

Critical Legal Empowerment for Human Rights

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‘You cannot defend human rights when you are ‘above’ and the people you are defending are ‘below.’ In a horizontal space, the people have information, consider it, and determine a course of action.’

—James Orliche Pierre, Kolektif Jistis Min, Haiti

1. Why Legal Empowerment for Human Rights?

It has been a decade since the UN's Commission on Legal Empowerment of the Poor found that four billion people live outside the protection of the law.² Ten years on, the estimate has reached 5.1 billion.³ This shocking statistic summarizes deep and broad forms of exclusion and subordination that persist today: immigrant families who are forced to live below the radar of the law rather than seeking its protection in the face of exploitative labor conditions; pregnant women who die when their local health center is again out of needed materials for an emergency blood transfusion; and Indigenous communities that are left without recourse when a mining company's tailings dam breaks and floods farmers' land with cyanide-laced water. Beyond formal exclusions, many communities that are formally ‘protected’ by the law in fact experience the legal system as a regime that actively devalues their lives, with often deadly consequences—as killings by police of Black Americans in the United States demonstrate. These are all human rights violations: they abrogate the right to equality, to be free from slavery, to enjoy fair working conditions, and to be recognized before the law; the right to healthcare, and gender equality; Indigenous rights; the rights to water and to a healthy environment; and the rights to equality and to life. Such violations happen every day, with justice beyond the reach of those experiencing the abuse. But what is the best way to tackle these problems? More and more, it is

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² Commission on Legal Empowerment of the Poor and United Nations Development Programme, *Making the Law Work for Everyone: Report of the Commission on Legal Empowerment*, Vol. 1 (2008) [hereinafter ‘CLEP, Making the Law Work’].

³ Task Force on Justice, *Justice for All – Final Report* 38 (2019), available at https://bf889554-6857-4cfe-8d55-8770007b8841.filesusr.com/ugd/90b3d6_746fc8e4f9404abeb994928d3fe85c9e.pdf (last visited 12 October 2020).

apparent that the old human rights methods of ‘naming and shaming’ are insufficient⁴—even if updated to include new narrative and interdisciplinary strategies.⁵

This chapter argues that a deep change in approach is needed to alter the basic conditions of those who experience persistent human rights violations. Legal empowerment—led by the grassroots, with lawyers and other professionals in supporting, rather than leading roles—is a crucial part of the justice transformation that is needed. When rights-holders directly engage institutions affecting their lives, they demand that systems become more accessible and responsive to the daily challenges of the people. And when the law and legal systems are actively harming marginalized and oppressed peoples, a critical form of legal empowerment can ensure they are the authors of their own liberation and demands transformation of the law. Human rights advocates should embrace this reality by becoming reliable partners to movements led by the communities experiencing grave rights deprivations.⁶ Human rights advocacy should support community justice workers such as paralegals, community-based monitors, and movement

⁴ See S. Dhital, *Reimagining justice: human rights through legal empowerment*, April 23, 2018, available at <https://www.openglobalrights.org/Reimagining-justice-human-rights-through-legal-empowerment/> (last visited 12 October 2020). Of course, acknowledging that these methods are insufficient does not mean they are ineffective. Reports and other campaigning materials written on the basis of interviews, testimony, and crowdsourced materials remain crucial and can advance reform in specific moments—especially, as Kathryn Sikkink has found, ‘when naming and shaming is done by networks with connections to domestic human rights NGOs in the target states’. K. Sikkink, *Evidence for Hope: Making Human Rights Work in the 21st Century* (2018), at 212 [hereinafter ‘Sikkink, *Evidence for Hope*’].

⁵ For discussion of shifts in human rights fact-finding, research, and advocacy, see generally P. Alston and S. Knuckey (eds.), *The Transformation of Human Rights Fact-Finding* (2016). When findings from fields such as neuroscience, social psychology, and data visualization are taken into account, human rights advocacy can become more effective: materials can be designed to inspire hope, to provide clear messages calling for change, and to overcome obstacles such as compassion fade. For a discussion of compassion fade, see Butts and Gabriel, ‘Helping one or helping many? A theoretical integration and meta-analytic review of the compassion fade literature’, 151 *Organizational Behavior & Human Decision Processes* 16 (2019) (meta-analysis of 41 studies finds that ‘victim group size negatively affects both helping intent and helping behavior’). For findings on how to inspire hope in human rights contexts, see Open Global Rights, *A Guide to Hope-based Communications* (2019), available at <https://www.openglobalrights.org/hope-guide/> (last visited 12 October 2020). For research on data visualization in human rights settings, see Rall, et al., ‘Data Visualization for Human Rights Advocacy’, 8 *Journal of Human Rights Practice* 171 (2016). See also Sikkink, ‘Why is it so hard to measure the effectiveness of human rights?’, *Evidence for Hope*, *supra* note 4, at 139, 152-178 (discussing how the information paradox, heuristics and biases, and changing standards of accountability confound efforts to assess the effectiveness of human rights law, institutions, and movements). Perhaps most importantly, international campaigns, when artfully crafted using broad coalitions, can turn the tide when they are responsive to, and coordinated with local advocates. For a discussion of how to create such effective coalitions, see Crisis Action, *Creative Coalitions: A Handbook for Change* (2017), available at <https://crisisaction.org/handbook/contents/> (last visited 12 October 2020).

⁶ For an example of a scholarly argument along these lines, see Snyder, ‘Empowering Rights through Mass Movements, Religion and Reform Parties’, in S. Hopgood, J. Snyder, and L. Vinjamuri, (eds.), *Human Rights Futures* (2017), at 94 (‘I argue that the human rights movement can make substantial progress toward achieving its goals if—and only if—it does a better job tapping into the latent power of mass civil society’).

organizers. They should ensure that strategic litigation is rooted in the most pressing concerns articulated by communities, collectivities, and movements. And they should take their cue in law and policy reform efforts from communities who seek to shape the law into a more accurate reflection of the justice they seek. Such transformations aim to make human rights advocates reliable allies in efforts to shift power toward those most directly affected. To achieve this shift, accurate terminology is also needed, to distinguish technocratic, development-focused, and sometimes top-down forms of legal empowerment from the more thorough-going kind, which seeks to build the power of movements to change the way societies organize themselves. In the next section, I suggest that human rights advocates should embrace a ‘critical’ form of legal empowerment, using insights from movement lawyering to reflect on our role in transformational work. This recommendation draws on work done by colleagues at the Bernstein Institute for Human Rights and the Global Justice Clinic at NYU School of Law and discussions with—and learning from the practice of—legal empowerment practitioners, activists, and scholars who work in this critical space.⁷ I take responsibility for any missteps in setting out this concept, but to the extent these ideas are useful, I do not claim credit as their author.⁸

2. Defining Critical Legal Empowerment

Scholars have argued that the legalism of the human rights movement has been one of the major forces behind its enormous failings.⁹ While these critiques have been refuted in many

⁷ I have learned directly from many who practice what I call here a critical form of legal empowerment, especially Sukti Dhital and Ellie Happel at NYU; Vivek Maru at Namati; Jhody Polk of LEAH; Meena Jagannath of the Movement Law Lab; Nixon Boumba of the Ensemble Contre la Corruption, Samuel Nesner of SOKIJA, and James Orluche Pierre of the Kolektif Jistis Min in Haiti; as well as from the writing, spoken words, and work of Amna Akbar of Ohio State University, Marbre Stahly-Butts of Law for Black Lives, Purvi Shah of Movement Law Lab, Ravi Ragbir of the New Sanctuary Coalition, Raj Jayadev of Silicon Valley Debug, Antonio Gutierrez of Organized Communities Against Deportation, and the organizations of the Justice Power Network, discussed below. While I attribute these activists with teaching me about the critical practice of legal empowerment, I am responsible for the errors and misunderstandings this article no doubt contains. While I offer this concept in part to lift up their work, I should note that they have not endorsed this concept.

⁸ As a white cisgender lesbian American law professor, I recognize that my perspective is partial and skewed in many respects. For a discussion of the importance of reflexivity in legal scholarship, see Harris, ‘Racing Law: Legal Scholarship and the Critical Race Revolution’, 52 *Equity & Excellence in Education* 12, at 17-18 (2019). I am especially grateful to those who have provided input into earlier drafts of this chapter for pointing out shortcomings and misperceptions, including Sukti Dhital, Ellie Happel, Fergus MacKay, Paula Fernandez-Wulff, and Gráinne de Burca.

⁹ Snyder and Vinjamuri, ‘Trials and Errors: Principle and Pragmatism in Strategies of International Justice’, 28 *International Security* 5 (2003); J. Goldsmith and E. Posner, *The Limits of International Law* (2005); E. Posner, *The Perils of Global Legalism* (2009); S. Moyn, *The Last Utopia: Human Rights in History* (2010); S. Hopgood, *The Endtimes of Human Rights* (2013); E. Posner, *The Twilight of Human Rights Law* (2014).

aspects¹⁰, the underlying concern retains its salience: human rights activism—especially the type concentrated in large, Northern-based NGOs—has often focused its energies on the adoption or ratification of international treaties, formal legal changes, and victories in big cases.¹¹ Human rights advocates have too often been ‘elite, professionalized shamers and blamers documenting failures to comply with international law.’¹² This orientation has been to the detriment of other methods for ensuring behavior change in government institutions, business practices, and international organizations of the type that would transform peoples’ daily lives. In many ways, human rights advocacy has often empowered lawyers more than communities.

However, in many places around the world, another model is being pursued. The monopoly that lawyers have had on the legal system and the fight for rights is being challenged from the bottom-up: community paralegals and ‘barefoot lawyers’ are working with people to pursue their own claims; community-based monitors are uncovering rights violations at the grassroots level; and strategic litigation is being driven by movements themselves, used as a tool for broader mobilization and institutional change. From a human rights perspective, the promise of these approaches lies not only in their efficacy, but also in the way they advance what rights-based approaches have demanded of government officials but not always of themselves. They require that lawyers recognize—and follow—the leadership of those who are the targets of injustice; they demand the accountability of lawyers to rights-holders; and they require engagement with community demands for equality as rights claims—whether supported by the

¹⁰ See, e.g., Dancy and Fariss, ‘Rescuing Human Rights Law From International Legalism and its Critics’, 39 *Human Rights Quarterly* 1 (2017) (arguing that the critiques of human rights legalism use an outdated realist model of the law that does not account for the very real changes that human rights law, activism, and politics have helped create).

¹¹ Hafner-Burton and Ron, ‘Review: Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes’, 61 *World Politics* 360 (2011) (reviewing *Human Rights and Structural Adjustment* by M. Abouharb and D. Cingranelli; *The Marketing of Rebellion: Insurgents, Media, and International Activism* by C. Bob; *Conflict and Compliance: State Responses to International Human Rights Pressure* by S. Cardenas; *Unexpected Power: Conflict and Change among Transnational Activists* by S. Hertel; *Keepers of the Flame: Understanding Amnesty International* by S. Hopgood; *Protecting Human Rights: A Comparative Study* by T. Landman; *Human Rights and Gender Violence: Translating International Law into Local Justice* by S. Merry; *Torture and Democracy* by D. Rejali).

¹² Snyder, ‘Empowering Rights through Mass Movements, Religion and Reform Parties’, in S. Hopgood, J. Snyder, and L. Vinjamuri (eds.), *HUMAN RIGHTS FUTURES* (2017), at 89.

existing law or not.¹³ Further, legal empowerment strategies facilitate the broad ‘localization’¹⁴ and ‘vernacularization’ of human rights¹⁵, as they involve people advancing and claiming their own rights in their own idiom. Legal empowerment also enlarges the focus on actors impacting human rights, engaging not only the usual (national) suspects but also frontline state agents like local police officers or doctors and nurses in medical outposts, as well as non-state actors—from the local to the global—that exercise significant power over communities, including representatives of companies or development (I)/NGOs.¹⁶ Indeed, in many contexts, legal empowerment suggests a shift away from dichotomies such as state v. private sector or local v. international and toward more embedded understandings of how power plays itself out across borders and in given contexts. Legal empowerment centers and demands accountability from all powerful actors impacting the human rights of the disempowered.¹⁷

A focus on how communities and movements are using legal empowerment to address the daily impacts of global injustice is similar to how Santos and Rodríguez-Garavito have used the lens of ‘subaltern cosmopolitanism.’¹⁸ A ‘bottom-up approach to the study of law in globalization,’ subaltern cosmopolitanism focuses on ‘detailed case studies of counter-hegemonic legal forms,’ with the aim of advancing those forms, ‘reconnecting law and politics and reimagining legal institutions from below.’¹⁹ A recent review of the literature of subaltern

¹³ See Knuckey and Satterthwaite, ‘Should Human Rights Practice be Rights-Based?’, in Bhuta, *et al.*, *The Struggle for Human Rights: Essays in Honour of Philip Alston* (forthcoming 2020); Satterthwaite and Klasing, ‘A Rights-Based Approach to Research: Assessing the Right to Water in Haiti’, in E. Beracochea, *et al.*, *Rights-Based Approaches to Public Health* (2011) 143; S. Knuckey, A. Parrin, and L. Fondebrider, *Human Rights-Based Forensic Anthropology and Mass Killing Investigations in Low Resource Settings: From Theory to Practice* (forthcoming).

¹⁴ See Mattingly, *Thirteen Insights from the Front Lines of Human Rights Activism*, Dec. 13, 2019. (‘Grassroots activists are the people best places to solve the problems facing their communities. . . it is much more effective to invest in community-driven social change than to impose an agenda’).

¹⁵ See Merry, ‘Transnational Human Rights and Local Activism: Mapping the Middle’, 108 *American Anthropologist* 38 (2006).

¹⁶ For example, see Nesner and Happel, *In Haiti, legal empowerment is resistance against exploitation*, Aug. 27, 2018, available at <https://www.openglobalrights.org/in-haiti-legal-empowerment-is-resistance-against-exploitation/> (last visited 12 October 2020) (‘Haitian communities are building their power, and making demands not only of the government, but of other relevant actors—for example, companies and international financial institutions’).

¹⁷ See, for example, Purkey, ‘A Dignified Approach: Legal Empowerment and Justice for Human Rights Violations in Protracted Refugee Situations’, 27 *Journal of Refugee Studies* 260, at 261 (2014), available at <https://doi.org/10.1093/jrs/fet031> (last visited 12 October 2020) (describing legal empowerment as a means ‘to enhance the accountability of powerful actors for the protection and fulfilment of refugee and community rights’).

¹⁸ B. de Sousa Santos and C. Rodríguez-Garavito, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (2005) 15.

¹⁹ B. de Sousa Santos and C. Rodríguez-Garavito, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (2005) 15. This approach is in line with Upendra Baxi’s efforts to ensure that human rights are authored not by ‘the politics of intergovernmental desire’ but by ‘the multitudinous struggles of people against human violation.’ U. Baxi, *The Future of Human Rights* (3d Indian ed., 2008), at 263.

cosmopolitanism suggests that the concept does not cohere around a unified theory, but instead ‘has helped scholars theorize [the] social and political agency of a wide range of peripheral subjectivities and broaden the possibilities of resistance and empowerment against hegemony of various kinds.’²⁰

I suggest that a focus on legal empowerment—as a practice, an approach, and a lens—may allow scholars of human rights to broaden our understanding of how communities and movements are engaging with the law and legal systems to advance their human rights and to resist exclusion and oppression. Further, categorizing these efforts under the rubric of legal empowerment may allow us to see the cross-movement ways that practitioners are building ‘new forms of connectivity, solidarity and interactions of globalization’²¹ out of the commonalities of their legally inflected struggles. Indeed, there are powerful nodes of learning, solidarity, and support forming around the concept of legal empowerment. The Global Legal Empowerment Network, led by the legal empowerment organization Namati

brings together 2154 organizations and 7887 individuals, all dedicated to grassroots justice. We meet online and in-person. We learn from each other and share a growing library of legal empowerment resources. We campaign on issues that affect us globally and nationally. We work together to secure support and sustainable funding for our field.²²

However, this chapter suggests that the potential of legal empowerment will be more fully realized when it embraces what movement lawyers have long recommended: a ‘critical’ shift to understanding that social change—and transformations in major economic, social, and cultural structures—will come only when legal efforts effectively build the power of communities facing human rights violations to transform those systems.²³ Building political power and armed with legal tools, movements can change the conditions of communities by shifting power within societies for good. Such political power is also needed to change the global systems that have led to radical inequality and its results. At a time when those results—including racialized mortality and the death of working class ‘frontline workers’ in global

²⁰ Zeng, ‘Subaltern cosmopolitanism: concept and approaches’, 62 *The Sociological Review* 137, at 140 (2014).

²¹ Wilson, ‘Discoursing on Slums: Representing the Cosmopolitan Subaltern’, in P. K. Malreddy, *et al.* (eds.), *Reworking Postcolonialism* (2015) 229, at 231.

²² Namati, *About the Network*, available at <https://namati.org/network/> (last visited 12 October 2020).

²³ For an excellent compilation of readings on movement lawyering, see *The Movement Lawyering Reading Guide* developed by Purvi Shah, available at: <https://static1.squarespace.com/static/5500a55ae4b05a69b3350e23/t/57802cbd893fc04f8168473a/1468017897029/Movement+Lawyering+Reading+Guide> (last visited 12 October 2020).

pandemics and the deathly injustice of climate change’s unfolding disasters—are front and center, human rights has an opportunity. It can join with internationally-aware and globally inflected movements, embracing legal empowerment and other methods for transformation, renewing the spirit of a field that has become increasingly irrelevant in many places.

This ‘critical’ component of critical legal empowerment entails a rejection of the technocratic approaches sometimes forwarded by access to justice practitioners and an embrace of community-based efforts to engage the legal system in strategies to shift power downward. Inspired by scholars of critical race theory, this quality of critique also requires self-reflection, humility, and a commitment to critical praxis—a groundedness in the grassroots.²⁴

This chapter highlights some of the main strategies being used by legal empowerment practitioners, with examples from a variety of contexts that demonstrate how critical forms of empowerment are being embraced. The use of community paralegals, community-based monitoring, strategic litigation, and accompaniment will be considered, and an in-depth case study concerning the deployment of law from below will be presented.²⁵ The goal of this chapter is both descriptive and normative: to introduce legal empowerment to human rights practitioners, to suggest and define the term ‘critical legal empowerment,’ and to demonstrate that these approaches are being used to sometimes remarkable effect. I also argue that the invitation to engage with legal empowerment offers much to human rights in its erstwhile time of crisis. Indeed, the attention to critical legal empowerment can help us decolonize the concept of a ‘failing’ international human rights project by opening our eyes to ways dispossessed communities in many places are advancing their own rights, often effectively, if also frequently outside the gaze of (dominant-group, academic) international human rights scholars and practitioners.²⁶ The next section will examine the concept of legal empowerment and suggest

²⁴ See Harris, *supra* note 8; Yamamoto, ‘Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America’, 95 *Michigan Law Review* 821, at 873-880 (1997) (calling for a ‘critical race praxis’, defined as ‘combines critical pragmatic socio-legal analysis with political lawyering and community organizing for justice practice by and for racialized communities. Its central idea is racial justice as antistatist practice’, with the praxis a way of ‘infusing antiracism practice with aspects of critical inquiry and pragmatism, and then recasting theory in light of practical experience’).

²⁵ The case study examines the work of a community with which my clinic at NYU has partnered. The information in the case study is based on publicly available information authored by, or approved by, community structures. No privileged or confidential information is included in this chapter, and the community’s governing structure has reviewed and agreed to the publication of the case study.

²⁶ In this way, the chapter places itself in conversation with other similar efforts. See, e.g., K. Grewal, *The Socio-Political Practice of Human Rights: Between the Universal and the Particular* (2016).

ways it could be broadened to embrace the critical practices that communities and movements are using to resist structural oppression and transform systems.

A. From Legal Empowerment of the Poor to Critical Legal Empowerment

Communities have embraced legal empowerment practices—such as the use of community paralegals—for many decades. Vivek Maru and Varun Gauri explain that South African organizers deployed community paralegals in work to resist apartheid as early as the 1950s.²⁷ By the early 2000s, major development agencies, including the World Bank, the Asian Development Bank, and the Carnegie Endowment had embraced some version of ‘legal empowerment’ as a method to combat poverty.²⁸ Rejecting ‘rule of law’ orthodoxies that focused on formal legal institutions, the term ‘legal empowerment’ was commonly used to denote the recognition and formalization of claims on the state made by people living in poverty.²⁹ Described variously as a way of combating poverty and enhancing the agency of the poor by bringing the informal sector into the fold of the recognized economy, the substantive focus was often on ‘the formalization of property rights, or the simplification of business regulations, or the reform of the justice system.’³⁰ This coupling of property, business, and justice system reform is significant. It placed the emphasis of legal empowerment on a process aimed at bringing those who were still unincorporated in the global capitalist order—including Indigenous Peoples, smallholder farmers, and slum dwellers—into the fold of the neoliberal state.

The concept was broadly popularized when it was taken up by the Commission on Legal Empowerment of the Poor, which reported in 2008 that four million people are ‘robbed of the chance to better their lives and climb out of poverty, because they are excluded from the rule of law.’³¹ The Commission defined legal empowerment as:

²⁷ Maru and Gauri, ‘Paralegals in Comparative Perspective’, in V. Maru and V. Gauri (eds.), *Community Paralegals and the Pursuit of Justice* (2018), at 4.

²⁸ See World Bank, *Legal empowerment of the poor: an action agenda for the World Bank*, at 15-16 (2006), available at <http://documents.worldbank.org/curated/en/991871468331228461/Legal-empowerment-of-the-poor-an-action-agenda-for-the-World-Bank> (last visited 12 October 2020).

²⁹ Golub, ‘Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative’, *Carnegie Endowment for International Peace Working Papers* 41 (October 2003), at 3, 33–37.

³⁰ World Bank, *supra* note 27.

³¹ Commission on Legal Empowerment of the Poor and United Nations Development Programme, *Making the Law Work for Everyone: Report of the Commission on Legal Empowerment*, Vol. 1 (2008).

the process through which the poor become protected and are enabled to use the law to advance their rights and their interests . . . It involves the poor realising their full rights, and reaping the opportunities that flow from that, through public support and their own efforts as well as the efforts of their supporters and wider networks. Legal empowerment is a country and context-based approach that takes place at both the national and local levels.³²

In the dozen years following publication of the Commission's report, the idea of legal empowerment has matured, expanded, and infused efforts to extend access to justice carried out by development agencies, governments, and NGOs. Many practitioners have argued that legal empowerment as deployed by development agencies has been too focused on simple 'inclusion' in the formal processes of law, leading to the reification of existing power relations.³³ In a recent article, Gisselquist explains that there are 'narrow' and 'broad' concepts of legal empowerment, with the former focusing on formal rights within given legal and economic systems and the latter engaged with efforts to use law and legal systems to more fully transform the lives of the poor.³⁴ This approach is aligned with what Hopgood has labeled 'human rights'—a bottom-up endeavor to change society and politics, in counter-distinction to 'Human Rights'—a top-down agenda for change.³⁵ For those who practice in and study in this 'broader' or bottom-up version of the field, legal empowerment is a method of advancing access to justice that aims to 'increase disadvantaged populations' control over their lives'³⁶ by capacitating communities to make claims of—and to change—the systems impacting their quest for justice and equality. While these claims are sometimes backed by formal law, there are many contexts where claims by marginalized communities have been ignored or left out of the law. In these contexts, legal empowerment will require major changes in the law and legal institutions.

As Joshi has explained, numerous tools are relied upon in such legal empowerment efforts, but they usually encompass legal awareness-raising, provision of legal services, dispute

³² *Ibid.*, at 26.

³³ For example, Bård A. Andreassen argues that the embrace of legal formalities—especially the right to property—should be corrected through infusion of human rights approaches in legal empowerment efforts. See 'The Right to Development and Legal Empowerment of the Poor', 33 *Bangladesh Development Studies*, 311 (2010), available at www.jstor.org/stable/23339890 (last visited 12 October 2020).

³⁴ See Gisselquist, 'Legal Empowerment and Group-Based Inequality', 55 *The Journal of Development Studies* (2019) 333, at 336, DOI: 10.1080/00220388.2018.1451636.

³⁵ See S. Hopgood, *The Endtimes of Human Rights* (2013).

³⁶ Joshi, 'Legal Empowerment and Social Accountability: Complementary Strategies Toward Rights-based Development in Health?', 99 *World Development* (2017) 160, at 162 (quoting and citing Golub).

resolution, and law reform.³⁷ Thus, while there are many pathways to legal empowerment, the broad, ‘bottom-up,’ human rights-focused ones are aimed at enabling people to ‘know, use, and shape the law,’ bringing about transformations in ‘knowledge, agency, and governance’.³⁸ In addition, as Waldorf explains, this approach to legal empowerment: ‘emphasises rights, participation, and accountability... [I]t adopts a pragmatic approach to legal pluralism, working with formal, customary, and religious law.’³⁹ The ‘empowerment’ sought is the critical agency to analyze reality from the perspective of the oppressed and to make change: ‘social transformation—not only a more just distribution of wealth and income, but a more expansive sharing of power’ that enables disempowered people to make ‘significant change through their own actions.’⁴⁰ As legal empowerment is normatively rooted in human rights law, these changes advance the rights of those disempowered within existing systems.⁴¹

This chapter will provide examples of such efforts. However, it also focuses its attention on contexts where the law has itself been a central tool in defining, crushing, and dispossessing marginalized communities. In such settings, legal empowerment cannot only seek the *inclusion* of marginalized communities and the *reform* of existing law. Instead, it must seek thoroughgoing change in the aims of legal systems. Achieving such changes requires movement building, organizing, and coalition work. It demands a reconceptualization of what the law is, what it can do, and *who* it can do those things for. It also demands what Gerald López calls ‘rebellious lawyering,’⁴² in which self-reflection, humility⁴³, and critical inquiry are essential for those who see themselves as legal professionals aligned with communities. For these reasons, and based on critiques coming from scholars and communities in the United States, I suggest the term ‘critical

³⁷ Joshi, *ibid.*, at 160, 163 (note that Joshi includes litigation as a separate category; I have included it in the provision of legal services).

³⁸ Maru and Manuel, *Session I: Conceptual framework – Introduction to legal empowerment*, Dec. 1, 2019, available at <https://community.namati.org/t/lclc-2019-legal-empowerment-community-organizing-sessions-day-1/71079> (last visited 12 October 2020).

³⁹ Waldorf, ‘Introduction: Legal empowerment in transitions’, 3 *The International Journal of Human Rights* 229 (2015). Perhaps most importantly, Waldorf believes that ‘[l]egal empowerment contains an inherent, normative assumption that law is empowering rather than disempowering.’ *Ibid.* I would suggest that the normative belief is instead that law *can be made to be* empowering—often through bottom-up efforts to shape, reform, or reorient the law.

⁴⁰ CLEP, *Making the Law Work*, at 281.

⁴¹ Gisselquist, ‘Legal Empowerment and Group-Based Inequality’, 55 *The Journal of Development Studies* (2019) 333, at 336, DOI: 10.1080/00220388.2018.1451636.

⁴² G. López, *Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice* (1992).

⁴³ See Hung, ‘Movement Lawyering as Rebellious Lawyering: Advocating with Humility, Love and Courage’, 23 *Clinical Law Review* 663, at 665 (2017); and Kassem and Shamas, ‘Rebellious Lawyering in the Security State’, 23 *Clinical Law Review* (2017) 671, at 704.

legal empowerment’ to highlight how communities are engaging critically with the law as a form of power and partnering with lawyers who know their (limited) place in these struggles. Critical legal empowerment requires a careful examination of where law and justice collide, and an effort to ensure that law bends toward justice and away from oppression. It also requires an embrace of movement direction and ownership. In this sense, critical legal empowerment is aimed not only at ensuring people can know, use, and shape the law, but they can also transform legal systems.

As feminists—especially feminists of color and those based in the Global South⁴⁴—have argued, when the ‘power’ in ‘empowerment’ is emphasized and interrogated from an intersectional angle, ‘empowerment is simultaneously an instrument for social transformation and an end in and of itself.’⁴⁵ This ‘liberating’ form of empowerment is the one being employed in what I am calling critical legal empowerment efforts. It is bound up with efforts to change major systems of oppression and domination, which require organized movements⁴⁶ and not only NGO or government ‘projects’ or ‘initiatives’. In this way, critical legal empowerment is inspired by what has been called movement lawyering in the United States, defined as:

the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define.⁴⁷

As Guinier and Torres explain, movement lawyering involves a ‘participatory, power-sharing process within the lawyer/client relationship’, between lawyers and marginalized groups, aimed at contributing to the ‘cultural shifts that make durable legal change possible’.⁴⁸ While movement lawyering focuses on the role of the lawyer in social movements and insists that the ‘lawyer is not the protagonist,’⁴⁹ critical legal empowerment focuses on how communities

⁴⁴ I use the term ‘Global South’ to denote spaces ‘historically conquered or controlled by modern imperial powers, leaving a continuing legacy of poverty, economic exploitation and dependence’. See Meekosha, ‘Decolonizing disability: thinking and acting globally’, 26 *Disability and Society*, at 667 (2011).

⁴⁵ See C. Sardenberg, *Liberal vs. Liberating Empowerment: Conceptualising Empowerment from a Latin American Feminist Perspective*, (2008), available at <https://assets.publishing.service.gov.uk/media/57a08b6c40f0b64974000b3e/PathwaysWP7-website.pdf> (last visited 12 October 2020) (citing Batliwala, defining ‘liberating empowerment’ in distinction to ‘liberal empowerment’ used in development discourses).

⁴⁶ *Ibid.*

⁴⁷ Cummings, ‘Movement Lawyering’, *University Illinois Law Review* 1645, at 1660 (2017).

⁴⁸ *Ibid.* (quoting and citing Guinier and Torres, Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements, 123 *Yale Law Journal* 2740, at 2743, 2753 (2014)).

⁴⁹ Gordon, ‘The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change’, 95 *California Law Review* 2133 (2007).

engage with the law directly—sometimes in partnership with lawyers and sometimes on their own. In this way, it is both a practice and a lens, making visible the work communities and movements are doing to transform legal systems.

Although critical legal empowerment efforts exceed any specific project or organization, they embrace existing legal empowerment tools, adding others where these are inadequate and redefining the existing ones to emphasize collective power. Common models for legal empowerment include the deployment of paralegals or ‘barefoot lawyers’, community-based monitoring of rights and institutions, engaging with community-based dispute resolution, and strategic litigation aimed at ending structural injustice. Critical approaches add to this inventory by including new tools and infusing existing approaches with a power-building ethos. For example, the Justice Power Network based at the Bernstein Institute in the United States uplifts legal empowerment programs that advance the rights of asylum seekers, refugees and immigrants in the US using both traditional legal empowerment tools and innovative strategies.⁵⁰ These strategies were developed specifically to advance the rights of those rendered by U.S. law as ‘rightsless’—communities described as ‘undocumented’ or even ‘illegal’ but imbued with human rights and claims for justice that reject these dehumanizing and criminalizing descriptions. The strategies these communities have developed include the use of accompaniment, community paralegals, conveners, community driven campaigns and litigation, hotlines, pro se legal clinics, and tech innovation.⁵¹ As Claudia Muñoz of Grassroots Leadership explains, ‘We know and believe that the people that can transform the systems are the people that have been through these systems. Nobody has better answers, nobody has more urgency’.⁵² The next section of this paper will discuss the spectrum of legal empowerment tools—including several overtly ‘critical’ tools—in the hopes of lifting up critical legal empowerment as a means of mobilization for human rights that can fundamentally alter unjust systems.

⁵⁰ See Walton, *Legal Empowerment during COVID-19 – From Justice Power to #FreeThemAll*, May 20, 2020, available at https://www.law.nyu.edu/centers/bernstein-institute/legal_empowerment/blogs (last visited 12 October 2020).

⁵¹ See Justice Power Network, <https://justicepower.org/> (last visited 12 October 2020).

⁵² Claudia Muñoz, interviewed in Justice Power Network video, ‘Accompaniment’, available at <https://justicepower.org/accompaniment/> (last visited 12 October 2020).

going change in a system thoroughly shaped by the injustice of racialized citizenship and criminalized human presence.

4. Case Study: Redefining Access to Justice through Legal Empowerment of Indigenous Communities in Guyana

If legal empowerment has significant contributions to make to human rights advocacy in this moment of crisis, those contributions may be especially apparent in relation to communities that are facing some of the forces seen as most troublesome for the rights project today. The use of legal empowerment approaches by Indigenous peoples and their communities that sit on the frontlines of climate change, face intense pressure to integrate into neoliberal capitalism from national governments and NGOs, as well as inter- and non-governmental international actors, and articulate rights claims that often exceed the bounds of existing interpretations of formal law, provide an opportunity to assess whether legal empowerment approaches can help re-calibrate the human rights endeavor. This section will examine the work of the South Rupununi District Council in Guyana (SRDC)¹²⁵, suggesting that SRDC's deployment of legal empowerment approaches—and its partnerships with external allies supporting these strategies—has allowed it to stand up to these forces in ways that can teach us useful lessons for human rights.

The SRDC, a collective governance body of the Indigenous Wapichan community of the Southern Rupununi in Guyana, is using numerous approaches that fit within the rubric of legal empowerment to advance their human rights to self-determination and equality. Through enunciation of customary law through their own institutions, participatory mapping, community monitoring, and advocacy with government institutions, the SRDC has been expanding its ability to exercise self-determination as Indigenous peoples while making specific claims as equal citizens of the state of Guyana. To advance its rights, the community has used all three of the 'know, use, and shape law' elements of legal empowerment, also advancing critical legal empowerment claims for transformation, though it does not often use these terms. Through an examination of SRDC's experience, this brief case study aims to demonstrate how critical legal

¹²⁵ This case study was reviewed and approved for publication by the SRDC. The work examined here has been undertaken by SRDC (and its partner NGO and secretariat, the South Central Peoples Development Association, SCPDA) with the support of several allies, including the Guyana-based Amerindian Peoples Association and the National Toshias Council, as well as international allies including, *inter alia*, Forest Peoples' Programme, Digital Democracy, Rainforest Foundation USA, the World Wildlife Fund, and the Global Justice Clinic at NYU School of Law (which the author directs).

empowerment can enhance the agency of rights-holders in ways that traditional human rights advocacy might not.¹²⁶

A. Know Law: Enunciation of Customary Law; Engagement with National & International Law

‘Knowing’ law in this Indigenous¹²⁷ context, as in many others, involves not only knowing the national and international law protecting the rights of Indigenous peoples, but also—most importantly, and as an antecedent to knowledge of these exogenous systems of law—knowing and affirming the customary law of the community itself. In the early 2000s, the Wapichan community of the South Rupununi undertook an intensive, participatory research project to identify and articulate customary norms. This effort spanned several years and culminated in a report entitled *Wa Wiizi, Wa Kaduzu/Our Territory, Our Custom*.¹²⁸ The Report sets out customary norms concerning Wapichan *wiizi* (territory) and the use of biological resources within Wapichan *wiizi*. Crucially, the process used to identify and document these norms was intensively collaborative, involving ‘visits to 17 major settlements, visits to many minor settlements, 257 separate interviews with elders, leaders and community members, 17 public meetings, and over 30 site visits to different resource areas.’¹²⁹ Mainstream human rights methods for protecting the land rights of Indigenous peoples often begin by identifying national and international laws that support land claims without attending to the relevant customary law. This approach de-centers the community’s most important knowledge, and can have a profoundly disempowering impact. Legal empowerment necessarily begins with the community’s own sense of entitlement—its own conception of its rights—and its own legal

¹²⁶ The information in this case study is drawn from publicly available materials and does not include privileged or confidential information.

¹²⁷ I capitalize the ‘I’ in Indigenous as a sign of respect and equality (e.g., ‘Indigenous’ is an identity, capitalized alongside others such as ‘French’ or ‘Spanish’), and to make clear that it is a noun, differentiating from the adjective ‘indigenous’, as in ‘indigenous plants’.

¹²⁸ David, et al., *Wa Wiizi – Wa Kaduzu/Our territory – Our Custom: Customary Use of Biological Resources and Related Traditional Practices within Wapichan Territory in Guyana* (Abridged Version 1.3, 2006), available at http://wapichanao.communitylands.org/1499798142646-wa_wiizi_wa_kaduzu.pdf (last visited 12 October 2020) [hereinafter ‘*Wa Wiizi – Wa Kaduzu*’].

¹²⁹ *Ibid.*, *supra* note 128 at 8 (Further explaining that ‘In accordance with customary methods of investigation, the researchers engaged in informal discussions (“gaffing”) with holders of traditional knowledge in the early morning, in the evenings or after *manoru* work (collective self-help), often over a traditional gourd of *parakari* (cassava beer),’ as well as desk research).

system. Beginning here is especially important in Indigenous contexts, since Indigenous communities have borne the brunt of epistemic violence for generations. ‘Knowing’ customary law involves honoring forms of law that may have been hidden, silenced, and even violently repressed by colonial systems. For the Wapichan of the Southern Rupununi, using a methodology that relied on the knowledge of elders, leaders, and the broader community allowed the community to center customary law concerning territory and biological resources before looking to exogenous sources of law that could be enlisted to support the community’s claims. As Daniel Brinks has written, the process of recording the customary law of Indigenous people must not essentialize those systems, lest the living nature of norms be transformed and made overly static.¹³⁰ The inclusion of the broader community in efforts to identify and formulate customary law is one way to ensure that this process enhances the legal agency of the community ‘in the production and reproduction of norms’.¹³¹

For the Wapichan of the Southern Rupununi, the written formulation of customary law has been iterative and purpose-driven.¹³² The enunciation of norms concerning territorial management, biological resource conservation, and use of natural resources has been prioritized, since these have been most relevant to the community’s most pressing legal concerns: confirmation of title over Wapichan *wiizi*, protection of the resources within the Wapichan *wiizi*, and regulation of the activities of outsiders on this traditional territory.¹³³ As explained in *Wa Wiizi, Wa Kaduzu*, the sustainable use of land and resources by the Wapichan depends on the ‘maintenance of the customary land tenure regime’, which is ‘threatened by inadequate land titles that do not recognise the extensive pattern of customary occupation and use’.¹³⁴ Thus, for the Wapichan of the Southern Rupununi, *knowing* customary law in turn demands that the community know, use, and shape—or transform—domestic and international law in order to advance the aims of the Wapichan people.

¹³⁰ Brinks, ‘Access to What? Legal Agency and Access to Justice for Indigenous Peoples in Latin America’, 55 *Journal of Development Studies* 348, 356 (2019) [hereinafter ‘Brinks, Access to What?’]. Indeed, this kind of stasis has been a legacy of colonialism in many places.

¹³¹ *Ibid.*, at 356.

¹³² David, *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 5 (noting that the study was undertaken using a community-inclusive, collaborative manner with the goal of ‘seek[ing] respect for our customary land rights and effective protection for all the cultural and biological diversity in our homeland’).

¹³³ David *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 3-5.

¹³⁴ David *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 4.

Indeed, ‘knowing’ customary law is crucial in part because international and domestic law concerning Indigenous Peoples involves comprehending systems of law that have been intensely oppressive from their inception. Distinctions between the ‘civilized’ and the ‘barbaric’ are fundamental to international law, and colonialist legal-political ideologies including the ‘discovery’ doctrine and the doctrine of *terra nullius* have been used to justify genocide, dispossession, and forced assimilation from the time of first contact well into the modern era.¹³⁵ Thus, Indigenous Peoples necessarily come to any encounter with formal law with a finely tuned sense of how the law has been used to *disempower*. This perspective engenders a well-founded critical consciousness that serves communities well when they begin to work intensively with national and international law. At that point, communities approach legal empowerment by asking when and how national and international law can be used to advance their agency and self-determination, and when the law is ill-suited for such goals, requiring transformation. The answer will be highly context-specific, given the broadly varying circumstances for the rights of Indigenous Peoples under national legal systems. At the international level, however, thanks to several decades of advocacy by Indigenous Peoples, international human rights law now includes robust norms recognizing the rights of Indigenous Peoples to self-determination, equality, and full participation and consent in development initiatives.¹³⁶

‘Knowing’ national and international law for the Wapichan of the Southern Rupununi means knowing how the law has been both empowering and disempowering. The central example is the way that the state of Guyana has both accepted and rejected claims by the Wapichan people for title of Wapichan *wiizi*. At the time of Guyana’s independence from the United Kingdom, the new state undertook to recognize ‘the legal ownership of lands, rights of occupancy and other legal rights held by custom or tradition’ by the Indigenous Peoples of Guyana as a condition of its very independence.¹³⁷ The Guyana Amerindian Lands Commission (ALC) was set up in 1966 to fulfill this agreement.¹³⁸ Wapichan communities in the Southern

¹³⁵ See generally S. Anaya, *Indigenous Peoples in International Law* (2009), 37-53. As Jessie Hohmann explains, ‘From the earliest encounters of Westphalian international law and Indigenous peoples, international law operated so as to bring Indigenous peoples within its reach, yet deny them the benefits of its protection.’ ‘Chapter 6: The UNDRIP and the Rights of Indigenous Peoples to Existence, Cultural Integrity and Identity, and Non-Assimilation: Articles 7(2), 8, and 43’, in J. Hoffman and M. Weller (eds.), *The UN Declaration on the Rights of Indigenous Peoples: A* (2018), 152.

¹³⁶ See generally S. James Anaya, *Indigenous Peoples in International Law*, *supra* note 135, at 55-132.

¹³⁷ David, *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 12.

¹³⁸ David, *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 13.

Rupununi presented claims for communal title in the areas encompassing Wapichan *wiizi*.¹³⁹ The Commissioners rejected these claims, finding the land claim to have been ‘excessive and beyond the ability of the residents to successfully administrate and develop.’¹⁴⁰ Instead of full title, only eleven of the twenty-two principal communities received any title—and even these titles do not include the full claim for the relevant areas, leaving many families outside of the titled land. However,

[o]ur communities have never accepted this assertion made by the ALC. We maintain that we do indeed have capacity to administer our territory and the Wapichan people have an inherent right to own and control the full extent of our traditional lands. . . We continue to demand that legal title be given to the communities over their land.¹⁴¹

Knowing the legal standards that have been used to refuse full land rights, the Wapichan communities of the South Rupununi have engaged in numerous processes aimed at demonstrating their continuous ‘ability’ to ‘administer’ Wapichan *wiizi*. As discussed above, the description of customary norms concerning land and natural resource use has been a crucial element in this effort. Further, by knowing their rights under the Amerindian Act—the framework law for the rights of Indigenous Peoples in Guyana—the SRDC was able to obtain recognition as the first self-governing representative body, or District Council, by the government of Guyana.¹⁴² In tandem, the SRDC has entered into official land talks with the government of Guyana, regulated by an agreed Terms of Reference.¹⁴³

B. Use Law: Participatory Mapping and Community Monitoring

As mentioned above, and like many Indigenous Peoples, the SRDC has been granted title to only some portions of its customary lands:

Our foreparents began work for the full recognition of our territory in the nineteenth century, yet only pieces of our land were recognised in the 1930s. In

¹³⁹ David, *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 13

¹⁴⁰ David, *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 13 (quoting Amerindian Lands Commission).

¹⁴¹ David, *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 13.

¹⁴² Filippo del Gatto/Rainforest Foundation USA, *Protecting Forests Through Protecting Rights in Guyana* (June 2018), at 17 [hereinafter RFUS, *Protecting Forests*], available at <https://rainforestfoundation.org/wp-content/uploads/2018/08/Protecting-Forests-Through-Protecting-Rights-in-Guyana.pdf> (last visited 12 October 2020). The Amerindian Act of 2006 provides for the creation of District Councils as representative indigenous organizations. *See* Amerindian Act 2006, at sec. 35-36.

¹⁴³ RFUS, *Protecting Forests*, *supra* note 142, at 9-10.

1967 a group of our leaders came together to present a written request for legal title to all of our lands in Wapichan wiizi in submissions and letters presented to the Amerindian Lands Commission. Some further land titles were received in 1991, but still did not cover the full extent of our lands.¹⁴⁴

Therefore, a constant priority has been seeking government recognition for the extension of those titled areas to encompass the remainder of the traditional Wapichan territory in the Southern Rupununi. While ‘those in power have employed maps over the centuries to mark off and control territories inhabited by indigenous peoples’, recent decades have seen the emergence of mapping by Indigenous Peoples with the aim of defending land rights.¹⁴⁵ For the Wapichan of the Southern Rupununi, participatory mapping—in which the community itself worked to map its ‘traditional occupation and use of land’, through traditional names, places, and practices in a way that made those forms of knowledge legible to both the community and the official eye—began in 2000, and has always been aimed at, *inter alia*, gaining legal recognition of the entirety of Wapichan wiizi.¹⁴⁶ These activities have resulted in what might be called ‘living maps’¹⁴⁷ that are continually updated of more than 4750km² of land is now represented with toponymic accuracy. As Fred Pearce explained in 2015:

[T]o justify their claim the [Wapichan of the Southern Rupununi] have mapped and catalogued their territory in far greater detail, and with much more accuracy, even than the government. The main maps are now done—with 40,000 digital points collated...and detailed notes from interviews with elders about the importance of every creek, homestead and forest clearing. And they have developed a plan to protect it, using traditional knowledge and methods of land use—in particular through the creation of a large community forest, managed and protected for hunting and gathering, for swidden farming and for science and tourism.¹⁴⁸

¹⁴⁴ South Central and South Rupununi Districts Tshaos Councils, *Baokopa'o wa di'itinpan wadaun nii nao ati: Kaimanamana'o, wa zaamatapan, wa di'itapan na'apamnii wa sha'apatan Wapichan wiizi Guyana'ao raza/Thinking together for those coming behind us: An outline plan for the care of Wapichan territory in Guyana* (2012), at iv, available at <https://www.forestpeoples.org/sites/fpp/files/publication/2012/05/wapichan-mp-22may12lowresnomarks.pdf> (last visited 12 October 2020).

¹⁴⁵ For an overview of the field of Indigenous mapping, see Chapin, Lamb, and Threlkeld, ‘Mapping Indigenous Lands’, *Annual Review of Anthropology* (2005), 619, 620.

¹⁴⁶ South Central and South Rupununi Districts Tshaos Councils, *Baokopa'o wa di'itinpan wadaun nii nao ati: Kaimanamana'o, wa zaamatapan, wa di'itapan na'apamnii wa sha'apatan Wapichan wiizi Guyana'ao RAZA/Thinking together for those coming behind us: An outline plan for the care of Wapichan territory in Guyana* (2012), at iv, available at <https://www.forestpeoples.org/sites/fpp/files/publication/2012/05/wapichan-mp-22may12lowresnomarks.pdf> (last visited 12 October 2020).

¹⁴⁷ Thanks to Fergus MacKay for this term; personal communication with author, July 2, 2020.

¹⁴⁸ Fred Pearce/Forest Peoples Programme, *Where They Stand* (2015), 6, available at <https://www.forestpeoples.org/sites/fpp/files/publication/2015/10/where-they-standweb-spreads.pdf> (last visited 12 October 2020).

Of crucial importance is the fact that some of the information collected by the Wapichan mappers is sensitive and thus not included on published versions of the maps. This information, concerning settlements with graves and the locations of spiritual sites, is protected by the community and not shared with outsiders.¹⁴⁹

Further, in an act of continuous custodial relation to Wapichan *wiizi*, the Wapichan of the Southern Rupununi have used these community-generated maps as the basis of a monitoring program aimed at curbing ‘external developments in *Wapichan wiizi* and the growing pressures coming from mining, logging, roads and other activities.’¹⁵⁰ Not only do the maps serve as a base layer for information about unlawful activities gathered by community monitors, they are also updated in real time through the mapping work of the monitors. In these ways, the monitoring program is a living method for using the law to advance the self-determination rights of the Wapichan.

Community monitors are selected by their villages and receive training in data collection using smartphones, operation of drones built and operated by the SRDC, and reporting to Village Councils and the District Council.¹⁵¹ Focusing on extractive activities, the SRDC’s monitors map and gather data concerning gold mining, logging, fishing, cattle rustling, and other activities carried out without the permission of the local villages or the SRDC.¹⁵² While most—if not all—of these activities are unlawful under Wapichan customary law, in recent years, the SRDC has turned its attention to using the laws of Guyana and international law to bolster its claims concerning these impermissible activities. Monitors are now being trained in the legal provisions relevant to the data they collect, including those drawn from, *inter alia*, Guyanese law concerning mining, forestry, the environment, and the rights of Amerindian communities.

¹⁴⁹ Pearce, *supra* note 148, at 13.

¹⁵⁰ South Central and South Rupununi Districts Toshaos Councils, *Baokopa’o wa di’itinpan wadaun nii nao ati: Kaimanamana’o, wa zaamatapan, wa di’itapan na’apamnii wa sha’apatan Wapichan wiizi Guyana’ao raza/Thinking together for those coming behind us: An outline plan for the care of Wapichan territory in Guyana* (2012), at iv, available at <https://www.forestpeoples.org/sites/fpp/files/publication/2012/05/wapichan-mp-22may12lowresnomarks.pdf> (last visited 12 October 2020).

¹⁵¹ South Rupununi District Council, ‘Executive Summary’, *Wapichan Environmental Monitoring Report*, Sept. 2018 [hereinafter SRDC, *Wapichan Environmental Monitoring Report*], available at <http://wapichanao.communitylands.org/1548691773093-wapichan-environmental-monitoring-report-2018-v2.pdf> (last visited 12 October 2020).

¹⁵² SRDC, *Wapichan Environmental Monitoring Report*, *supra* note 151.

In fall 2018, the SRDC published its first environmental monitoring report, presenting data on dozens of instances of mining unlawful under Guyanese and customary law, including the following:

- Between 2013-2018, our monitors have made more than 250 observations of activities that are harmful, illegal, and/or violations of our rights.
- Between 2013-2018, our monitors have observed more than 380 impacts on the environment and our way of life, including deforestation, water pollution, destruction of hunting and fishing grounds, and damage to cultural heritage, among others.
- Almost 50% of the impacts observed by monitors are caused by mining activities.¹⁵³

The report showed that mining activity has been concentrated on Marutu Taawa (known as Marudi Mountain in English), where Guyana Goldstrike, a Canadian company, holds a permit to move forward with large-scale gold mining.¹⁵⁴ This mountain lies within traditional Wapichan territory.¹⁵⁵ As the company seeks investments sufficient to advance these plans, it allows small-scale miners to work within its concession, where they have been documented to use mercury in processing gold.¹⁵⁶ A study published in 2020 found that 100% of adult residents sampled in a nearby SRDC village had hair mercury levels exceeding WHO standards as a result of eating mercury-contaminated fish.¹⁵⁷ The SRDC had not provided free, prior, and informed consent for these activities on Marutu Taawa, ‘an important spiritual, cultural, and resource-gathering site’ for the Wapichan of the South Rupununi.¹⁵⁸ On this basis (among others), the SRDC called for the rejection of Guyana Goldstrike’s recently submitted environmental and social impact assessment (ESIA).¹⁵⁹

In September 2018, the SRDC presented its environmental report to the head of government, President David Granger, calling on him to officially recognize and collaborate with

¹⁵³ SRDC, *Wapichan Environmental Monitoring Report*, *supra* note 151.

¹⁵⁴ SRDC, *Wapichan Environmental Monitoring Report*, *supra* note 151, at 13.

¹⁵⁵ SRDC, *Wapichan Environmental Monitoring Report*, *supra* note 151, at 13.

¹⁵⁶ SRDC, *Wapichan Environmental Monitoring Report*, *supra* note 151, at 13, 15, 18, 22, 25.

¹⁵⁷ Watson, *et al.*, ‘Survey of Methylmercury Exposures and Risk Factors Among Indigenous Communities in Guyana, South America’, 10 *Journal of Health & Pollution* 1 (2020).

¹⁵⁸ SRDC, *Wapichan Environmental Monitoring Report*, *supra* note 151, at i.

¹⁵⁹ SRDC, *Wapichan Environmental Monitoring Report*, *supra* note 151, at 27-28; *see also* Stabroek News, *South Rupununi Council objects to Romanex’s proposed Marudi Mountain mine-claims lack of consultation for impact assessment* (Sept. 30, 2018), available at <https://www.stabroeknews.com/2018/09/30/news/guyana/south-rupununi-council-objects-to-romanexs-proposed-marudi-mountain-mine/> (last visited 12 October 2020).

the SRDC's monitoring program and to reject Guyana Goldstrike's ESIA.¹⁶⁰ In response, the President promised not to 'sweep the problems under the carpet', and said he would create a multi-agency task force to respond to the SRDC's environmental concerns.¹⁶¹

Pressing forward to monitor the full effects of extractive activities on Wapichan *wiizi*, in 2019, the SRDC added a scientific element to its monitoring program. Community monitors are now trained to conduct field measurements to check for impacts of extractive activities on water quality within Wapichan *wiizi*.¹⁶² These field measurements are then compared with national and international benchmarks and regulations concerning safe water. As SRDC has explained, these scientific measurements are intended to supplement—not displace—traditional ways of knowing about the environment. As one SRDC monitor explained,

We know about the importance of protecting our lands and our waters because this is impressed upon us by our fore-parents. I have also learned about the environment through interactions with indigenous communities and because of my connection to nature itself. This means that for a long time, I've been able to look at water and know from my observations and experience whether it is contaminated. However, learning about scientific principles allows me to explain changes in water quality that I have long observed but never been able to explain in scientific terms.¹⁶³

This kind of explanation is important as the SRDC pursues government action to remedy water damage, stop unlawful mining, and extend title to Wapichan *wiizi*. As this monitor explained, the combination of scientific data and knowledge of the law can be powerful:

Learning about the international and Guyanese laws that protect our rights strengthens our ability to use this data as information to influence both the miners who are causing harm, and also the government authorities and decision makers who have an obligation to regulate mining and protect our environment, but are presently falling short of their responsibilities.¹⁶⁴

¹⁶⁰ SRDC, *Indigenous Council's First Environmental Monitoring Report Prompts Presidential Action in Guyana—SRDC Calls for Government Recognition and Collaboration to Combat Treats Posed by Mining in Wapichan Territory*, Nov. 20, 2018, available at <https://chrgj.org/wp-content/uploads/2018/11/SRDC-Monitoring-Report-Announcement-Final-11.20.2018.pdf> (last visited 12 October 2020).

¹⁶¹ Department of Public Information (Guyana), *President Granger orders multi-agency task force to tackle South Rupununi problems*, Sept. 17, 2018, available at <https://dpi.gov.gy/president-granger-orders-multi-agency-task-force-to-tackle-south-rupununi-problems/> (last visited 12 October 2020).

¹⁶² SRDC, *SRDC Launches Water Monitoring Pilot to Protect the Wapichanao Right to Water: The Global Justice Clinic and Water Scientist Lend Support to Crucial New Effort*, March 2019, available at <http://wapichanao.communitylands.org/news.html> (last visited 12 October 2020).

¹⁶³ SRDC, *SRDC Launches Water Monitoring Pilot to Protect the Wapichanao Right to Water: The Global Justice Clinic and Water Scientist Lend Support to Crucial New Effort*, March 2019, available at <http://wapichanao.communitylands.org/news.html> (last visited 12 October 2020).

¹⁶⁴ *Ibid.*

The SRDC mapping and monitoring program thus plays multiple roles: it asserts the community's protective and custodial gaze across all of *Wapichan wiizi*; it documents activities it labels as unlawful in real time; and it provides evidence of activities that amount to unlawful acts under customary law and may amount to violations of the law of Guyana and international law. In all of these ways, the SRDC is 'using' law as a tool of empowerment through its monitoring program. In fact, the empowerment the SRDC is enacting here can be seen as a form of 'performative ontology' as articulated by TWAIL scholar Jayson Lamchek.¹⁶⁵ By using customary law alongside formal, state-recognized law, and by using it in *all* of *Wapichan wiizi*—not only the formally titled areas—the SRDC is enacting a form of resistance that 'breathes life into' rights.¹⁶⁶

C. Shape and Transform Law: Law and Policy Reform Efforts

The Wapichan of the Southern Rupununi have long engaged in efforts to *shape* the law—to reform, amend, and extend the protections of the laws of Guyana. From the time of external contact, legal norms have been used to dispossess Wapichan communities. In the face of these violations, the Wapichan have sought legal recognition of their land claims—first from colonial powers and later from the modern state of Guyana. For example, in the Nineteenth Century, when Wapichan were made vulnerable to slave raiders from Brazil, they sought both assistance in defending themselves from the raiders and recognition of their land claims from the colonial government in Georgetown.¹⁶⁷ They were successful in obtaining protection, but instead of granting title, their land was declared to be 'Crown lands', where colonists succeeded in obtaining grazing rights.¹⁶⁸ Similar conditions prevailed until the time of Guyana's independence, when—as described above—the Wapichan presented their land claim to the Guyana Amerindian Lands Commission; efforts to obtain the relevant titles continue to this day.¹⁶⁹

¹⁶⁵ Lamchek, 'Exercising rights into existence: new human rights strategies by Third World peoples', 19 *Australian Journal of Human Rights* 175 (2013).

¹⁶⁶ Fergus MacKay, personal communication with author, July 2, 2020.

¹⁶⁷ David, *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 11-13.

¹⁶⁸ David, *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 11-13.

¹⁶⁹ David, *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 11-13.

While the Wapichan have engaged with the prevailing legal systems at any given time to seek their rights, they have also continuously engaged in efforts to change the laws that have disempowered and disadvantaged them. As explained in *Wa Wiizi, Wa Kaduzu/Our Territory, Our Custom*, Guyanese law has ‘included measures intended to protect the traditional rights of indigenous peoples’,¹⁷⁰ such as the Constitution’s Article 149G, which states that ‘Indigenous peoples shall have the right to the protection, preservation and promulgation of their languages, cultural heritage and way of life.’¹⁷¹ However, provisions like this, dating as far back as the early nineteenth century¹⁷² ‘have not always been upheld in practice and have been systematically contracted over the centuries’.¹⁷³ In recent years, the Wapichan communities of the Southern Rupununi have repeatedly called for reform and revision of the 2006 Amerindian Act, which ‘provide[s] only very limited protections for customary natural resource management systems’, fails “to adequately recognise indigenous systems of governance and jurisdiction,” and does not ‘recognise customary land and resource ownership rights in protected areas’, among other shortcomings.¹⁷⁴ For these reasons, the SRDC’s engagement in efforts to shape the law include the transformative call for greater recognition of the Council’s governance space through ‘ownership and control’ of Wapichan *wiizi*.¹⁷⁵ As Daniel Brinks has written of legal empowerment efforts by Indigenous Peoples,

the goal is not to secure the same substantive notions of justice [as in the ambient community], but rather to pursue alternative ones altogether, ones that will more closely reflect their own [Indigenous] normative framework. For indigenous groups and other communities bound by a common identity, this means not only finding ways to enhance agency within the formal system, but also expanding the reach of customary, indigenous legal systems.¹⁷⁶

To strengthen their calls for transformation, the SRDC has partnered with national and international organizations to amplify the demand for revision of the Amerindian Act.¹⁷⁷ This

¹⁷⁰ David, *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 53.

¹⁷¹ Constitution of Guyana, Art. 149G.

¹⁷² Fergus MacKay, personal communication with author, July 2, 2020.

¹⁷³ David, *et al.*, *WA WIIZI – WA KADUZU*, *supra* note 128, at 53.

¹⁷⁴ David, *et al.*, *WA WIIZI – WA KADUZU*, *supra* note 128, at 55-56.

¹⁷⁵ David, *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 55-56.

¹⁷⁶ Brinks, *Access to What?*, *supra* note 130.

¹⁷⁷ The Wapichan of the Southern Rupununi (represented by the SRDC, Village councils, and their partner NGO the South Central Peoples Development Association, SCPDA) have, over the years, partnered with numerous national and international organizations, including, *inter alia*, the Amerindian Peoples’ Association; Digital Democracy, the Forest Peoples’ Programme, the Global Justice Clinic at NYU School of Law; Rainforest Foundation USA; and Size of Wales.

successful effort has led to recommendations from the UN Committee on the Elimination of Racial Discrimination and the UN Committee on the Elimination of All Forms of Discrimination Against Women to the government of Guyana seeking revision of the Amerindian Act to ensure the full range of rights guaranteed to the Wapichan as Indigenous Peoples are protected under formal law in Guyana.¹⁷⁸ In addition to advocating for revision of the broad national framework law for Indigenous Peoples, the SRDC has called for revision and reform of a variety of other legal provisions and policies that impact their rights and interests. These efforts have drawn on Wapichan customary law concerning resource use, and they encompass calls for reform of Guyana's Wildlife Regulations¹⁷⁹, the laws and regulations concerning environmental impact assessments¹⁸⁰, and numerous policies concerning resource use.¹⁸¹

The SRDC's engagement in law and policy advocacy can be seen as an example of what Rodríguez-Garavito and Arenas describe as a process of 'legal innovation' led by Indigenous Peoples:

the transnational mobilization of indigenous peoples has unleashed a process of legal innovation with profound implications for national constitutional systems and the international human rights regime. Centered on the recognition of collective rights and embodied by myriad constitutional reforms and new international legal instruments, this 'renaissance of indigenous peoples for the law' has shaken the individualist and Western-centric tenets of liberal legal

¹⁷⁸ See, e.g., UN Committee on the Elimination of Racial Discrimination, Consideration of reports submitted by States Parties under article 9 of the Convention—Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana, UN Doc. CERD/C/GUY/CO/14 (2006) ('The Committee urges the State party to remove the discriminatory distinction between titled and untitled communities from the 2006 Amerindian Act and from any other legislation...The Committee is deeply concerned about the lack of legal recognition of the rights of ownership and possession of indigenous communities over the lands which they traditionally occupy and about the State party's practice of granting land titles excluding bodies of waters and subsoil resources to indigenous communities on the basis of numerical and other criteria not necessarily in accordance with the traditions of indigenous communities concerned, thereby depriving untitled and ineligible communities of rights to lands they traditionally occupy'); UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the combined second to fourth periodic reports of Guyana*, United Nations Economic and Social Council, UN Doc. E/C.12/GUY/CO/2-4, para. 15 (Oct. 28 2015) (finding that the lack of legal recognition and ownership over Wapichan *wiizi* to be a violation of the rights of the Wapichan as an Indigenous People); UN Committee on the Elimination of Discrimination Against Women, *Concluding observations on the ninth periodic report of Guyana*, UN Doc. CEDAW/C/GUY/CO/9 (2019) (calling on the government of Guyana to 'Amend the Amerindian Act (2006) and other relevant laws, using a gender-sensitive approach, with a view to ensuring that the rights of Amerindian communities to their lands, territories and resources are fully recognized and protected, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples').

¹⁷⁹ David, *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 57.

¹⁸⁰ David, *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 58.

¹⁸¹ David, *et al.*, *Wa Wiizi – Wa Kaduzu*, *supra* note 128, at 57-58.

thought and institutions and holds out the prospect for a cosmopolitan reconstruction of human rights.¹⁸²

Indeed, this substantive renaissance, when coupled with a critical legal empowerment approach, holds many lessons for human rights advocacy. By centering the visions, experience, and agency of those whose rights have been systematically violated, the use of critical legal empowerment by Indigenous Peoples can model a shift that could be applied more broadly to human rights efforts in many places around the world. Professional human rights advocates and lawyers would do well to ask whether their work is led by those most affected by injustice, whether they are directly accountable to rights-holders, and whether strategies like strategic litigation and law reform, which require engagement with lawyers and legal systems, are pursued in ways that effectively shift power to those whose rights are at stake.

5. Conclusion: Critical legal empowerment's lessons for human rights

What lessons might a focus on critical legal empowerment bring to human rights in its current moment of crisis? It could be persuasively argued that most (if not all) of what legal empowerment offers is already present within human rights practice—at least good, accountable, human rights (if not Human Rights) practice. This is in many ways true—some forms of human rights advocacy, especially those that are explicitly rights-based, movement-centered, decolonial, or community-accountable—are aimed at capacitating rights-holders and reshaping the state and other powerful institutions from the bottom up. What a focus on critical legal empowerment offers, however, is something that can be forgotten or distorted when human rights advocacy is tethered more to norms and standards and less to the realities of rights-holders' daily struggles: a commitment to transformative leadership by the grassroots. In this way, such efforts to know, use, shape—and transform—the law to reflect communities' own visions of justice form part of 'an unprecedented effervescence of debate and experimentation in bottom-up legal reform and new international legal regimes'.¹⁸³ By decentering human rights advocates and re-centering leadership in the grassroots, the critical legal empowerment endeavor insists that any such experimentation be carried out by and for those with most at stake. Ultimately, critical legal

¹⁸² C. Rodríguez-Garavito and L. Arenas, 'Indigenous Rights, Transnational Activism, and Legal Mobilization: The Struggle of the U-Wa People in Colombia', in *Boaventura de Sousa Santos and César A. Rodríguez-Garavito, Law and Globalization from Below: Towards a Cosmopolitan Legality* (2005), 243 (internal citations omitted).

¹⁸³ B. de Sousa Santos and C. Rodríguez-Garavito, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (2005), at 2.

empowerment is about the transformation of power relations that result when the disempowered and excluded make claims through—and of—legal systems that have been designed to oppress them. Such a transformation may be implicit in human rights norms, but in recent decades, human rights has been seen to be either unable or unwilling to respond to rapidly increasing inequality, the systemic race-based oppression, climate change, and the rise of surveillance capitalism. The commitment to building the power of grassroots leadership makes clear that rights are always already political; they demand engagement especially with the most persistent forms of inequality and injustice; and they insist that engagement cannot be ‘in the name of’ communities whose own voices must define the path forward.