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RESEARCH REPORT

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# Do more empowered citizens make more accountable states? Power and legitimacy in legal empowerment initiatives in Kenya and South Africa



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# Summary

Marginalised groups and individuals often face difficulties in accessing essential services such as housing, health care and water – despite the existence of national and international laws that require states to guarantee equal access to basic services. Civil society organisations and lawyers in several countries are using legal frameworks to hold states accountable for their legal obligations and ensure that citizens are able to claim services to which they are entitled.

This research report examines four case studies of organisations that use legal-based approaches to improve marginalised groups' access to services, and how the state responds to them. These cases are Hakijamii, which helps people realise their socio-economic rights in Kenya; the Bar Hostess Empowerment and Support Programme in Nairobi, which supports sex workers in obtaining access to health care and challenging criminal charges; Ndifuna Ukwazi which tackles spatial inequality and land and housing segregation in Cape Town; and the Witzenberg Rural Development Center which supports and advises farm workers in one of the largest fruit growing regions in southern Africa.

The findings point at the interrelation between empowerment and accountability, and how legal frameworks are used to achieve both ends, leading to more equal and inclusive access to services. Citizens' empowerment is achieved in many ways: by providing education about and raising awareness of citizens' rights and entitlements; providing information on how to access and reach those in power; and supporting individuals and communities in using existing complaint mechanisms and pursuing legal challenges. Each organisation also works to create spaces where citizens can communicate with the state. This engagement is an iterative process which may combine adversarial (e.g. protests) and collaborative (e.g. meetings with service providers) approaches. Organisations' identity and legitimacy are crucial in shaping the choice of approaches and their outcomes for access to services and accountable governance. Finding a balance in the combination of approaches is challenging and exposes organisations to risks of retaliation, co-optation or being discredited.

## Key themes in this paper

- The link between empowerment and accountability, and using legal frameworks for obtaining both
- Combining formal, informal, adversarial and collaborative approaches for seeking accountability
- Identity and legitimacy of intermediary organisations

# Introduction

In many countries, access to essential services – health care, housing, water and sanitation, among others – remains deeply unequal, being determined by factors including income, gender and race. To address this issue, civil society and lawyers, especially in the global South, have increasingly been using legal channels to ensure that marginalised groups can enjoy these basic socio-economic rights (Brinks and Gauri 2012).

However, the use of formal legal channels is not always sufficient to address the many different barriers that marginalised groups face in accessing services. In addition, courts and formal justice systems are still inaccessible to many, due to financial, geographic and language barriers, among others. More importantly, taking grievances to court requires those who experience injustice to recognise the legal violations they face, as well as being able to access the lawyers and organisations that can support their claims and secure their legal entitlements.

To breach these barriers, civil society organisations (CSOs) have been combining formal channels with legal education and mass mobilisation. Evidence shows that this strategy, known as ‘legal empowerment’, can lead to better access to services for individuals and communities at local levels (Berenschot 2011) and wider changes in policy development and implementation, obtained through bottom-up mobilisation (Brinks and Gauri 2012; Golub 2003).

Building on both theory and practical examples, this research report explores how legal empowerment strategies are used to influence the power dynamics that underpin access to services for marginalised groups. This includes: addressing stigma and discrimination in access to health care; obtaining more progressive legal safeguards for historically

disenfranchised groups; and ensuring the more equal allocation and distribution of resources in terms of adequate housing, water and sanitation for poor people. In particular, the report explores the work of four organisations in Kenya and South Africa that support marginalised communities in their quests for justice and equality.

## Structure of this research report

Section 1 introduces the key concepts underpinning legal empowerment, followed by the analytical framework that informed the analysis (Section 2). Section 3 presents and unpacks the research questions driving the study, while Section 4 discusses the scope and methodology of the study, to draw the boundaries and introduce the case studies. This is followed by more detailed background on each country and organisation analysed in the study, including an overview of approaches the four organisations use to empower community members and demand accountability from government.

The findings are then analysed in two sections: Section 5 discusses how the different approaches contribute to building individual and collective empowerment (and agency), and Section 6 discusses how these approaches seek to address the different types of power imbalance that underpin service delivery. Lastly, the analysis unpacks the crucial factors that shape the choice and impact of different approaches, and determine the quality of relations between citizens, intermediaries and states (Section 7). The conclusion (Section 8) summarises the analysis and draws out the key considerations for future studies and practice.

# 1. Key concepts

## 1.1 Literature on legal empowerment

Legal empowerment<sup>1</sup> refers to a set of approaches that involves “poor people (i) knowing and understanding their rights and (ii) being able to effectively assert and enforce their rights” (Palacio 2006: 24).<sup>2</sup> These approaches centre on the view that citizens’ ability to make use of legal frameworks – to protect their rights and advance their interests – is arguably more significant than the actual provisions of the law. Consequently, legal empowerment strategies combine litigation and the use of formal channels with public legal education and mass mobilisation, often spearheaded by grass-roots paralegals; they seek rights enforcement outside courts as much as inside (McQuoid-Mason 2013).

The concept of legal empowerment strongly relies on Sen’s definition of poverty (1981) as the deprivation of capabilities and opportunities, and therefore “the extent to which an individual’s capacity and opportunity to exercise and shape his / her basic rights are limited by external constraints” (Bruce 2007: 5; Golub 2013). This expressly acknowledges the political implications of legal empowerment (Domingo and O’Neill 2014), which “extends far beyond the confines of the purely formal legal system” (Palacio 2006: 8). It is a concept in which empowerment is understood as part of political empowerment that ‘builds citizenship’ or, as Palacio (*Ibid.*) puts it, “provides citizens with a stake in the state”.

A combination of education and action, legal empowerment practice draws from the concept of critical consciousness developed by Freire (1992) and used by feminist movements and trade unions from the 1980s onwards. Indeed,

these movements saw the emancipatory power of popular education and therefore embedded rights awareness with self-reflection and collective action<sup>3</sup> (Miller, VeneKlasen and Clark 2005). Feminist groups applied a gender lens to Freire’s theory on critical consciousness to challenge patriarchal norms. In doing so, they recognised that, “like other marginalised groups, women are socialised to accept and blame themselves for their abuse, despite its injustice” (*Ibid.*: 60).

A similar lens is applied today by groups that seek to expand access to socio-economic entitlements and demand more accountable service delivery (Feruglio 2015; Flores 2011). Community members often consider issues around maternal mortality, poverty and illiteracy as acts of fate, rather than violations of rights – the right to life, the right to health, the right to equality – and thus make very little effort to challenge them through the law.

Legal empowerment, therefore, is closely related to debates on power and the relations of accountability between state and society. For the purposes of this report, understanding how legal empowerment interventions may or may not improve equitable access to services requires consideration of how power dynamics shape citizens’ actions and how this, in turn, is reflected in accountability.

Recent literature on accountability has sought to analyse more closely the ‘politics of accountability’ by challenging technical or ‘linear’ understandings of how citizens can effectively hold states accountable. For instance, it unpacks assumptions about how information is used to hold states accountable (e.g. Gaventa and McGee 2010), and rethinks accountability

<sup>1</sup> The emergence of legal empowerment as a stand-alone field of literature is quite recent (2001 onwards), resulting from an attempt of scholars and funders, and to a lesser extent of practitioners, to overcome a purely legalistic vision of the law and access to justice – or as Golub puts it the ‘rule of law orthodoxy’ (Golub 2003).

<sup>2</sup> A further definition is “a process ... through which the poor and excluded 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” (CLEP 2008: 3).

<sup>3</sup> As Miller *et al.* (2005: 57) state, “[t]hese projects [movements] often adapted popular education methods, using pictures, posters and plays to depict and facilitate an analysis of common problems. Problem-centred rather than legalistic, emphasis was placed on understanding the many causes of a problem and exploring solutions that could be handled at community level. Only after these problem-solving processes had generated some critical analysis would information about law and legal processes be introduced to affirm people’s sense of rights and expand their thinking about possible solutions.”

*Understanding how legal empowerment interventions may or may not improve equitable access to services requires consideration of how power dynamics shape citizens' actions and how this, in turn, is reflected in accountability.*

efforts in terms of 'ecosystems' of actors and strategies (Fox and Halloran 2016) that leverage 'horizontal', built-in mechanisms (Fox 2014, 2016; O'Donnell 1998) and coordinate efforts 'vertically' by engaging with the state at different levels (Fox 2014, 2016). Accordingly, the remainder of this section synthesises the relevant concepts that inform the analysis in this report.

## 1.2 Intermediating between citizens and states

Legal empowerment is not limited to formal accountability mechanisms such as litigation, but encompasses other efforts, such as administrative grievance processes, mediation, representations to local authorities, and public actions such as awareness-raising and protests. Community paralegals<sup>4</sup> and legal organisations play a crucial role in legal empowerment initiatives by 'closing the gap' left by the state in the delivery of justice (Brinks and Botero 2010).

This combination of approaches requires actors to possess a savvy political understanding of the relations between marginalised groups and states (Wilson 2011), and recognise that while accountability is mediated by formal institutions, it does not happen in a political vacuum.

The literature defining the type and role of intermediaries is rich. Interlocutors are organisations or individuals with the necessary characteristics to address a collective action problem for citizens, or state inaction, so that appropriate solutions for a citizen–state interface can be found (Grandvoinnet, Aslam and Raha 2015; Tembo 2012). Interlocutors are skilled at building the "mutually reinforcing cross-sectoral coalitions between state and society, grounded in mutually perceived shared interests" (Fox 2005: 25).

While the 'interface' between citizens (through intermediaries) and state begins, and mostly takes place, at the local level (Grandvoinnet *et al.* 2015), for accountability efforts to address systemic bottlenecks in service delivery, and tackle issues around the redistribution of resources (and therefore power), these need to be vertically integrated across the state system – including a variety of stakeholders within and outside the state, at local, regional and central levels (Fox 2014).

## 1.3 Collaborative and adversarial approaches to power

To effectively engage with different levels of power, intermediary organisations may choose to combine collaborative approaches with more adversarial ones. A recent study by the Public Affairs Research Institute (2017) reflects on the different types of relations that social justice organisations (SJOs) in South Africa have developed with the state. The basis of the study is that state–civil society relations "can be best understood through an understanding of shared or divergent means and ends" (PARI 2017: 3), which can lead to relations being collaborative, confrontational, cooperative or co-opted.

As the study suggests however, the understanding of means and ends is not necessarily objective, and different perceptions can lead to counterproductive relations or conflict. Indeed, the study concludes that "[w]here there was more or less some agreement with the state's perspective, relations of cooperation, complementarity and co-option were found to be most often successful in improving relations and processes but often had a weaker ability to influence outcomes. This is because such

<sup>4</sup> Gauri and Maru (forthcoming) identifies six broad strategies that paralegals use to assist people in exercising their rights: (1) education; (2) mediation; (3) organising; (4) advocacy; (5) monitoring; and (6), with the help of lawyers, litigation.

relations were often less able to contest the overall goal of a particular programme but sought more to improve the delivery of a particular goal. In cases where SJOs sought to contest government's overall vision for social justice, confrontational relations were often the only avenue through which SJOs could have the necessary impact to shift the social justice agenda" (PARI 2017: 24). Hence, understanding of the context and its relationship with communities on the one hand, and with the state on the other, have important implications for the outcome of accountability actions (*Ibid.*).

With regard to conflict, Fox (2016: 22) argues for recognising the "productive nature of conflict" triggered by adversarial strategies, especially when they leverage the checks and balances within the state system (i.e. courts) that have a specific mandate for "producing accountability". On the other hand, collaborative partnerships between civil society and reformists within the government "can strengthen insider reformists by providing them with civil society backing, as well as with eyes and ears on the ground" (*Ibid.*: 21). This is particularly important in 'politically closed' contexts, in which the space for civil society is narrow and safeguards within the state system are likely to be weak. However, the risk is that "policy-makers often expect civil society partners to abstain from any public criticism of the government, which in turn might reduce CSO leverage" (*Ibid.*: 31).

In line with the PARI study (2017), which found that both adversarial and collaborative approaches are necessary, under different circumstances, for pursuing a social justice agenda with and against the state, Fox also argues for overcoming the dichotomy between the two approaches and instead reframing the terms of citizen-state engagement on a "continuum of more or less adversarial strategies" (Fox 2016: 22-3).

The need to overcome dichotomous and 'monolithic' views between adversarial approaches – which are considered typical of legal empowerment strategies – and collaborative approaches, which are typically associated with social accountability, has also been the focus of recent literature that looks at the overlap between legal empowerment and social accountability (e.g. Feinglass, Gomes and Maru 2016; Joshi 2017; Maru 2010).

Social accountability is based on the premise that transparency in decision-making processes, answerability and enforceability, as well as the ability to sanction, are necessary to ensure that communities can hold public authorities accountable (Rocha and Sharma 2008). This requires two things: (1) that communities have access to transparent information on relevant administrative or legal provisions, which depends on the nature of service providers' (and government officials') responsibilities; and (2) that communities are able to use existing mechanisms to trigger sanctions or remedies. Similarly, communities' access to transparent information and their ability to sanction are regarded as the 'bread and butter' of legal empowerment (Maru and Moy 2013).

While legal empowerment and social accountability both evolved from similar concerns about participatory approaches to governance, they differ in crucial ways. First, social accountability has an exclusively collective dimension, without necessarily focusing on marginalised or discriminated-against individuals. By contrast, legal empowerment has a strong focus on redressing the rights violations faced by marginalised individual and communities, which is crucial for maintaining community traction and ensuring stronger mobilisation of community members, while also seeking systemic improvements in service delivery (Joshi 2017).

The focus on social justice, particularly towards historically marginalised groups and individuals, is reflected in the strong role of legal remedies, which have the 'teeth' (Fox 2014) needed to hold relevant authorities accountable to their duties in a time-bound manner. However, focusing on these approaches may lead to adversarial engagement with the state.

By comparison, social accountability programmes are not always framed within legal rights, but rather on socially accepted standards and norms, which may or may not be distilled in law (A. Joshi, pers. comm.) This approach can be used to negotiate better access to services through direct engagement with the state or relevant providers. In this regard, social accountability initiatives rely on collaboration with the state.

Despite this partial divergence, legal empowerment practitioners are increasingly combining the two approaches strategically, to

ensure that the violations faced by individuals are redressed, and to seek systemic change (Feinglass *et al.* 2016; Joshi 2017). In both theory and practice, therefore, the dichotomy may hinder us from fully grasping the ‘politics of accountability’, in which the relations between citizens and the state are dynamic and constantly evolving.

This report contributes to this debate by analysing different examples of organisations that

use a range of confrontational and adversarial approaches to seek more equal access to services. In particular, it unpacks the factors surrounding the choice of approach, and their impact on equitable access. Power relations between citizens and states underpin the ability of citizens to hold states accountable; the next section outlines the analytical framework used to unpack these relations.

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## 2. Analytical framework

### 2.1 Power and empowerment

The literature on power is particularly useful for understanding how citizens’ use of legal frameworks can shape their access to services and, more broadly, governance and resource distribution. Having – or lacking – the power to achieve desired outcomes is often shaped by contextual, socio-economic and political factors, as well as cognitive or personal factors. The very definition of power and, in turn, empowerment therefore varies from one context to another, and from one issue to another. In line with the subjective nature of power, and resonating with Sen’s (1981) view of empowerment, Vermeulen (in Chambers 2006: 100) defines power as having the “ability to achieve a wanted end in a social context, with or without the consent of others”. Similarly, Alsop (in *Ibid.*: 100) describes empowerment as “enhancing an individual’s or group’s capacity to make purposive choice and transform that choice into desired outcomes”.

Because different actors enjoy discriminate forms of power, one useful way to map power distribution is to draw on the works of Veneklasen and Miller (2006) and Chambers (2006). Together, they identify four categories or expressions of power: ‘power over’, ‘power to’, ‘power with’ and ‘power within’.

Typically associated with unfavourable power distribution, ‘power over’ implies the privileged exercising of power by a group of actors over others, usually in an undemocratic or restrictive manner. However, exercising ‘power over’ is not inherently attached or fixated to certain actors,

such as government officials. Rather, upholding ‘power over’ is contextually and temporally bound and linked to the positionality held by a certain actor. The same actor may have ‘power over’ a certain actor, but not over another.

For example, a lawyer or legal non-government organisation (NGO) could be perceived as having ‘power over’ its clients or community members by virtue of its stock of legal knowledge and access to decision-making mechanisms, which are not enjoyed by those clients and community members. The lawyer or legal NGO does not have the same decisive power as a judge or a government official, however, who, by virtue of her / his role and position, can exercise stronger decision-making power – even over the lawyer or NGO. Having said that, ‘power over’ should not be seen as inherently disempowering or negative, even if it is a typical example of the top-down flow of power.

If ‘power over’ is typically associated with state actors, ‘power with’ concerns citizen-led decision-making at the collective level. Actors pool their efforts into a collectively decided issue and dedicate time and commitment to achieve a shared goal. ‘Power with’ is characterised by a sense of peer support and solidarity, which may be drawn from a shared understanding of injustice, experiences faced, goals or identities.

Typically, and in contrast to ‘power over’, ‘power with’ is associated with bottom-up decision flows and is therefore more participatory. Marginalised groups that strive to bring about change may need to first build their collective power to be able to strategise and decide on the actions to be taken.

*The four case studies in this report are used to discuss the links between empowerment and accountability, and the role of legal frameworks and rights-based action for strengthening both.*

Actions, which can range from adversarial to collaborative, aim to trigger a response by actors with 'power over.'

Closely linked to 'power with' are the two further categories of power: 'power to' and 'power within'. When actors are able to decide on a desired plan of change and act upon it, they are said to exercise 'power to'. The capacity to organise, strategise and act is the foundation of 'power to'. In this regard, 'power to' can be understood as agency.

'Power within' is the presence of the self-awareness and self-confidence necessary to take action to achieve desired change. It refers to an individual's ability to enjoy self-worth and self-knowledge.

All four categories can be achieved through a variety of strategies, using those best suited to the goals and contexts in which individuals operate. In the case of CSOs, for example, there are different action strategies which embody the above categories of power. Chambers (2006) provides a useful list of action strategies, which he describes as using different forms of power 'to empower'. Table 1 (page 11) presents examples of the action strategies adopted by the CSOs that provide the case studies for this research report.

## 2.2 Forms of power

All these categories of power can be expressed in different spaces and channels. The 'power cube' framework<sup>5</sup> developed by Gaventa (2006) and others focuses on the interrelations between different spaces, levels and forms of power. The cube identifies visible, invisible and hidden as the forms in which power is exerted, and which have a direct impact on marginalised groups' access to services.

Visible forms of power are represented by the formal structures – laws, regulations and decision-making processes – that determine resource allocation and service delivery. Engaging with visible forms of power may entail resorting to judicial and non-judicial processes, administrative procedures and other formal mechanisms for participation. In the context of legal empowerment, visible forms of power provide a normative standard for citizens to base their demands, as well as a platform for advancing them. Visible forms of power can also be challenged, for instance when seeking policy reform or strategic litigation, to allow for inclusive and equal resource allocation.

Invisible forms of power refer to sets of values and behaviours that prevent marginalised groups from being able to challenge the status quo and take action, individually or collectively. They are relevant when analysing marginalised groups' perceptions of themselves and of the state, and the perceptions of service providers towards them. The former aspect has been further explored by others (e.g. Rowlands 1997; VeneKlasen and Miller 2006), who associate it with 'power within'. Invisible forms of power are more subtle as they result from the historical socialisation of norms and values, which are rarely questioned by society. For example, historical cultural constructions of gender roles have ingrained man–woman interactions in a fixed power relationship that passes through generations. Similarly, the historical marginalisation of certain groups has socially normalised discriminatory practices and policies, and gives little incentive for people to challenge the status quo. Changing these norms is particularly difficult as it requires challenging a society's belief systems and social values.

<sup>5</sup> See [www.powercube.net](http://www.powercube.net)

Table 1. Case-study organisations and the scope of their work

	Organisation	Location	Mission	Constituency	Position with the community	Key issues covered
Kenya	<b>Hakijamii</b>	Nairobi; Garissa County	To strengthen the capacity of people's organisations to effectively and directly participate in advocacy and realising people's economic, social and cultural rights in Kenya.	Grass-roots community-based organisations (CBOs), informal collectives / social movements. Within these, Hakijamii works with existing or emerging leaders.	Intermediary	<ul style="list-style-type: none"> <li>• Housing (evictions and displacement)</li> <li>• Water health and sanitation</li> <li>• Participation in national consultations on budgetary issues</li> </ul>
	<b>Bar Hostess Empowerment and Support Programme (BHESP)</b>	Nairobi	To influence policy and facilitate the provision of quality health services, human rights awareness, legal services and economic empowerment for sex workers, women who have sex with women, women using drugs and bar hostesses in Kenya.	Sex workers, bar hostesses (20% of the sex worker population), drug users, young women.	Community-embedded	<ul style="list-style-type: none"> <li>• Criminalisation of sex workers</li> <li>• Protection from discrimination and police abuse</li> <li>• Access to services, especially health</li> </ul>
South Africa	<b>Ndifuna Ukwazi</b>	Cape Town	To disrupt the reproduction of apartheid spatial inequality and segregation by compelling the government to meet its obligations to use well-located land to provide affordable housing, while simultaneously defending the rights and security of tenure for poor and working class people who are being forced out of the city because of gentrification and unfair rental practices.	Poor and working class tenants.	Intermediary	<ul style="list-style-type: none"> <li>• Housing (evictions and displacement)</li> <li>• Water health and sanitation</li> <li>• Participation in national consultations on budgetary issues</li> </ul>
	<b>Witzenberg Rural Development Center (WRDC)</b>	Ceres, Western Cape	Community advice offices provide advice on human rights issues, focusing on early childhood development and capacity-building on relevant topics.	Farm workers, poor rural people living in informal settlements.	Community-embedded	<ul style="list-style-type: none"> <li>• Housing</li> <li>• Access to water and essential services</li> <li>• Labour rights</li> <li>• Social grants</li> </ul>

Hidden forms of power set the agenda of the issues being discussed in formal settings, and use rules and regulations to exclude powerless voices from being represented in decision-making. In the context of service delivery, hidden power may be relevant to understand how vested economic interests shape the allocation of resources and public investment.

By drawing on these interpretations of power as an analytical framework, this research explores the different legal empowerment approaches used for obtaining more equal access to basic services. The four case studies in this report are used to discuss the links between empowerment and accountability, and the role of legal frameworks and rights-based action for strengthening both.

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## 3. Research questions

Using the existing literature as a backdrop, this research sought to develop a more nuanced understanding of how the law – understood, in this context, as rights-based legal discourse, and legal frameworks and mechanisms – is used to obtain a more inclusive and equitable delivery of basic services.

To do so, the research addressed two questions:

*1. How do organisations use legal discourse, frameworks and mechanisms to empower citizens, build agency and catalyse actions?*

Here, the research sought to unpack the meanings of ‘empowerment’ and ‘agency’, and address questions of power within, power to and power with. For instance, how does legal education help

build ‘power within’, and a new understanding of self and legal rights / entitlements? How does the acquired knowledge / consciousness translate into action?

*2. How does the state respond when (empowered) groups and organisations engage with the state?*

To address this question, the research analysed how different approaches impact on the different forms of power (visible, invisible and hidden) that affect marginalised groups’ access to services. The analysis reflected not only on the differences between collaborative and adversarial approaches – which differentiate between legal empowerment and social accountability – but also demarcated formal and informal channels for participation.

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## 4. Research scope and methodology

Using the law to address gaps in service delivery often requires groups and organisations to work with individuals and communities to use formal and informal mechanisms, such as judicial and administrative channels, mobilisation and protest.

For this reason, this study focused on the work of different organisations that support marginalised groups in claiming more equitable access to services. As case studies, the research analysed four organisations, two each in Kenya and South Africa.

The choice of these two countries was based on the following criteria:

- In both countries, socio-economic rights are enshrined in the national constitution, placing a legal obligation on the state to allocate adequate resources for entitlements such as housing, health and food.
- In both countries, the legal and policy frameworks ensure a degree of citizen participation in decision-making processes,

for instance through the decentralisation of development planning and budget decisions.

In addition, South Africa has a rich history of civil society activism around the law, which began during apartheid and continues today. Community paralegals, which operate through the hundreds of community advice offices spread across the country, play a crucial role in the defence of black and poor citizens' rights. While Kenya lacks a similar capillary presence of community paralegals, the new constitution, passed in 2010, catalysed efforts to realise poorer citizens' rights to health, housing, water and sanitation.

In each country, the two organisations were chosen to represent: (1) a variety of approaches used, ranging from collaborative to adversarial, and a combination of formal and informal mechanisms; (2) different types of constituencies served; and (3) both community-embedded and intermediary organisations. Table 1 summarises the work of each organisation.

The research process proceeded as follows. Firstly, an extensive review of the literature on legal empowerment was conducted to understand the evolution of the concept in theory, and provide an overview of the empirical evidence related to legal empowerment as an approach to expanding access to services. This review identified 200 studies, of which 72 were selected as relevant, drawing from diverse disciplines including pedagogy, legal studies and access to justice, and political science.

Following this, a field study was conducted for each case-study organisation. In total, 69 people were interviewed across different respondent groups. Among the interviews, 45 were focus group discussions with community members<sup>6</sup> and 24 were in-depth interviews with members of the organisations' staff, government representatives and service providers, and other key informants. Table 2 provides an overview of the interviews conducted.

The number of interviews varied depending on the size of the organisation and the availability of respondents. As Table 2 indicates, the limited availability of government staff skewed the balance towards community members and

organisational staff, with fewer participants from government authorities. Increased representation of government voices would have shed light on important aspects related to state responsiveness, particularly in light of the centrality of the concept of legitimacy within relations of accountability. Further research could seek to capture the perspective of state authorities in these relations.

This limitation had implications for the subsequent analysis, introducing potential bias towards the perspectives brought by the organisations interviewed. Further, the contacts of the community members and government representatives or service providers interviewed were provided by the organisations under analysis, even though, where possible, the researcher engaged independently with interviewees.

To counter this, triangulation of the data collected through the interviews was undertaken in two ways: (1) through interviews with key informants external to the organisation concerned and the community; and (2) by reviewing a range of media reports and court documentation.

The distinction between staff and community members has, in some cases, been blurred by the peculiar position of some community paralegals / activists, who are members of the community they engage with, but (often) receive a salary or stipend from the relevant organisation. In Table 2, paralegals are included in either category, depending on the issues discussed during the interviews.

The analysis sought to tease out the approaches used by each organisation, and the impacts of these on the empowerment of marginalised individuals and groups, and on the different forms of power that shape access to services. With regard to the forms of power affected, the analysis distinguished between approaches that use formal or informal channels, and adversarial and collaborative approaches. A matrix was developed to identify the outcomes of these different approaches on each form and expression of powers.

<sup>6</sup> In some circumstances, discussions with community members took place through in-depth interviews rather than through focus groups.

Table 2. Interviews conducted

	Organisational staff	Focus group discussions with community members	Government / service providers	Key informants	Total
Hakijamii	3	15	2	1	21
Bar Hostess Empowerment and Support Programme (BHESP)	3	12	1	1	17
Ndifuna Ukwazi and Social Justice Coalition*	7	6	0	1	14
Witzenberg Rural Development Center (WRDC)	2	12	1	2	17
<b>Total</b>	<b>15</b>	<b>45</b>	<b>4</b>	<b>5</b>	<b>69</b>

\* See Section 4.2 for an explanation of the links between Ndifuna Ukwazi and the Social Justice Coalition.

## 4.1 Background to the case studies in Kenya

In 2010, Kenya enacted a new constitution that specifically addresses long-standing historical, geographic, demographic and human rights violations that have hindered progressive development (UNICEF 2014). It contains explicitly the principles of equality, accountable leadership, integrity and transparency, public participation, non-discrimination and protection of the marginalised, diversity and representativeness in public service (Hakijamii 2011). The new constitution created optimism for change in Kenya and provided a more stable framework for legal and political reforms.

A key provision was the inclusion of an expansive Bill of Rights that incorporated economic, social and cultural rights, such as the rights to health care, housing, sanitation, and clean and safe water (Article 43, Bill of Rights). Similarly, the inclusion of the right to access to public information was seen as an important tool in fostering the culture of accountability and transparency (Hakijamii 2011).

Under the new constitution, power was devolved from the national government to 47 newly decentralised counties. The national (central) government remained responsible for national-level policy-making relating to education, health, macro-financial management and national security, among other matters. Counties were given responsibility for making decisions on the allocation of public resources, therefore playing a leading role in the delivery of basic services.

While the new constitution and governance order created new opportunities for addressing social inequalities and fostering development, access to basic services and the enjoyment of rights remains deeply unequal in Kenya. According to UNICEF (2014), 42% of the population of 44 million lives below the poverty line. Significant divides persist in terms of income (Beegle, Christiaensen, Dabalen and Gaddis 2016), gender and other factors. With regard to geographic disparity, poverty is higher in the northern and coastal regions of the country, and half of people in rural areas live below the poverty line, compared to one third in urban areas (Sivi Njonjo 2013).

**Hakijamii**

Hakijamii was established to enable marginalised people to advocate for their economic and social rights in Kenya. Founded in 2004 by a human rights lawyer, and initially focused on ensuring protection against forced evictions and the displacement of poor communities in rural and urban areas, over time Hakijamii expanded its work to include water, health and sanitation, among other issues. The organisation also diversified the type of approaches used to include legal training, capacity-building, policy advocacy and participatory budgeting.

The organisation works across 15 counties in Kenya, partnering with local CBOs and / or informal groups to address collective issues faced in relation to socio-economic rights. Once local groups identify the issues that are most relevant to them, Hakijamii conducts workshops to explain the relevant legal provisions and procedures.

Bridging between communities and local government, Hakijamii uses the legal framework, with its rights and responsibilities enshrined, to create a shared platform for discussion. It sometimes uses existing platforms, such as participatory budgeting processes, to raise voices from communities. Local engagement is also translated into county- and national-level advocacy, seeking to expand the allocation and distribution of budgetary resources and instil better legal protection of socio-economic rights. Litigation is used as a last resort to address violations of, or threats to, fundamental rights, for instance in cases of forced eviction and displacement. Even in such cases, litigation occurs to safeguard the collective rights of communities, rather than individuals.

**Bar Hostess Empowerment and Support Programme**

The Bar Hostess Empowerment and Support Programme (BHESP) was founded in 1988 following a protest triggered by the arrest of a sex worker in Nairobi, who was later jailed, for demanding payment from her clients. The protest got the attention of high-ranking police officers and led to the release of the sex worker. BHESP's founder and current executive director identifies this episode as a key empowering moment for sex workers in Nairobi.

In 1989, HIV was declared as a national emergency and the need for sex workers to organise politically became even more compelling. BHESP began to raise sex workers' awareness about issues around HIV, supplying medical information to destigmatise HIV-positive (HIV+) workers and providing 'role model' examples of HIV+ workers who were able to carry on with their lives. In doing so, the organisation became a collective voice for sex workers and a valid interlocutor for government and international donors, particularly the World Health Organization, that were seeking to engage with sex workers to tackle the pandemic.

Today, BHESP provides health and legal awareness and counselling, legal representation in individual and collective cases of discrimination and abuse against sex workers, and awareness-raising services for health providers and police officers. At the national level, it represents sex workers' interests with government bodies in charge of delivering services related to HIV and sexually transmitted infections. BHESP is also involved in wider efforts to decriminalise petty offences which discriminate against sex workers, through policy advocacy and strategic litigation.<sup>7</sup>

**4.2 Background to the case studies in South Africa**

South Africa's constitution, often referred to as one of the most progressive in the world, is the result of the long-term social struggle and unrest that led to the abolition of apartheid in 1994 and the establishment of the Truth and Reconciliation Commission in 1996. The constitution protects socio-economic rights, as well the rights to equality and freedom from discrimination. The governance system comprises three levels: (1) the national government, in charge of policy-making and the delivery of protective and economic services, including labour, housing and trade; (2) nine provinces tasked with ensuring the delivery of health, education, social development and welfare; and (3) eight metropolitan, 44 district and 226 local municipalities, responsible for the delivery of household utilities including water, electricity and sanitation.

<sup>7</sup> Although sex work is not a criminal offence in Kenya, sex workers are often charged for petty offences such as loitering, or 'being idle and disorderly'. Across many African countries, CSOs are seeking to declassify and decriminalise such petty offences, which are often a colonial hangover used to extort bribes and target vulnerable people (Ehlers 2017).

Despite strong equality provisions and a number of legal instruments and policies designed to address the injustices of the apartheid era, progress to ensure equal access for all to services has been slow in practice. South Africa today is one of the world's most unequal countries: in 2015, the Human Development Index ranked it 116th out of 187 (UNDP 2015). Inequality figures highlight race and geography as key factors, with black men and women, and those living in ex-homeland<sup>8</sup> and informal urban settlements, most likely to be poor. Social tension persists, with many protests related to service delivery and government performance.

Affordable housing is a particularly contentious issue. In recognition of the fact that access to prime (centrally located) land was the main demand of the anti-apartheid movement from its early days, the 1994 Housing White Paper committed to building 1 million houses by 1999. However, the Department of Human Settlements states that between 1994 and 2012, only 2.5 million houses were delivered; this figure is highly contested, however, and it fails to take into account the poor quality of these houses (Free State Housing Campaign 2016).

Today, South Africa has enacted deep reforms of its legislation. Yet while the post-apartheid legislative framework requires cities and municipalities to end spatial segregation, the political class has largely maintained strong economic interests over prime land, making it difficult to implement these legal commitments.

#### ***Ndifuna Ukwazi***

Ndifuna Ukwazi was established by two human rights lawyers / activists in 2011 to support existing social movements (mostly in black townships) by providing leadership training opportunities and intensive advocacy and research support, including legal support.

In particular, it has been working in close partnership with the Social Justice Coalition, a membership-based movement demanding more dignified living conditions for black and working class people living in Cape Town's informal settlements.<sup>9</sup> This partnership has focused on

issues of safety and access to sanitation in informal settlements, providing strategic campaign support, research capacity and litigation support. With regard to access to sanitation in informal settlements, Ndifuna Ukwazi conducted training events on budget analysis, supported a social-auditing exercise, gathered citizens' submissions for Cape Town's budget formulation, and provides strategic litigation services.

In 2016 Ndifuna Ukwazi underwent an organisational restructuring to reorient its work towards the 'bigger question' of land and spatial segregation in Cape Town. It launched the 'Reclaim the City' campaign with the goal of building 'a social movement to counter property power'. The campaign mobilises people from across the boundaries of race, class and place of residence (from informal settlements to the central business district) to disrupt the replication of spatial apartheid and ensure the city government invests in affordable, mixed-income housing solutions in central areas. Ndifuna Ukwazi supports the campaign by mobilising working class communities, coordinating public actions, providing legal advice and representation, liaising with officials, conducting extensive research and information dissemination, and amplifying the voices of poor and working class people in the media.

#### ***Witzenberg Rural Development Center***

Witzenberg Rural Development Center (WRDC) is a community advice office located in the municipality of Ceres, Western Cape Province. The area is well known for supplying over half of the country's fruit, as well as producing wine and vegetables. The community advice office was established in 2013 by two local activists who had been working in advice offices elsewhere.

Most of the office's clients are workers from nearby farms and black people living in the informal settlements which have been growing near Ceres. WRDC provides 'standard' legal services, including advice, mediation, negotiation (e.g. with employers and government), and referrals and follow-up action with relevant authorities and lawyers. Cases dealt with range from labour issues to access to government services. In addition, WRDC works on

<sup>8</sup> 'Homelands' were territories set aside for black inhabitants under the policies of apartheid.

<sup>9</sup> The Social Justice Coalition comprises 2,500 members in 17 branches across the black townships of Crossroads, Gugulethu, Khayelitsha and Kraaifontein, all of which are in Cape Town. See: [www.sjc.org.za](http://www.sjc.org.za)

early childhood development by running two early childhood development facilities for children living in informal settlements.

To ensure these services reach farm workers living in remote areas, and to tackle systemic issues more effectively, in 2015 WRDC began organising workshops at the community level to raise awareness on rights and relevant administrative procedures, and to facilitate exchanges with representatives of government departments or other dispute resolution bodies (e.g. the Commission for Conciliation Mediation and Arbitration, CCMA). These workshops triggered the establishment of the Witzenberg Action Group, a collective of 35 activists who discuss and strategise on common challenges faced in accessing housing, water and sanitation. Through the support of the community advice office, the Witzenberg Action Group organises protests and marches, and undertakes exchanges with activists from other areas and 'strategic engagement' meetings with the Cape Town municipality.

### 4.3 Overview of approaches used and their outcomes

Across these four organisations, a number of approaches are used to expand access to land, housing, water and sanitation. Table 3 summarises these.

Some of these approaches are primarily geared towards building citizens' agency and capacity to demand entitlements (empowerment), while others entail engagement with the state (accountability) – which in turn shapes the way in which citizens perceive and engage with the state. For instance, rights education and capacity-building are mainly linked with empowering marginalised groups, while litigation and policy advocacy are used to hold the state accountable. However, the process of litigation can have important repercussions for individual and collective empowerment. Table 4 outlines the relevance of each approach for empowerment and accountability.

**Table 3.** Approaches used by the four case-study organisations

Approach	Use of this approach	Organisations
Education on rights and decision-making processes	This is a strong focus for all the organisations analysed. Modalities vary, and include holding collective workshops / training with community members, producing popular education materials, and providing free and specialised advice to individuals. Raising awareness is rarely an end in itself, rather a preliminary step towards taking action.	All
Legal advice and access to administrative and judicial remedies	Court litigation is the most prevalent means, but some organisations also use arbitration tribunals (e.g. the CCMA in the WRDC case, and the housing and planning tribunals in the Ndifuna Ukwazi case) and mediation (e.g. WRDC paralegals mediate between farm workers and their employers). Organisations may also resort to quasi-judicial mechanisms such as human rights commissions (e.g. Ndifuna Ukwazi, WRDC).	All
	Strategic litigation: litigation can have strategic value when it seeks to achieve an impact beyond the specific individual or community affected by a problem. Strategic cases tackle systemic issues that hinder the enjoyment of basic rights.	BHESP, Ndifuna Ukwazi
Organising and capacity-building	The organisations mobilise community members (e.g. Ndifuna Ukwazi through the 'Reclaim the City' campaign, and BHESP) or support community organising, for instance providing the infrastructure to hold meetings and organise protests (e.g. WRDC, Ndifuna Ukwazi).	All
Facilitating engagement with service providers and government authorities	The organisations provide direct access to administrative departments either by accompanying individuals to the relevant offices or health facilities (e.g. BHESP) or by facilitating workshops where community members can engage with officials (e.g. Hakijamii, WRDC).	BHESP, WRDC, Hakijamii
Protests and campaigning	This approach is used in several ways: to tackle a lack of political will in ensuring access to basic entitlements for a specific group (e.g. Ndifuna Ukwazi); to help groups gain visibility and have their voice heard (e.g. WRDC); to draw attention on an ongoing litigation and pressurise the judiciary to rule fairly (Ndifuna Ukwazi); or to uncover corrupt and discriminatory practices that further marginalisation (e.g. BHESP, Hakijamii). This is often supported by strong media engagement and the production of multimedia materials (e.g. Ndifuna Ukwazi).	All
Policy advocacy	This includes lobbying members of parliament and other actions to influence parliamentary discussions at national and regional levels (e.g. Hakijamii, Ndifuna Ukwazi), or using existing mechanisms such as council and parliamentary committees (e.g. Ndifuna Ukwazi).	Hakijamii, Ndifuna Ukwazi
Alliances with other CSOs	This may be at different levels, to build horizontal solidarity and facilitate exchange among activists, or to build vertical alliances for tackling national-level issues.	All
Participatory budgeting	Only the two intermediary organisations covered in this study (Hakijamii and Ndifuna Ukwazi) engage in participatory budgeting efforts; therefore this is not fully addressed in this report.	Hakijamii, Ndifuna Ukwazi

**Table 4. The impacts of each approach on empowerment and accountability**

Approach	Outcomes for empowerment	Outcomes for accountability
Education on rights and decision-making processes	Learning the content of the law and relevant procedures; builds a shared understanding of issues	Individuals are keener to engage with authorities once they have the right knowledge
Legal advice and access to administrative and judicial remedies	Individuals and groups feel supported (by lawyers) and are more likely to take action	Courts can direct states to ensure access to services to individuals and groups
Organising and capacity-building	People gain skills and agency to advocate for themselves and other community members	States have new interlocutors to engage with
Facilitating engagement with service providers and government authorities	Individuals feel legitimised and able to raise their issues	This can lead to direct improvements in access to services
Strategic litigation	Builds collective power	Addresses systemic issues that prevent equal access to services
Protests and campaigning	Builds collective power	The state is held accountable in public spaces
Policy advocacy	Builds collective power	Policy changes can address systemic issues
Alliances with other CSOs	Builds horizontal solidarity	Allows organisations to tackle national-level issues

The approaches aimed at increasing accountability can be separated into those using formal channels (e.g. courts, arbitration, administrative procedures) and those engaging with the state informally (e.g. through meetings, media and protests).

A further classification lies in whether the approach is perceived as collaborative or adversarial (by either the state or the activists / communities). Perceptions vary, but litigation is usually seen as

a confrontational way to engage with the state, while administrative channels (e.g. complaints and petitions) and policy advocacy are seen as more collaborative approaches, at least by the community members interviewed for this research. Similarly, with regard to informal strategies, protests, public action and use of the media can be confrontational, while informal engagements and dialogues with authorities are more collaborative. Table 5 summarises these classifications.

**Table 5. Classification of the approaches used**

	Formal	Informal
Collaborative	<ul style="list-style-type: none"> <li>• Policy advocacy</li> <li>• Use of administrative channels</li> </ul>	<ul style="list-style-type: none"> <li>• Engagement with authorities and service providers</li> </ul>
Adversarial	<ul style="list-style-type: none"> <li>• Litigation</li> </ul>	<ul style="list-style-type: none"> <li>• Protest and campaign</li> </ul>

## 5. Empowering marginalised groups: building individual and collective agency

The change in community members' awareness and perception of their rights and entitlements, and about the role of the state in ensuring access to basic services, is one of the most prominent impacts achieved across all organisations. This is especially true for CBOs such as BHESP and WRDC, which work with smaller, relatively more homogeneous constituencies. Conversely, intermediary organisations are successful at bringing together a diverse group of communities, which are able to tackle more systemic issues, though with a weaker

impact on individual empowerment. Although the concept of empowerment has different meanings across community members interviewed (see Box 1), all organisations analysed strongly rely on education, legal advice and representation, and capacity-building for building the agency of marginalised groups, enabling them to engage with the state more effectively. A key strategy is to create collective spaces for building a common understanding of the issues that affect individuals, and to catalyse action.

### Box 1. How is empowerment perceived?

Community members interviewed had different perceptions of empowerment. Some viewed it through a structural / institutional lens; others perceived empowerment as a stronger sense of collectivity, or the ability to access legal advice.

To unpack the different, nuanced meanings of empowerment, community respondents were asked about the outcome and value of legal empowerment interventions in their lives, and how these helped them to address the issues they faced in accessing services. Their answers mirror the approaches used by each organisation to strengthen empowerment.

#### Hakijamii

- “We were able to get structured as an organisation, got funding / access to funding.”
- “We learned how to speak to the government, new strategies and ideas.”
- “We learned about how to track budgets.”
- “We gained ammunition and courage to lead our community.”
- “We have opened legitimate channels with government.”

#### WRDC

- “We have a space to meet as a group, are able to take decisions and plan strategy.”
- “We have someone who stands next to us and walks us through the process.”
- “In case we face problems, the advice office is always able to assist us, as they have the right contacts.”
- “We are being listened [to] by government officials. They never used to meet with us before.”

#### BHESP

- “I have a place where I can go, be safe, and be understood and not judged.”
- “Earlier, we were alone but now it's a lot of us and we are stronger.”
- “People see us differently; the police treat us differently. Now, many people have come forward and support us.”

#### Ndifuna Ukwazi

- “We now have access to lawyers who understand the law and are able to tell us what documents mean, and help us decide what to do.”
- “They are able to get ‘big wins’.”

*“If we talk about rights written in the constitution which has been adopted, and it’s in law, the fact that you don’t have a service becomes a problem. If I am entitled to it, then I will fight for it.”*

This section outlines how these different but intertwined approaches build on different expressions of power and help overcome the challenges that inhibit people from claiming their rights – the invisible power mentioned in Section 2.2.

## 5.1 Education on rights and decision-making processes

Articulating service delivery in terms of entitlements can provide solid ground for demanding better services (power within):

“If we talk about rights written in the constitution which has been adopted, and it’s in law, the fact that you don’t have a service becomes a problem. If I am entitled to it, then I will fight for it.” – Social Justice Coalition member

It can also be used to counter discriminatory practices:

“As a sex worker I have the right to tell the police that I am not doing anything wrong.”  
– BHESP, sex worker

Discussions about laws and policies are grounded in personal experiences, and build understanding about wider, structural issues that underpin poor resource delivery or distribution and unequal access. They create a shared identity and encourage people to rethink the role of the state in ensuring basic rights. During Reclaim the City meetings, for instance, legal information for tenants on how to prevent evictions is combined with a wider discourse on power, race and class:

“We are ... interested in discussing power ... rights are being violated through racial expressions of power.” – co-director, Ndifuna Ukwazi

This requires challenging deeply rooted sentiments that inhibit raising voices, which are often the result of long-term injustice and exploitation, especially in the case of South Africa.

### **Actionable information and access to those in charge**

Understanding the content of laws and the political ecosystem is by no means enough to be able to take action (power to). Most community members stated that knowing the process and the relevant officers, and having a concrete opportunity to reach them, is what engenders confidence and enables action. Even more important is knowing who the key respondents in charge of service provision are:

“People already know what their rights are, but they have given up, and also they feel that rights work for people who are more privileged. So [they] need to gain more knowledge about which places they are supposed to go to and what is the process ... who are you talking to? Who is responsible for this? [You] can’t strike without knowing why and who is responsible.” – Social Justice Coalition member

## 5.2 Legal advice and court representation

The process of engaging with courts has significant implications for the idea of agency. People feel that having a lawyer or an organisation next to them provides ‘ammunition’; they feel they are being supported. Petitioners who successfully addressed their grievances in court have been able to prevent similar issues from happening again. Litigation can also prompt collective support (see Box 2).

However, engaging with courts can be a daunting experience when societal bias is reproduced by the justice system, and court processes turn into a daunting and / or disempowering experience. One of the activists in the Witzenberg Activist Group described her treatment in court as “one of the most humiliating experiences of my life” after the judge challenged her ability to raise her own child because she is poor. While such experiences can discourage some people from using this approach, and reinforce a lack of trust in the state, they do

## Box 2. A case of strategic litigation challenging systemic discrimination and triggering collective action

An activist from BHESP is the first sex worker in Nairobi to have successfully challenged in court an arrest for loitering. “I was arrested and taken to court, charged with loitering with intention of prostitution ... I denied the charge. I knew I was not loitering because I knew what it meant under the law ... There weren't lawyers: I acted in self-defence, and other activists were advising. Being a

paralegal, I knew what to say ... My case was very helpful to the community in setting a precedent. They [the police] used to arrest ... but since my case, things have changed. Everyone was really happy ... [other sex workers] came out in court in big numbers, and attended the proceedings ... It wasn't easy for me, because [I felt] eyes on me, but wanted to fight.”

not deter people from participating in the group's other activities, especially more informal ones like protests and meetings with authorities.

### 5.3 Capacity-building

Organisations develop a range of strategies for building advocacy and organising the skills of community members. Intermediary organisations usually work with existing community leaders and grass-roots activists:

“Learning about the law and gaining courage helped us organise and advocate.” – Garissa community leader, Hakijamii

Community-embedded organisations also invest in building new leadership, especially where this does not already exist (e.g. BHESP, WRDC).

#### *Peer-to-peer learning*

A crucial way in which organisations support capacity-building is by facilitating exchanges with similarly placed communities in other areas. According to several community members, this has been essential in gaining problem-solving skills and identifying needs and priorities. For example, Hakijamii facilitated an exchange between community members from Garissa County with community members from Kakamega County, which was useful for the Garissa activists to learn practical strategies for distributing ward funds in a more equitable way.

#### *Alliances with other groups*

Creating links is not just important for activists to gain skills, but also for building horizontal solidarity that enables them to fight on issues that have national reach. WRDC regularly ensures that

activists from the Witzenberg Action Group visit the Housing Assembly in Cape Town, a movement that amplifies voices of residents of informal settlements across the country. This allows them to gain information on national policies, for example on the installation of water meters, and informed their demands on access to water during the strategic dialogues held with the municipality.

### 5.4 Creating collective spaces for action

Agency-building processes lead to, and complement, the formation of collective spaces. These provide a further way for building individual confidence (power within) while being crucial for taking decisions on collective action (power with). Collective spaces are used by community members to mobilise, organise, discuss issues and enable ‘safe’ exchanges, mutual support and solidarity. At a later stage, these spaces become the expression of a collective voice, through which claims to the state can be advanced.

For example, collectives organise meetings with local officials, public actions and protests, and engage with the media using a single voice. While initial discussions with state officials are often facilitated by intermediary organisations, at later stages community members are able to engage directly with government, and are seen as representatives of the community at large. In this way, community groups gain legitimacy in the eyes of local governments and become valid interlocutors for negotiating access to services (see Box 3).

### Box 3. Claiming space for engaging with the state

In Witzenberg, black farm workers and residents of informal settlements are often cut off from basic services. The absence of a space for the community to engage with municipal authorities led the Witzenberg Action Group (WAG) to use confrontational approaches in order to be heard. Following street protests and mass mobilisation the Municipal Manager agreed to hold periodic strategic engagements with activists and community members from the WAG.

This established a completely new space for engagement. Strategic engagement meetings are held approximately every six months at the municipality office, on issues prioritised by the WAG. The WRDC coordinator makes arrangements for the meeting, for instance formally requesting the meeting and organising transport, while

activists from various parts of the municipality bring their own issues and cases.

Activists participating in the meetings reported a change in municipality's responsiveness. Not only were they able to ask questions, but they obtained actual improvements in access to services. For example, one activist managed to get temporary toilets installed in her community, which until that point had not had access to sanitation.

Claiming this space for engagement has also led to the WAG gaining visibility, as well as shedding light on issues that were previously overlooked by the municipality. The Municipal Manager now recognises the WAG as a legitimate interlocutor for discussions related to service delivery. As activists from the WAG put it, "we were invisible and we became visible".

## 6. Engaging with the state: invisible, visible and hidden power

This section focuses on the relationships between marginalised groups, organisations and the state. In particular, it analyses how different approaches affect three different forms of power that shape access to services: invisible power, visible power and hidden power.

### 6.1 Invisible power

According to the organisations and communities interviewed in this research, there are several intangible barriers, or invisible forms of power, that prevent marginalised people from accessing services. These relate to: (1) citizens' perceptions of themselves and the state; (2) their ability to organise and take action (individual and collective agency); and (3) government and service providers' perceptions of, and relationships to, marginalised groups.

The first two factors have been addressed in Section 5.

Through rights education, capacity-building and litigation, community members reported gaining the courage to speak up, not just for themselves but for others in the community:

"From being silent and uninformed, I became very vocal and engaged in making sure that what happened to me will not happen to others." – community activist, Witzenberg Activist Group.

By gaining skills and channels to demand their rights, as well as some concrete wins through litigation, they feel more confident to engage with government providers. To this end, organisations create and facilitate spaces for community members to directly engage with local government and service providers.

With regard to the third factor, BHESP and Hakijamii both work directly with government officials and service providers (police officers and health providers in the case of BHESP; water providers and land department officials in the case of Hakijamii),

providing information and sensitisation. Both organisations undertake a non-confrontational approach, which entails improving communication between the two sides:

“We learned how to talk to the police and clients ... You don’t start screaming, you stay calm. If you are arrested for loitering, call [a paralegal]; if you fight against it, [you] will face retaliation.”  
– sex worker, BHESP

Hakijamii links community members with service providers, and tries to prevent potential conflicts from arising. This approach is in line with a ‘social accountability’ understanding of relations between consumers and service providers, rather than rights holders and government. According to a local officer at the Garissa Water Supply Company, Hakijamii was “the first [stakeholder] to approach us in a polite way and with an interest in understanding [the] challenges faced”. By stressing both the rights and responsibilities of water consumers, and the need to pay for water distribution, Hakijamii became an ally for the company.

This impartial approach allowed Hakijamii to mediate between communities and service providers through existing ‘invited’ spaces for engagement, such as local Water Action Groups established under the Water Service Regulatory Board, which had been inactive. According to the Garissa Water Supply Company, this led to a strong improvement in relations on both sides: according to an officer, customers “now understand [the] need for paying” and “even come directly to the office to report issues”, while company officers “also changed the way in which [we] speak to consumers”.

With regards to broader bottlenecks in the system, working through invited spaces like the Water Action Group allows Hakijamii to cooperate with local providers in tackling poor resource allocation by county governments. The Garissa Water Supply Company recently obtained a small ‘win’ with a new facility to help water distribution, but wider issues of corruption and a lack of payment of bills by powerful actors such as companies and luxury hotels have remained unaddressed:

“If individual officers or managers try to make them pay, they will be removed.” – Water Action Group member

BHESP uses a different approach, though this has similar outcomes. The organisation sets up sensitisation workshops at which police officers or

health staff working in government hospitals meet sex workers and hear their personal challenges in accessing public services or combating police corruption:

“We meet with nurses and tell them we are human beings.” – sex worker, BHESP

In addition, BHESP paralegals accompany sex workers to government facilities where trusted health practitioners operate. Over time, this has created a preferential channel of communication with key doctors and nurses, who are able to ensure sex workers receive dignified and safe treatment. This has led to increased demand for health services by sex workers and more responsive (because more sensitive and dignified) provision of services.

Relations with police officers have also improved substantially, as a result of both direct engagement and litigation to challenge arrests for loitering and other petty offences. The number of arrests and the frequency of abuse against sex workers have both decreased:

“Now we are more human and try to understand our brothers and sisters. We understand sex work is a consequence of poverty and structural problems.” – police officer, Nairobi

A challenge faced by BHESP is the high turnover of police officers and health staff, which requires the organisation to constantly engage with new people. Also, according to one police officer interviewed, there is a generation gap between police officers. Older generations were not sensitised to social issues, while younger officers have more opportunities for training and education, and for playing a service role rather than just policing.

The change in local dynamics between marginalised groups and government can open the way for changes in policies that either remove discriminatory practices or promote access for excluded groups. Through a broader coalition of civil society groups, BHESP is currently advocating for reforming the law that criminalises petty offences in Kenya.

## 6.2 Visible power

The approaches used to influence visible forms of power (e.g. legislation and policies, or working with public decision-making bodies) include written petitions, administrative complaints and litigation. While the administrative mechanisms examined

often don't have 'teeth', and are thus perceived as non-confrontational,<sup>10</sup> court litigation is more clearly adversarial, as it often entails sanctions and compensation, as well as tangible relief – such as housing allocation, social benefits or health treatment – for the individuals affected.

There are also chronological considerations when choosing one approach or another. Litigation is either filed to seek emergency court interventions, in cases where a right is under threat (e.g. eviction cases), or as a 'last resort' mechanism that follows when administrative channels are exhausted. In fact, across the cases analysed, formal mechanisms that lack 'teeth' are largely ignored by government respondents. Exhausting the administrative channels available becomes a box-ticking exercise, the ineffectiveness of which reinforces the need for recurring to approaches that have more 'teeth', like litigation and protests:

"If you go on the street after having tried to engage [formally] with the government through its own processes, you ... have a stronger case." Water Action Group member, Garissa, Kenya

The range of legal cases analysed are based on obligations in international and domestic laws to 'respect, protect and fulfil' rights.<sup>11</sup>

Cases based on the obligation to respect and protect are most frequent, and usually consist of claims brought by individuals or collectives who face, or are threatened by, the denial or deprivation of socio-economic rights (e.g. evictions, discrimination or abuse faced in public hospitals, loss of access to water). These cases are argued on the basis of constitutional protections of the rights to life, housing, health and water, along with the right to be free from discrimination on grounds of gender, income or race (see Box 4).

For example, Hakijamii litigated on behalf of 1,222 individuals whose homes had been unlawfully

demolished by the local administration, and who were evicted from the land they had occupied (Constitutional petition n.2 of 2011, Garissa High Court). The case led to the community regaining access to the land and rebuilding the homes. The verdict went even further, mandating the local administration to ensure access to water for the community and to pay significant compensation, for the violence and abuse faced and the loss of property incurred during the eviction.<sup>12</sup>

Cases based on the obligation to fulfil rights seek to expand existing access to services for marginalised groups, mainly through increasing their allocation of resources and realising changes in policy. These cases are difficult to win in court, and litigation is usually accompanied by other, non-legal strategies such as community mobilisation and public awareness on a specific issue. The legal discourse is used to 'push the boundaries' of what constitutes adequate and satisfactory fulfilment of the state's obligation to provide housing, water, health, etc. The notion of 'progressive realisation of rights', enshrined in international and national laws, provides the legal basis to argue for an increased allocation of resources. The principles of equality and non-discrimination provide room for arguing for the state to invest in reaching marginalised groups.

For example, Ndifuna Ukwazi is representing the Social Justice Coalition in a case to compel the City of Cape Town to budget adequately and plan for the provision of improved access to sanitation in Cape Town's informal settlements.<sup>13</sup>

Overall, the successful implementation of judicial outcomes depends on several factors, including the awareness and agency of the individual(s) affected to ensure that respondents act according to the court's directions. As explored in Section 6.1, organisations make significant efforts to address other forms of power that inhibit people's ability to claim their rights.

<sup>10</sup> As outlined in Section 4, the classification of administrative complaints as less adversarial is largely based on the perceptions of the community members and organisational staff interviewed, who strongly believed that the government does not take complaints seriously. For example, in most cases complainants did not receive a reply from the government about the grievances raised.

<sup>11</sup> This categorisation is used here because the human rights framework is relevant to, and widely used in, Kenya and South Africa.

<sup>12</sup> For a description of the case see [www.escr-net.org/caselaw/2012/constitutional-petition-no-2-2011-garissa](http://www.escr-net.org/caselaw/2012/constitutional-petition-no-2-2011-garissa) (accessed 25 July 2017).

<sup>13</sup> The case claims that the City of Cape Town's provision of temporary sanitation, and the lack of planning for permanent sanitation infrastructure in informal settlements, contravenes constitutional and statutory obligations to ensure the progressive realisation of rights, including the right to sanitation. See: <http://nu.org.za/law-centre/#1460396155691-5b824c44-26cd>.

## Box 4. Protecting access to land and housing through policy change

From 2006 to 2016, Hakijamii worked with stakeholders to build bottom-up and top-down pressure to protect access to land and housing, through community mobilisation, the use of international mechanisms and the national courts.

In 2008, Hakijamii submitted a shadow report to the United Nations Committee on Economic Social and Cultural Rights (CESCR), which requested that the government develop recommendations for guidelines on evictions. Members of civil society, including Hakijamii, drafted the guidelines on the basis of existing international standards on evictions (formulated by CESCR in its General Comment No. 7). Hakijamii's director believes that, at the time, the lack of political will for approving a bill on evictions was based on the fear that this would have traded property rights for squatters' rights. Such a bill would have made title deeds sufficient for guaranteeing land ownership, paving the way for thousands of land claims by slum dwellers.

Together with a broader housing rights coalition, Hakijamii began to raise awareness about the draft guidelines among community groups, which started using it in their advocacy with local governments to counter threats of eviction and to claim access to land and housing. This agitation brought media coverage on the issue. Simultaneously, Hakijamii challenged a number of evictions in court by arguing for the guidelines to become binding on the government, as they were the direct implementation of legal international treaties that Kenya had ratified. This eventually forced the government to approve the Eviction Bill in 2016.

According to Hakijamii's director, these ten-year, multi-approach, multi-stakeholder advocacy efforts, which brought about the new policy, paved the way for a change of attitude among the government towards poor citizens occupying land illegally. These people, who often had no other option, are now increasingly recognised as historically disenfranchised.<sup>14</sup>

### 6.3 Hidden power

In contexts where laws and regulations for overcoming marginalisation and exclusion exist, organisations may use more confrontational approaches to expose the hidden forms of powers that hinder their implementation. These approaches are both formal (e.g. litigation) and informal (e.g. protests, public action, naming and shaming).

For instance, South Africa's spatial segregation and the increasing unaffordability of housing in central areas of cities has pushed Ndifuna Ukwazi and WRDC to fight vested powers by publicly challenging the legality and fairness of decision-making and resource allocation. In Cape Town, for example, Ndifuna Ukwazi campaigns aim to expose corruption, vested interests and collusion between urban developers and political class – a form of hidden power. Similar claims are advanced by the group of activists organised around WRDC,

representing black farm workers and other landless groups that struggle to secure decent housing and living conditions in Witzenberg. Here, farm workers have mobilised around a few key issues, including proposed land reform advanced by the powerful local fruit industry and landowners.

In another challenge to hidden power, the Reclaim the City campaign, launched in 2016, seeks to create an alternative narrative – and way of planning – that is more inclusive of poorer citizens, and convey this narrative through a combination of public and media action, litigation and strategic research. The campaign identifies vacant public sites located in central areas of Cape Town that could be devoted to social housing and / or low-income housing. Through in-depth research, Ndifuna Ukwazi looks into potential ways in which these sites could be deployed for social housing, including analysis of the costs and financial feasibility.

<sup>14</sup> The change in attitude is confirmed by the establishment of the Land Commission in 2012 “to implement an efficient land administration and management system in order to ensure equity in access to land” (National Land Commission 2016). It was further reiterated during the interview with an officer from the Garissa Land Department. Hakijamii now liaises with the land commission to assist people in obtaining information on entitlements and procedures for ensuring safety of tenure.

Heavy use of the media contributes to raising the visibility of the everyday experiences of Cape Town residents who cannot afford basic housing, electricity and sanitation. Reclaim the City produces content in different forms (e.g. videos, photos, infographics and written pieces) to engage the local media and promote an alternative view of the city. The production of first-hand, high-quality content has led to a strong uptake of these views and perspective by local media, as proved by the extensive coverage in mainstream and non-mainstream papers devoted to the issues of affordable housing and inclusive cities.<sup>15</sup>

Public actions are organised to physically disrupt spatial segregation, by bringing black citizens living in informal settlements into 'white' areas, and holding public meetings to discuss issues around racial and class segregation:

“We had a rally on the promenade – typically a leisure space that we wanted to turn into a political space. We got a political permit for a protest, and every arm of government tried to shut it down – police came to try shut it down. We have been picketing down [at] the Mayor’s office. So, they are not used to this, and [they] invoke security service very quickly ... We did a very similar thing outside the parliament two years ago, and there wasn’t a breath from the police. Parliament is voided of power because it’s not very real power place.” – co-director, Ndifuna Ukwazi

Public actions and media coverage are aimed at engaging not only the city authorities, but also the public. In fact, Ndifuna Ukwazi hopes that the campaign will become a political movement able to force the city authorities to plan for more inclusive access to land and essential services. For example, one of the public meetings held near Tafelberg was attended both by tenants at risk of eviction and by a smaller number of flat owners who, for the first time, confronted the issues faced by domestic workers and working class tenants.

Formal remedies such as courts are a forum to

challenge decision-making that adversely affects black, working class residents, on both substantive (anti-constitutional) and procedural grounds. In one example, Ndifuna Ukwazi challenged the sale of a piece of vacant land in central Cape Town (see Box 5). While the court could not decide on the substantive arguments (because the Province of Western Cape withdrew the sale), it ruled in favour of Ndifuna Ukwazi on procedural grounds.

Litigation can also trigger media coverage and visibility, contributing to raised awareness on issues such as gentrification within society at large. In a case where 43 people in Bromwell Street, in the Woodstock area of Cape Town, faced eviction, some petitioners were able to directly engage with the media, and had ‘their side’ represented. This allowed them to publicly challenge the biased and discriminatory treatment they received from the judge in the case, on the basis of which the judge was prevented from arbitrating in another matter involving poor communities.<sup>16</sup>

Not surprisingly, the adversarial approach undertaken by Reclaim the City has not eased engagement between the campaign and the City of Cape Town. The heated debates led to the City refusing to publicly engage on the arguments and the proposals advanced by the campaign:

“How will you answer if you are publicly asked why you haven’t built social housing since 2008? They [the City] have a lot to lose by engaging [with us] but they don’t have anything to lose by not engaging!” – staff member, Ndifuna Ukwazi

However, the campaign’s openly defiant approach has been successful in shaping the public discourse on social housing in Cape Town, and shifting the City’s discourse towards concerns for more equitable access to housing. Exposing hidden agendas through litigation, public engagement and media exposure has forced the City to take a stand on social housing and “be more serious” about its commitments to inclusive city development, according to Ndifuna Ukwazi staff. The shift in

<sup>15</sup> The author consulted over 300 published media articles from 36 different sources between August and December 2016.

<sup>16</sup> An application for recusal was filed by the lead petitioner of the Bromwell Street case in April 2017. According to media reports, following the application, legal representatives for the Department of Agriculture, Forestry and Fisheries (“the Department”) requested that the Judge be recused from a case concerning fishing quotas for poor communities which the Department was a party to. The Department complained about the performance of the Judge, who eventually recused himself from the Bromwell Street case. See [www.groundup.org.za/article/bromwell-street-residents-apply-judges-recusal/](http://www.groundup.org.za/article/bromwell-street-residents-apply-judges-recusal/) and [www.iol.co.za/news/crime-courts/bromwell-street-judge-accused-of-being-classist-racist-7804063](http://www.iol.co.za/news/crime-courts/bromwell-street-judge-accused-of-being-classist-racist-7804063) (accessed 20 July 2017).

narrative is evidenced by the inclusion of social housing in the speeches and public declarations of the Mayor and members of the Executive Committee, which recently culminated in the designation of ten sites in central areas to be developed for affordable housing. The mayoral committee member for transport and urban development, Brett Herron,

labelled this move a “180-degree change in how we will confront the urgent demand for affordable and inclusionary housing in future.”<sup>17</sup> In addition, the development of social housing units has been included in tenders for public development projects (e.g. the Foreshore Freeway Development).

## Box 5. The Tafelberg Case

In 2016, the Ndifuna Ukwazi Law Center challenged the sale of a piece of vacant land in central Cape Town, known as Tafelberg School and owned by the Western Cape Province, to a private buyer. According to Ndifuna Ukwazi, the sale: (1) conflicted with the obligation of the City of Cape Town to allocate well-located land assets towards affordable housing solutions, and to ensure spatial justice under spatial planning law; and (2) occurred without a transparent and lawful process.

The collective case was brought by a black resident of the area who alleged that the sale would have negatively affected her right to adequate and affordable housing, as the unavailability of affordable housing required the City to invest in social housing rather than selling public property. The court found that the sale process occurred without due process and mandated the Province to reissue the notice of disposal and call for comments from the public.

Through the consultation process, the Reclaim the City campaign mobilised 937 submissions and a petition signed by over 4,000 people, including individuals, civil society groups and religious associations, which opposed the sale and supported the construction of mixed-income housing in Tafelberg instead. The campaign also exposed, and publicly protested against, the alleged conflict of interest in the sale: the provincial official in charge of the sale was also a property investor owning several buildings near Tafelberg.<sup>18</sup>

Following the campaigning, the Provincial Cabinet of Western Cape passed a resolution calling for a feasibility study on the possibility of devoting the site to social housing. The study, led by the Department of Transport and Public Works, proved that 270 social housing units could be built in Tafelberg. Ndifuna Ukwazi partnered with developers and architects to develop additional proposals for the construction of mixed-income housing, which included social housing and commercial uses of the land.

Nonetheless, in March 2017, the Province decided to proceed with the sale of the property to the private buyer. However, in its submission, the Provincial Cabinet committed to allocating two other centrally located sites, Woodstock hospital and Helen Bowden Nurses Home, to social housing. Reclaim the City activists have symbolically occupied these two buildings to protest the decision to proceed with the sale of Tafelberg and claim affordable housing solutions.

Following the Cabinet decision, the City of Cape Town – whose Mayor publicly endorsed the development of social housing in Tafelberg – started the process of designating the area as a ‘restructuring zone’, which would allow the Province to apply for a national subsidy for the construction of social housing.

<sup>17</sup> *Mail & Guardian*, ‘Cape Town to develop 10 sites in the inner city for affordable housing,’ 19 July 2017, available at <https://mg.co.za/article/2017-07-19-cape-town-to-develop-ten-sites-in-the-inner-city-for-affordable-housing>, accessed 25 July 2017. The full speech of Councillor Brett Herron is available at [www.tct.gov.za/en/news/general/Affordable-housing-developments-to-proceed-in-Inner-city-Precinct/page-1/](http://www.tct.gov.za/en/news/general/Affordable-housing-developments-to-proceed-in-Inner-city-Precinct/page-1/), accessed 25 July 2017.

<sup>18</sup> According to Reclaim the City, the official forced through the sale “despite a 2012 feasibility study to investigate the development of affordable housing on the Tafelberg site”. This study, funded and coordinated by the Social Housing Regulatory Authority and the National Association of Social Housing Organizations, concluded that the Tafelberg site was very well suited to affordable housing development. See: <https://stopthesale.net/developments/> (accessed May 10, 2017).

## 7. Beyond adversarial versus collaborative: identity, legitimacy and conflict

Why do organisations act in the ways that they do? What factors shape the choice of their approaches, and how do these impact outcomes on access to service delivery for marginalised groups? The literature explores the different roles played by intermediary NGOs (see Chambers 2006; Tembo 2012; Grandvoisinnet *et al.* 2015) and legal empowerment practitioners (see Gauri and Maru (forthcoming); Dugard and Drag 2013; Wilson 2011); this report suggests that there are also important considerations to be made around the position of intermediaries in the ‘accountability ecosystem’.

Insofar as questioning the state should be read as falling along a continuum of ‘more or less’ adversarial strategies (Fox 2016), the data from this research points at two key factors that influence the positionality of organisations on this continuum: (1) organisational identity and (2) legitimacy.<sup>19</sup> These factors significantly influence the choice of strategy and, in turn, the impact on accountability relations. They are fluid and not fixed in time. In fact, they are iteratively renegotiated by organisations based on developments in the political and organisational context.

Drawing from the four case studies, this section unpacks these two factors and their links to the type and impact of accountability efforts.

### 7.1 Organisational identity

To gain a deeper understanding of the ways in which power relations between citizens and states are impacted, it is important to look at organisations’ identity. Factors such as political ideology and values (e.g. understanding of the legal and socio-political context), organisational history and development, funding streams and staff composition contribute to shaping the choice of approaches

used. These approaches influence the relationships the organisation develops with communities and the state, which in turn impacts on the effectiveness of their approaches – and on the choice of future strategies.

Among the cases analysed, organisations with a longer history (BHESP and Hakijamii) have been able to acquire more legitimacy from the state and, over time, build trust with key government authorities. As expressed by BHESP, a challenge is posed when key allies in the government are moved to a different position. Also, the case studies of Hakijamii and Ndifuna Ukwazi illustrate how a certain political ideology and understanding of the legal and socio-political context shape the way in which these organisations position themselves with the state (see Box 6).

The case of BHESP illustrates how staff composition and funding streams can determine relationships with the state. BHESP is composed of former and current sex workers and receives funding from international donors, both directly and through the government, to (among other things) deliver health services to sex workers in Nairobi at clinics and provide outreach to sex worker hot spots. Through the clinics, the organisation can provide sex workers with effective legal advice and representation. Sex workers trust the organisation and the services because they are delivered by peers in a safe space, and they are therefore more willing to report cases of abuse by the police and nurses. Legal advice and representation strengthen the power of sex workers and counter discrimination and stigma.

At the same time, BHESP’s effectiveness in reaching out to sex workers led the government to invite staff members to represent sex workers in decision-making fora such as the National Aids Control Council and the National AIDS & STI<sup>20</sup> Control Programme.

<sup>19</sup> See Section 7.2. For the purpose of this study, legitimacy is understood as authority or validity that organisations enjoy in the eyes of community members and / or the state, and which allows them to, for instance, mobilise people, and influence decision-making processes and public agendas.

<sup>20</sup> Sexually transmitted infection

Through these bodies, BHESP advises on policy and resource allocation towards programmes that deliver health care to sex workers. In addition, it is able to use its position as the representative of sex workers, and a recipient of international donor funding for combating HIV/AIDS, to hold the state accountable and use the funding in a way that is truly responsive to sex workers' needs.

By virtue of its recognition by the state, as well as the trust held by the community it serves, BHESP is also able to approach and effectively engage local nurses and policemen through educational training, which in turn improves sex workers' access to health care and reduces instances of abuse.

## Box 6. How organisational values and backgrounds influence the approaches used

Hakijamii and Ndifuna Ukwazi offer examples of how organisations' backgrounds, staff composition and values determine the type of relationships they hold with the state and the approaches they use.

Hakijamii is headed by a human rights lawyer, while most of the staff come from the development sector and the private sector. Ndifuna Ukwazi's staff, by contrast, mostly come from social movements and other organisations with a long tradition of leading social justice struggles in South Africa, which have historically been adversarial; it also has a team of lawyers. Some of the staff interviewed live in the informal settlements that are the focus of its work.

These differences are reflected in the type of approaches the two organisations choose to engage with community members and the state, and the type of outcomes obtained. For example, Hakijamii uses legal frameworks – in particular the Constitution of Kenya – and a human rights-based approach to create a common platform for dialogue. The legal discourse provides a common language and helps to articulate the rights and responsibilities of citizens and the state. This approach led Hakijamii to play the role of mediator between government and citizens. It is an ally for both the communities, providing information, training and access to funding and formal structures, and government, providing technical expertise (e.g. through county-level sectoral committees). The relation of trust that Hakijamii was able to build with government interlocutors at various levels thanks to its mediator role offers opportunities for influencing government's decision-making. However, working at this collective level entailed engaging with existing leaders and 'gatekeepers', and at times having to compromise on the needs of marginalised individuals and groups, such as those who are not able to pay for water.

According to Ndifuna Ukwazi, the constitution of South Africa and existing laws around housing and land explicitly state the need to redistribute existing resources and correct the wrongdoings of the apartheid era. The legal and political discourse

counterpose two sides of the community (blacks and whites) and their unequal access to basic services. According to this reading, Ndifuna Ukwazi's role is to support black communities that have been deprived of their land by the state, which is placed in an adversarial position.

Ndifuna Ukwazi adheres to the needs and wishes of community members (e.g. members of the Reclaim the City campaign or petitioners in court cases). As it acts in open opposition to the City of Cape Town, it is regarded and treated by the City as a political opponent, closing the door to the possibility of non-confrontational engagement, as well as further validating its reading of the political context. For example, government representatives avoid engaging with it in public platforms (e.g. radio shows, conferences) and at times try to undermine the organisation's legitimacy in the public eye, regardless of the type of approaches being used:

"It's supposed to be normal to lobby your [member of parliament] to ask questions, but this results in you being seen as aligned [with a party] – which is stupid, because that's the spirit of democracy." – staff member, Ndifuna Ukwazi

The field research exposed a major difference in how governments responded to similar attempts by Hakijamii and Ndifuna Ukwazi to initiate participatory budgeting processes. Both organisations have used existing participatory budgeting processes to direct the allocation of resources towards the delivery of public services (Ndifuna Ukwazi in partnership with the Social Justice Coalition). While Hakijamii's inputs were validated and taken on board by the local county government during efforts to obtain funds to upgrade an informal settlement in Kakamega County, Ndifuna Ukwazi and the Social Justice Coalition faced a very different reaction. The City of Cape Town disregarded their inputs, challenged the validity of the information submitted, and tried to publicly discredit both organisations (see Section 7.2).

*Internal legitimacy is built by strengthening power with and power within, which often leads to acquiring power to. For instance, awareness-raising leads to mobilisation and collective action, which may open new spaces for engagement with local authorities and service providers, and create opportunities for exerting power to.*

## 7.2 Legitimacy

A crucial factor in these relations is legitimacy, understood as the 'validity' or 'credibility' of the organisation and based on its values, staff, approaches and resources, among others. From the perspective of legal empowerment organisations, legitimacy can be understood at two levels: legitimacy in the eyes of the community – 'internal legitimacy' – and in the eyes of the state – 'external legitimacy'.

### **Internal legitimacy**

How internal legitimacy is built varies depending on the organisation's identity. For example, community-embedded organisations such as BHESP and WRDC are bound to the groups they represent; their goals and agendas are discussed and agreed collectively with the groups. Internal legitimacy is built by strengthening power with and power within, which often leads to acquiring power to. For instance, awareness-raising leads to mobilisation and collective action, which may open new spaces for engagement with local authorities and service providers, and create opportunities for exerting power to.

Conversely, intermediary organisations also have their own identity and agendas. Their identity centres on the resources available and their understanding of the legal and socio-political context, which in turn depends on the staff's background and previous experience. Building legitimacy with the groups they seek to support takes a longer, more fragile route, which depends on providing services and support that respond to the community's needs, among other things, thus creating a relationship based on accountability which, over time, develops into trust. Here, power analysis and mapping may allow organisations to decide on strategies for working with communities. For example, across all the communities interviewed in this research, legal advising and representation are highly valued and at the core of

the trust that communities have in staff members.

### **External legitimacy**

Once organisations have gained legitimacy from the groups they seek to support, they then need to negotiate their relationships with the state. In all the cases analysed, internal legitimacy with the community appears to be a precondition to seeking external legitimacy from the state. However, external legitimacy is not a precondition for engaging with the state. Rather, it is often an outcome of engagement: groups can acquire legitimacy when they respond to the needs of the state.

In contexts of deep inequality and strongly skewed power relations, the state may choose to open spaces for negotiation to avoid escalation of social tensions around service delivery. For example, the Witzenberg Municipal Manager began to see the Witzenberg Action Group as a 'legitimate interlocutor' following a particularly tense public demonstration, organised by WRDC to protest a series of policy amendments that would have adversely affected access to basic services for poor and working class people. In this case, a disruptive, strongly adversarial action gave the group greater legitimacy and a better position to negotiate improvements in service delivery. In other cases, the need to engage with marginalised groups may have been triggered by external circumstances. For example, as outlined in Section 7.1, the donor-led agenda for combating HIV/AIDS created a new space for BHESP to engage with the government and advance the interests and needs of sex workers.

External legitimacy can be difficult to obtain when organisations seek to challenge vested interests (hidden power) that hinder marginalised groups' equal access to resources. In fact, the state is unlikely to validate an openly disruptive approach. In cases of lower legitimacy, organisations may

*Enjoying external legitimacy is not a precondition for effective action. Even though an actor may lack legitimacy in the eyes of the state, it can seek to influence it by working in influential spaces, or with stakeholders to whom the state is likely to respond.*

seek to make use of spaces that are ‘validated’ by the state. In particular, the media and courts have emerged as important fora for shaping legitimacy. Ndifuna Ukwazi’s media strategy entails producing high-quality media content targeted at the mainstream media, which exposes the impacts of gentrification and spatial inequality on black and working class people. Once these perspectives and concerns – which were previously absent from the public political discourse – were reported by the mainstream media, the City of Cape Town was forced to engage with the arguments and claims being made, and make public commitments, in the press and in courts, to tackle unequal access to housing.

Enjoying external legitimacy is not a precondition for effective action. Even though an actor may lack legitimacy in the eyes of the state, it can seek to influence it by working in influential spaces, or with stakeholders to whom the state is likely to respond. Once again, power analysis may help identify actors that enjoy power over the state, and determine the types of approaches used accordingly.

### 7.3 Balancing adversarial and collaborative approaches

Balancing adversarial and collaborative approaches requires organisations to iteratively reassess their identity and legitimacy with the community and the state. These factors, which are fluid and change with evolving political, social and financial contexts, deeply influence the type of approaches chosen and their outcomes, as shown in Figure 1.

As observed in Section 7.2, an organisation’s identity determines the type of empowerment approaches it uses, which in turn shapes its relationships with the community. On the basis of this internal legitimacy, an organisation then negotiates its relationship with the state – its external legitimacy. For instance, community

members are often inclined towards adversarial approaches, such as litigation and protest; organisations may need to balance the two types of legitimacy in order to be an effective intermediary.

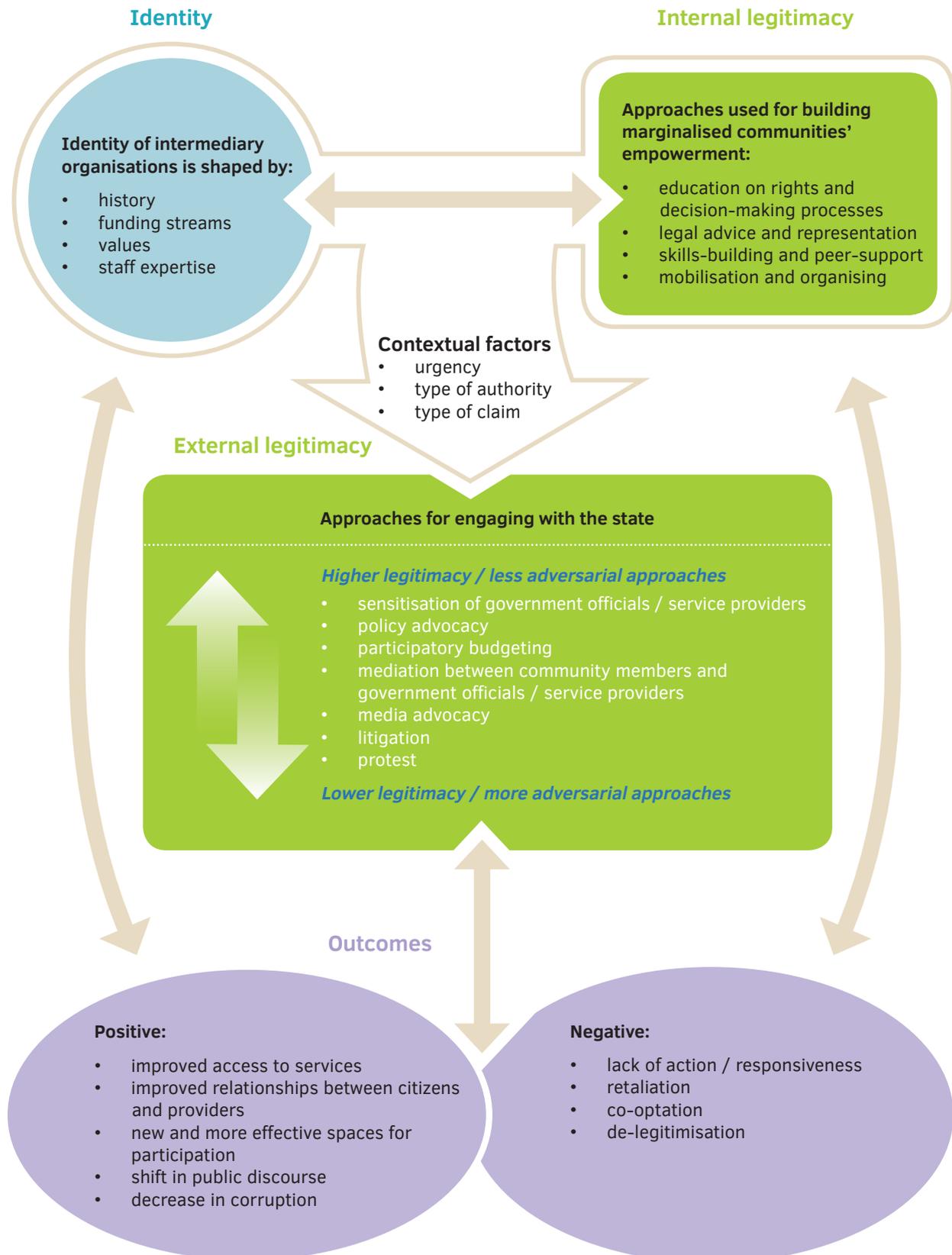
When engaging with the state, the degree of legitimacy is directly related to the degree of conflict the organisation engages in. Organisations with established relationships with the state are in a position to combine collaborative approaches with more adversarial ones; organisations that are not perceived as legitimate are likely to resort to more adversarial approaches earlier, in order to make their voice heard or to gain leverage for engaging through less adversarial channels (see the case of WRDC in Section 7.2). Thus, organisations may move across the spectrum of more and less adversarial approaches depending on the outcomes of their actions.

The degree of legitimacy also determines the range of approaches to which an organisation can resort. Ndifuna Ukwazi staff explained how their actions are constantly perceived as adversarial, even though they involve ‘soft’ mechanisms such as parliamentary debates (see Box 6):

“You try to use legitimate [state] structures so that you are not perceived as adversarial or playing ‘back door’ games. However, even if you don’t make it adversarial, [you are] seen as such.” – staff member, Ndifuna Ukwazi

In all cases, while organisations may have access to a range of approaches, the choice of one or another may depend on contextual factors such as urgency, the type of authority being dealt with, and the outcome sought. For instance, Hakijamii has filed litigation in instances where the court had authority to provide immediate, tangible relief to individuals deprived of basic services – for example, through forced evictions.

**Figure 1.** How intermediary organisations engage with the state: legitimacy, identity, approaches and outcomes



*Groups using a combination of both collaborative and adversarial approaches are exposed to the risks of retaliation ... or co-optation, which jeopardise integrity and values ... Organisations that use adversarial approaches instead ... are more likely to have to deal with attempts by the state to publicly discredit their arguments.*

In terms of the outcome achieved, the study illustrated several examples of positive ways in which states responded to demands by community members and organisations. These included improvements in the quality of relations between water providers and customers, reduction of stigma and discrimination and improved access to health care for sex workers, increased legal protections for slum dwellers, shifts in narrative and discourse to recognise the need for affordable housing, and opening of spaces for participation of marginalised groups at local level.

Although less explicitly, the study also found that the approach used and the state's response could also have a negative outcome for accountability relations. Factors such as identity and legitimacy, and the type of approaches used, also determine the risk of such negative outcomes. Groups using a combination of both collaborative and adversarial approaches are exposed to the risks of retaliation – therefore losing their bargaining power with the state – or co-optation, which jeopardises integrity and values. For example, BHESP was threatened with losing its funding when it sought to file a litigation case regarding the forced HIV testing of a group of sex workers. In other cases, attempts to co-opt organisations can occur by trying to place activists in government positions, or ensuring they receive favourable treatment in their access to services, as has happened with staff from WRDC.

Organisations that use adversarial approaches instead, such as BHESP, Ndifuna Ukwazi and WRDC, are more likely to have to deal with attempts by the state to publicly discredit their arguments. Discrediting may occur by drawing affiliations with a political party, or questioning the legitimacy of funding (PARI 2017), or arguing against the validity of information presented. In the case of Ndifuna

Ukwazi and the Social Justice Coalition, the City of Cape Town rejected the validity of their evidence on the water and sanitation services available to black communities, even though it had been collected through a methodologically sound social auditing exercise. The City has also openly discredited these organisations in the media and other public fora, accusing them of “peddling untruths”, animated by “malicious intent” and a desire to “impress their international donors with false information” (Mayor Patricia de Lille, budget speech to the Council for 2015/2016, cited in PARI 2017: 81). In these cases, public discredit was used to reduce the organisations' legitimacy and traction among community members, as well as their partners such as civil society and the media.

In cases when demands for more equitable and inclusive service delivery were rejected or curtailed, this led to more adversarial relations. In this regard, the PARI study makes an important consideration: “When analysing confrontational relations there can be a tendency to see confrontation as emanating only from SJOs. However, in some cases it is the hostility from the state that creates a situation in which confrontation is the only available mode of engagement” (PARI 2017: 35). In a similar vein, this study found that court was often a last resort channel following the state's inability or unwillingness to respond to claims made through collaborative channels. Likewise and not surprisingly, community members who experienced dismissive – or, worse – degrading treatment when approaching authorities developed a more adversarial relation with the state, which informed their future actions. As a result, the type of response provided by states can trigger more adversarial relations with communities and intermediaries.

## Box 7. The need for political leverage

Tackling state power, in all its forms, often requires an ability to navigate the political system strategically. In doing so, organisations juggle between using existing political leverage and avoiding of the risk of being co-opted.

The organisations in this research stressed the need to understand how to engage with the political system, and especially with partisan bodies, in a tactical way. For example, Ndifuna Ukwazi lobbies members of parliament (MPs) to obtain information about decisions taken: “You request information through an MP, who then asks questions to the ministry during parliamentary sessions or specific occasions (we use channels of democratic

processes) ... so [you] need to think what is the leverage / incentives for MPs to ask a certain question.”

By contrast, Hakijamii found that members of county assemblies are interested in “looking proactive” and “show[ing] that they listen to citizens, since they represent them in the assembly and may not be voted [for] again if they don’t perform.” The organisation approaches sectoral committees at the county assembly level, which is where policies on public services (mainly water, health, education) are developed; this provides them with technical advice for developing policies that improve the efficiency of service delivery.

## 8. Conclusion

By studying these four different organisations in Kenya and South Africa, this research set out to explore whether more empowered citizens make states more accountable in the delivery of basic services to marginalised groups. Overall, the cases examined illustrate that for concrete improvements in access to services, there needed to be the longer-term, systemic inclusion of marginalised groups’ needs and voices in government planning and decision-making.

More specifically, the research sought to answer the following two questions: (1) how do organisations use the legal discourse, frameworks and mechanisms to ‘empower’ citizens, build agency and catalyse actions, and (2) how does the state respond when empowered groups and organisations engage with it?

With regard to the first question, the four organisations all catalyse citizens’ action by mixing different approaches and making use of the intimate links between empowerment and agency. Education programmes help citizens to grapple with the political and juridical systems which, coupled with increasing awareness of rights and building their skills, provides them with a language and a platform to engage with the state: ‘power within’ is the prerequisite to ‘power to’.

An important finding that emerged from the research is that having access channels to those in power allows citizens to direct their awareness of their rights towards effectively mobilising these. Not surprisingly, positionality matters and community-embedded organisations are more focused on building power with and within, particularly through peer solidarity, and by supporting individuals who are making claims related to access to services. In the case of BHESP, for example, sex workers have improved their self-worth and their access to services by learning how to communicate with nurses and policemen. Their ability to tackle injustices, despite their fears, has been enhanced by an awareness that, if they get arrested, they can go to court and win a case.

Across all four organisations, it emerged that another prerequisite for taking action to improve access to services is the ability to mobilise and organise a group (power with). For BHESP, it is not enough for one sex worker to win a case against loitering. Instead, when the results of one case are shared with other sex workers, it can be amplified so that one victory acquires collective significance. Meanwhile, Hakijamii stressed the need to formalise and equip community groups with skills and technical knowledge, to give them a stronger position from which to advocate with the state for change.

*This research argues for reframing organisational identity and legitimacy as factors crucial in shaping the relations between intermediaries, marginalised groups and states.*

'Power with' is activated and converted into 'power to' through collective spaces for action. This can take different forms. The case of WRDC is an example of an organisation adopting a more adversarial approach to gain visibility before a municipality, using protests to obtain a regular space to negotiate and be heard. Collective spaces for action can also be gained collaboratively. For example, through their continued work and their strategic partnerships, BHESP gained enough credibility to be invited to provide technical advice on government programmes, and to take part in facilitation meetings with relevant authorities. Their training events with police officers and nurses are further examples of opening spaces that, through dialogue and storytelling, can enable the 'power within' of the police force and health-care providers to reduce abuse and ensure that sex workers have better access to health care.

Across all the cases analysed, community members strongly conveyed that adversarial mechanisms with 'teeth', such as litigation and public protests, are more effective and in line with their needs. Litigation may be used to seek emergency court interventions in cases where a right is under threat (e.g. eviction cases). In addition, and in line with existing evidence (PARI 2017), litigation was seen as a last-resort option, which follows once other formal channels that lack 'teeth' have been exhausted. In these cases, the ineffectiveness of less adversarial strategies (e.g. administrative complaints) confirms the need for going back to adversarial ones – but risks polarising marginalised groups and states, and increasing the conflicts between them.

With regard to the second question, of how the state responds to empowered groups, the reactions were diverse in the four cases studied. At the local level, both BHESP and Hakijamii focused on building collaborative relationships with local authorities and service providers, which resulted in short-term improvements in access to health care (BHESP) and water (Hakijamii). At a higher level,

and over a longer term, legitimacy acquired by the organisations allowed them to influence policy and resource allocation through formal channels and decision-making fora.

It is interesting to note that both these organisations combine the use of collaborative and adversarial approaches. Hakijamii has been using litigation to guarantee the protection of slum dwellers, as well as to seek policy changes. Indeed, policy-level impacts (visible power) are the result of long-term processes that rely on multi-pronged and multi-level actions (e.g. mass mobilisations, international mechanisms, national courts and parliamentary processes). These findings are in line with the literature on vertical integration and accountability (Fox 2016; Acheron and Isaac 2016).

The two South African organisations, Ndifuna Ukwazi and WRDC, had different experiences of using adversarial strategies. WRDC's protests made it possible to establish a regular channel of communication with the local authority and obtain concrete improvements in services, although this did not address the systemic issues behind these problems. Meanwhile, Ndifuna Ukwazi's adversarial approaches have escalated conflict with the city government, but this eventually led to a shift in the discourse on spatial inequality and concrete commitments and plans to tackle the shortage of affordable housing in Cape Town. These findings support Fox's understanding of conflict as necessary in "producing accountability" (2016: 24), as well as PARI's finding (2017) that confrontational relations are the only possible avenue to shift the social justice agenda when the state and CSOs differ radically in their understanding of ends and means.

More broadly, this research argues for reframing organisational identity and legitimacy as factors crucial in shaping the relations between intermediaries, marginalised groups and states. These factors directly determine the choice and outcomes of approaches used.

Further research could explore the range of factors shaping organisations' identity and choices of action. Meanwhile, this research identified the key factors contributing to organisations' identity as ideology and values (i.e. understanding of the legal and socio-political context), organisational history and development, funding streams and staff composition. Based on their identity, intermediary organisations negotiate their approaches with community members and subsequently with the state. In turn, this determines the degree of legitimacy the organisation can negotiate with the community (internal legitimacy) and the state (external legitimacy).

Legitimacy can be understood as the credibility and recognition enjoyed by the organisation, which makes its actions more influential and is a form of 'power over'. How internal legitimacy is built varies depending on the organisational identity, but usually occurs through processes that build the collective and inner power of marginalised groups (power with).

External legitimacy can be gained by responding to the needs of the state. In the cases analysed, this was achieved through adversarial action (e.g. WRDC), external opportunities for engagement (e.g. BHESP), or offering an adequate channel for states to communicate with communities (e.g. Hakijamii). External legitimacy is therefore both an outcome of engagement (which can be 'more or less' adversarial) and a precondition for engaging effectively through collaborative approaches.

Analysing legitimacy has important implications for understanding the 'more or less' adversarial relations of accountability. This research found that the degree of legitimacy is directly related to the degree of conflict with which organisations engage. Organisations with established relationships with the state were in a position to combine collaborative and adversarial approaches, as well as vertically integrate their efforts in the longer term. Conversely, organisations that are not perceived as legitimate by the state are likely to resort to more adversarial approaches.

The degree of legitimacy determines the range of approaches to which an organisation can resort. As shown in the case of Ndifuna Ukwazi, low legitimacy (when not openly discredited) results in the organisation always being seen as adversarial, regardless of the type of approach used. However, Ndifuna Ukwazi uses other spaces (e.g. media and courts) that are validated by the state, in order to influence the government's agenda on affordable housing.

Another important finding is that legitimacy and organisational identity are fluid and not fixed in time. Balancing more adversarial approaches with less adversarial ones is challenging, and raises the risk of retaliation, or being co-opted and discredited. Maintaining a balance, when this is at all possible, requires organisations to reassess iteratively their identity and relations of legitimacy with communities and the state.

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## About Making All Voices Count

Making All Voices Count is a programme working towards a world in which open, effective and participatory governance is the norm and not the exception. It focuses global attention on creative and cutting-edge solutions to transform the relationship between citizens and their governments. The programme is inspired by and supports the goals of the Open Government Partnership.

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## Research, Evidence and Learning component

The programme's Research, Evidence and Learning component, managed by IDS, contributes to improving performance and practice, and builds an evidence base in the field of citizen voice, government responsiveness, transparency and accountability (T&A) and technology for T&A (Tech4T&A).

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