$2358] for the months of September, October and November 2006*".[304] To put this in perspective, the capital expenditure for Delhi for the period 2004-2005 had been RS1950.47 crore.[305] Moreover, when I spoke to a senior official in the MCD, he protested that the officials now spend an inordinate amount of time in court or in front of one of the court monitoring committees defending their actions and reporting on their actions. They complain that a case such as the Sealings Case takes up an enormous amount of time and energy and does not leave sufficient of either to get

[302] According to the website Index Mundi the exchange rate in 2006 was about 6.3 Indian Rupees for every South African Rand or 45 Indian Rupees to one US Dollar, http://www.indexmundi.com/xrates/graph.aspx?c1=INR&c2=USD&days=2500&lastday=20100824 accessed 10.12.2012
[303] Sharma, V., 2007: Legal experts cost MCD a fortune, *Hindustan Times*, 5th January, 6, NIUA Archive.
[304] Ibid.
[305] Crore is equal to 10 000 000; JNNURM, 2005: Review of Urban Finance in Delhi, http://www.ccsindia.org/ccsindia/pdf/Ch14_Review%20of%20Urban%20Finances.pdf accessed 10.12.2012

on with what they are supposed to do. The end result is that the MCD does not complete all of its work and officials are criticised by their executive and the public for not doing their job.

Court cases can have unintended and unforeseen consequences. In Delhi, the Sealings Case has lowered the SCI's political capital and ensured a sense of mistrust of the legal system. In Johannesburg, because of the case, there are elements in the City who see their responsibility as trying to decrease the number of people who can claim alternative accommodation as the city cannot afford it and does not feel that it should be solely responsible for this particular mandate. Thus, there has been a slipping back by the City, where instead of acknowledging that it is not sure what to do, what it can afford to do and negotiating the various possibilities with the residents and the lawyers, it has taken a far more high-handed approach and is either not responding or finding more subversive ways of carrying out what it sees as its mandate. The consequences of cases are capricious and unpredictable and although much might be won through litigation, a significant amount may also be lost.

7.7 Changes in values: hegemony and counter-hegemony

Aside from changes in policy, policy processes, power and practice, Rochon and Mazmanian (1993) also argue that social movements also affect "social values". They contend that

> "By changing social values, movements expand the range of ideas about what is possible. This ultimately has an effect on politics because it changes perceptions of what the most important political problems are. In so doing, movements redefine the political agenda" (Rochon and Mazmanian, 1993: 76).

Guigni agrees: "contemporary movements often address the larger public, aiming, for example, to change attitudes and opinions on a given matter" (1998: 385). It is also acknowledged that

> **"**Although social change is only an indirect means of changing governmental policy, it is nonetheless a goal in its own right. To change public policy without changing social values can prove to be a Pyrrhic victory, To be completely successful in gaining the legal and behavioural changes sought by movements, there must be change on all three dimensions: public policy, the policy process, and social values" (Rochon and Mazmanian, 1993: 77).

Hunt (1990) argues that rights enacted through a variety of mechanisms, including litigation, have the ability to "articulate a vision of entitlements of how things might be, which in turn has the capacity to advance a political aspiration and action". Another way to express these ideas would be to see social movements and court cases as ways of changing the dominant hegemony of the moment. By disrupting the existing values and possibilities and by being able to add to the existing vision of the cities, court cases are able to change the existing values not just in the public, as Rochon and Mazmanian and Guigni suggest, but also in the state.

7.7.1 Courts as sites of hegemonic and counter-hegemonic projects

The two cases were able to provide alternative visions and values and to push them into the public domain for equal consideration. Thus, the court cases as well as the court decisions publicised and changed public discourse. The traders even though excluded in many ways from the actual court, were not excluded from the court case and used alternative mechanisms such as public action, political connections and the media to communicate a counter-narrative. Through these channels, they were able to ensure that they and their vision were seen to be just as legitimate as the worldviews that the RWAs and the SCI promoted. In fact, it was their vision, which eventually superseded that of the SCI and the RWAs and became entrenched through law and practice as the "norm" and encapsulating "common sense" planning for the city. Although the Master Plan 2021 (webpage) reveals as one of its goals the intention to make "Delhi a global metropolis and a world class city", what the traders were able to do was to contribute, rejig and reconfigure the world class city vision so that it incorporated their own views and needs.

The San Jose residents through their litigation also offered a counter-narrative and counter-hegemonic idea to that which had been presented by the CoJ and private-sector coalition. Through litigation they were transformed into legitimate rights-bearing citizens. The alternative vision that the residents and their lawyers invoked was one of inclusivity, partnership and negotiation and was taken up and to some degree instituted in law, if not in practice. However, as has been shown in this chapter, changes in policy and precedent from institutions such as the courts and the state can be extremely powerful in gradually changing practice. Thus, the two cases demonstrate different changes in values through litigation and court cases: the Sealings Case provides an example of the failure of litigation to ensure that a certain vision was promoted. Even though, the court case itself was powerful enough to open the space for a change in the existing urban hegemony. By comparison, the Olivia Road Case demonstrated the success of litigation to promote a counter-hegemonic vision and a change in some of the key institutions and power relations of the state.

7.7.2 Entrenching the role of the court… and their vision?

The cases importantly demonstrate the visions of the SCI and the Constitutional Court and the roles and terrains of power that they attempted to define for themselves within Delhi and Johannesburg. As has already been discussed courts are institutions of hegemony: they are able to legitimise the worldviews of litigants but they can also promote their own vision or the project that they share with specific group or coalition and due to their position, they are able to embed a hegemonic or counter-hegemonic project. Thus, the very same legitimacy allows them the space to define and try and embed their own "role": in the Sealings Case the SCI was not able to fully entrench its vision of a clean and green Delhi and its overall world class city vision for Delhi, nor was the SCI able to completely inculcate itself as the legitimate legislator and implementer of laws and law and order. Through the harshness of its approach, it surfaced its hegemonic project and made it clear that it was not for the benefit of all of Delhi's citizens

The role that the Constitutional Court has defined for itself and the vision that it has attempted to pursue is quite revolutionary. It would seem that the Constitutional Court through their emphasis on procedural justice is attempting to ensure a participative and deliberative drive towards hegemony by consensus. The Constitutional Court seems to be articulating and driving a form of justice which will define fair and engaged process in an attempt to gain a just outcome. As Moray Hathorn puts it:

> *'They will only go as far as to say that there should be proper engagement on the outcome of these issues and presumably therefore the concerns and interests of occupiers are properly taken into account… but they not really prepared to prescribe the outcome at all. They want to prescribe a fair process and hope that a fair outcome will come about' (Pers. Comm., 2010).*

Over the last few years the Constitutional Court has consistently stressed the issues of human dignity and treating people as human beings. According to Coggin and Pieterse, (2011: no page number) in the Olivia Road Case the Court recognised that engagement should be the defining factor in the City's relations with citizens. It noted that "a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of [its] constitutional obligations". The emphasis on fair process is very much in keeping with such an approach. It insists on an engagement of equals and an implicit notion of people as capable and self-determined entities who do not need to rely on the direct intervention of a Court.

Christiansen (2007: 356) argues that the Constitutional Court "is centrally involved in the ideological project of the "new South Africa." As former Chief Justice Chaskalson described it, "[u]nder our Constitution the normative value system and the goal of transformation, are intertwined." This ideology is focussed on an image of South Africa as a reformed nation - not just a liberal democracy but a "human rights state" - which is in the process of rising to its great potential to transform itself and to be an example to other nations. The Court plays the role of chief architect of a "society based on democratic values, social justice and fundamental human rights" (SA Constitution, 1994).

Furthermore, it also attempts to drive a more mature form of democratic engagement between parties and open gaps for other groups to begin to define their own hegemonies. In doing so it gives credence to the separation of powers and holds to a vision in which each branch of the state is capable of implementing its own responsibilities.

7.8 Conclusions

The sections above have tried to give a sense of the main modifications and the responses to them under each category of change. The following section summarises the overall changes that the various actors caused and experienced as a result of the court cases in Delhi (see Table 8) and Johannesburg (Table 9) and demonstrates how difficult success or failure is to measure in its totality.

The last section summates these wins and losses and makes comment on the various successes and failures of each of the actors.

Table 8: Changes engendered by the Sealings Case

Actor	Activity Engaged in	Affected by	Policy	Policy-making	Practise	Power	Values
Delhi Traders							
RWAs							
MCD							
DDA							
Union & Central gvt							
SCI							

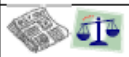
Legend:

Icon	Meaning		Icon	Meaning
	Litigation			Aim stopped or blocked or excluded
	Public Action			No change/Maintain status quo
	Media/Newspapers			Significant change
	Political Society			Some change/partial change
	Positive change			Negative change

The RWAs effectively initiated the Sealings Case and they, in conjunction with the SCI, attempted to modify policy and practice to ensure the realisation of their vision. However, the court case unfolded in such a way that although the SCI was partially able to seal some of the offending businesses, their world class city vision of Delhi was never achieved in the way that they had envisioned it. In addition, the instruments of policy and planning that they tried to mobilise such as the implementation of the old masterplanning process and forcing the MCD to seal the whole of Delhi were only partially successful. In the process of trying to achieve this vision and mobilise these instruments both actors lost power in the city. The SCI managed to maintain its position *vis-à-vis* the Union Government but lost the trust of the Delhi traders. The RWAs were excluded from political society and the processes of decision-making in the city. It is also speculated that their exclusion was due to the DDA's reluctance to do anything that would upset their process and the expedient promulgation of the new Master Plan. Furthermore, because of the traders' influence, the DDA's planning went from fairly classical

modernist planning values to a more mixed-use system that was more appropriate to a city such as Delhi. However, in the process it lost much of its authority as it was forced by the traders and the politicians to follow a particular planning regime. Delhi's other local authority the MCD also lost power in the city as its policy was modified and mutated first by the SCI and the SCMC and then by the government, putting them in an untenable position, which ensured subversive practices on their part to try and survive the political maelstrom.

Table 9: Changes engendered by the Olivia Road Case

Actor	Activity Engaged in	Affected by	Policy	Policy-making	Practise	Power	Values
San Jose Residents							
Residents' legal advisers							
City of Johannesburg							
Constitutional Court							

The Olivia Road Case was far less complex than the Sealings Case and overall the changes in favour of a more progressive policy direction seem to be significantly clearer. Through litigation the San Jose residents and their legal advisors were able to ensure changes to policy and policy-making especially around the meaningful engagement and alternative accommodation remedies. The residents have also been the main beneficiaries of both policy changes. Initially, they received good access to key decision-makers in the city and as a result of the Constitutional Court's injunctions were able to negotiate around their needs and were provided with temporary accommodation that was better than their original shelter in the San Jose building. However, after the court case ended and in general practice, alternative accommodation and meaningful engagement have, at best, only been unevenly implemented by the CoJ. Furthermore, aside from changes in policy the CoJ has yet to modify their attitude and understanding of inner-city regeneration and the role of the private sector and have continued to pursue a market-led approach to urban regeneration. The Constitutional Court has been very successful in changing policy, policy-making and has had some effect on practice. The Court's decisions have been quite controversial and have earned it some new supporters for being cautious in its approach to the separation of power and the potential of the meaningful engagement remedy, and some new critics due to its unwillingness to add too much content to the housing rights. Thus, overall it has managed to maintain its position of authority, legitimacy and to consistently maintain its larger hegemonic position in SA society.

In the two contexts, of the very different strategies of engagement, the residents' litigation and the traders' use of public action and political society, it was the latter that proved to be far more politically

useful than the RWAs' litigation. In part, this is because of the sheer numbers of the Delhi traders' and their ability to leverage themselves as a votebank and a threat. However, it would also seem to be related to other factors such as the fact that the politicians were very happy to have an excuse to go up against the judiciary and fight for supremacy. The case was also well-timed for the traders who were better able to utilise the larger election battle for their own ends. The success of the residents' litigation had similar structural roots in the sense that they accessed a highly sympathetic and progressive court as well as a local authority who was at the time willing and able to negotiate. The change in inner-city housing policy was as a result of the case but occurred at a key moment and in a direction that the City was already moving. Thus, there were a constellation of factors which coalesced to ensure that these particular actors at these specific times were so successful. The same is true as to why certain aspects of the cases were less successful for certain actors. The traders' inability to access the court was largely because the SCI regarded the traders as an "inappropriate public" whose actions contravened their intended vision for Delhi. The City of Johannesburg's and the MCD's refusal to put into practice many of the Courts' rulings is in part due to the resentment that the officials felt at being disempowered by the courts and their practical concerns around capacity and resources, which curtailed their ability to implement the Courts' decisions. Thus, the political utility of various strategies is highly dependent on the larger institutional and structural context in which a case occurs.

The last chapter attempts to understand and make sense of the role that the courts and the court cases have played in the urban governance of Delhi and Johannesburg. It flags some of the concerns around judicial activism and deference for urban governance and the role that the court has played as a hegemonic institution within an environment of scarce and unevenly distributed resources.

Chapter Eight: A few Conclusions and Reflections

8.1 Introduction

The two cases demonstrate convergences and divergences in theory and practise, indicating startling similarities and differences across the two contexts. Using the four-fold and inter-related conceptual frameworks of urban regime approaches, Chatterjee's political and civil society, concerns around engagement and participation and my extension of the Gramscian idea of hegemony, this section summarises my case studies and key arguments, debates and the conclusions that I have reached. Aside from considering areas of future research, it also provides a set of personal reflections on what I think and feel are the tensions that currently face litigation and urban governance and my concerns and hopes around the future of this form of mobilisation in cities of the global south.

8.2 A summary of the cases and findings

The Olivia Road case began with the City of Johannesburg and a coalition of inner city developers' desire for the similar end of a property-led solution to inner city re-development and regeneration. Such an aim also seemed to suit the interests of pursuing the stated ideal of a "World Class African City". The programme intended to lead this particular project was the Bad, later Better, Buildings Programme (BBP). The BBP, however, ran into a whole host of problems and effectively meant the eviction of some of the poorest residents of Johannesburg's inner city. The San Jose residents were caught up in these larger forces. The order to evict the residents sparked legal mobilisation by the residents, which eventually led to the Constitutional Court case and the resolution of a number of the concerns of the San Jose residents, the wider class of inner city households and the human rights lawyers who were involved in these matters.

The Constitutional Court's two-part ruling constituted of an interim decision which enforced ideas of engagement and participation and their final judgement of administrative justice, meaningful engagement and alternative accommodation re-embedded earlier commitments that the Constitutional Court had made. The consequences and reactions to these remedies were mixed: policy changed in local government and the BBP was brought to an end, whilst evictions without alternative accommodation and meaningful engagement were supposed to become a thing of the past. However, in practise evictions continued by the private sector and some of the other departments and units of the CoJ went on evicting people. Alternative accommodation in the inner city also proved difficult to access as there are only few buildings which could provide the necessary space. Equally, the lack of clarity concerning what constitutes meaningful engagement meant that there have been agents within the City who have effectively ignored this requirement or done the minimum possible. However, the lack of clarity also opened the way for civil society to step in and

define what was meant by meaningful engagement. The court case also opened up the possibility of other groups contributing to a vision of what the CoJ could look like.

The direct benefits to the San Jose residents were also quite mixed. On the one hand, they were provided with accommodation close to their previous home and it was massively subsidised by the state. The residents also participated in the process of moving and were actively consulted throughout the procedure and their input was taken on board. Subsequently, there have been issues with the quality of the accommodation, its management and what has become a very contested and antagonistic relationship with the state. The antagonism has also become more generalised and there has been widespread breakdown in the relationship between inner-city residents, their lawyers and the City, which has been seen by some, particularly the CoJ and its lawyers, as counter-productive to the larger project of creating a more inclusive city.

The Sealings Case was initiated by a group of middle-class Resident Welfare Associations, as part of their longer term strategy to beautify and maintain the gentrified character of their residential colonies. The original case was supposed to be just a matter of law and the Supreme Court was supposed to just decide on which local authority had the relevant jurisdiction over sealing the activities that contravened the masterplan. The SCI went far beyond its brief and ordered the sealing of all activities within a few months. This was a part of what was, in the court's own words, part of their longer term strategy to clean and green Delhi. The heavy-handed and extensively top-down approach of the SCI and what was perceived as the injustice of their decision caused massive popular action from the traders who were directly affected but who were refused admittance into the SCI.

The exclusion from the court meant that the traders used their numbers and their power as a votebank as well as exploiting the timing of the case, i.e., a year before local elections, and the on-going tensions between the state and the judiciary to access political parties and key political figures. Through such activities they were able to get the national government to promulgate legislation protecting their enterprises, and later to access the new masterplanning so that their ideas of a more commercial and mixed use vision of Delhi won out overall. Thus, despite a large degree of sympathy between the SCI and the RWAs in Delhi, their shared vision and the enormous power of the court, ultimately this alliance failed to achieve its end. Furthermore, through the case the SCI lost significant ground and lower income residents of Delhi lost trust in the institution. However, they were not alone and the INC lost the next election in Delhi as two of their main constituencies were disappointed by the Congress' role in the sealings, but in contradictory ways: the traders saw the INC as powerless and unable to protect their interests, whereas the middle-class RWAs felt betrayed by the INC and the government's support of the traders. Thus the Congress' earlier indecisiveness and policy reversals had significant consequences for the party's political future.

Despite differences in scale, content and the income groups of the litigants, the two cases typified the sort of trials, decisions and remedies that have been taking place in the courts over the last two decades. The trends that the cases typify seem to be characterised by the SCI's project to transform Delhi into a world class city and the Constitutional Court's commitment to ensure engagement

between all aspects of South African society. The following section will summarise some of the conclusions that arguments that can be drawn from analysing these cases.

8.3 On urban governance: deconstructing groups, constructing urban hegemonies and relationships within the state

8.3.1 Deconstructing the whole: a revelation of groups within groups

Within the two cases the fact that the cases even came to court and pitted different and, in some cases, equally powerful groups against each other, i.e., the City of Johannesburg against an alliance of poor inner-city residents and their lawyers, or the RWAs and the SCI against the traders and their political handlers, reinforces the general urban governance approach that the determination of a city's policies, the distribution of space and resources and how the space is used and shaped and by whom is an activity shared, albeit unequally, by a number of urban actors. Furthermore, the power of the courts to direct local government action and the challenge that other groups offer signals that within this milieu the state is only one of the urban agents of change and not always the most important one (Rakodi, 2003 and 2004; Jessop; 2002). Furthermore, the tensions that could be seen from the original Bad Buildings Programme which was resisted by various units within the state and the fact that the Delhi and Johannesburg local authorities found ways to subvert the courts' orders further deconstructs the idea of "the state" as a homogenous body that responds as one coherent monolith (Veron, *et al.*, 2003; Marion Young, 2004; Corbridge, *et al.*, 2005). Rather, it offers an account of the "state" as a highly heterogeneous institution comprised of a number of different individuals and departments, each following their own mandate and vision.

Similarly, the cases provided an opportunity to gain some insights into the fissures and heterogeneity of the various citizen groups and agents participating in governance. The Sealings Case offered two moments of disaggregation: the first was within the Indian middle-class (Deshpande, 2006; Lemanski and Tawa Lama-Rewal, 2013) and revealed the fracture lines and tensions between the interest groups of which it is comprised. The second aspect and one which was not investigated in significant depth within this study, looked at the differences within the trading community. These included both the tensions between informal traders, i.e., street traders and the more formal but extra-legal businesses that comprised the constituency of CAIT, as well as within the CAIT the wide variety of activities, income levels, and shades of legality and extra-legality that exist.

Another distinction that the case studies offered was the insight that was gained by distinguishing between the court and the court case, which had methodological and analytical implications. What became clear through the course of the study was that the "court case" was the actual object of investigation and analysis and the "court" was just one more actor within the court case. The court case extended beyond the physical boundaries and the legal questions of the court and was analysed as a socio-political phenomenon rather than an issue of jurisprudence. Thus, it was the court case that had an important role in urban governance and the court and judiciary were only one set of players within the broader phenomenon of the court case. Where much of the literature on the impact

of court decisions looks at the implications and consequences of court decisions for policy changes and the implementation of remedies (della Porta and Diani, 1999; Earl 2000; Giugni 1999), this study was able to reveal that court cases have the ability to reshape and reconfigure coalitions and relationships of power, as well as policy and political contexts. Their ripples are felt far outside of the boundaries of the actual courtroom and are able to shift existing power-relations at a wide variety of scales, from the micro-politics of groups of litigants to national party politics and inter-governmental relationships.

8.3.2 Coalescing around an urban vision: alliances and coalitions of power

The cases also revealed the manner in which each city is shaped by the coalitions, convergences and alliances of interest groups who come together to pursue their visions (Molotch, 1976; Logan and Molotch, 1987; Mossberger and Stoker, 2001: Rodgers, 2009). A key finding around the nature of these combinations of agents was that in Johannesburg there was a shared vision of a World Class African City which was constructed and supported by a coalition of interests between private sector developers and the local authorities. The shared vision was actualised in the form of the BBP, which would have benefitted both the local authority and the private sector developers, whilst simultaneously converting the inner city into a space that conformed to their vision. The Delhi case does not provide a similar instance of a coalition of different interests coming together but offers an account of a long term alliance of middle-class RWAs and the SCI using PILs as a way of attempting to reshape Delhi into their desired image. These actors clearly articulated the urban future that they wanted for Delhi and due to the shared goal, and resulting sympathy, a clear alliance formed between them. I have also argued that these shared projects in Johannesburg and Delhi are a type of urban hegemony projects in the sense that they are normative-ethical visions, which these groups are attempting to make materially manifest on their respective cityscapes.

The question then arises as to whether the same kind of alliance that I identify as evident in Delhi would be possible elsewhere, i.e., in non-urban areas or in cities that do not host apex courts. Bhan (2009) argues that the location of the courts in specific cities allows them direct interference in the day to day implementation of their decisions and the ability to observe if their remedies are being carried out or not. Thus, physical proximity allows a degree of oversight that would not otherwise be possible. Findings from my two cases reaffirm this idea as the Courts, most particularly the SCI through the SCMC, involved itself in the everyday practicalities of sealing, which would have been far more difficult if the court had been located elsewhere (Bhan 2009). Furthermore, apex courts are often located in capital cities or sites that are symbolically important. Courts can become devoted to maintaining these cities' aesthetic as they may be invested in how these spaces should look either because of their "innate" national importance or as appropriate hosts for the grandeur of the courts. Thus, they take decisions, as was seen in the case Delhi, which reinforce their own image of how these spaces should look. In addition, from an analytical perspective urban court cases in which the court is an actor allow researchers to see and understand how urban coalitions and convergences occur when the court is an active and "on-site" player rather than a symbolic and distant institution.

Such thinking will allow further analysis of the court and court cases as socio-political institutions engaged in city-making and shaping processes.

8.3.3 A "bullying" and usurping court in urban government

The direct engagement and enforceability of the Courts' remedies in these cities has also led to significant concerns over what the use of PILs and the power of litigation has meant for the balance of powers, both in the local and national spheres. In India, there have been significant concerns over the court's use of PIL and Usher (2008: 165) contends that through the PIL and its judicial activism "the Court is pursuing its own political [and spatial] agenda, in breach of the separation of powers and of the express intention of the Constitution". Sripati (1998:451) contends that the courts "now play a political role with unclear legislative and adjudicative functions" and where the public interest litigation jurisprudence of the Indian Supreme Court has been "informed by strong socio-political views and commitments" (Cassels, 1998: 497-98).There is a strong sense, therefore, that through PIL the courts have been able to choose their cases and in doing so have been able to develop their own canon of precedent and thus develop policy and enforce practise.

Furthermore, Gauri (2009:5) contends that the courts have "used their post-Emergency popularity, to which PIL has significantly contributed, to expand their own powers and shield themselves from scrutiny and accountability." The courts have even been accused of using their privileged status and powers of contempt to protect themselves from criticism and to avoid close scrutiny of their actions. The SCI has also refused to be held accountable or make many of its actions and relationships transparent, which has led at least one author, noted commentator Arundhati Roy, to claim that "we (Indians) live in a sort of judicial dictatorship."[306] In the Sealings Case, and what followed with the accusations of Vitusha Oberoi (discussed in Chapter Four), the SCI seems to have abused its authority in these ways. The SCI held people in contempt when they refused to carry out orders for very justifiable reasons, i.e., Delhi was in chaos and continuing sealing would have made the situation worse. It also imprisoned journalists who made accusations against SCI judges which should have been investigated. In the SCI's case there is a justifiable fear that the courts can use their power and authority to "bully" other institutions into following their orders without due consideration of their objections. Thus, within the sphere of local government the concern is around an institution that through the powers of mandamus and contempt is able to push other units and departments of the state to do its bidding irrespective of their own mandate, policy or resources. As a response other state organisations can and do resort to forms of open and covert rebellion. Such rebellion constructs difficult inter-governmental relations; disturb or distract from other local government activities; and may make the implementation of judicial remedies impossible.

Critics have also claimed that the SCI and Constitutional Court are usurping the function of the executive and entering into the fields of policy and resource allocation for which they are ill-equipped.

[306] Roy, A., 2007: Scandal In The Palace, *Outlook India,* 25th September, http://www.countercurrents.org/roy250907.htm accessed 05.10.2012.

This has at times led the Court to make orders which represent micro-management of state agencies, especially where the SCI has formulated monitoring commissions to ensure that their structural injunctions are managed and enforced (Sripati, 1998). These actions were apparent in the Sealings Case as the SCI consistently ordered the MCD, DDA and national spheres of the state to implement their orders. The MCD also had to absorb the additional costs that the cases caused and changed the lines of reporting away from those designated by legislation and redirected them to the Supreme Court Monitoring Committee and the SCI. In the Olivia Road Case, the Constitutional Court refused to allow the City of Johannesburg to enjoin the province or national government as respondents and then required the local authorities to provide interim services and alternative accommodation. In doing so, the court did not pay attention to the fact that the City's budget is allocated months in advance and there is generally very little left for exigencies. As a result, the City had to use money that had been earmarked for other uses and could not rely on the support of provincial or national government as they had not been directed by the court and they could legitimately hold on to their budget. Furthermore, the Constitutional Court's decision to disallow other spheres of the state from becoming respondents had unintentionally negative impacts: As a consequence of this decision, the City could and did consistently use the reason that they could not get additional funding as justification for why they did not act on the court's orders or implement aspects of the agreement. By ignoring the bureaucratic workings of the state and how line budgets function, the court provided a built-in excuse for the City to only undertake their orders to a limited extent.

8.3.4 A more difficult judicial project?

Unlike the Indian court that has been accused of overstepping its mark, the South African Constitutional Court has consistently come under fire for the "reasonableness" of its approach (Bilchitz, 2002 and 2008; Wilson and Dugard, 2011), its unwillingness to force implementation through stronger remedies (Roach and Budlender, 2005; Roach, 2009) and its deference to the state (Mbazira, 2008; McLean, 2009). There has been a sense that the court has stepped back from making difficult decisions. I would disagree and would argue that what the Olivia Road Case demonstrates, especially when placed within its larger trajectory, is how the Constitutional Court has taken a far harder path. Their project and the role that they have defined for themselves attempts to strike an appropriate balance in a still-evolving and very young democracy. The Constitutional Court has clearly decided that instead of encouraging South Africans to come to the court for Solomon-like decisions, it has decided that it will try and enhance discussion, debate and procedural justice. It has consistently taken judgements that demonstrate how an

> "invocation of constitutional rights against urban governments can force relevant agencies to engage with communities and can accordingly impact on the eventual content of policies, thereby giving effect to the dialogic and participatory elements of the right to the city" (Coggin and Pieterse (2011: webpage).

In addition, I agree with Christiansen (2010: 603) that in this way the Constitutional Court is using its

> "own authority to advance the transformative values of the Constitution, established a standard for governmental entities that requires them to accommodate those values of the Constitution even when acting otherwise in conformity with existing law - the Court empowers communities and civil society organizations to ensure their compliance".

I think this is a difficult path to take, especially in the face of certain sectors pushing for greater judicial intervention and a state that seems reluctant to engage. Ultimately, however, I would support such a project and see the value in attempts that seek to construct a more engaged and informed society in which interaction and resolution is driven by fair and considered consensus of all parties.

8.4 Spaces of engagement and mobilisation – what "difference" does the court offer?

8.4.1 Courts a new space of engagement

Gauri and Brinks (2012: 4) observe that

> "constitutional rights are increasingly supporting demands for social and economic goods and services, and that courts are taking on an increasingly important role in deciding the extent to which the seemingly non-negotiable interests embodied in constitutions should be considered and protected in policy making. The mounting evidence that courts are indeed taking important steps, with increasingly important policy consequences…".

Thus I would argue that although neither designed nor intended for it, courts and court cases are increasingly becoming sites of engagement between urban actors who are using their rights to make claims against the state and against each other. In urban contexts where the state and civil society have limited opportunities for engagement, court cases have become important sites of communication and connection between state and non-state actors. Furthermore, the courts and court cases are able to provide an alternative site to those offered by traditional democratic representation such as ward committees, conventional public actions and protest.

Given the increasing acceptance of the idea of litigation as a form of legitimate claim-making and mobilisation for social movements and citizens groups, I was then faced with the question of what type of space the courts do offer to these groups and how they compare to other sites of claim-making and participation. The analysis seems to reveal that the courts offer a very mixed space when it comes to questions of engagement and participation. As was revealed, the court as a site of engagement is limited by the mediation of the judges and the wide array of court protocol that accompanies litigation. The Olivia Road Case indicated just how limited the opportunities are for the residents to "speak their own truth" and how frustrating that can be. Moreover, the same rules turn the court into a spectacle that is half-gladiatorial arena and half-theatre, which can and does transmogrify people into archetypes. However, the site of the court is also, simultaneously, a liberating space as individuals and groups become legitimate rights-bearing citizens recognised by one of the most

eminent state institutions. Courts enforcing engagement and interaction both as interim orders and as matters of policy is very encouraging in constructing a space of real conversation and communication between urban actors, which may hold significant promise for civil society/state relations (Ray, 2009).

The court is also limited in its mandate as it can only decide on legal and constitutional issues but once the matter fulfils this criterion, any of the parties can define the agenda by raising issues and concerns during the trial. Thus, the court provides a variegated site in which urban actors can engage and marginal groups can make claims on the state, but it is also a mediated site and limited in its mandate; therefore, it is neither completely liberating and supportive nor is it ultimately a completely repressive tool of those in power.

8.4.2 A contentious use of rights: negating urban mobilisation

Rights-based litigation is a highly contentious form of mobilisation. There are those for whom the use of the rights-based discourse creates insular and inward looking individuals who are only concerned about their own parochial interests (Hirschl, 2004). Furthermore, rights-based litigation is considered problematic for two reasons: it takes issues out of the public sphere; and because litigation can be demobilising as residents use the courts to attempt to make claims (Sinwell, 2010) and in doing so start to use the institutions and hegemony of the state to try and fight the state, some would argue that this is a losing battle from the start (Lilley, 2009). In opposition is the view that "… there is no doubt that the global spread of the discourse of human rights has provided a huge boost to local democratic formations" (Appadurai, 2002: 25) and Hunt (1990: 326) who argues "rights as a significant component of counter-hegemonic strategies provide a potentially fruitful approach to the prosecution of transformatory political practice".

I would argue that the Olivia Road Case demonstrates both how rights-based litigation can be demobilising and pacifying, and simultaneously an emancipatory tactic for a group to attempt to fight for their own urban hegemony. Litigation and access to meaningful engagement pacified the residents and inculcated them in the language of rights; as such, they did not use public action nor approach the media and were willing to wait for the outcome of the case and have subsequently relied on legal mediation in order to achieve their goals. Litigation deconstructed and disempowered the San Jose residents association and the community leadership, which has made it very difficult for the residents to subsequently coalesce into a unified community and to oppose the CoJ. However, that is not the whole story, as the residents and their lawyers were also able to add some content to the canon of rights, leverage change from the city, and become legitimate partners. In doing so, they partially embed a broader rights-based vision in Johannesburg's policy and policy-making processes.

8.5 Political/civil society and the utility of exceptional treatment

Throughout the thesis, I have used Chatterjee's notions of civil and political society to explore how different groups used different forms of mobilisation and what was or was not successful. Chatterjee's distinction between civil society and political society is a useful beginning point but I would argue that his original approach in the *Politics of the Governed* is too distinct a binary, which does not reflect how

and when different groups utilise different strategies and that his work is too focused on the ideas of legality and rights, rather than on the politics of scale and the contingencies of local context. Furthermore, I would argue that Chatterjee does not unpack the key element of why either civil or political society is approached, which is due to the utility of exceptional treatment that they offer. The following sections unpack these arguments that have been explored in detail in the rest of the thesis.

Having one's voice heard or turning a claim into a reality in a city often requires that the group or individual is treated in a way that is exceptional or different to others. The RWAs capitalised on such exceptional treatment when they used their special relationship with the courts and their convergence of interests to push their agenda. In Johannesburg, the local authorities could not claim special treatment, which is what eventually led to the litigation. The traders, however, attempted to access exceptional treatment through the public sphere, namely through protest and the press, in order to get the ear of those in power. As Chatterjee has discussed, the traders, unable to access civil society since they were mostly denied access to litigation, used the threats of violence and the spectacle of public action to contact political connections to fight their battle. Public action proved extremely useful and worked as the traders had hoped. The use of political society was accomplished through the traders' claims to the right to livelihood, citizenship and urban space and, most importantly, through their sheer numbers, which they leveraged as a votebank to gain political support. This support provided them with numerous pieces of legislation that offered some relief as well as access to the masterplanning process which was ultimately the instrument that was used to shape Delhi. The RWAs were effectively denied access to the masterplanning process despite their prominence with the courts and as such they and the courts were denied the final say in reshaping and re-ordering the City.

The San Jose residents accessed exceptional treatment through the Constitutional Court who determined that the residents should sit down and discuss their needs and issues with City of Johannesburg. As such a space was invented where for the first time inner-city residents and local authorities could meet as equals to mutually determine the future. The Constitutional Court recognised the rights and citizenship of the San Jose residents, which meant that poor people living in extra-legal circumstances were, in contrast to Chatterjee's view, able to access civil society and use the rights-based discourse as the basis for their engagement. The negotiation yielded a settlement that both parties could live with, although it was not able to resolve the profoundly worrying question of permanent accommodation.

Thus, the courts can provide a channel to civil society and exceptional treatment. For a small group without the numbers of the Delhi traders and the ability to act as a votebank, litigation would seem like a useful proposition of making claims on the state. However, use of the court for exceptional treatment does raise a question of whether the use of the court by a minority of people to gain justice and access state resources is in itself socially just? (Melish, 2007: Gunatilleke, 2010). The San Jose residents were a small group who were provided for with exceptional resources and attention; they

"jumped" the queue[307] and were given better housing and far more quickly than many of their fellow citizens. The Delhi traders were offered access and given a significant say in the Master Plan, whilst the RWAs, although ultimately unsuccessfully, were able to exploit and leverage their "special relationship" with the court in order to be heard and reshape Delhi in their image. Gauri and Brinks (2012) would argue that the multiplier effects of litigation, specifically in South Africa and India, indicate that the exceptional treatment sought and received by small groups through litigation actually has enormous benefits for people in the same position. As such, litigation can be justified due to the improvements in the quality of life, the changes in policy, process or position it brings to a similar "class of people". However, the dark side of exceptional treatment is the potential for selective capture of the courts by the middle-classes, as was seen in India (Dupont and Ramanathan, 2005 and 2006; Usher, 2008) and their ability to seek and receive special treatment by the courts, which has ensured the spatial and social exclusion of many of the poorest and most marginal groups from urban areas. Although this has not happened in SA since 1994, selective capture by a specific constituency is a clear risk that needs to guarded against. Thus, the justice and fairness of the outcomes of litigation are highly dependent on the nature of the cause that is being fought for and the predisposition of the court and their larger projects rather than any inherent dysfunctionality in either SERs or litigation.

Thus through analysing this group and their actions, as well as the litigation of the San Jose residents, the study was also able to further nuance Chatterjee's (2004) political/civil society dichotomy and demonstrate how different groups are able to adopt the language and tactics of both civil and political society. Both groups used the rights-based discourse to further their cause (and as the basis for their counter-hegemonic visions) and in the case of the San Jose residents to guide their path into civil society. However, in the case of the traders the rights-based discourse was used in conjunction with very powerful public demonstrations to leverage support from the public and politicians.

8.6 Gramsci, hegemony and the courts

Running throughout my thesis is the idea of hegemony and urban hegemonic projects and the argument that what was at stake throughout the court cases was a contest for dominance between different groups, each wanting to embed their own urban vision onto the landscape. The argument is an extension of classical Gramscian theory as I have taken his arguments regarding the desire of dominant class or group of elites to maintain power through moral and ideological leadership combined with coercive power and looked at them at the scale of the urban. His ideas were only partially helpful: on the one hand they offered me a way of getting to grips with why certain agents and actors behaved in the way that they did, i.e., why the RWAs aligned with the courts and why they pursued their vision even whilst realising the serious opposition that it faced. Gramsci's work on the apparatus of hegemony also allowed me to understand why groups choose to litigate or what the power of litigation is as opposed to other forms of mobilisation. However, he never intended his

[307] According to Melish (2007: 182) queue-jumping is "the strategic use of rights-based litigation to jump to the head of a line in accessing scarce entitlements".

framework to be used at the scale of the city and so I had to use much of what he said as a jumping off point rather than as a complete framework of analysis.

At the beginning of the thesis, I argued that an urban hegemonic project is the fight by one group or coalition of urban actors to try and embed their spatial and political vision onto the landscape of the city and the minds of the urban residents (Ghertner, 2004). The benefits of such a vision would accrue mainly to that specific group but the attempt would be to legitimise the urban project so that all urban residents bought into the idea and felt that they too would benefit or that it was a legitimate end to be pursued. I argued that such a project was a normative-spatial project, which defined not only what the spaces *should* look like but what activities *should* take place in these environments and who *should* live and work in these spaces.

I would thus argue that the coalitions and alliances that have been examined throughout the thesis were engaged in contests for urban hegemony. The contests were startlingly similar across the two contexts as the SCI and the RWAs were fighting for a clean and green, world class Delhi, just as the CoJ and the private sector developers through the BBP were attempting to transform the inner city of Johannesburg into the ideal of the World Class African City. In their attempts the two groups were trying to convince those who would not benefit, i.e., the traders, the poorer inner-city residents etc. that these visions were appropriate and "right". However, these groups exposed their hegemonic projects by revealing that the rights and claims that they made were not in the best interests of these other groups. They, in turn, contested these exclusionary visions and constructed their own idea of what their cities *should* look like and who *should* be allowed to live and work in these spaces.

The turn to litigation can in part be explained by the Gramscian understanding of courts as institutions of hegemony, which means that they are able to legitimise, normalise and embed the vision of the winning litigants. Thus litigants chose or attempted to utilise litigation as a way of ensuring that their specific spatial vision was inculcated as the most appropriate aesthetic. However, I would also argue that courts are not passive and politically neutral entities, but have their own projects which they too are seeking to legitimise and normalise. These may either be as part of a coalition or alliance or in support of such groupings, as there is complementarity between their goals. Furthermore, they also have clear ideas about their own roles within these urban environments and networks of urban actors, which they pursue in order to manifest their visions of space and society and their place within these governance networks.

Thus, there is a clear relationship between the courts' projects, the cases that they allow into the apex courts and the nature of their adjudication and remedies. Cases that align with the courts' larger project or those of the groups with whom they are ideologically aligned are more likely to be taken on, i.e., RWA PILs whilst those that oppose it are more likely to be excluded, i.e., the petitions of the traders against sealing. Moreover, the manner in which courts adjudicate is significantly correlated to their larger projects, both the visions that they are trying to achieve as well as the roles that they are attempting to define and entrench for themselves. The result is that if litigants' projects are aligned with the courts then they are able to leverage a very powerful coalition or convergence of urban

interests. However, if the courts disagree or disapprove of an activity, claim or worldview as it opposes their own, then it is very likely that the litigants' project will be retarded, fail or face enormous opposition. Such an argument has implications for groups and individuals who are trying to use the courts as sites of redress or claim-making, for accountability, voice and accessing the state and adds an element of precariousness and caution to the idea of litigation as a site of rights and claim-making.

Court cases can be effective in changing policy and precedent at the official level and are at times able to change legislation and laws with relative ease. What is changed or what is decided is profoundly affected by the courts' larger projects and goals. Thus, courts can be sites in which the dominant hegemony is embedded and further inculcated into the public sphere; alternatively their decisions can also make policy changes that support counter-hegemonic movements and in doing so destabilise the existing hegemonic order.

The court cases that were analysed have, however, both been effective in promoting urban hegemonies driven by more marginal quarters. The Sealings Case ultimately, albeit inadvertently, gave the traders access to the masterplanning process and in doing so allowed them to construct a more inclusive vision of Delhi, which will influence the shape of the city for the medium term. The Olivia Road Case countered the world class city hegemony and promoted a more inclusive vision in which shelter, livelihoods and procedural justice are more important than order and international investment. Thus a Gramscian analysis of the role of courts is useful in unpacking and identifying why different urban actors coalesce and what is being fought for as well as identifying the particular usefulness of litigation as a method of legitimising one vision over another. However, Gramsci's work was aimed at the national scale and did not consider how groups contest dominance within cities. Nor did his account see the court as an active agent that is more than just an apparatus of hegemony. Thus I would argue that the study of hegemony, the courts and governance is a fruitful method of analysis and should be extended and furthered but which needs to be rescaled and reconsidered if it is to be useful in analysing power and governance within cities of the global south.

8.7 Areas of further research

The thesis did something that I think all good research should do: it has raised more questions than it has answered, which means that there are a number of other areas and questions that I would like to explore in India and South Africa. There were also areas that I was not able to sufficiently engage with during the study or which only after significant analysis (and some growth as a researcher) occurred to me as sites and issues that required further interrogation. In SA, there is a small but important legal-aid sector, which has been fundamental in supporting communities and individuals in their ability to access and mobilise litigation. How exactly these organisations choose cases and how that affects governance and claim-making is certainly an under-researched area in SA and needs far more analytical work. I would also very much like to know what has happened subsequently to my own study and what further litigation, such as the Blue Moonlight Case, has meant for the relationships of different urban actors in the inner-city of Johannesburg, as well as the longer term impacts of these

cases on policy and practice. In addition, I think that the contribution of the lower courts make to shaping both cities is important but little understood.

I also see the thesis as only the beginning of what I hope is a much longer and deeper engagement with Indian urbanism and comparative research. Although I have learnt a great deal during the study, it is clear that there is far more to learn, study and explore in Indian cities, governance and courts, and I hope to be able to build on the small beginning that I have made here. The thesis has also signalled a set of directions and areas that I would be interested in pursuing: In India the executive and legislature have accused the SCI of taking over both of their roles, in making policy and then enforcing it through their supervisory powers. This is a further area that is under-researched and I was unable to find a systematic review of these two branches of the state's critique of the SCI's actions. The Confederation of All Indian Traders is also deliberately exclusive, only representing traders that operate out of formal premises and their interests, and has gender biases that require further investigation. I have also presented the traders as one group but there are no doubt tensions and contestations within the organisation. As a future project it would be interesting to investigate and unpack these differences, as well as the nature of the relationship between the traders and informal commercial actors, such as hawkers and street sellers in Delhi. A key area and one that I have had some difficulty finding information about, and which requires deepening, is the nature of the political life of Delhi during the period of the court case. I would also like to know if the traders have been able to continue to capitalise on their access to political society and city-making processes. At the more theoretical level I would also like to continue asking questions about the nature of hegemony, hegemonic projects and practices and how they unfold in urban environments and what they mean for urban governance.

8.8 Concluding words and observations

The thesis has given me a significant amount of time to reflect on what my decision would be if I was faced with litigation, either as an option, or because it had been thrust upon me in some way. Unfortunately, even after all of this time I cannot conclusively say what I would do or which way I would go. Even if I could find the legal support that I needed, I am not sure that I would litigate. The reasons for this are many but simple: litigation takes a large amount of time and resources; still, beyond these hackneyed excuses is the more definite concern that I am not sure I have the stomach for it - when sitting in a court and listening to other people representing my story, even with great integrity, I am not sure I would not feel slightly disempowered waiting for other people to define the contours of my fight, unable to respond. I would also find the legal wrangling back and forth and the antagonistic interplay that is needed over a sustained period, difficult to contend with.

The cases have also indicated that what is fought for in the court is not necessarily what is won on the ground and in SA searching for absolute resolution in the Constitutional Court seems slightly misplaced given their larger project. Furthermore, the outcomes of court cases seem to be unpredictable. Unexpected and unintended outcomes are difficult to combat and deal with as they take on new, invisible and subversive manifestations, which may be more difficult to root out. I am

also not convinced that public protest and the use of political networks is not more politically efficient, as it seems better able to achieve results in a shorter (and less expensive way).

However, given the consistent failure of representative democracy that I have seen and which does not seem to be improving in most cities, then seeking engagement through litigation may be a viable option. Furthermore, if my cause aligned with what the court was trying to achieve I think I would use litigation, having an apex court as an ally or fellow collaborator in materialising a specific vision or courting change, is extremely powerful. Not to mention that stretching my wings as a citizen and using one of the most important institutions of a democratic state for redress and rights realisation would, in and of itself, be liberating. Not to mention that if I won, I would have the added advantage of having my view and vision publicly and powerfully legitimated. Moreover, the very unpredictability may be attractive, and considering what the traders and the San Jose residents have won, I too might be willing to roll the dice, spin the wheel and see if my number comes up.

So, I end with words of hope that the courts continue to grow in strength and ability to bring about progressive change, and in their best incarnation give voice to the voiceless, strength to the weak and justice to all those who seek it. Over the next few years in situations of increasing inequity, scarcity of resources and more contentious politics, I think cities and urban citizens are going to need it.

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Appendix I: List of Respondents India First Phase January 2010

Name	Organisation	Date of interview
Awadhendra Sharan	SARAI	22.01.2010
Professor Sivakumar	Indian Law Institute	25.01.2010
Dr Chattarnath,	Indian Social Institution	27.01.2010
Professor Kapadia	Delhi School of Architecture and Planning,	27.01.2010
Professor Prakash	Center for Law and Governance	28.01.2010
Ravi Nair	South Asia Human Rights Documentation Centre	29.01.2010
Professor Sivakumar,	Indian Law Institute,	29.01.2010
Professor Madha Menon	Commission on Centre-State Relations,	03.02.2010
Professor Ravendaran	Delhi School of Architecture and Planning,	04.02.2010
Dr Gupta,	Delhi School of Architecture and Planning,	04.02.2010
Sachin Chaudry	Public Administration	04.02.2010
BK Jain	Commissioner of Planning from the DDA	05.02.2010
Mr Dhillon	DDA, Director Masterplanning	05.02.2010
Sunil Thomas	Registrar, Supreme Court of India,	05.02.2010
Bharati Chaturvedi	Editor of “Finding Delhi: Loss and Renewal in the Megacity” and Director of Chintan	08.02.2010
Aditya Nigam	Centre for the study of developing societies	09.02.2010
Prof Sridaran	Delhi School of Architecture and Planning,	11.02.2010
Usha Ramanathan	Independent Researcher	12.02.2010

Appendix II: List of Respondents India Second Phase: December 2010-March 2011

Name	Organisation	Date of interview
BK Jain	Commissioner of Planning from the DDA	14.12.2010
AK Jain	Author Delhi Under Hammer and Retired Commissioner (Planning) Delhi Development Authority	15.12.2010
Prof Sridaran	Professor Delhi School of Planning and Architecture	16.12.2010
Mahendra Rana	Advocate at the Supreme Court	16.12.2010
Rajeev Dhavan	Human Rights Lawyer	18.12.2010 19.02.1011
Praveen Khanderwal	CAIT's Secretary General of Delhi	20.12.2010
Sudhir Vohra	Architect and public commentator on sealings and MP2010	21.12.2010
Amitabh Kundu	Professor: Jawaharlal Nehru University	22.12.2010
Ranjit Kumar	High and Supreme Court Lawyer (represented Traders)	23.12.2010
Mr Mahanshabdey	DDA: Director Masterplanning	23.12.2010
PK Vohra	Member of the High Court Monitoring Committee	24.12.2010
Manoj Mitta	Times of India correspondent to the Supreme Court of India	24.12.2010
Vijender Gupta	Chairman, Standing Committee of MCD	27.12.2010
Jagdish Mamgain	Member of BJP Chairman Work's Committee, MCD	27.12.2010
Bhure Lal	Supreme Court Monitoring Committee	28.12.2010
Rajiv Kakria	Chairman: Greater Kailash RWA	28.12.2010
Mssrs. K J Rao and S Jhingon	Supreme Court Monitoring Committee	29.12.2010
Anonymous	Senior Official Engineering Department: MCD	02.02.2011
Romy Thavan	Defense Colony RWA	04.01.2011
Ramesh Khanna	Vice President of CAIT's Delhi division	04.01.2011
Vikas Singh	Additional Solicitor General for MCD	04.01.2011
Anil Sood and Anil Sharma	Founders of CHETNA	04.01.2011
Sanjiv Sen	Additional Solicitor General for MCD	05.01.2011
Deep Marthur	Director of Information: MCD	13.01.2011
Mr Mandal	BJP Councillor: MCD	13.01.2011
Amit Agrawal	Coordinator South Delhi RWA, Affected	14.01.2011

	Resident Joint Action	
Mr Sharma	Lawyer for RWAS	15.01.2011
Dhir Singh Kasana	BJP Councillor: MCD	17.01.2011
Mr Ralli	Lawyer: Delhi High Court	21.01.2011
Deepak Hastur	Senior Official: MCD Planning Department	27.01.2011
Jitender Kumar Kochara and Harish Ahuja	Congress member and Ex-Leader of the House and his PA	15.02.2011
Mr and Mrs Pawar	Congress Ex-Councillor and Councillor for Delhi (respectively)	15.02.2011
Satinder Wadwha	President of M-Block Market Traders Association	16.02.2011
Ravinder Chaudry	Member of BJP and Chairman of the MCD	16.02.2011

Appendix III: List of Respondents South African Respondents

Name	Organisation	Date of interview
Monty Narsoo	Independent Consultant	15.03.2010
Graeme Gotz	Ex-City of Johannesburg	15.03.2010 29.03.2010 04.05.2010
Edwin Cameron	Constitutional Court Judge	20.04.2010
Phil Harrisson	Ex-City of Johannesburg City Manager	21.04.2010
Geoff Mendelowitz	Ex-Programme Manager of the Better Buildings Programme	22.04.2010
Sol Cowan	Ex-Councillor: Inner-city Portfolio	28.04.2010
Lauren Royston	Independent Consultant	29.04.2010
Graeme Reid	Ex-Inner-city Office Director	30.04.2010
Brian Miller	Ithemba Property	03.05.2010
Kate Tissington	SERI/Ex-CALS	04.05.2010
Moray Hathorn	Webber Wentzel Pro Bono Division	04.05.2010
Lael Bethlehem	Managing Director of Johannesburg Development Agency	05.05.2010
Anonymous	Senior Official in City of Johannesburg: Inner-city	07.05.2010
Charles Beckenstrater	Lawyer Moodie and Robertson	10.05.2010
Greg Vermaak	Lawyer Moodie and Robertson	11.05.2010
Neil Fraser	Inner-city Expert	11.05.2010
Samantha Naidu	City of Johannesburg: Department of Housing	13.05.2010
Mary-Anne Munyembate	Head of Litigation: CALS	14.05.2010 27.08.2010
Karen Brits	City of Johannesburg: Legal Services	17.05.2010
Ruby Mathang	Councillor: City of Johannesburg	31.05.2010
Clinton Povall	Lawyer Moodie and Robertson	02.06.2010
Nelson Khetani	Head of San Jose Residents Committee	08.06.2010 01.10.2010 07.06.2012
Osmond Mngomezulu	Lawyer: Ex-CALS/SERI	09.06.2010
Leslie Magoro	City of Johannesburg: Department of Housing	10.06.2010
Anonymous	Senior Official: in City of Johannesburg: Legal Compliance	10.06.2010
Tanya Zack	Independent Consultant	17.06.2010
Renney Plitt	Director: AFHCO	25.06.2010

Isaiah Mahlobo	Secretary of San Jose Residents Committee	27.08.2010 01.10.2010
Jackie Dugard	Lawyer: Ex-CALS/SERI	01.09.2010
David Bilchitz	Director: South African Institute for Advanced Constitutional, Public, Human Rights, and International Law	03.09.2010
Ahmedi Vawda	Office of the President	09.09.2010
Renier Erasmus	Director: Madulomoho Housing Association	15.09.2010
Mpumi Kubheka	Project Manager: Gauteng Provincial Department of Local Government and Housing	16.09.2010
Rory Gallocher	Managing Director: JOSHCO	22.09.2010
Ros Greef	Councillor: City of Johannesburg	10.11.2010