LEGAL EMPOWERMENT IN INFORMAL SETTLEMENTS: LESSONS ON USING THE LAW TO OVERCOME URBAN EXCLUSION AND POVERTY IN THE GLOBAL SOUTH

Adrian Di Giovanni* & Luciana Bercovich†

* Senior Program Specialist, Law & Development, International Development Research Centre, Canada; LL.M. New York University; J.D. University of Toronto; B.A. McGill University.

† Network Manager, Legal Empowerment Network, Namati. Law degree from Universidad de Buenos Aires, Master's degree in Urban and Regional Development from Universitat Politècnica de Catalunya (UPC), MS in International Affairs and Development from the New School.

Legal empowerment provides an important set of strategies for using the law and human rights to confront urban poverty and exclusion, by putting communities at the center of holistic approaches to urban development. This paper's analysis draws on a series of legal empowerment experiences pursued by and on behalf of informal settlement dwellers in six cities in Africa and Latin America. From a legal perspective, the challenges of informal settlements are mostly framed in terms of a need to overcome informality. Legal empowerment's defining feature is in deploying a series of strategies and human rights guarantees to confront informality, beyond the classic roles of challenging incompatible or poorly implemented laws, to shift the power imbalances that shape informal settlement life. Additional lessons relate to the role of participation and the use of strategic litigation in spurring citizen-led legal advocacy and reforms. A range of strategies—purely political, technical, and legal—act to complement or clash with one another. Together they offer a picture of the law as a potential force for social change and development, which provides a normative anchor, but reflects the law's instrumental limits, if pursued in the absence of a larger set of socio-political strategies. Discussions regarding the right to the city help crystallize the interplay between the legal and socio-political spheres.

I. INTRODUCTION[1]

> "Informal settlements are often an incredible accomplishment, a profound expression of individuals, families and communities claiming their place and their right to housing. They are "habitats made by people," who are creating homes, culture and community life in the most adverse circumstances."[2]

In the Global South, informal settlements (e.g. slums, favelas) are a persistent development challenge, as countries continue to face population growth and rapid urbanization.[3]

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2. Leilani Farha (Special Rapporteur), Rep. on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, ¶ 13, U.N.Doc. A/73/310/Rev.1 (Sept. 19, 2018) (quoting Lorena Zárate, *They are Not "Informal Settlements"—They are Habitats Made by People*, THE NATURE OF CITIES (Apr. 26, 2016), https://perma.cc/RQ7E-CGE4) [hereinafter UNSR Housing].

3. *See* U.N. DEP'T ECON. & SOC. AFFS., POPULATION DIV., WORLD URBANIZATION PROSPECTS (2019), at 1, U.N.Doc. ST/ESA/SER.A/420, (estimating that fifty-five percent of the world's population lives in urban areas, which is

Twenty-five percent of the world's urban population lives in informal settlements, and that rate is rising to over half of the population in some cities in the Global South.[4] With homelessness, forced evictions, and urban expansion on the rise in virtually every country, urban poverty and exclusion stand to increase in the future. The development challenges posed by informal settlements, conditions of poverty, and vulnerability in urban centers around the world are complex and structural in nature. Solving them requires addressing several problems at once, which in essence are about ensuring "access" to affordable housing and tenure security; to health services, potable water,[5] and sanitation, which often link to larger environmental injustices; to livelihood and educational opportunities; and to public financing for related infrastructure and services, like electricity.[6] Added to that are perennial debates over how best to plan the world's ever-growing cities, especially with intensifying pressures of migration from rural areas, and how best to ensure equitable access to urban space to accommodate a diversity of social, cultural, and economic ways of life.

In a further range of contexts, residents suffer from public and institutional discrimination and stigmatization. The content and application of laws and policies, as well as the acts, decisions, and omissions of public authorities consequently drive or sustain the denial of a host of civil and political rights for the urban poor, including rights related to democratic citi-

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expected to increase to sixty-eight percent by 2050 (roughly 2.5 billion people) with close to ninety percent of this increase taking place in Asia and Africa).

4. Globally, there was a reduction from twenty-eight percent to twenty-three percent of urban populations living in informal settlements, from 2000 to 2014. The large majority, eighty percent are located in the global south: "Eastern and South-Eastern Asia (370 million), sub-Saharan Africa (238 million), and Central and Southern Asia (227 million)." *Id.*

5. *See generally* Loretta Muzondi, *Urban Development Planning for Sustainability: Urbanization and Informal Settlements in a Democratic South Africa*, 5 MEDITERRANEAN J. SOC. SCIS. 641–648 (2014) (analyzing how South Africa's new democratic government addressed informal settlement development as a consequence of growing urbanization).

6. *See* ASOCIACIÓN CIVIL POR LA IGUALDAD Y LA JUSTICIA (ACIJ), *A la luz de las desigualdades. Informe sobre la prestación discriminatoria del servicio de energía eléctrica en las villas de la ciudad* 11 (2010), https://acij.org.ar/wp-content/uploads/informe_de_electricidad.pdf (describing how a lack of basic services makes electricity vital to access clean water, gas, telephone service, healthcare and education).

zenship.[7] For instance, residents may face forced relocation or eviction, unlawful arrest or abuse by police, and are often driven to take up low paid, precarious, or exploitative work in the informal sector. In this sense, informal settlements often represent, by their very existence, an interrelated violation of human rights, which can generally be referred to as socio-spatial segregation.[8] The coronavirus pandemic and related lockdown measures, which struck as this Article was being finalized, brought to the fore the segregated realities of informal settlements with painful clarity, especially related to overcrowding and access to basic public services and guarantees.[9]

Against that backdrop, this Article shall argue that legal empowerment provides an important set of strategies for using the law and human rights to confront urban poverty and exclusion as part of a holistic approach to urban development. The language of legal empowerment first appeared towards the start of the twenty-first century to capture "the use of legal services and related development activities to increase disad-

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7. *See e.g.*, Magdalena Sepúlveda Carmona (Special Rapporteur), Rep. on Extreme Poverty and Human Rights, U.N. Doc. A/66/265 (Aug. 4, 2011), (arguing that poverty is a condition that is exacerbated and perpetuated by the state and undermines the freedoms and autonomy of those living in poverty).

8. ACIJ, DESAFIANDO A LA SEGREGACIÓN SOCIO-ESPACIAL EN GRANDES CIUDADES LATINOAMERICANAS: EMPODERAMIENTO LEGAL COMUNITARIO Y ACCESO A LA JUSTICIA – INFORME TÉCNICO FINAL [DISMANTLING SOCIO-SPATIAL SEGREGATION IN LARGE LATIN AMERICAN CITIES: COMMUNITY LEGAL EMPOWERMENT AND ACCESS TO JUSTICE – FINAL TECHNICAL REPORT] 54 (2020), https://perma.cc/5Z88-YZN5 [hereinafter ACIJ FINAL REPORT] define socio-spatial or socio-urban segregation, in brief, as the expression of an unequal social order that results in – and is the consequence of – structural inequality. *See* Leilani Farha (Special Rapporteur), Rep. on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, U.N. Doc. A/71/310 ¶ 15 (Aug. 8, 2016) [hereinafter UNSR Housing Indivisibility]. Yet as Susan Parnell and Edgar Pieterse argue, urban governance reforms have focused too much on political rights and representation and not enough on corresponding socio-economic rights. Susan Parnell & Edgar Pieterse, *The "Right to the City": Institutional Imperatives of a Developmental State*, 34 INT'L J. URB. & REG'L RSCH. 146–162, 148 (2010).

9. *See generally* Annie Wilkinson, *Local response in health emergencies: key considerations for addressing the COVID-19 pandemic in informal urban settlements*, ENV'T & URBANIZATION (2020) (highlighting the effects of the COVID-19 pandemic on public health in informal settlements).

vantaged populations' control over their lives."[10] Central to legal empowerment, in that sense, are efforts to support "the poor and excluded" to lead the "process of systemic change through which [they] become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens and economic actors."[11] Beyond the resolution of an individual or set of disputes, legal empowerment's use of the law and legal strategies ultimately seeks to shift the power imbalances that drive the denial of the rights of affected groups and the larger injustices they face in society. This analysis is based on promising experiences in informal settlements in Latin America and Africa. In particular, this Article draws on the findings and comparative lessons that emerged from a series of participatory action-research projects in over a dozen settlements in six cities: Accra, Buenos Aires, La Paz, Lagos, Nairobi, and Quito.[12] In different ways, those research projects deployed legal empowerment approaches with the aim of achieving a more dignified status and improved living conditions.

A comparative analysis of those experiences demonstrates how legal empowerment can contribute in unique ways to ad-

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10. Definitions, respectively, from Stephen Golub, *Beyond Rule of Law Orthodoxy* 25 (Carnegie Endowment for Int'l Peace, Working Paper No. 41, 2003) http://www.jstor.org/stable/resrep12751 (pioneering the term), and U.N. Comm'n on Legal Empowerment of the Poor, 1 Rep. on Making the Law Work for Everyone, at 5, (2008), https://perma.cc/9D3J-J7TW, which a U.N. General Assembly Resolution, G.A. Res. 64/133 ¶ 3 (July 13, 2009), later adopted when endorsing a report by the Secretary-General.

11. *Id.*, at 16.

12. Those case studies are part of a series of research projects funded by the International Development Research Centre (IDRC) which one of us has been directly involved in supporting, between 2013–20: in Argentina, Bolivia and Ecuador, IDRC, *Confronting urban segregation: Legal empowerment in Latin American cities (2016–19)*, https://perma.cc/PL6K-N7RU (last visited Sept. 24, 2021); IDRC, *Improving governance, voice and access to justice in Ghana's informal settlements (2016–20)*, https://perma.cc/JC4J-34UG (last visited Sept. 24, 2021); IDRC, *Unlocking the Poverty Penalty and Upscaling the Respect for Rights in Kenya's Informal Settlements (2013–15)*, https://perma.cc/Q3K8-YAMX (last visited Sept. 24, 2021); IDRC, *Unlocking the Poverty Penalty and Upscaling the Respect for Rights in Kenya's Informal Settlements (2013–15)*; IRDC, *Improving Access to Justice and Basic Services in the Informal Settlements of Nairobi (2016–19)*, https://perma.cc/7GBJ-27NJ (last visited Sept. 24, 2021); and IDRC, *Promoting Legal Empowerment of the Urban Poor in Nigeria through an Inter-City Community Paralegal Network (2019-)*, https://perma.cc/5WNF-2JLD (last visited Sept. 24, 2021).

dressing socio-spatial segregation in informal settlements. Each section below presents a complementary set of legal empowerment approaches, strategies, and tools which, taken together, form the holistic approach to addressing urban segregation that this Article argues for. For purposes of this discussion, the analysis focuses on informality, participation, and litigation. To set the stage, Section Two defines legal empowerment and the elements that are distinct to its use in poor urban settings. On one level, these elements are defined by the geographic or locational nature of problems, such as proximity and density of public institutions, with a greater emphasis on collective challenges and action—that is, human rights challenges that affect the settlements as a whole (e.g. poor access to water and sanitation) and not individual residents or disputes between two or a few residents. On a deeper level, a defining feature is how legal empowerment deploys human rights to confront informality—beyond more classic roles of securing greater recognition of residents' rights in the face of incompatible or poorly implemented laws. Fundamentally, legal empowerment seeks to shift the power imbalances that shape conditions in informal settlements, notably the tenuous and exclusionary legal and sociopolitical status of residents. Ideas of power imbalances or of leveling the playing field provide a thread that runs through this analysis at each step. Section Three then briefly describes the informal settlement case studies in six cities and the various research and legal empowerment approaches pursued in each. This section also outlines the different human rights, constitutional rights, and legal protections the research teams have deployed across the six contexts, including the 'right to the city.' A broad understanding of the right to housing as the right to "live somewhere in security, peace, and dignity" has been a starting point for many of the teams' efforts, building on greater advocacy by international and regional human rights institutions over the past few decades to frame the challenges posed by informal settlements in terms of human rights violations, and to prompt, improved public responses and accountability.[13]

Section Four revisits questions of informality, and depicts in more detail how the legal empowerment efforts, across con-

13. *See* UNSR Housing, *supra* note 2 (outlining measures for States to progressively realize the right to housing in settlement contexts).

texts, have sought to navigate between formality and informality or legality and illegality, in asserting the rights of residents. Resolving tensions in confronting informality is about more than changing laws and policies; it is also about who can define the rules of the game. Section Five examines lessons emerging from the case studies in promoting the participation and voices of residents. This Article argues that legal empowerment's rights-based approach, grounded in legal accountability, provides an important, albeit complementary set of strategies to help redress power imbalances that underlie the exclusion of urban poor populations from policy and decision-making processes affecting informal settlements, urban poverty, and planning more broadly. This rights-based approach stands in contrast to the more purely developmental or urbanist approaches.[14] Understanding the challenges in informal settlements in human rights terms, such as poor participation, shines a light on the corresponding obligations of the state at the municipal level or the obligations of any other national or public entity. Communities' demands for improved conditions, therefore, cannot be treated merely "as a socioeconomic policy aspiration," but must entail a corresponding guarantee to ensure "access to justice to hold states accountable" for any violations of residents' rights or for failures to take the necessary positive measures.[15] Yet, diagnosing the plight of the urban poor in human rights terms arguably restates the complexity of challenges.[16] In other words, there are important

14. Global commitments in the Sustainable Development Goals (SDGs), together with the New Urban Agenda adopted in Habitat III in 2016, reinforce the vision of urban matters as development issues. *See* G.A. Res. 71/256, The New Urban Agenda (Dec. 23, 2016) (recognizing the interrelation between urbanization and development, e.g., job creation, livelihood opportunities, and improved quality of life).

15. UNSR Housing Indivisibility, *supra* note 8, ¶ 5 (arguing for the right to housing in informal settlements "as a fundamental right which demands effective, rights-based responses and timely access to justice").

16. Though slightly beyond the scope of this Article, on one level there are a series of practical challenges to fulfilling human rights obligations, such as the magnitude of demands placed primarily on municipal governments, and constraints they face in delivering a wide range of basic services, public functions and obligations. *See* Michael Cohen, *Urban assistance and the material world: learning by doing at the World Bank*, 13 ENV'T & URBANIZATION 37, 42 (Apr. 1, 2001) (explaining the shifting patterns of urbanization, which leave cities and municipal authorities far more integrated in global-

limits to relying exclusively on human rights or other legal strategies for social and political change.

Section Six addresses those potential limits head-on when examining legal empowerment experiences in the use of litigation by and on behalf of informal settlement residents to assert their rights. A key insight of those experiences, this Article argues, is how they recognize a need to embed litigation and efforts to enforce judgments within a wider set of social and political strategies aimed at shifting power imbalances and overcoming socio-spatial segregation. Finally, this Article concludes by offering general recommendations on the need for a more holistic approach to addressing the complexity and diverse dimensions of urban segregation. Thus, legal empowerment can provide a way to articulate community mobilization and participation, litigation, and social accountability, recognizing both the potential and the limits of legal strategies, and understanding that, to overcome urban segregation, it is crucial to change power imbalances that determine how cities are shaped.

In seeking to capture the comparative lessons emerging from the case studies, this Article's goals are three-fold. First, its analysis aims to answer the call for deeper, systematic, and comparative evidence and lesson-sharing on legal empowerment, including for the more specialized themes and problem-areas, such as urban informal settlements.[17] Second, this Article aims to contribute to the articulation of a distinct place for legal empowerment as a field of legal study, by situating legal empowerment efforts within existing debates on law and social change, law and development, community-based lawyering, and public interest law advocacy. From a legal perspective, existing analysis of the law in relation to various urban develop-

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ized systems while also having much loftier expectations placed on them to address local challenges).

17. *See* Pilar Domingo & Tam O'Neil, *The politics of legal empowerment: legal mobilisation strategies and implications for development* 10 (2014), https://perma.cc/YU7N-JUHV (stressing the need for context-specificity as key to understanding the potential of legal empowerment); Lars Waldorf, *Legal Empowerment and Horizontal Inequalities after Conflict*, 55 J. DEV. STUD. 437, 441–42 (2019) (critiquing the community paralegal model); *see generally* Laura Goodwin & Vivek Maru, *What Do We Know about Legal Empowerment? Mapping the Evidence*, 9 HAGUE J. RULE L. 157 (2017) (reviewing the literature on legal empowerment).

ment challenges tends to focus on: the shortcomings of existing legal frameworks (e.g., planning laws, building standards, and property rights), the law as a tool to enable financing and investment, or the use of legal frameworks to overcome informality in its different forms.[18] Relatively little analysis exists, however, on the strategies settlement residents have deployed to achieve access to justice and ensure that legal protections, human rights or otherwise, respond to their needs and realities. Finally, speaking more modestly to urban development, this Article proposes an additional set of lessons and strategies to tackle socio-spatial segregation in informal settlements as part of a larger body of participatory, community-driven, and human rights-based approaches to urban development.[19]

The methodology for this study consists primarily of a qualitative analysis of six case studies which were supported by the International Development Research Centre. The study "took the form of a learning review rather than a more hypothesis-driven research," seeking to "capture, analyze, and distill" a common set of lessons from the primary findings of the participatory action-research projects.[20] This comparative analysis builds on a set of practice-oriented and policy lessons, which were cogenerated with members of the six case study teams, and other experts, through a precursor peer-to-peer exchange of emerging findings and past experiences, structured around a common set of questions.[21] Those questions and lessons pro-

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18. *See generally* ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES (Edesio Fernandes & Ann Varley eds., 1998) [hereinafter ILLEGAL CITIES] (examining the role of law in the process of urban change in informal settlements); PATRICK MCAUSLAN, BRINGING THE LAW BACK IN. ESSAYS IN LAND, LAW AND DEVELOPMENT (2003) (exploring causes of the "urban land problem" in developing countries; Matthew Glasser & Stephen Berrisford, *Urban Law: A Key to Accountable Urban Government and Effective Urban Service Delivery*, 6 WORLD BANK L. REV. 211 (2015) (addressing shortcomings in legal frameworks around services in informal urban areas).

19. In contrast to more purely self-help models, *see* Parnell & Pieterse, *supra* note 8, at 149–50.

20. Catherine Lyall et al., *The role of funding agencies in creating interdisciplinary knowledge*, 40 SCI. PUB. POL'Y 62, 63–64 (2013).

21. IDRC, *Promoting Legal Empowerment in Informal Settlements: Recommendations & Lessons Learned. IDRC Africa-Latin America Partners Workshop* (2018), https://perma.cc/JN5B-YZEZ [hereinafter IDRC Partners Note]. Our analysis also draws on insights from many years of front-line legal empowerment

vided a starting point to identify patterns for the more academic and contextual analysis of this study, which consisted of a comparative desk review of primary literature, interim research findings and reports, and policy and practice-oriented grey literature produced by the six project teams. The study drew on those questions as a basis for developing its conceptual framework and to prioritize the analyzed themes. A review of relevant academic and grey literature served to supplement the framework to locate this work within academic, policy, and practice-oriented debates concerning legal empowerment, human rights, and urban poverty interventions throughout the Global South. To validate the conclusions and descriptions of the case studies, earlier drafts were shared with the research teams for review and input. In comparing experiences across case studies, this Article at best offers a snapshot, given that a range of contextual factors, outside of the experiences, events, and actors it focuses on, will invariably have a bearing on the questions addressed. In that light, this Article's more modest goal is to provide an initial, comparative analysis of the efforts of the front-line researchers and advocates in the hopes that they can offer, in their own words, a deeper analysis of their experiences and lessons for the future.

II. The Distinctive Elements of Legal Empowerment in Informal Settlements and the Role of Human Rights Perspectives

Legal empowerment is a relatively new and flexible concept that continues to evolve and be re-defined with breakthroughs in its implementation in practice. More generally, it has contributed to a growing international shift towards people-centered approaches to access to justice, and away from predominantly institutional or court-centric approaches.[22] Peoples' legal problems and the mechanisms for solving them are the starting point, meaning that legal empowerment is

activism of one of us in Buenos Aires and more recently in supporting a network of legal empowerment organizations across Latin America.

22. For recent examples, see Task Force on Justice, *Justice for All – Final Report* (2019), https://perma.cc/54B8-2KXD (discussing the Task Force's efforts towards justice reforms that take a people-centered approach by understanding peoples' justice needs and designing solutions that respond to these needs).

mostly agnostic to a given institutional setup. Framed in this way, legal empowerment falls within a recent wave of experimentalist approaches to governance, which are characterized in terms of pursuing a set of outcomes through open-ended and iterative change processes, adapted to locally defined problems and institutional settings.[23] Over time, a range of definitions has emerged which casts legal empowerment's goals and methods in broader or narrower terms. The tighter definitions tend to emphasize supporting the agency and capacity of individuals to claim rights on a more case-by-case level, reflecting legal empowerment's community legal aid roots.[24] A broader conception of legal empowerment is oriented towards systemic change, and links efforts to addressing structural injustices, socio-economic barriers, and shifting power dynamics.[25] For purposes of this discussion and based on experiences across the informal settlement case studies, this Article adopts a broader conception of legal empowerment. This conception entails a less circumscribed set of activities, but nonetheless delineates a distinctive boundary between legal empowerment and the complementary efforts to tackle

23. *See, e.g.*, Matthew Andrews, Lant Pritchett & Michael Woolcock, *Escaping Capability Traps Through Problem-Driven Iterative Adaptation (PDIA)*, 51 WORLD DEV. 234 (2013) (proposing a community goal-oriented framework for projects, paired with a dynamic, ongoing dialogue between actors); Grainne de Burca, Robert Keohane & Charles Sabel, *Global Experimentalist Governance*, 44 BRIT. J. POLIT. SCI. 477 (2014) (setting out a definition of Global Experimentalist Governance as "an institutionalized process of participatory and multilevel collective problem solving" subject to revision in light of locally generated knowledge).

24. For a critique of narrower definitions, see, e.g., Magdalena Sepúlveda Carmona & Kate Donald, *Beyond legal empowerment: Improving access to justice from the human rights perspective*, 19 INT. J. HUM. RIGHTS 242 (2015), who see the Commission on Legal Empowerment's definition as over-prioritizing certain private rights (property, labour and business) while failing to engage directly with structural issues and power asymmetries.

25. In following this conception, we view as overstated a recent critique that broader conceptions blur the "boundary between what is and is not legal empowerment" and treat "legal empowerment as any activity that functions to support disadvantaged populations." Rachel M. Gisselquist, *Legal Empowerment and Group-Based Inequality*, 55 J. DEV. STUD. 333, 336 (2019). In short, efforts to link legal empowerment strategies to, or embed them within, a larger set of change processes need not be mistaken for a blurring or subsuming of those latter efforts.

structural problems like poverty and urban segregation.[26] It is imperative to be clear on the limits of the legal dimensions, which the analysis seeks to do when describing the approaches to informality, participation, and litigation below.

A. *The Distinctive Features of Legal Empowerment in Informal Settlements*

There are several common elements distinctive to legal empowerment in informal settlement contexts, as identified in the experiences across the case studies. The first overarching element, already alluded to, is legal empowerment's immediate targeting of collective and structural issues, notably the array of human rights violations suffered by informal settlement residents. The challenge at the structural level is to promote stronger social and urban integration, to improve the quality of life of residents, and overcome the visible markers that drive current narratives of stigmatization and prevent residents from exercising their citizenship and participating in society.[27] For instance, public policy responses aimed at providing access to services such as sanitation, electricity, or water, usually encompass all or part of a settlement by their nature and are not as effectively addressed through individual claims. From a practical standpoint, a basic insight guiding several of the case study efforts is that "achieving justice and legal solutions requires multidisciplinary research (lawyers, urban planners, finance specialists, and community organizers) and a mix of legal and nonlegal interventions."[28] The emphasis on collective struggles in informal settlements also shares strong affinities to community lawyering, which sees the need to move beyond atomized, depoliticized, or overly individualistic approaches to

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26. *See* Caroline Sage, Nicholas Menzies & Michael Woolcock, *Taking the Rules of the Game Seriously: Mainstreaming Justice in Development-The World Bank's Justice for the Poor Program* 5 (WBG, Working Paper No. 51845, 2009), https://perma.cc/XK5D-GFH8 (advocating a broad approach aimed at mainstreaming legal empowerment within larger development and sectoral interventions "as one part of the governance-and state-building agenda").

27. Christien Klaufus, *The Symbolic Dimension of Mobility: Architecture and Social Status Ecuadorian Informal Settlements*, 36 INT'L J. URB. & REG'L RSCH. 689, 695 (2012).

28. Jane Weru, Waikwa Wanyoike & Adrian Di Giovanni, *Confronting Complexity: Using Action-Research to Build Voice, Accountability, and Justice in Nairobi's Mukuru Informal Settlements*, 6 WORLD BANK L. REV. 233, 235 (2015).

legal support as essential to achieving systemic change.[29] Communities are at the center of these approaches: they are best positioned to understand the realities and injustices they face, and should therefore take the lead in any legal action and in defining their own political objectives. A difference with traditional legal advocacy is that community lawyering prioritizes helping to build the capacity, leadership, and power of communities more broadly, in contrast to a narrower focus on achieving legal victories.[30] This mix of goals will remerge in the discussion of litigation below.

A main set of challenges in pursuing structural change in informal settlements relates to how residents access public institutions, including justice institutions. Residents tend to live physically close to local governments, state agencies, and services providers' offices, yet nonetheless feel a symbolic distance or barrier. On one level, this distance arises because of the institutional complexity in urban settings. Municipal or local governments have gained an ever-larger set of roles and responsibilities in past decades.[31] At the same time, a range of powers and responsibilities also tend to be spread across multiple layers of overlapping or competing provincial or state juris-

29. Charles Elsesser, *Community lawyering: The Role of Lawyers in the Social Justice Movement*, 14 LOYOLA J. PUB. INTEREST L. 375, 376 (2013).

30. Taylor Healy & Aja G. Taylor, *Making the Case for Community Lawyering*, CLEARINGHOUSE ARTICLE (Nov. 2016), https://perma.cc/U5AY-H8DS (last visited Oct. 3, 2021), at 2. *See also* Christine Zuni Cruz, *[On The] Road Back in: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229, 240–41 (1999) (arguing community lawyering places greater emphasis on understanding and valuing the community's culture, which broadens the lawyer's perspective about non-legal forces, and enables the community to shape the legal strategies); Michael R. Diamond, *Community Lawyering: Introductory Thoughts on Theory and Practice*, 22 GEO. J. POVERTY L. POL'Y 395, 397 (2015) (arguing that community lawyers have, inter alia, a particular type of relationship with the clients, knowledge of their community and its leaders and suggesting a theory of how different political and legal actions can contribute to larger goals of improving the community's conditions).

31. *See* Stacey-Leigh Joseph, *Activating citizen engagement through the State of South African Cities People's Guide*, *in* 5 A BETTER WORLD 77–79 (2019) (arguing that large cities in the globalized world and under current models of development are experiencing power asymmetries with states, which will gain urgency in coming years, whereby local governments are called on to provide answers to big and structural challenges without having, many times, the resources and power to do so).

dictions, institutions, and related regulatory frameworks.[32] Policy approaches to urban poverty and planning have in some cases resulted in contradictory legal frameworks. For example, constitutional or international regulatory frameworks might oblige the state to guarantee the human rights of settlement residents, yet criminal and administrative legal frameworks frequently treat settlements and many of the activities of their residents as illegal. This tension between applicable legal frameworks is particularly clear with regard to the eviction and relocation processes.[33] Additionally, drastic changes in policy approaches are common, particularly with changes in government, which can hinder the long-term coherence needed for structural change. As a result, the pathway to seeking accountability is elusive and requires coordinating efforts across a complex network of institutional powers and capacities.[34]

From a tactical standpoint, in the face of the symbolic distance, legal empowerment efforts take advantage of the physical closeness between residents and public officials and institutions in urban contexts and combine an arguably broader and more flexible range of strategies. One set of strategies could be described in terms of political or social advocacy, with communities and residents mobilizing collective action and using their physical presence to exert pressure at institutions' offices and front doors through demonstrations and sit-ins, for example. Similarly, in advocating for change, groups recognize the need for larger coalitions, i.e. 'strength in numbers' strategies,

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32. For instance, on issues such as urban and land use planning, zoning, environmental regulation, public health, budgetary responsibilities, as well as public utilities, parastatal, private or public-private service-providers.

33. María Carman & María Paula Yacovino, *Transgrediendo el derecho de los que nos vulneran: Espacios ocupados y recuperados en la Ciudad de Buenos Aires*, 8 Rev. Arg. de Sociología 26, 31 (2007); Ayelén Amigo, Prof. of Pyschology, *Derecho a la vivienda y desalojos forzosos: legislación, discriminación y discursos en tensión*, *in* 1 Congreso Internacional de Investigación y Práctica Profesional en Psicología XVI Jornadas de Investigación Quinto Encuentro de Investigadores en Psicología del MERCOSUR 20, 21 (2009), available at https://perma.cc/3MP9-6VUF (last visited Oct. 15, 2021).

34. *See, e.g.*, Leilani Farha (Special Rapporteur), Rep. on the Right to Housing on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, UN Doc. A/HRC/28/62 ¶ 23 (Dec. 22, 2014) ("the challenge for local residents is to claim their rights within a complex web of regulatory schemes and decisions applied by an array of governmental actors").

to achieve a larger and effective voice by and on behalf of informal settlement residents (e.g., the media, non-governmental organizations, independent public institutions, and other pressure groups). Physical closeness is also used as a tool to raise societal awareness regarding the disparities in living conditions of informal settlement residents, who often live side-by-side with residents of the 'formal' city.

B. *Efforts to Confront Informality in Informal Settlements*

More profoundly, the symbolic wall experienced by settlement residents arises from the conceptualization of the informality that defines these settlements. Within the legal empowerment field, discussions of informality have generally centered on legal pluralism, largely in rural contexts, to understand how people use a range of customary or 'informal' mechanisms to access justice.[35] In urban contexts, questions of informality take on a distinct shape, however, because a common ethnic identity or customary justice system is less likely (the geographic space in the city is more often the decisive element shared by diverse populations) and due to the greater physical proximity of the institutions just described.[36] The image of an urban space divided into two separate cities—the formal city, or the city "with rights," and the informal city, lying outside of a recognized legal, institutional, and regulatory sphere—captures how residents experience informality.

Urban planning has long grappled with the latter, spatial notion of informality, but it arguably remains under-examined from a legal or human rights perspective, let alone in the context of legal empowerment. Traditionally, informality has been conceived in more binary terms, in much the same way that the image of two urban spheres evokes. From that perspective, law and legal empowerment play a key role in bridging these two spheres to enable secure or 'legal' recognition and inte-

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35. Brian Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYD. L. REV. 375 (2007) (surveying the history of legal pluralism and suggesting conception approaches).

36. These distinctions are not strict. In Nigeria, Ghana and Bolivia, the teams cite instances where land tenure status was traditionally derived from customary or indigenous authority, which has later created insecurity of tenure over time as the city expanded – literally engulfing what were rural villages or settlements. MCAUSLAN, *supra* note 18, at 7 (describing different land systems).

gration of informal settlements, residents, and their various rights in the 'formal city,' while also respecting the collective cultural and social identity of those neighborhoods. The straightforward approach to informality arises in several ways, for instance, when appealing to constitutional rights to housing or other legal and regulatory guarantees in a protective function, to prevent evictions, to gain more secure longer-term recognition of settlements, and to compel government action to provide better access to services like sanitation and health.[37] In reality, however, the neat separation between spheres quickly collapses. From a legal perspective, a clear and orderly hierarchy of laws is in many cases not easily identifiable to resolve competing claims (i.e. between *de jure* provisions and efforts to gain recognition of informal realities grounded in rights or other legal claims). Emphasizing the 'bridging' function in this sense risks an inherent bias towards the formal as the ideal state of affairs to achieve.[38] This bias is witnessed in urban policy approaches that treat the informal sphere as "unplannable" or a "nuisance" and is at the root of much of the stigma against residents living in "poverty" or squalor.[39] The use of laws, including criminal sanctions, and the language of "beautification" or "decongestion" accompanying policies to address (or essentially eliminate) urban informality typifies such a bias.[40] Fernandes and Varley caution that hold-

37. From the case studies, groups have mobilized those efforts respectively in (i) Accra, Nairobi, Buenos Aires, Lagos; (ii) LaPaz, Nairobi; (iii) Buenos Aires, Nairobi. Relevant regulatory or administrative laws here would relate, for instance, to urban planning (Quito), environmental protection (Buenos Aires), public health (Nairobi) and land administration (Quito, Nairobi).

38. Nicola Banks, Melanie Lombard & Diana Mitlin, *Urban Informality as a Site of Critical Analysis*, 56 J. DEV. STUD. 223, 225 (2020) ("the hierarchy of 'formal' as the norm and 'informal' as abnormal and/or inferior has underpinned repressive policy responses"). *See* Zárate, *supra* note 2 (noting how the term "informal" fails to capture a range and diversity of settlements, conditions of exclusion in them and their relevance and location within cities, resulting in a tendency to be uncritical of formal spaces).

39. *See generally* Ananya Roy, *Urban Informality: Toward an Epistemology of Planning*, 71 J. AM. PLAN. ASS'N 147 (2005) (highlighting the challenges of managing spaces of poverty and emphasizing perceptions of informal spaces as unplannable or a nuisance); MCAUSLAN, *supra* note 18, at 143 (discussing "nuisance" and law impeding ordinary people's efforts to access housing).

40. From the case studies that bias is seen in Lagos and Accra, and with failure to include informal settlements in the Nairobi Master Urban Plan.

ing too closely to the formal as more the "norm" than the exception risks mistakenly viewing "the state as a neutral agent in charge of protecting the public good and social welfare" thus failing to understand the "social reality" that by design or incapacity "deviat[es] from official law perspective."[41] The relationship between the formal and informal spheres is thus more appropriately described as intertwined.

C. *Use of Human Rights in Informal Settlements*

The human rights framework (within domestic or international law) provides a crucial source of norms and legal protections to confront these shifting conceptions of informality. In the absence of more supportive legislation, legal empowerment groups have appealed to human rights to advocate for the legitimacy and legality of existing "illegal" settlement realities, or to underpin advocacy to improve existing legal protections, especially in contexts in which public officials view the reality of the settlements in a simplified and binary (i.e. formality-informality or legality-illegality) way. The normative value of human rights also derives from the international responsibility of the state which, in some contexts, can contribute to tipping the scale towards the inhabitants' rights, or creating the basis for grounding a claim where none other exists. Lastly, using a human rights narrative to frame the situation of

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Weru et al., *supra* note 28, at 235. To be sure, international development tends to emphasize "formal institutions as the crucial factor in development success, with informal rules and practices playing at best a secondary and often anti-developmental role", which betrays a "cookie-cutter" or one-size-fits-all mindset to institutional reform. Tom Goodfellow, *Political Informality: Deals, Trust Networks, and the Negotiation of Value in the Urban Realm*, 56 J. DEV. STUD. 278, 281 (2020). *See* MATT ANDREWS, LANT PRITCHETT & MICHAEL WOOLCOCK, BUILDING STATE CAPABILITY: EVIDENCE, ANALYSIS, ACTION 4–5 (2017).

41. ILLEGAL CITIES, *supra* note 18, at 9. MCAUSLAN, *supra* note 18, at 139 (highlighting law as "not a neutral instrument"); Jean-Louis van Gelder, *Paradoxes of Urban Housing Informality in the Developing World: Paradoxes of Housing Informality*, 47 L. SOC. REV. 493, 496 (2013) [hereinafter van Gelder 2013] (taking the "official law as the point of departure," thus risks begging the question, and mischaracterizing the challenges residents face as "victims" of the law); James Holston, *The Misrule of Law: Land and Usurpation in Brazil*, 33 COMP. STUD. SOC. HIST. 695, 722 (1991); Goodfellow, *supra* note 40, at 290 (also using language of victims). *See also* UNSR Housing, *supra* note 2, ¶ 6 ("[i]nformality is a response to exclusionary formal systems").

informal settlements can also have symbolic effects and contribute to generating greater support and sympathy in society. The deeper role of human rights in providing a normative framework, arguably, is to complexify positions about informality across contexts. As a set of standards or guidelines to integrate informal settlements into the formal "city with rights," human rights are conditioned on respecting the identity and preferences of the community and guaranteeing their active participation in the urban integration process. As the team in Argentina notes, informality has two faces: the solidarity and efforts of communities to auto-construct housing and urban spaces, but also the grave urban inequalities that urban spaces too often represent and perpetuate.

Our emphasis on human rights reflects the strategies pursued across the case studies and how the teams and the residents themselves define the challenges they have confronted. However, as seen in the next section, the extent to which those rights are recognized varies across the analyzed countries, as does the ability for groups to assert a range of claims and engage with public officials. Moreover, to echo legal scholar Daniel Brinks, the challenge is not simply one of access to institutions and rights, but in the ability to shape those institutions and rights and contest outcomes once residents manage to lower the barrier to access.[42] In other words, the role of human rights stretches beyond doctrine to questions of how residents can shape the content and application of laws. Those questions, in turn, are fundamentally about state-society relationships and the power dynamics that govern them. Indeed, the stronger constitutional guarantees in some contexts reflect a pre-existing shift in those relationships, premised on ensuring greater political, social, and economic inclusion for citizens—especially those who have not previously benefited from ameliorative public policies. Constitutional protections, in this sense, contribute to the foundational ideal of human rights of "leveling the playing field" by mediating power dynamics and shaping inclusive terms of engagement. From that perspective, the crucial role of legal empowerment strategies in informal settlements is in how they contribute to confronting and shifting the power imbalances that drive the exclusion or segrega-

42. Daniel M. Brinks, *Access to What? Legal Agency and Access to Justice for Indigenous Peoples in Latin America*, 55 J. DEV. STUD. 348, 348–49 (2019).

tion from public life that residents experience.[43] These strategies are essential for residents to give life on the ground to "the transformative capacities of rights."[44] This Article argues that the effectiveness of such strategies is their ability to move constantly in and out of the formal and informal spheres, and to mediate various inherent tensions between them. This strand of analysis will resurface in the more detailed discussion of informality in Section Four and extends to how the use of participation and litigation with informal settlement communities is understood.

Finally, the "right to the city" emerges from this analysis as an umbrella concept that helps capture the various approaches and goals of legal empowerment efforts in informal settlements. Although it remains an emerging, contested, and largely political concept, the right to the city makes explicit the interdependence of rights that underpin the realities and complexities of urban life—political, civil, economic, social, cultural, and environmental rights—and as a "collective right invokes by necessity the need for collective action, solidarity, and new forms of alliances between different stakeholder groups within society."[45] It calls for a multidisciplinary, holistic, and integrated approach grounded in firm legal guarantees on the one hand, but serves to articulate large collective and democratic aspirations, on the other hand. Social movements and urban poor organizations have embraced and mobilized this in support of a robust range of advocacy strategies as a normative standard for public policy.

To understand the different ways in which the case study teams have attempted to mobilize legal empowerment to assert a range of rights and level the playing field, through both a holistic and multidisciplinary approach, this Article first turns to the actors and contexts in these six case studies.

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43. For broad definitions emphasizing power dynamics, see Domingo & O'Neil, *supra* note 17, at 8, and Golub, *supra* note 10, at 29.

44. ACIJ FINAL REPORT, *supra* note 8, at 11 (noting this "participatory perspective moves away from traditional views of law that see conflicts being resolved by technicians (lawyers, judges, etc.) and not the communities themselves") (authors' translation).

45. GLOBAL PLATFORM FOR THE RIGHT TO THE CITY, MOVING TOWARD THE IMPLEMENTATION OF THE RIGHT TO THE CITY IN LATIN AMERICA AND INTERNATIONALLY (2015) 138 [hereinafter GLOBAL PLATFORM].

III. Case Study Contexts, Legal Frameworks, and Legal Empowerment Strategies

The experiences from the six research contexts analyzed here—three in Latin America and three in Africa—emerge from a series of participatory-action research projects. In different ways, those projects sought to integrate data collection and lesson-learning alongside legal empowerment interventions that the project teams pursued with community members.[46] The six research contexts, while each distinct, share similar characteristics typically associated with informal settlements. Consistent with U.N. Habitat's definition, residents lack "security of tenure vis-à-vis the land or dwellings," which can range from "squatting to informal rental housing"; lacking or being "cut off from basic services and city infrastructure"; and, for the most part, non-compliance "with current planning and building regulations" in settlements that are "often situated in geographically and environmentally hazardous areas."[47] Poor access to water stands out as a challenge shared across the six settlement contexts, with access to toilets and proper sanitation being particularly scarce in the African contexts. Women and girls face a heightened risk of sexual violence, especially at night when needing to access services outside of the home, which reflects the deeper gender discrimination within each society. Communities also live with environmental hazards and a lack of public waste collection. Finally, across research contexts, residents generally lack an awareness of the rights and mechanisms that would ostensibly protect them from the challenges in the settlements.

A. *Latin American Projects*

The research in Buenos Aires, La Paz, and Quito was part of a larger comparative project that shared a common conceptual framing and a set of overarching questions. Together, the three studies sought to understand how the strategies to promote legal empowerment and access to justice of informal set-

46. The respective research teams employed different combinations of qualitative and quantitative research methodologies. A deeper description of each is beyond the scope of this paper.

47. U.N. Conference on Housing and Sustainable Development, *22 Habitat III Issue Papers: Informal Settlements* (May 31, 2015), https://perma.cc/7TTC-QQEL, at 1.

tlement communities can reinforce, or come into tension with, community mobilization or collective action, in efforts to overcome socio-spatial segregation and the consequential violation of human rights. In essence, the research sought to bring together three disparate fields of inquiry on socio-spatial segregation, community mobilization, and legal empowerment.

In BUENOS AIRES, ARGENTINA, the Asociación Civil por la Igualdad y la Justicia (ACIJ) coordinated the larger project and led the research. Buenos Aires hosts close to forty informal settlements (*villas*), amounting to ten percent of the city's population concentrated on the city's periphery.[48] As a starting point, ACIJ sought to systematize in-depth lessons from its more than fifteen years of work in defending the right to housing, urban inclusion, and the participation of *villas*' residents in decisions affecting their lives. ACIJ's long track-record served as a reference point, in some respects, for the studies in La Paz and Quito, where public recognition of residents' human rights in urban policy and administrative processes was relatively novel, as were the teams' attempts to introduce legal empowerment approaches to the informal settlement contexts.[49] The types of tools ACIJ has used over time included strategic litigation, advocacy on public policies and legislation, development of public awareness and communication materials, free legal aid, popular education, and technical assistance in participation roundtables. A main takeaway from the retrospective analysis is how ACIJ's efforts contributed to a progression from the inception of Buenos Aires' constitution of specific demands for access to public services and access to information, to more systemic changes like shaping laws and formalizing the status of communities in decision-making processes. The team noted a growing public receptivity or normalization in addressing urban poor demands over time, culminating in the redevelopment of four *villas* in 2016 along with a series of public institutions focused on *villas* and the safeguarding of human rights and access to justice for the urban poor.[50] The participatory-action component of the re-

48. ACIJ FINAL REPORT, *supra* note 8, at 16.

49. *Id.* at 19.

50. A main reason has been the City's constitution, which not only incorporates the right to housing, but details the kind of public policies that must

search involved analyzing the use of legal empowerment tools to support three informal settlements in and around Buenos Aires named Villa Inflamable, Villa 31-31bis, and Villa 20, which ACIJ had supported over several years. The latter two *villas* are emblematic, due to their proximity to the wealthiest neighborhoods in the city, and a long history of community organization and struggle, which has gradually formalized around internal representative bodies and public consultative processes. Community organization is more incipient in Villa Inflamable, which is facing the prospect of a judicially ordered relocation, for which its rights have been upheld, under the "Mendoza" case.[51]

In La Paz, Bolivia, ongoing mass migrations from rural areas and urban peripheries to the city contribute to land and housing struggles and poor tenure security. As a result, residents of informal settlements regularly face forced evictions and threats to their safety. The research and legal empowerment efforts in La Paz have focused on a settlement in what is known as the Alto Pura Pura III Sector. Fundación Construir, a non-governmental organization, has been supporting the efforts of grassroots organizations in the settlement, along with input from researchers at Universidad Mayor de San Andrés. Their efforts have targeted three different dimensions. First, the team has worked to secure recognition of the community's legal personality, a precondition to gain access to basic services provided by the municipal and national governments. Second, building upon more than seven years of struggle by residents,

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be developed to make it effective, including specifications for *villas*. Constitución de la Ciudad Autónoma de Buenos Aires, Oct. 10, 1996, Art. 31 (Arg.). In recent years, the city passed a series of laws, specific to individual Villas (1-11-14, 20, 31-31 bis) or of general application (Ley 148) to give priority to social, housing and other redevelopment needs. Law No. 403, June 8, 2000, B.O.C.B.A. 984 (Arg.) (Villa 1-11-14); Law No. 5705, Nov. 24, 2016, B.O.C.B.A. 5048 (Arg.) (Villa 20); Law No. 3342, Dec. 3, 2009, B.O.C.B.A. 3358 (Arg.) (Villas 31 and 31 bis); Law No. 148, Dec. 30, 1998, B.O.C.B.A. 621 (Arg.) (law of general application).

51. That case is a 2008 Supreme Court judgment against the National State, the Province of Buenos Aires, the Autonomous City of Buenos Aires and 44 companies, ordering clean-up of and compensation arising from pollution of the Matanza-Riachuelo basin. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 08/06/2008, "Mendoza Beatriz Silva c. República Argentina / daños," M-1569-XL, available at https://perma.cc/Q2S9-5STQ.

the team provided legal assistance and accompanied residents to meetings with public officials, in an effort to regularize their land tenure.[52] Third, Fundación Construir participated in a process to develop a national policy for the integrated development of cities ("Política Nacional de Desarrollo Integral de Ciudades") organized by U.N. Habitat and the Vice Ministry of Housing and Urbanism. The team advocated for the inclusion of a human rights perspective and the input of grassroots organizations and informal settlement residents. These efforts to defend human rights through more formal and legal channels arguably represent, on some level, a departure from a long-held tradition of popular, non-institutionalized participation in Bolivia, through large-scale social mobilization—the so-called "fight in the streets" by marginalized groups such as peasant, indigenous, and afro-Bolivian communities.[53]

The Centro Andino de Acción Popular, a non-governmental organization, has led the research in QUITO AND CUTUGLAGUA, ECUADOR, alongside researchers from the Department of Urban and Political Studies at FLACSO University (Ecuador). Over the last half century, urbanization has caused one of the largest transformations in Ecuador, with a dramatic rise of the population living in cities from less than thirty percent in 1950, to over seventy percent in 2001. Over 750 informal settlements were registered in Quito in 2014, with a majority of new constructions built without city approval. As part of its action-oriented efforts, the team worked closely with neighborhood associations in Cutuglagua, on Quito's outskirts, to support efforts to improve conditions in neighborhoods and

52. Their struggle originated following "sale" of the lands from an individual who was not the actual owner.

53. NATALY VIVIANA VARGAS GAMBOA, *La participación de los asentados irregulares: la lucha por los derechos* (2016) (on file with author) at 9, tracing such trends back to a legacy of colonial domination. Protests reached a peak in the 1990s, when thousands of people took to the streets, leading to the birth of the Plurinational State of Bolivia. *See generally* Blanca Soledad Fernández & Florencia Puente, *Configuración y demandas de los movimientos sociales hacia la Asamblea Constituyente en Bolivia y Ecuador*, 44 ÍCONOS REV. CIENCIAS SOCIALES 49 (2012) (comparing Bolivian and Ecuadorian indigenous organizations within their sociopolitical context). In late 2019, large protests again led to a change in power following contested election results. *See, e.g.*, *Bolivia crisis: New elections proposed as violence rages*, BBC NEWS (NOV. 21, 2019), https://perma.cc/J78U-23JR.

gain formal recognition of land ownership.[54] One significant legal empowerment tool has been the development of neighborhood agendas (known as "*Agenda Barrial*") by different neighborhood improvement committees ("*Comité Pro-Mejoras*"). These *Agendas Barriales* aim to help residents articulate a roadmap to claim, enhance, and structure their participation in established municipal participation channels, which are provided by national and municipal laws. To reinforce those efforts, the team conducted a series of activities through a network of neighborhood leaders aimed at raising community members' awareness of urban development and their rights and access to justice. Subsequently, residents in two neighborhoods worked with their *Comité Pro-Mejoras* to develop petitions to local authorities to claim various rights and protections related to access to basic services, notably water.

B. *African Projects*

The experiences in Kenya, Ghana, and Nigeria emerged from separate research projects. A unifying trait across them has been the direct participation of the local federations of the Slum/Shack Dwellers International (SDI) network. Their involvement has helped ensure that research was firmly embedded in existing grassroots community advocacy, and that residents and community organizations actively participated in research activities.

In NAIROBI, KENYA, Akiba Mashinani Trust (AMT) led the research and legal empowerment efforts in the Mukuru informal settlement, alongside Muungano wa Wanavijiji (the Kenyan federation of slum dwellers and urban poor people). The project built on many years of advocacy, on behalf of informal settlement residents in Kenya, and brought together a larger multidisciplinary research consortium involving the University of Nairobi's School of Urban Planning, Strathmore University's School of Finance, the Katiba Institute, Slum Dwellers International (SDI) Kenya, and the University of California, Berkeley. Mukuru is one of the 150 informal settlements that together host over half of Nairobi's population.

54. An initial research phase comprised a social, political and historical analysis of the status and development of informal settlements in Quitumbe and Turubamba in Quito's metropolitan district, and on its periphery in Cutuglagua in Mejía canton.

Spread out over almost 700 acres, Mukuru is home to an estimated 400,000 residents or about 100,000 households—which equates to approximately ten percent of greater Nairobi's population on only 0.5 percent of its developable land. Access to housing and utilities (i.e. water, electricity, sewage) is largely controlled by layers of cartels who charge extortionate rates. A distinctive element of the Mukuru settlements is that they are located largely on privately-owned lands. As a result, Mukuru has not benefited from the various large, international donor-financed upgrading programs in other well-known settlements like Kibera and Korogocho that are located on public lands (though the success, transparency, and community buy-in of these programs are debatable). In 2012, AMT and its partners secured a court order that put a freeze on evictions in Mukuru pending the outcome of a larger challenge to the privately held land titles in Mukuru. The freeze in evictions enabled AMT to initiate research alongside a larger set of legal and policy engagement efforts. Novel findings on the "poverty penalty" and governance dynamics (e.g. informal markets for services like water and electricity, housing and land) were key to building inroads with municipal officials and moving beyond case-by-case advocacy efforts and developing a holistic set of solutions.[55] Those efforts culminated in the declaration by the Nairobi County government of a Special Planning Area in August 2017, which froze development in Mukuru and triggered a process to create an Integrated Plan for the re-development of Mukuru.

In Accra, Ghana, project efforts have focused on three informal settlements: Agbogbloshie, Madina Zongo, and Chorkor-Chemuana ('Chorkor'). Agbogbloshie and Madina Zongo are both adjacent to large informal markets and trading centers in central Accra. They have diverse populations, the majority of which are migrant traders from across Ghana and neighboring countries like Cote d'Ivoire, Togo, and Nigeria. Residents in both settlements report a fear of evictions by city authorities due to policies targeting "decongestion" of the

55. The team adopted "poverty penalty" to capture the rates residents pay for squalid and unsafe services, like water, electricity, and housing, which are in some cases two to three times more expensive than in formal, wealthier neighbourhoods.

city or poor respect for building code standards.[56] Chorkor is an indigenous, seaside community southwest of Accra, largely made up of fishers and food vendors, and generally lacking in most basic infrastructure and housing. A multidisciplinary team comprised of the Land Resource Management Centre (LRMC), a non-governmental organization, the People's Dialogue on Human Settlement (an SDI federation), and the Faculty of Built Environment and the Faculty of Law at the Kwame Nkrumah University of Science and Technology (KNUST) has led the research. In its first period, the team diagnosed various governance and justice challenges in the settlements, which included: poor to no community participation in urban planning and development decisions; lack of community mobilization structures to ensure better engagement with public authorities; limited knowledge by residents of their rights, planning and development regulations, or their pathways to access justice; and poor tenure security. Aiming to move beyond ad hoc or reactive responses to those challenges, the team developed context-appropriate legal empowerment training tools and conducted information sessions to raise residents' awareness about their rights and access to justice mechanisms. In parallel, the team worked with residents in each settlement to establish governance committees, building on existing community structures, to improve their engagement with public authorities and participation in decision-making processes. To date, these committees have progressed well in Agbogbloshie and Chorkor, though in Madina Zongo efforts to establish a committee stalled due to partisan political divisions among residents. As for direct court actions, in August 2018, residents and members of the project team successfully prevented the demolition by the Accra Municipal Authority of around 1,800 buildings through a court order as part of efforts to relocate the Agbogbloshie market.

In Lagos and Port Harcourt, Nigeria, the challenges for settlement residents are arguably most acute in magnitude due to the closed, hostile space for policy dialogue and re-

56. *See* Aba Crentsil & George Owusu, *Accra's Decongestion Policy: Another Face of Urban Clearance or Bulldozing Approach?*, 10 Int'l Dev. Pol'y 213 (2018) (providing a more detailed discussion of the decongestion policies).

form.[57] Justice and Empowerment Initiatives (JEI), a civil society organization, is leading a multidisciplinary team of researchers from universities in Lagos, the United States, and the United Kingdom. Settlement residents will co-produce the research, which is in its early stages. Many residents are caught in a "poverty trap" of marginalization and insecurity.[58] Beyond a lack of access to basic services and tenure security, these largely waterfront communities face discrimination, unlawful evictions and arrests, and threats of force and violence, notably from police and state security forces.[59] The settlements are home to many ethnic minorities and urban migrants from across Nigeria and beyond, who are particularly vulnerable to social and political exclusion. State-level policy responses are often formulated in terms of urban "beautification" or decongestion, or are in support of public-private ventures benefiting higher socio-economic populations.[60] In response to such obstacles, JEI established an inter-city paralegal network, which provides grassroots legal support to informal settlement residents, such as rights awareness building among residents, assistance with disputes, and assistance with community-wide challenges (e.g. access to services and forced evictions). Where necessary, lawyers also work with paralegals to bring litigation. In one notable case, JEI secured an injunction to prevent a series of demolitions of Otodo Gbame, a traditional fishing community. The governor of Lagos defied this injunction, however, demolishing an estimated 30,000 families' houses. Plans for research will proceed along several tracks, all with the aim of generating much needed evidence to address re-

57. Upwards of two thirds of the urban populations live in informal settlements, representing the largest informal settlement population by country in Africa. WORLD BANK, FEDERAL REPUBLIC OF NIGERIA: SLUM UPGRADING, INVOLUNTARY RESETTLEMENT, LAND AND HOUSING, at vi (June 23, 2015), https://perma.cc/EU4D-9QWJ.

58. Language of "poverty trap" is from the research team and is also used by the World Bank. *Id.* at 10.

59. UNSR Housing, *supra* note 2, ¶¶ 105–106.

60. A 2010 urban planning law in Lagos, e.g., granted public authorities retroactive powers to demolish informal settlements that contravene planning laws, leading to demolition of an informal settlement that was home to 85,000 residents. Akinola Akintayo, *Planning law versus the right of the poor to adequate housing: A progressive assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law of 2010*, 14 AFR. HUM. RTS. L.J. 553, 575–76 (2014).

sidents' justice challenges and understand their links to perpetuating the poverty trap. The larger aim is to improve public awareness and perceptions about those challenges, and foster collaboration between urban poor communities, civil society, and the government.

C. *Comparing How The Constitutional Recognition of Rights Frames Legal Empowerment Experiences*

Unsurprisingly, the legal frameworks in the case study countries and cities play an important role in shaping the opportunities or obstacles for informal settlement populations and, in turn, the legal empowerment strategies that groups identify as most relevant at a given moment. Within both Latin America and Africa there has been regional recognition of the right to housing with respect to informal settlements, which buttresses the national level protections, for instance, through the Inter-American Commission on Human Rights and the African Court on Human Rights. Inspiration has also been taken from jurisprudence in other countries, notably South Africa, with trailblazing cases such as *Grootboom*, *Port Elizabeth,* and further afield in India, the *Olga Tellis*, and subsequent cases.

At the national level, constitutional protections, especially in guaranteeing social and economic rights—which include the right to housing—play a crucial role, to varying degrees. The constitutions of Argentina, Bolivia, Ecuador, and Kenya explicitly guarantee the right to housing, which extends to the constitution of the city of Buenos Aires in the case of Argentina under its federal system. In Bolivia, Ecuador, and Kenya, the recognition of those rights is more recent, under relatively new constitutions. However, the experiences of groups making use of these newer protections as part of larger legal empowerment efforts differs somewhat. Experiences in Kenya arguably mirror those in Argentina, where there is a similar and longer-established tradition of public interest litigation. Constitutional protections thus are used both as protective instruments to prevent evictions and forced displacement, and to assert positive claims to access various rights and entitlements, such as access to basic services and the upgrading of living conditions. While the jurisprudence remains somewhat nascent in Kenya, a range of courts in Argentina have ruled in favor of informal settlement residents concerning access to public ser-

vices relating to water and sanitation, electrical hazards, and redevelopment and relocation. In Ecuador and Bolivia, there appears to be less of a tradition or familiarity for mobilizing constitutional rights to address urban or other development challenges. The constitutional protections are relatively untested and many open questions remain about how they should be expressed in practice and bridge the gap between the "laws on the books" and the realities experienced by informal settlement residents. Those questions take on added intrigue in the case of Ecuador, since it is among the Latin American countries and cities that has enacted the "right to the city" as a legal guarantee. Its constitution frames the right in terms of the Quecha community-centric worldview of *sumak kawsay* or *buen vivir*, which invokes a social coexistence that safeguards the rights of nature based on inclusion, equality, and sustainable development.[61]

In Ghana, recognition of social and economic rights under the Constitution is a relatively recent development, and results from the Court's interpretation of the Constitution's Directive Principles related to economic and social rights. Despite these developments in jurisprudence, however, advocates in Ghana appear to have been slow in appreciating or taking advantage of these new protections. Finally, the Constitution in Nigeria contains similar Directive Principles regarding social and economic rights that would apply to informal settlements contexts, but clearly states that the Principles are nonjusticiable. The courts have repeatedly confirmed that interpretation and rejected attempts to assert that the rights contained in the Principles should be justiciable based on international human rights treaties, in particular, the African Charter on Human Rights. As a result, the teams in Nigeria essentially face the double challenge of gaining a foothold for rights claims, as well as the subsequent step of upholding those rights. In the face of such obstacles in domestic law, they nonetheless see potential in appealing to regional bodies like the Economic Community of West African States tribunal, as of yet an untested venue. Absent more supportive language in domestic law, the team appealed to foundational concepts of human rights, with mixed success in marshalling creative legal arguments to secure court orders to protect residents. These

61. ACIJ FINAL REPORT, *supra* note 8, at 57.

strategies take on added importance because, as noted, many existing laws and policies drive the exclusion and insecurity experienced by informal settlement residents. With these basic contextual elements in hand, this Article turns to a more in-depth description of how the legal empowerment experiences in these cities have confronted informality, participation, and litigation.

IV. Reframing Informality as Power Imbalances: Legal Empowerment Experiences in Navigating the Tensions between Law and Informality

These case studies illustrate the deeply intertwined relationship between formal and informal spheres, specifically, how the study teams engage with informality in more complex ways than merely bridging the spheres.[62] The most common situations that arose in the case studies were with the teams' respective efforts to improve the security of housing, by pushing governments to officially recognize settlements and fulfill obligations to provide essential services and infrastructure. Instances of "squatters" are instructive, in that respect, and all of the case studies include situations where residents and communities occupied private or public lands to which they formally did not have any claim. A tension in those situations is that, despite their ostensibly irregular status and initial act of "illegality," or violation of property rights under the formal system, residents generally seek security of tenure and formalized recognition of their status on the lands.[63] Court orders to prevent evictions or displacement—as seen in Nairobi, Lagos, Accra, and Buenos Aires (Villa 31, Villa Rodrigo Bueno)—alongside efforts to gain formal recognition of settlements under municipal law, as undertaken in Quito, La Paz, and Buenos Aires, are some of the incremental steps groups have pursued

62. A systematic discussion of different notions of informality, which "as a generic concept has been defined in innumerable ways over the past five decades," Goodfellow, *supra* note 40, at 3, is beyond the scope of this paper. Based on a review of literature, conceptions are relied on that better represent how informality appears in different legal empowerment efforts, without presuming to resolve in any way larger debates within urban studies on how best to characterise it.

63. Jean-Louis van Gelder, *Tales of Deviance and Control: On Space, Rules, and Law in Squatter Settlements*, 44 Law & Soc'y Rev. 239, 254 (2010); van Gelder 2013, *supra* note 41, at 496.

to assert claims, generally relying on constitutional or human rights to housing. The additional tension in those instances is that efforts to uphold the rights of residents could be characterized, on the one hand, as efforts to strengthen the rule of law. On the other hand, regularizing or legitimizing the status of residents on the settlement lands, in one form or another, could be seen as undermining the respect for the rule of law, since the original encroachments were, formally speaking, illegal.[64] A related tension arising in some contexts within the formal system is the reconciliation of competing claims to public-oriented rights like housing, and to constitutional protections of private property rights.[65]

A similar dynamic of seeking to formalize what are initially non-conforming conditions arises within urban local laws and their planning and building standards. The challenge posed in these situations, on the one hand, is that bringing existing buildings and services into conformity with formal standards might not be immediately practical or affordable. On the other hand, advocating for recognition of standards that fall below existing standards could entrench a two-tiered system, where poorer communities can only expect less than ideal conditions which could pose challenges for tenants. At the same time, bringing conditions up to standard could carry the risk of displacing residents by gentrifying or increasing the desirability of settlements and pricing residents out of the market.[66] Experiences in Buenos Aires capture this tension starkly.

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64. van Gelder 2013, *supra* note 41, at 494–5.

65. The latter which carry police and court powers to ensure enforcement. A distinctive element in the Mukuru settlement, which is almost entirely on private lands, is that private property owners potentially have an obligation to the residents under somewhat novel horizontal application of rights in Kenya's Constitution. See Weru et al., *supra* note 28, at 235, for additional analysis.

66. ACIJ FINAL REPORT, *supra* note 8, at 92. *See* MCAUSLAN, *supra* note 18, at 35–36 (describing how reforms based on raising standards can fail to properly account for local conditions and exacerbate existing issues); Vanessa Watson, *'The planned city sweeps the poor away. . .': Urban planning and 21st century urbanisation*, 72 PROGRESS IN PLANNING 151 (2009) (reviewing urban planning approaches but rejecting ready-made solutions for Southern urban contexts). *See also* Roy, *supra* note 39, at 153 ("One of the great challenges of formalization is that it can displace the most vulnerable residents of an informal settlement. . . . Indeed, if informality is a differentiated structure, then formalization can be a moment when inequality is deepened.").

Residents living on environmentally condemned lands are faced with the choice of accepting state-sponsored relocation or advocating to continue living in pollution while seeking to prompt lengthy and expensive government clean-up.[67] As various authors have noted, "there are degrees of illegality" or informality, and "some forms . . . tend to be more accepted and/or tolerated than others, by both the state and public opinion."[68] To be sure, which manifestations of informality are allowed to persist is often highly dependent on political will and discretion, however legitimate they might be.[69] For instance, officials often take a blind-eye to parallel, "informal" markets within settlements (e.g., for service provision, rent, and "purchase" of land or housing) which tend to be controlled by and benefit political and economic elites, particularly in the cases of Lagos, Accra, and Nairobi. In Buenos Aires, informal rental markets in the *villas* were found to reproduce or mimic rules of the formal market, which owners imposed on tenants in an effort to exploit and maintain existing power disparities.[70] This dynamic illustrates how, far from a manifestation of poverty, informality might be perpetuated by powerful interests—again, blurring the neat distinction between who inhabits formal or informal spheres.[71]

Reflecting on these realities, various authors frame the relationship between informality and formality as a continuum

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67. Which is the case for residents in Villa Inflammable who live by the Mantanza-Richuelo river which has been a source of legal controversy and environmental challenges for decades. Luis E. Duacastella Arbizu & Agustín Territoriale, *Del saneamiento a la justicia ambiental: Conflictos en torno a la ejecución del litigio estructural en el caso "Mendoza" sobre la contaminación del Riachuelo*, 8 Revista Institucional de la Defensa Pública de la Ciudad Autónoma de Buenos Aires 193, 194 (2018).

68. Illegal Cities, *supra* note 18, at 4; Antonio Azuela Cueva, *Low income settlements and the law in Mexico City*, 11 Int'l J. Urb. & Reg'l Rsch. 522, 524 (1987).

69. Roy, *supra* note 39, at 149; van Gelder 2010 *supra* note 63, at 256.

70. María Carla Rodríguez, María Florencia Rodríguez & María Cecilia Zapata, *Mercantilización y expansión de la inquilinización informal en villas de Buenos Aires, Argentina*, 33 Revista INVI 125, 146 (2018) (analyzing how use of formal rules increased with consolidation and commodification of previously spontaneous markets, premised on meeting basic needs.)

71. Illegal Cities, *supra* note 18, at 5; Roy, *supra* note 39, at 153 (noting risks of formalization cause "great internal conflict for squatter settlements, a bloody and brutal sorting out of 'legitimate' claims" and consolidation of existing gender divisions).

or spectrum, containing varying degrees of legality and legitimacy.[72] Ideas used to capture the dynamics of actors simultaneously working inside and outside of the formal legal system include an "a-formal" space, the "suspension" of the formal, and the invocation of the law as an "aspirational" assertion of rights.[73] Inasmuch as groups are working "outside," they nonetheless formulate their efforts in legal terms, while also invoking a broader set of social and political justifications to legitimate their claims. In this way, the law "can be used as a handle in the struggle for a more human or reasonable government."[74] Those efforts, to echo Bonaventura de Sousa Santos's earlier insights, however, "must always be articulated with a political defense, so that both defenses are mutually reinforced."[75] In this way, legal empowerment efforts are embedded in a broader social and political context.[76] To the extent that a set of strategies could be framed as more legal or sociopolitical will differ by context, depending on a range of factors like which legal frameworks are in place and how receptive public officials are to legal or political claims. In some cases, actors knowingly rely on weaker legal arguments to obtain other strategic advantages using legal processes or "complications," notably, "to bring conflict into the legal arena as a way to keep it unresolved but contained, controlling it in a residual

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72. Land Res. Mgmt. Ctr. (LRMC) et al., Improving Governance, Voice and Access to Justice in Ghana's Informal Settlements 22 (Nov. 2018) (on file with the authors); Roy, *supra* note 39, at 149; Goodfellow, *supra* note 40, at 281; McAuslan, *supra* note 18, at 8.

73. Roy, *supra* note 39, at 149; Goodfellow, *supra* note 40, at 281; Banks, Lombard & Mitlin, *supra* note 38, at 227–28; Cueva, *supra* note 68, at 524 (on use of legal forms in informal contexts by powerful actors to convince "settlers and/or authorities that their control over land is legitimate from the point of view of the legal system . . . a compromise between the actual power of the social agents who control the urbanization process, on the one hand, and the legal rules of the form of landownership involved.").

74. McAuslan, *supra* note 18, at 145.

75. Boaventura de Sousa Santos, Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition 386 (1995).

76. Illegal Cities, *supra* note 18, at 10 ("Rather than a technical matter to be understood within the limits of the legal universe, we regard the production of urban law as a political process, one fundamental aspect of the social conflict which lies at the heart of the city."); Roy, *supra* note 39, at 150 ("Instead, it becomes apparent that the legalization of informal property systems is not simply a bureaucratic or technical problem but rather a complex political struggle.").

sense until the political will is found."[77] Our larger reflection is that states of a-formality, although effective in describing the interplay between formal and informal spheres, in reality, pose great risk, uncertainty, and insecurity for residents.

Legal empowerment efforts to confront informality, while not accepting existing formal structures as a necessary endpoint, are nonetheless oriented towards greater integration into the formal system. That stance embodies a conception of human rights premised on governments delivering on formal legal obligations. Moreover, as the urban planning scholar Ananya Roy notes, focusing too heavily on self-help or empowerment of the urban poor alone risks devolving "responsibility for poverty to the poor themselves," because it "obscures the role of the state and even renders it unnecessary."[78] Governments must articulate stronger state responsibilities and actions that are sensitive to "informality" and guarantee residents' participation in defining the contours of the "formal" and integrating their realities into the urban fabric.[79] Legal empowerment does not abandon, but reaffirms a disciplinary commitment to the institutions, norms, and processes underlying human rights and the rule of law. That commitment, however, remains agnostic to the appropriate balance between the formal and informal, in the abstract. Rather, as urban poverty and development scholars Banks, Lombard, and Mitlin observe, "[i]ncorporating the 'informal' may require bringing it into the formal in ways that reflect the nature of informal processes in terms of flexibility, and its incremental and context-specific nature."[80] This open-ended concept, of not holding too closely to a specific set of institutional forms, reflects

77. *See* Holston, *supra* note 41, at 705–09 (describing stall techniques in his study on urban law and informality in Brazil).

78. Roy, *supra* note 39, at 148 (drawing the connection to approaches advocated for instance by Hernando de Soto centered on formalization of land tenure rights and removal of government regulations). *See generally* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000) (laying out his theory of development).

79. *See* Banks, Lombard & Mitlin, *supra* note 38, at 232–33 (speaking of "negotiating more advantageous terms of inclusion").

80. *Id.* at 233; MCAUSLAN, *supra* note 18, at 43–44 (setting out his vision of incremental reforms adapted to urban poor settlements).

an experimental approach.[81] The experiences with the Special Planning Area (SPA) in Mukuru embody this approach of ongoing, iterative testing and identifying solutions. The SPA formally "suspended" the state of informality to give it a chance to articulate an integrated set of solutions, tailored to context and premised on community input.[82] It is an attempt to recognize "incrementalism" without it becoming "a generalized condition where those unable to afford formal housing are condemned to a set of second-tier standards and codes."[83] As of this writing, the team preparing the integrated plan were recommending a set of public health standards that would not fully meet the formal standards. The extent to which SPA's ground-breaking attempts will live up to their promise—to merge formal and informal spheres in an incremental adaptive manner—could ultimately hinge on the political openness to accept these sets of more granular, though important, standards and to continue ameliorating conditions so as to avoid different "tiers."[84]

Finally, these case study experiences demonstrate how much hinges on the political will of public officials, whether an openness to engage or, in the alternative, an outright hostility towards informality. Concern for power imbalances reemerges in this political will, which is arguably capricious by nature. Recent political economy understandings of informality have recognized those imbalances as a central concern and frame the relationship between the formal and informal in terms of who is able to define what counts as formal or informal. Viewing informality in this way serves to bring into focus the winners and losers in urban development, and the processes by which advantage and disadvantage are conferred.

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81. Again, this has been the tendency with urban planning laws. *See* Sepúlveda Carmona & Donald, *supra* note 24 (describing the over-prioritization of private rights in planning discourse).

82. Muungano wa Wanavijiji [United Slum Dwellers], *Mukuru SPA*, https://perma.cc/PGL5-YH53 (last visited Sept. 23, 2021).

83. Roy, *supra* note 39, at 153.

84. In late 2020, as part of its efforts to respond to the pandemic, the Kenyan government began implementing infrastructure development inspired by the SPA, with additional plans to extend that model to other major informal settlements in Nairobi such as Mathare, Kibera and Korogocho, Gilbert Koech, *MUKURU RISING – Fixing of Mukuru roads, water and sewer lines on course — NMS*, The Star (Feb. 2, 2021), https://perma.cc/C45W-8P9Y.

Formality offers state resources and social status, and hence power. A focus on informality highlights those disadvantaged by their inability to be 'formal', but also those advantaged by their ability to be selectively 'informal'.[85]

Overcoming informality again becomes a question of "leveling the playing field," which helps to capture the empowering dimension of legal empowerment in the face of informality. Much of the legal empowerment efforts in informal settlements have sought to overcome dynamics which have predominantly advantaged public and private actors in the formal sphere.[86] Legal solutions on this framing become instrumentalized in support of a larger set of development or sociopolitical goals, while nonetheless providing a normative underpinning to other technical interventions. The following sections describe more concretely how the different teams have attempted to "level the playing field" using legal empowerment strategies centered on participation and litigation.

V. Legal Empowerment Approaches to Participation: Grounding Voice and Empowerment in Legal Rights

A priority across all of these case studies has been to support structures to improve the participation and voice of residents. These efforts are a response to perceived failures of different levels of government—municipal, provincial, national—to include community members and their concerns in efforts to address urban poverty. The lack of inclusion takes various shapes, ranging from degrees of general disregard (e.g., Ecuador, Bolivia), to efforts to eliminate or criminalize settlements and activities within them (e.g., Nigeria). In other cases, groups have articulated the concern that state-led interventions to improve settlement conditions, where they exist, have tended to be overly technical or top-down in nature, ostensibly for the benefit of settlement communities but without residents' meaningful input in shaping and implementing the

85. Banks, Lombard & Mitlin, *supra* note 38, at 223–24.

86. As well as powerful actors in the informal (such as exploitive cartels and gangs). Holston, *supra* note 41, at 708 ("They are not changing the rules of the game using but them to challenge the exclusivity of its strategic players.").

interventions.[87] The participation strategies generally pursued multiple goals at the same time, targeted public processes of legislative and policy reform and decision-making, and zeroed in on the responsibilities of government actors. Such strategies aim to build awareness, capacity, and empowerment of residents, while also targeting more instrumental and immediate goals, like advocating for improved settlement conditions.[88] The main set of strategies employed across these case studies included raising awareness and bolstering residents' legal literacy of their participation and related rights, accompanying residents to public meetings or participating on their behalf, and taking legal action like administrative review of decisions to challenge the lack of opportunities for public participation or information. A shorter-term goal has been to secure recognition and input of communities in planning processes, including those related to relocation. Longer-term, those efforts aimed to shift from a more reactive to a more holistic mode of engagement, both at the settlement level but also with respect to city-wide or national policies on urban poverty and planning.[89]

Significant commentary and donor funds have been devoted to participatory approaches to development over the past several decades, in both urban settings and further

87. LRMC ET AL., *supra* note 72, at 124 (asserting that participation was found to be very weak in Ghanaian informal settlements studied in the report); Weru et al., *supra* note 28, at 235.

88. Further, as Sarah White, *Depoliticising Development: The Uses and Abuses of Participation*, 6 DEV. PRAC. 142, 146–47 (1996), observes, external actors are more likely to identify empowerment as "the key issue" while residents might focus on "more immediate and tangible interests and goals" initially with a greater appreciation and focus on empowerment emerging later. Indeed, in settlement communities concern with living conditions is often front of mind, for instance, in Accra first efforts focused on water access and cleanup of garbage in the settlements. Luciana Bercovich et al., *Desde el barrio hasta el juicio*, *in* 4 EL DERECHO DE LA VIVIENDA EN LA CIUDAD DE BUENOS AIRES 99, 110–11 (2010) (citing participation as an element of progressive realization).

89. Parnell & Pieterse, *supra* note 8, at 158 (describing the need for strategic engagement with the state and limits of purely oppositional approaches). *See* Global Platform, *supra* note 45, at 138 (the right to the city requires "the inclusion of the urban poor in processes of city making and management as a means to ensure justice and equality").

afield.[90] A lack of "participation in decision-making and in civil, social, and cultural life is thus recognized . . . as a defining feature and cause of poverty, rather than just its consequence."[91] By corollary, improving participation is seen as the key to reducing poverty, by strengthening the cohesion and empowerment of communities, along with public and private sector accountability and responsiveness.[92] In informal settlements, two dominant modes of participation are at play: decentralization and community-driven approaches. Decentralization is premised on making government institutions more accountable and responsive by bringing them closer to citizens, who are then better able to make demands and participate in governance processes.[93] Community-driven approaches focus on processes, to build the capacity and agency of community members to shape the development processes that implicate them. Over time, authors have developed a range of frameworks to describe the objectives, forms, and functions that participation aims to promote by design or in practice. To illustrate, Sarah C. White, a scholar of the sociology of international development, classifies from weakest to strongest: (1) nominal forms (perfunctory or tokenistic) used to legitimate interventions; (2) instrumental, aimed at improving interventions' efficacy and cost-effectiveness; (3) representative, which "allow the local people a voice" in shaping interventions; and (4) transformative, where participation itself builds empowerment—the consciousness and confidence of

90. Our aim, again, is not to rehash longstanding debates but to describe a few salient features from the case studies that affirm or build on existing commentary and lessons. *See generally* Samuel Hickey & Giles Mohan, *Towards participation as transformation: Critical themes and challenges for a post-tyranny agenda*, *in* PARTICIPATION – FROM TYRANNY TO TRANSFORMATION: EXPLORING NEW APPROACHES TO PARTICIPATION IN DEVELOPMENT 3 (2004) (providing a deeper history); Ghazala Mansuri & Vijayendra Rao, *Why does participation matter?*, *in* LOCALIZING DEVELOPMENT: DOES PARTICIPATION WORK? 15 (2013) (estimating that in the prior decade the World Bank had invested "almost $85 billion to local participatory development" and that other development agencies and governments have likely spent at least that much).

91. Madgalena Sepúlveda Carmona (U.N. Special Rapporteur), Rep. on Extreme Poverty and Human Rights, U.N. Doc. A/HRC/23/36 ¶ 14 (Mar. 11, 2013) [hereinafter UNSR Poverty].

92. Mansuri & Rao, *supra* note 90 at 15–6.

93. *Id.* at 16–17. In the informal settlement contexts, the focus has indeed been on new and existing municipal levels, though by interacting with a complex mix of public institutions

groups "in their ability to make a difference."[94] Analysis across the case studies indicates that groups have supported an "integrated approach" to community participation, which combines multiple objectives and features across the spectrum, with more distinct legal empowerment elements.[95] Following the lead of Gaventa, a well-known international development thinker, different strands of participation should be brought together under larger conceptions of citizenship and participation as a right.[96]

Before describing this rights-based conception in more detail, it should first be noted that the case study teams are well-attuned to the fundamental lessons about participation being a social and political process that is not to be treated in a cursory or technocratic manner.[97] The groups thus recognize their status as "external" actors (as civil society advocates and experts), and that responding effectively to community concerns requires at a minimum a deep understanding of settlement contexts, and the diverse, at times competing, interests within communities. The groups emphasize the need to work through existing community structures, whether formal or informal, to ensure sustainability and legitimacy of efforts.[98] At

94. White, *supra* note 88, at 145–46. The team in Ghana lists four forms of participation: "information sharing; consultation; decision-making and initiating action." LRMC et al., *supra* note 72, at 124.

95. *See* Anuradha Joshi, *Legal Empowerment and Social Accountability: Complementary Strategies Toward Rights-based Development in Health?*, 99 WORLD DEV. 160, 163–64 (2017) (describing an "integrated approach"); Vivek Maru, *Allies unknown: Social accountability and legal empowerment*, 12 HEALTH HUM. RTS. 83 (2010) (exploring the relationship between social accountability and legal empowerment); Domingo & O'Neil, *supra* note 17, at 41–42.

96. John Gaventa, *Towards Participatory Local Governance: Assessing the Transformative Possibilities*, *in* Hickey & Mohan, *supra* note 90, at 25, 28–29.

97. These lessons are adapted from IDRC Partners Note, *supra* note 21 (discussing the importance of generating participation at the community level through formal or informal means and highlights utilizing various strategies for legal empowerment to address challenges indifferent contexts). *See* White, *supra* note 88, at 143–44; Jo Beall, *Valuing Social Resources or Capitalizing on Them? Limits to Pro-poor Urban Governance in Nine Cities of the South*, 6 INT'L PLAN. STUD. 357, 368 (2001) ("[P]eople in poor urban communities assign a high value to external agents. In this regard, non-governmental organizations (NGOs) play an important intermediary role in the relationship between civil society organizations and local government.").

98. Structures include community mobilization groups, savings cooperatives or traditional leaders.

the same time, they acknowledge a risk of entrenching poor participation and exclusion, or reinforcing weak accountability of leaders and other powerful actors, where those structures are not representative or prone to capture by powerful interests.[99] For instance, anecdotally, community structures are often male-dominated, but are generally more inclusive and responsive to the common good of residents when women play a stronger leadership role.[100] As a result, in some instances the groups profess to engage in frank discussions with community leaders about the need for greater inclusion in community structures.[101] Promoting participation, thus, often hinges on residents' own prior efforts to "self-build" the neighborhood, or the community cohesion, structures, and democratic culture later needed to engage with the state or with other external actors.[102] To illustrate, in Accra, the team's attempts to establish a new governance committee in Madina Zongo failed twice despite working with existing community associations, due to social, ethnic, and political divisions.[103]

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99. Diana Mitlin, *The Formal and Informal Worlds of State and Civil Society: What Do They Offer to the Urban Poor?*, 6 INT'L PLAN. STUD. 377, 384–85 (2001) (on clientelist relations with local authorities undermining accountability of settlement leaders); UNSR Poverty, *supra* note 91, ¶ 47 (on risks of elite capture and the need to reach out to new or marginalized groups to ensure the principle of equality).

100. Deeper analysis of the impacts of different gender representation in community leadership structures is ripe for deeper investigation. *See, e.g.*, CITIES ALLIANCE, *How Data Empowers Women to Drive Change in Informal Urban Settlements* (2017), https://perma.cc/D3E8-CGDV (last visited Oct. 2, 2021) (discussing how women-led data collection can help shift power dynamics in communities and improve women's empowerment).

101. Such discussions would link to questions of external actors building legitimacy and trust, in terms of the nature of participation they are seeking to promote and what support they can offer to settlement residents and leaders. The groups recognize the importance of ensuring clear expectations, alignment in goals and that residents are themselves defining and driving efforts. Participatory approaches, including in urban settings, are littered with examples of clashes in goals and external actors monopolising funding and power and dictating terms of engagement. Mitlin, *supra* note 99, at 382–83; UNSR Poverty, *supra* note 91, ¶ 77; White, *supra* note 88, at 143–44; Hickey & Mohan, *supra* note 90, at 17.

102. To be clear, in the case study communities, efforts to achieve greater cohesion are reflective of a larger history of engagement of the groups within these and other communities predating research efforts.

103. How best to overcome such divisions is a question that, as of writing, the team was actively grappling with. LRMC, IMPROVING GOVERNANCE, VOICE

Legal empowerment approaches arguably depart from purely community-based or political conceptions in viewing participation, in its essence, as a right. From a legal perspective, this framing is somewhat axiomatic since participation is a basic guarantee in public or administrative law frameworks to ensure procedural fairness. The maxim, "*audi alteram partem* ('hear the other side')," as legal scholar Liebenberg is quick to note, "recognizes that an essential element of fair administrative decision-making is for people to be given "an opportunity to participate in the decisions that will affect them, and—crucially—a chance of influencing the outcome of those decisions."[104] The case study teams have proven resourceful in deploying guarantees under national legislation, to open new or dormant spaces for participation, or to resist the closing of existing ones.[105] A salient feature of legal framings of human rights, to participation or otherwise,[]is that rights have "teeth," namely, that they are backed by state obligations and the tacit threat of legal redress in the event of a government

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AND ACCESS TO JUSTICE IN GHANA'S INFORMAL SETTLEMENTS (IDRC PROJECT 108379) 5TH PROGRESS REPORT 7 (2019) [hereinafter LRMC 2019] (on file with author). The team in Ecuador encountered similar challenges when initiating efforts in the Los Pinos community, ultimately abandoning them when internal divisions proved insurmountable. The teams in Buenos Aires and Nairobi describe similar debates about when to include powerful actors like landlords in formalization processes, to avoid them either co-opting residents or leaders if included too early or acting as spoilers if left out or included too late.

104. Sandra Liebenberg, *Participatory Justice in Social Rights Adjudication*, 18 HUM. RTS. L. REV. 623, 623 (2018) (citing (CORA HOEXTER, ADMINISTRATIVE LAW IN SOUTH AFRICA 363 (2d. ed. 2012) (a basic administrative law textbook)).

105. For instance, Kenya's Constitution (2010) guarantees the right to participate in local or urban affairs, CONSTITUTION arts. 174, 184, 196 (2010) (Kenya), as well as a broader set of rights related to administrative justice, art. 47. The Constitution of Ghana provides for rights to participate in development processes, CONSTITUTION OF THE REPUBLIC OF GHANA, (last amended 1996), Jan. 7, 1993, art. 37 (". . . in decision-making at every level in national life and in government"), art. 35(6)(d) (Political Objectives), which is bolstered by an administrative justice provision, art. 23. Argentina's Constitution enshrines participatory democracy as a fundamental value, Constitución Nacional [Const. Nac.], art. 1 (Arg.), and participation as a right in a range of provisions, e.g. related to health, art. 21, education, art. 24, environment, art. 27, gender, art. 38, and youth, art. 40.

failure to meet them.[106] On the one hand, participation as a legal right promotes a more deliberative, rights-based conception of government authority and decision-making while, on the other hand, staying true to legal notions of redress and accountability. The teams in Buenos Aires and Nairobi describe how they actively negotiate two sides of this equation when engaging with public officials through participatory channels. To bolster their position, or when sensing that a process might not be proceeding in a fully participatory manner, they will stress to the officials their mutual interest in avoiding court.[107] The rights-based approach to participation, in short, is aptly described in terms of "optimistic" conflict.[108]

In the notion of participation as a right, which is oriented towards ensuring that "the voiceless gain a voice," the same concepts of "levelling the playing field" and shifting power imbalances resurface. Viewed this way, participation is not a purely procedural or instrumental goal—in service of other rights or development goals—but is inextricably linked to empowerment as an end in itself, "which is a key human rights goal and principle."[109] In this light, the legal empowerment approaches to participation as a right should be situated within conceptions of administrative and public law that view procedural justice as essentially about larger social and politi-

106. Joshi, *supra* note 95, at 163, evokes the notion of "teeth" in contrast to social accountability approaches, noting that, "while redress and justice is at the heart of legal empowerment approaches, it is the weakest part of social accountability, which for the most part lacks 'teeth.'" As Joshi notes, legal empowerment approaches—inasmuch as they are underpinned by human rights considerations of equality and non-discrimination—tend to be better attuned to questions of exclusion and marginalization and more inclusive as a result. *See also* Weru et al., *supra* note 28, at 252 (describing administrative redress mechanisms as possible alternative to courts for ease of access and responsiveness).

107. Witnessed firsthand by the authors in Nairobi (Di Giovanni), and evoked previously in Buenos Aires by team members, including one of the authors (Bercovich), who notes that ACIJ is one of the most frequent litigators on social rights against the Buenos Aires municipal authority.

108. *See* Gaventa, *supra* note 96, at 28 (describing the interface of civil society and good governance agendas); White, *supra* note 88, at 15 (referring to the inevitable conflict that arises when confronting existing power relations and engendering processes whereby the "voiceless gain a voice"); Mansuri & Rao, *supra* note 90, at 91 (speaking of "deliberative contestation")

109. UNSR Poverty, *supra* note 91, at ¶ 22. *See also* White, *supra* note 88, at 146.

cal aspirations, namely, ensuring dignity, personal autonomy, and a larger culture or system of democratic citizenship.[110] Stated differently, the efforts at promoting participation are primarily oriented towards the executive, or the day-to-day exercise of public power (e.g. the implementation of programs).[111] Yet the challenge that co-author Bercovich notes is that promoting improved participation requires a cultural shift on the part of public authorities, to see themselves as accountable to citizens.[112] This shift is akin to the one described previously, where engagement between settlement communities and authorities, starting from a position of confrontation or distrust, becomes increasingly collaborative. The teams report this shift to varying degrees in Nairobi and Buenos Aires, with nascent progress in Quito, La Paz, and Accra, and a search for more constructive engagement as a key goal in Nigeria.[113]

Questions of participation and informality come together in these instances because, as described above, many of the participation efforts have built on existing community structures which later took on a more external or right-claiming orientation. Those structures tend to be informal, in the sense

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110. Hickey & Mohan, *supra* note 90, at 13. Gaventa, *supra* note 96, at 29, links notions of participation to personal agency. *See also* David Dyzenhaus, *Dignity in Administrative Law: Judicial Deference in a Culture of Justification*, 17 REV. CONST. STUD. 87, 111 (2012) (deeper discussion on dignity and participation in administrative law).

111. On procedural guarantees contributing to day-to-day, deliberative democracy, see MIGAI AKECH, ADMINISTRATIVE LAW 20–21 (2016) (on Kenya), and Mary Liston, *Governments in Miniature: The Rule of Law in the Administrative State*, *in* ADMINISTRATIVE LAW IN CONTEXT, 39, 49–50, (Lorne Sossin & Colleen Flood eds., 2d ed. 2013). The team in Quito defines access to justice in holistic terms to include participation. ÁLVARO ORBEA, ACCESO A LA JUSTICIA Y EMPODERAMIENTO JURÍDICO: CASOS PUNTUALES EN QUITO Y MEJÍA (2019) (on file with authors).

112. Bercovich et al., *supra* note 88, at 237 (describing experiences in promoting the right to housing in Buenos Aires of informal settlement residents); GHAZALI MANSURI & VIJAYENDRA RAO, LOCALIZING DEVELOPMENT: DOES PARTICIPATION WORK? 91 (2013) (also mentioning a culture shift and "changing the character of everyday interactions—a process that, over time, reshapes social relationships"); Gaventa, *supra* note 96, at 27 (describing a project of institutional change as participatory approaches and efforts to strengthen accountability scale up from projects to policies).

113. A number of studies point to growing democratic spaces across developing countries to explain in part the increase in emphasis on participation and in participatory initiatives. *See, e.g.*, Mansuri & Rao, *supra* note 90, at 10; Mitlin, *supra* note 99, at 382.

of not having an officially recognized status, within local governance structures or with respect to consultative requirements under various administrative law statutes. A dynamic witnessed over time, however, is that public authorities come to recognize the communities, formally or informally, depending on the case, as the legitimate representative structure for community members. Reflecting on their experiences with the World Bank's Justice for the Poor program, justice and social development specialists Sage, Menzies, and Woolcock refer to these setups that bridge between formal and informal spaces as "iterative, interim institutions" which could also be described as hybrid institutions.[114] On a practical level, a distinct challenge in informal settlement contexts is that the pathways for creating new openings for participation run through the dense web of, at times dysfunctional or unresponsive, administrative institutions and regulatory frameworks. The awareness of how and when their guarantees to participation "on the books" can live up to their empowering or transformative promise in practice, more often than not proves elusive. A large reason for the success of legal empowerment groups thus comes from their ability to move, at strategic moments, between these institutional layers and, simultaneously, between the formal and informal spheres. Being able to navigate across that institutional web is further significant, given the tendency for public officials to hide behind the complexity of different social problems, as a convenient justification for inaction, claiming that "these problems are too difficult for us to solve."[115]

Asserting participation rights alongside a broader range of human rights and legal guarantees, to be sure, is by no means a foregone conclusion. The groups' efforts across the six cities could at best be described as a process of ongoing

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114. Sage, Menzies, & Woolcock, *supra* note 26, at 9.

115. Weru et al., *supra* note 28, at 241 (noting that was the case with officials in Nairobi County when discussing Mukuru). Brinks and Gauri point to lack of knowledge, which presents itself as a technical problem, as actually symptomatic of lack of political will and larger clashes over the redistribution of public resources whereby "political elites . . . hide the true cost of fulfilling universalistic commitments so that public expenditures can continue to be used for narrow partisan or sectarian agendas." DANIEL BRINKS & VARUN GAURI, *A new policy landscape: Legalizing social and economic rights in the developing world*, *in* COURTING SOCIAL JUSTICE 348 (2008).

trial and error to shift both the attitudes of public officials and the application of legal standards.[116] Experiences in Buenos Aires are perhaps the most far-reaching, where there is a local law that requires community representatives' participation in the development of public policies regarding informal settlements. The government did not fulfill this law and a court decision ordered elections in all settlements in the city for members of community-level committees, which were formally recognized as the main representatives of settlement residents in the urban plans. A salient aspect of this process is that the first step to achieving formal recognition, integration, and land titles is the formalization of participation structures.[117] In other cities, there are various degrees of formalization. In Mukuru, the declaration of the Special Planning Area marked a crucial success in the team's efforts over many years to achieve a more formalized redevelopment process. Despite these deep inroads, the team's efforts have remained informal, to the extent that their efforts to lead a consortium of over forty organizations to prepare a redevelopment plan have continued to be, formally speaking, in a background or supportive role. More recently, the team encountered challenges in seeking formal adoption of the redevelopment plan by the county, following county elections, which led to the turnover of previous allies in the administration. Absent formal recognition of their status, the team had to rebuild their previous informal working-level relationships with new officials.[118] Across case studies, groups

116. Again reflecting the iterative or experimentalist approach above.

117. Jonatan Emanuel Baldiviezo & Albertina Maranzana, *El Poder Judicial en las villas de la Ciudad: vitalizando la democracia participativa*, *in* LOS DERECHOS SOCIALES EN LA GRAN BUENOS AIRES 441, 441 (Luciana Bercovich & Gustavo Maurino eds. 2013). Villa 31 is the informal settlement of Buenos Aires in which the participation of both organized neighbors and technical organizations has been more discussed and legally regulated. In 2018, a new law, Law No. 6.129, Dec. 13, 2018, B.O.C.B.A. 5537 (Arg.), explicitly recognized the involvement in the process of urban integration of the villa 31 of various actors, including ACIJ. Felipe Mesel, *¿Cómo se encuentra garantizada la seguridad en la tenencia en la Villa 31?*, 13 REVISTA HÁBITAT INCLUSIVO, Aug. 2019, at 1 (analyzing the effects of law 6.129 on residents of villa 31).

118. Similarly, in Accra, the governance committees were created to fill a gap in communities' ability to mobilize larger claims, with initial positive experiences in engaging public officials around smaller-scale initiatives, like building links with the Ghana Water company in (Chorkor and with the Ghana Railways Authority in Agbogbloshie to build a passageway over tracks

cited turnover of officials as a perennial challenge, remarking that the settlement communities are the true constant in participation and policy engagement efforts.

In Quito and La Paz, the participation experiences centered on supporting communities to gain formal status of representative bodies to fulfill requirements for them to participate in land or settlement regularization processes.[119] Those experiences raise broader questions about some of the assumptions made about democratic citizenship. In Quito, the community associations in the El Mirador and La Isla settlements in Cutuglagua obtained the support of the municipal water parastatal (la Empresa Pública Municipal de Agua Potable y Alcantarillado (EPAA-Mejía EP)) to regularize provision of water in the settlements as a right to water claim. In early 2018, the national water authority granted formal approval to the associations under a scheme that would ensure that a neighboring farm, which had initially opposed the application, would continue to access needed water supply for irrigation. In late 2018, the national authority revoked its approval, citing administrative and procedural defects. The municipal parastatal then refused to renew its support for the settlements' water rights claim, leaving them "bewildered" and back to square one.[120] The team noted that this result points to the fragility of the participatory processes, and the extent that securing outcomes depends on the political goodwill or discretion of the state. The communities in question have opted not to pursue any judicial recourse. This raises larger questions about the potential limits of legal empowerment strategies that, although grounded in legal frameworks and processes, do not access the full array of available legal tools. To be clear, the claim is not that litigation would be an appropriate or effective next step; that decision lies with the communities involved. Rather, absent other strategies with more teeth, an open question is whether participation quickly reaches its limits for shifting power dynamics or promoting empowerment

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running through the settlement that they were rehabilitating. LRMC 2019, *supra* note 103.

119. ORBEA, *supra* note 111, at 2, 6 in respect to experiences in Quito.

120. *Id.* at 6 ("El desconcierto de los vecinos les obliga a replantearse la estrategia para seguir apoyando el caso." [The neighbors' confusion forced them to rethink their strategy to continue supporting the case]).

(the communities' frustration raises the specter even of disempowering results).[121]

A case study in Tarija, Bolivia, which was not part of the cases analyzed here, suggests additional limits of rights-based approaches, where the political path is seen as more effective and legitimate. In the face of few formal avenues for participation, researchers supported informal settlement community leaders to claim constitutional rights to housing and gain legal recognition of their settlement. A basic finding was that collective action (e.g., popular protests and marches) occupied a special place in the imagination of residents. They viewed it as the only effective way to obtain results from the government, given the lack of institutionalized mechanisms for participation prior to the adoption of Bolivia's Constitution in 2009 (the advent of which is also attributed to large-scale social action). Residents had little awareness of participation mechanisms created under the Constitution and placed little confidence in their effectiveness. Political dynamics between national and municipal governments played a pivotal role in this context. The municipal government proved a central obstacle, ignoring residents' claims and failing to respect various legislative and constitutional guarantees. Thus, the residents' strategy was to appeal directly to the national government through political channels, which was sympathetic to the popular claims of residents (an important electoral base) to legalize informal settlements.[122]

The experiences in Tarija and Quito raise deeper questions, which are only posed and are not claimed to be answered here, to the extent that notions of democratic citizenship—which underpin a legal empowerment approach to participation—depend on legal accountability, and the methods of achieving it absent a more firmly entrenched culture of pursuing legal redress. When queried about the possibility of seeking judicial review, the lead researcher from La Paz cited a less theoretical challenge of access to justice, instead pointing to

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121. *See* Mansuri & Rao, *supra* note 90, at 7 ("Clear mechanisms for downward accountability are critical.").

122. Nataly Viviana Vargas Gamboa, *El decisivo impacto de la participación sobre la realización de los derechos: Un análisis de las dinámicas sociales en torno a la propiedad en Bolivia*, 28 Revista Latinoamericana de Derechos Humanos 41, 57 (2017).

an additional layer of institutional challenges, namely, delays in the courts that are so long that bringing an action is not worth the trouble.[123] The narrative arcs in cities like Nairobi, Buenos Aires, and Accra include the positive shifts in accountable and participatory governance, however they remain contested. Experiences in Nigeria in the coming years will be a source of new insights. For now, the observation of Domingo and O'Neil, justice and legal empowerment specialists, sets the stage for the following discussion on litigation:

> whether legal mobilization and court action is perceived as a viable site of political and social contestation depends on particular political and social histories. Law is only one part of the story of political settlements, and its relative weight is intimately linked to whether national, local, or transnational elites agree through calculated consent or coercion to be bound by law in practice.[124]

VI. Beyond the Courts: Embedding Litigation within Larger Legal Empowerment, and Social Change Strategies

The experiences in Bolivia and Ecuador, where the groups have not turned to the courts, point to larger questions about when to pursue litigation, including, under which conditions can litigation be successful, and for which goals. The use of litigation as a strategy to address poverty or social change has been the subject of great academic debate, and much depends on how success is defined. In an obvious sense, success is the recognition of claimants' rights, especially through judgments ordering ameliorative action by the government. Looking beyond a binary, win or lose model, litigation's value is also framed in "non-material" or symbolic terms, such as the changing power dynamics, the behavior of public officials, the "social meanings and understandings" of issues, and the affected groups' sense of empowerment, dignity, and self-understanding.[125] Litigation can also produce a range of

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123. Informal Interview with Principal Investigator from Bolivia, in Buenos Aires, Arg. (Nov. 2019).

124. Domingo & O'Neil, *supra* note 17, at 10.

125. Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 Iowa L. Rev. Bull. 61, 62 (2010) (referring to "[s]ymbolic/stra-

strategic results, such as attracting media attention and financial resources, which can serve as a rallying cry "to organize a movement" around or draw in new participants, as well as in bolstering a movement's standing "in informal negotiations" or by naming-and-shaming "opponents into capitulation."[126] Furthermore, in some cases, going to court might be the only viable option when weighed against other alternatives.[127]

Conversely, litigation presents several practical risks for claimants related to financial costs, time, and emotional stress associated with cases. Certain critics see litigation's tendency to "atomize collective grievances" and unduly restrict the scope of claimants' human rights, especially when tailoring grievances to fit the legal remedy that has the most viable chance to succeed.[128] Unsuccessful claims and regressive or unenforced judgments carry the risk of discouraging groups, which can disempower or demobilize social and political movements. Similarly, if litigation becomes mystified and groups place too much trust in it as the solution to their struggle, it can sap such movements to the detriment of building broader political efforts. Litigation can also disarm communities where, by design or not, legal professionals (most often lawyers) take on the roles of the main knowledge-bearers and protagonists of judicial proceedings, effectively sidelining the community's leadership role in the process.[129] Some critics further question

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tegic proponents"); OPEN SOC'Y JUST. INITIATIVE, STRATEGIC LITIGATION IMPACTS: INSIGHTS FROM GLOBAL EXPERIENCE (2018) [hereinafter OSJI] ("Respondents frequently used words like 'hope,' 'vindication,' 'healing,' 'determination,' 'motivation,' and 'empowerment' to describe litigation's impact on their lives and self-understanding."); Liebenberg, *supra* note 104, at 631 n. 47 (citing Charles Sabel & William Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004)).

126. Albiston, *supra* note 125, at 63.

127. *See* Jackie Dugard, Tshepo Madlingozi &Kate Tissington, *Rights-Compromised or Rights-Savvy? The Use of Rights-Based Strategies to Advance Socio-Economic Struggles by Abahlali baseMjondolo, the South African Shack-Dwellers' Movement*, *in* SOCIAL AND ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES 23, 32 (2014), (explaining the Abahlali baseMjondolo social movement in South Africa's reasons for going to court: "because we know that in court we will not be beaten, arrested, denied the right to speak or ignored.").

128. Albiston, *supra* note 125, at 63.

129. Again, this type of disconnect can sap momentum from potential collective action processes that community members might otherwise lead, and which could generate faster improvements to their realities.

whether litigation produces any real change for disadvantaged groups due to the government's failure to "implement fully the court orders made in a number of socio-economic rights cases."[130] At a deeper level, some critics see human rights litigation as reinforcing entrenched power, class, racial, or other negative structures in the legal system, which have traditionally protected elite interests and perpetuated the discrimination and exclusion of different groups.[131]

Mindful of these debates, this case study analysis reveals a more practical picture about how various communities and legal groups approach litigation. Stated simply, they do not view it in binary terms, i.e. as a zero sum, or win/lose process, but as one tool within a larger set of legal empowerment and political strategies.[132] The teams reported being alive to litigation's risks, or the "distorting effects of the law," as referenced by the team in Argentina, while grappling with its limits in generating structural change.[133] In that light, the Buenos Aires team identifies four categories of cases to frame the purposes and results of the use of litigation over time: to defend or protect; to ensure citizen participation in public processes; to provide compensation in the face of violations; and to address larger struc-

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130. Christopher Mbazira, *Non-implementation of court orders in socio-economic rights litigation in South Africa?: is the cancer here to stay?*, 9 ESR REV. 2, 2 (2008). *See also* Malcolm Langford, *Housing Rights Litigation. Grootboom and Beyond, in* SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA. SYMBOLS OR SUBSTANCE? 187, 204 (2014) (describing residents' responses to responses to housing rights litigation; César A Rodríguez-Garavito & Celeste Kauffman, *Making social rights real: implementation strategies for courts, decision makers and civil society* 7 (Dejusticia Working Paper No. 2, 2014), https://perma.cc/ZT3A-XQ7Q (last visited Jun 24, 2020) ("Unfortunately many court decisions regarding ESR are never implemented."); OSJI, supra note 125, at 18 (citing challenges related to funding, legislative or administrative changes, political will and disagreement on the precise meaning of a ruling).

131. OSJI, supra note 125, at 18; Dugard et al., *supra* note 127, at 27.

132. See Dugard et al., *supra* note 127, at 27., on the Abahlali base Mjondolo social movement's use of litigation in South Africa: "while academics may continue to agonize and debate the value and use of rights especially to poor people's social movements, such movements are not as preoccupied with this issue. For them, it is not an either–or choice between rights-based and other tactics."

133. Felipe Mesel, Pablo Vitale & Mariano Valentini, *El derecho y sus usos en el hábitat informal de la Ciudad de Buenos Aires*, *in* DESARROLLO TERRITORIAL, REASENTAMIENTO Y DESPLAZAMIENTO DE POBLACIÓN REALIDAD, POLÍTICA PÚBLICA Y DERECHOS EN LA CIUDAD LATINOAMERICANA DEL SIGLO XXI 249, 279 (Análida Rincón Patiño & Andrés Felipe Correa Cárdenas eds., 2018).

tural problems.[134] Efforts to secure injunctions to prevent demolitions and evictions in Nairobi, Accra, and Lagos, illustrate defensive or protective uses. An example of participation-oriented uses is the "Villas Elections" cases ("*Elecciones en villas*") in Buenos Aires, which resulted in residents securing guarantees of political participation and democratic representation in the development and implementation of public policies in the settlements. The "Villas Elections" cases are part of a larger wave of collective rights litigation focused on improving living conditions in the *villas* since 2004.[135] These cases have gone in two main directions. A first set has aimed to solve the "meanwhile" and address urgent matters while a neighborhood becomes more fully integrated into the city—for instance, a fight for access to potable water in Villa 31 bis, or against electrical risks in Villa 21-24. A second set of cases targets farther-reaching structural change and urban integration needed to fulfill the right to housing and right to the city. Examples here include the complete relocation of *villas* as part of efforts to clean up the Matanza Riachuelo river basin (Villa Inflamable, Villa 21-14, among others) or a full-scale redevelopment and integration of the settlement within the city (Villa Rodrigo Bueno).[136]

The successes of the *villas* litigation in Buenos Aires are notable not only for generating positive recognition of rights claims, but also for opening dialogue channels for communities centered on their participation. This observation aligns with the earlier assertion in the discussions on informality and participation about how the recognition and enforcement of rights can contribute to shifting power dynamics and leveling the playing field.[137] At the same time, the larger challenge

134. *Id.* N.B. this framework would apply just as aptly to the other case studies.

135. This turn to the courts has helped amplify or replace claims previously restricted to political or administrative spheres. There are scores of access to dignified housing court cases, reflecting diverse actors, designs of substantive claims and legal strategies. *See* Baldiviezo & Maranzana, *supra* note 117, at 445.

136. Measures would include formal recognition or regularization of the settlement, its land tenure and access to public services.

137. *See* Pablo Vitale et al., *Prácticas de empoderamiento jurídico y abogacía comunitaria en América Latina: Asentamientos y pobreza urbana*, *in* EMPODERAMIENTO JURÍDICO Y ABOGACÍA COMUNITARIA EN LATINOAMÉRICA 14, 21 (Natalia Echegoyemberry et al. eds., 2019) (arguing that community advocacy

with litigation might be the one of unenforced or unimplemented judgments highlighted above.[138] Experiences in Lagos provide a sobering example, where the Governor of Lagos proceeded with planned demolitions and forced evictions in the Otodo Gbame settlement, in outright defiance of a court order the team secured to protect residents. The Nairobi team also reported an endemic challenge to ensuring government respect for court judgments. Alive to that challenge, their approach was deliberately "premised on working with communities to identify solutions, which implicitly evinces a preference not to rely solely on courts or legal processes to resolve the challenges that the settlements face," but also "to strengthen engagement with public officials in an effort to increase policy windows outside judicial proceedings."[139] Here again, the teams approach litigation as one strategy within a broader set of mutually-reinforcing strategies, which arguably reflects a legal empowerment approach to litigation more broadly.[140] Of note, beyond lawyers, the Nairobi team is comprised of com-

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and legal empowerment have significant impacts on efforts to increase access to justice at local levels). The Buenos Aires team identifies 5 factors for why litigation has been effective: 1) recognition of social, economic and participation rights in a new City constitution (1996); 2) new judicial channels and procedures to claim those rights; 3) existence of strong community movements fighting in the legal arena; 4) public and non-governmental access to justice support, located in or near the *villas*; and 5) the City's status as the wealthiest district in the country, making it hard to justify failure to realize residents' right due to a lack of resources. Absent from those factors is how litigation is pursued alongside other strategies, and to further results beyond a lawsuit's immediate objectives.

138. Rodríguez-Garavito & Kauffman, *supra* note 130, at 13–16, list five factors that influence the implementation of ESCR cases: 1) Legitimacy and strength of the judiciary; 2) Institutional capacity; 3) Implementation costs; 4) Size of litigant group; 5) Social movements surrounding the litigation. Building on Vitale et al.'s framing, *supra* note 137, at 21, we would add: the constitutional recognition of social rights as enforceable rights, the openness of institutions to recognize and respect the adjudicatory authority, access to public or NGO justice supports and the degree of trust in the institutions by the affected communities.

139. Weru et al., *supra* note 28, at 252.

140. See Dugard et al., *supra* note 127, at 29, on Abahlali baseMjondolo's use of litigation social movement in South Africa: "almost from the outset it has engaged in legal mobilization and used rights-based approaches both tactically, to defend space for mobilization and effect strategic advances in their struggle for social and economic gains, as well as constitutively, to frame its identity and mobilize its constituency."

munity organizers and non-legal, technical experts like urban planners and economists. In the context of structural litigation, this interdisciplinary expert knowledge becomes fundamental, especially for the purposes of developing an evidentiary basis to support rights-violation claims and also for identifying a feasible and persuasive range of remedies to assert.[141]

The reason that remedies are emphasized here is due to the increasing use of social and economic rights litigation which has given rise to extensive discussions about the role and the limits of judicial power in issuing orders to resolve complex policy challenges.[142] Alive to the potential danger of judicial overreach, courts in several countries have sought to achieve a balance between, on the one hand, their enforcement and adjudicatory role in respect to fundamental rights and on the other, providing flexibility for public officials to implement solutions for the deep social challenges. A main approach of courts has been described as "experimentalism" or "dialogic activism," whereby they declare a violation of rights and for the remedy, order the parties (often rights-holders and public authorities) to identify a solution within a prescribed period. The court retains supervisory jurisdiction and requires parties to report on their progress in complying with the court's order. In effect, the court "does not build the decision, but guarantees the material and normative conditions needed for it."[143] The perceived advantage of this approach is

141. OSJI, *supra* note 125, at 42, espouses an understanding of strategic litigation as "multi-dimensional, multi-disciplinary, multi-stakeholder, iterative, and composed of several stages" that calls for "creative strategic thinking, partnerships, and activism that could substantially enrich efforts to advance human rights and legal empowerment." The mix of efforts that have been described to this point, which the case study teams have pursued concurrently, paint a picture of such an approach.

142. Again, our goal is not to wade into wider debates about separation of powers or courts' democratic legitimacy. *See* Rodrigo Uprimny Yepes, *Should Courts enforce social rights? The Experience of the Colombian Constitutional Court*, DEJUSTICIA 1 (2006), https://perma.cc/7RVT-9JPT (describing the debate as a "theoretical draw or tie"); Pratap Bhanu Mehta, *India's Unlikely Democracy: The Rise of Judicial Sovereignty*, 18 J. OF DEMOCRACY 70 (2007) (providing a classic critique); Varun Gauri, *Public Interest Litigation in India: Overreaching or Underachieving?*, (World Bank Pol'y Rsch. Working Paper No. 5109, Nov. 2009) [hereinafter Gauri 2009] (examining the relationship between social class and success in socioeconomic rights litigation).

143. LAURA MUSA, IMPLEMENTACIÓN DE SENTENCIAS JUDICIALES COLECTIVAS 53 (2013) (authors' translation).

that they provide an opportunity to strengthen the claimants' participation rights, by creating "a space for democratic deliberation among equal citizens, rather than a place of interest group bargaining."[144] In that light, a deeper connection emerges with the prior discussion of participation and how, within the context of litigation, "participatory justice can facilitate the more effective protection and realization of the substantive elements" of informal settlement residents' social and economic rights.[145] In other words, legal empowerment strategies play a key role in ensuring affected communities can participate in an informed and empowered manner in the remedial dialogues with governments and other actors.

In the case study contexts, these types of remedies have been primarily witnessed in Argentina and are evolving in Kenya.[146] The efforts in Villa Inflamable are notable, because they feature one of the most expansive instances of a court taking a supervisorial approach in the Matanza-Riachuelo river case. In 2006 and 2008, the Argentinian Supreme Court issued a wide-ranging and innovative series of orders in two decisions, which amounted to a full-scale emergency cleanup or "health" plan for Latin America's most contaminated river.[147] In essence, the Court created new administrative mechanisms to ensure participation, transparency, and flexibility, including public hearings to monitor its ruling.[148] The Court, however,

144. Gauri 2009, *supra* note 142, at 5. *See also* Liebenberg, *supra* note 104, at 624 ("A spectrum of participatory rights, ranging from a basic right to be notified . . . to more extensive models of engagement or even co-decision-making between community groups and public authorities is potentially available to adjudicators in social rights cases."

145. Liebenberg, *supra* note 104, at 625.

146. In Kenya, the first economic and social rights case under the Constitution showed signs of openness at the lower court level to adopt a flexible approach to remedies where the court retains supervisory jurisdiction. The Court of Appeal later took a more restrictive approach and as of writing the cases in question were awaiting appeal before the Supreme Court of Kenya (*Mitu-Bell* and *Satrose Ayuma* cases). Updates from team members (notes on file).

147. And for decades one of Argentina's biggest environmental emergencies. *See* Arbizu & Territoriale, *supra* note 67, at 195 (describing the Supreme Court decision).

148. A few features include clean-up and remediation plans involving strict timelines; a tailor-made, evidence-based process of judicial review of government implementation of the Court's clean-up plan; and public hearings held by the Court to listen to all relevant stakeholders, and probationary

neglected to provide a participation mechanism for the communities who would be resettled due to the river's cleanup. In response, residents of Villa Inflamable obtained a Supreme Court order in 2012 to ensure that public authorities respected their participation rights in any decisions regarding resettlement. To be sure, courts' efforts to establish dialogue between parties in order to formulate remedial plans jointly in such cases are not always successful. Public authorities still need the political will to take the process seriously and sit down with claimants to work out solutions. Where it is lacking, claimants might again find themselves facing implementation challenges and returning to court for new orders to enforce the earlier judgment. These scenarios speak to Liebenberg's broader concerns that the supervisorial model leaves too much discretion to the parties. That is, in setting "the broad parameters for the deliberations," courts risk diluting public responsibilities and shifting the burdens onto marginalized and disadvantaged groups who might "lack political, economic, or alternative sources of power compared to better resourced public and private participants."[149]

The uncertain outcomes in structural cases are a reminder that litigation carries risks for communities, even in the most far-reaching and progressive cases. More profoundly, the uncertain results point to the potential limits of litigation in the face of complex or politically contentious social problems, like the exclusion and inequality seen in informal settlement contexts. For this reason, legal empowerment, as this Article has described it, frames litigation as a "lever for social change" within a broader set of socio-political strategies defined and led by the community. As the Open Society Justice Initiative underscores, "litigation operates in a complicated relationship with these other tools" or "other problem solving approaches."[150] More evocatively, in analyzing the impacts of the ground-breaking *Grootboom* right to housing case

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procedural standards which were more flexible and less formal to fit the needs and complexity of the court case. *See* Pablo S. Carducci, *¿Puede Influirse en política pública a través de procesos judiciales? El rol del juez en el litigio de reforma estructural*, *in* 2 EL CONTROL DE LA ACTIVIDAD ESTATAL II 59, 65 (Enrique M. Alonso Regueira ed., 2016).

149. Liebenberg, *supra* note 104, at 625.

150. OSJI, *supra* note 125, at 33 (listing "media campaigns, advocacy, and attempts to modify legislative or administrative actions.")

in South Africa, Dugard describes litigation as being "more of a background variable" and "not the foreground on which particular achievements were fought for and established."[151] In contrast to public interest law's overriding focus on identifying strategies needed for a lawsuit to succeed, legal empowerment casts litigation as part of broader efforts to shift power dynamics and generate structural improvements in peoples' lives. Tackling structural changes of that nature, to be sure, is a tall order.

VII. Conclusion

Informal settlements and the underlying urban poverty and exclusion, represent major challenges for governments in the Global South. The complexity of socio-spatial segregation requires policies to address how societies organize themselves at their very core, not only the physical dimensions (housing and access to services), but also the longstanding questions related to human relations (political, social, and economic). Settlement residents understand and experience the multidimensional reality of urban segregation. Therefore, community-led political strategies to achieve urban inclusion are not compartmentalized according to disciplines or sectors. Throughout the world, urban poor communities have been some of the most organized and politically active sectors. The professionals who support residents, rather, tend to be the ones to divide such strategies along those lines—for example, lawyers pursuing litigation or other legal actions, urban planners drawing up participatory designs to reimagine urban spaces, and economists analyzing models to finance urban integration. These case study analyses reveal that a diverse and holistic set of strategies is more successful, and in fact critical, to achieving urban inclusion. While this analysis evaluates tools and actions related to informality, participation, and litigation in an ordered sequence, in reality, residents are simultaneously pursuing those strategies in mutually reinforcing, though often unpredictable, ways.

Achieving systemic and structural changes in the physical and social living conditions of informal settlements is a long-

151. Jackie Dugard, *Urban basic services: Rights, reality, and resistance, in* Socio-economic rights in South Africa. Symbols or Substance? 187, 204 (Malcolm Langford et. al eds., 2014).

term process. Residents stand a greater chance of achieving political change and the fulfilment of their rights when they act collectively, through community-led processes with the support of networks of institutions, organizations, and professionals. Court, administrative, or other purely legal actions are more likely to contribute to structural change when situated within a broader social and political strategy and struggle, which takes the power, risks, and limitations of the law seriously. In this sense, legal empowerment provides an important set of tools to help mobilize the law to redress power imbalances underlying the exclusion of the urban poor, imbalances which in some cases might be inherent in formal legal structures. The human rights framework also provides a crucial source of norms and legal protections to orient the legal empowerment experiences this paper analyzed, serving, on the one hand, to underpin legal actions at multiple levels and on the other, helping to frame political advocacy and narratives beyond strictly legal actions.

However, relatively little attention has been paid to analyzing, holistically or systematically, the diverse strategies that informal settlement residents have developed to improve their lives and claim their rights. The emerging "right to the city" concept offers a framework that encapsulates the broader political demands for systemic change to redress the inequalities and power imbalances underlying socio-spatial segregation in the urban context. At the same time, that concept frames such claims and struggles in a rights-based language and brings together the full range of interdependent social, economic, political, cultural, and environmental rights at stake. Moreover, the use of the term "city" as an object of law and politics at the concept's core brings the corresponding obligations and responsibilities of local authorities and municipalities to the fore. The legal empowerment experiences analyzed here provide an initial glimpse of the types of holistic strategies, both legal and socio-political, that could ground efforts to claim and achieve fulfillment of a right to the city in concrete terms. This observation points to larger questions, beyond the scope of this analysis, about which longer-term, tangible effects this holistic conceptualization of urban demands stands to have on public policies, local governance in urban settings, the realities of informal settlement communities, and about how and when

the urban poor can meaningfully shape a larger, collective vision of the urban spaces they inhabit.

As this paper was being finalized, the COVID-19 pandemic hit, thrusting the lives of informal settlement residents into an even more precarious and life-threatening position. It is still too early to assess the full effects that the pandemic and the measures to counteract it will have on our societies in the medium- and long-term. However, during its early months, there is clear evidence of the disproportionate impacts of the virus and measures to contain it on informal settlement populations. Their plight during this global crisis has highlighted more clearly than ever before the interrelation and interdependence of human rights and the necessity of access to adequate housing and basic services like healthcare for daily survival and a dignified life. Leilani Farha, the outgoing U.N. Special Rapporteur on the Right to Housing was quick to sound the alarm on this reality, arguing that: "Housing has become the front line defense against the coronavirus. Home has rarely been more of a life or death situation."[152] While this Article's analysis is based on experiences that pre-date the pandemic, its findings remain salient to current efforts to fulfill the mantra of "building forward better."

The future is uncertain and in the face of both of these new and existing challenges, the legal empowerment efforts that organizations around the world are putting into practice, like those analyzed here, offer promise. They unveil the law as something that is alive and that defies traditional and conservative conceptions of the lawyer and legal practice. Legal empowerment offers a vital set of tools and methodologies for serving marginalized and vulnerable communities, as part of larger efforts to shift power imbalances, address inequalities, and generate meaningful change to their living conditions. The main takeaway is that legal empowerment should be used more frequently and should become a part of conversations about urban poverty and development because it can help articulate diverse dimensions and respond to the communities' demands.

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152. UN OHCHR, *"Housing, the front line defence against the COVID-19 outbreak," says UN expert*, https://perma.cc/H87R-987B (last visited Oct. 17, 2021).

Many questions still remain unanswered, which this discussion was unable to address, about how informal settlement residents and other groups can mobilize similar holistic, multidisciplinary strategies and approaches to claim their rights regarding, for instance: the role of women and their leadership in community-led processes and struggles; strategies for community building and community organizing; the interrelation and collaboration between social movements and legal empowerment approaches; the balance between taking collaborative or confrontational approaches when communities and civil society actors engage the state at different levels; and methods for sustaining support for such processes over the long-term. The hope is that these types of questions and this Article's initial analysis will contribute to and help spur a larger research and learning agenda in the years to come, to document and systematize more broadly legal empowerment's contributions to the achievement of rights, and to aspire for a larger set of political and social goals—as depicted in the six cities here. As a final note, the tireless efforts of those community members and organizations merit gratitude and recognition.