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INTRODUCTION

THE HUNT FOR JUSTICE

Activism using the tools of law and formal organizations has become essential for many who, through their justice claims, refer to themselves as indigenous peoples. Their varied uses of state courts, global organizations, NGOs, and media are a growing phenomenon, marking an epochal shift toward increasing activist engagement with formal organizations and legal processes. Rights claimants are forming broad alliances, often using the latest communication technologies, to advocate for new international legal standards and forms of accountability (Becker 2013). The multiple strategies of justice campaigns have been applied toward issues that include forced displacement, criminalization of ways of life, genocide, and land dispossession, becoming necessary parts of the ways that many indigenous peoples define and defend their rights and secure their livelihoods. The conditions for participating in these processes are beyond the reach of many, producing inequalities, exclusions, and the risk of keeping structural imbalances of power in place. At the same time, these campaigns express hope for restitution, recognition, and a just future under conditions in which people feel oppressed and excluded from decision making and the benefits deriving from state and corporate uses of their resources.

This book offers an account of the quest for justice by the San peoples of Botswana – and of its widely ramifying effects – with a focus on those few people who were forcefully displaced from the Central Kalahari Game Reserve (CKGR) and who became the focus of the

San's justice cause more generally.[1] The San of Botswana (also known internationally as "Bushmen" and nationally as "Basarwa")[2] who were facing numerous forms of discrimination and dispossession, were often compelled to confront their government as an adversary in a context in which the state refused to recognize their legal status as indigenous. And so San representatives reached out to others – to researchers, donors, and NGOs from abroad – who sympathized with their struggles and identified with the way of life they sought to defend. The high-profile justice campaign that resulted from these collaborations is in fact a prominent instance of a wider phenomenon that is occurring in many parts of the world: publicly visible contests between marginalized peoples and those powerful governments and industries with which they are in conflict.

In addition to the more familiar focus on the *pursuits* of activist struggles, with their compelling narrative of displaced peoples using legal tools to fight back against powerful foes, I pay equal attention here to the *outcomes* of these struggles. What happens, for example, when judges render their verdicts, the dust settles, and people continue with their lives under new legal conditions? What are the actual consequences of recourse to justice campaigns, especially for how people come to see themselves as legal subjects? What is the relationship between dispossession, legal struggles, and the formalization of group identities, including their exclusionary consequences and the implications for redistribution? In this book, I provide answers to these questions by refererring to how legal and political processes play out at multiple levels, from the local to the state, and to international forums, reflecting the simultaneous multiple strategies of many indigenous justice campaigns.

The San's social justice activism took on some of the qualities of movements that have formed around a variety of causes, including those of women, children, those who are LGBTQ, and persons with disabilities. It first involved identifying their conditions of oppression in terms of injustice, for which they sought legal and political remedies in multiple venues. To accomplish their goals, they developed collaborative networks with donors, experts, and justice-oriented non-governmental organizations (NGOs). Finally, their activism was largely oriented toward communication, persuasion, and public outreach, in efforts to influence legal and political decision-making through the mobilization of public sympathy and support. As an *indigenous* movement, however, it was different in the emphasis it placed on distinct

rights to ancestral territories and to self-determination. This put it at odds with a state striving toward the equal rights of citizenship and a common national identity. The San's indigenous claims of difference also involved framing their rights in terms of their distinct contributions to humanity, as the embodiment of hunting peoples' ethics of egalitarianism, social intimacy, and ecological wisdom in a time of global crisis.

It was unclear at the outset of this investigation whether justice campaigns have the potential to deliver on their promises in ways that actually improve the conditions of peoples' lives or whether they readily become mired in the hegemonic structures erected not only by the powers against which they struggle, but also by those very structures and strategies that they employ of to advance their causes. There is a tendency for legal and governance institutions to assign rights claimants to specific categories. Institutions are regularly inclined toward the formalization of collective selves, creating particular narratives that define group identities, conceived and contested in ways that either further or diminish (and sometimes even eliminate) possibilities for peoples to exercise their distinct rights.

There are good reasons, however, to treat state-centered law and transnational activism not just as one-dimensional, top-down, hegemonic processes, but also as negotiated and malleable resources that claimants are able to use, sometimes effectively, in defense of their interests. The focus on the outcomes of the San's hunt for justice allows us to see more clearly how particular causes and cases can transform the interpretation of legal principles, raise questions about the implementation of legal judgments, and cast light on the conditions in which restitution and redistribution stall or fail, revealing more clearly the obstacles to and opportunities for justice that would not otherwise have appeared.

This book will therefore follow San representatives and activists in a process through which the categories and templates of state and international law are appropriated, incorporated, and resignified in making justice claims. It will also consider how new legal norms are created through these practices (see Wilson 1997, Merry 2006, Parmar 2015). In some ways these dynamics recall points of continuity between the role of law in the colonial period and that of international and state law today (see, e.g., Chanock 1998, Comaroff and Comaroff 2006, Mamdani 2012), including some of the ways in which law has been shaped by the "spaces of resistance, struggles among colonizers, and forms of accommodation by colonized elites" (Merry 2003).

The case of the central Kalahari is a kind of artifact that I examine from different angles and follow in my ethnography, using it to see how the use of formal systems of law does not depoliticize the struggle (see, Eckert et al. 2014), but brings it more actively into a wider political field in which law and politics are embedded in one another. I consider the consequences of the activist campaign with a focus on how justice goes beyond its formal venues to influence claimants' sense of themselves and others, their sense of the seemingly stagnant conditions of injustice in which they live, including its tangible effects on their bodies and well-being, and the imagined possibilities they might have for a just future.

A LAND FILLED WITH *FILES*

While I was visiting Metseamonong, a village in the eastern part of the CKGR, in 2011, I was present at a heated discussion that occurred in the shade of an acacia tree. I had met some of the people involved in this exchange several years earlier in New Xade, one of the resettlement villages that the government of Botswana had developed to relocate over 2,000 San and Bakgalagadi people outside of the reserve in the late 1990s and early 2000s, which they had since left to return to their ancestral home. Their removal had occurred in the name of modernization, conservation, and development, even though many of those who were displaced did not want to be removed from their territory in the CKGR. They knew about my interest in their struggle against the government and they knew I was there to follow up on how life had been for them since they were allowed by the Botswana High Court to go back to their villages in the reserve in late 2006. I had travelled there with Jumanda Gakelebone, whom I had known for many years, then a community mobilizer of the indigenous NGO First People of the Kalahari (FPK). He was helping me out, not only driving me around but also translating between English and Sekgalagadi and G//ana (one of the many San languages).

The people in Metseamonong were fired up by a recent visit from several government ministers that had taken place a few weeks earlier; and wanted me to understand how they felt about this visit and the injustices it invoked with greater intensity than was usual in these kinds of group discussions. One elderly woman recalled how, over the past years, the government of Botswana had tried to convince the people of her village to leave their territories (*#kai*) in the Central Kalahari, places where they had lived for generations, and asserted, "They still

want to relocate us. They say this is a land for wild animals not for people." A man in his forties reminded me of events I had heard about many times before, when government employees came and loaded people onto trucks and then moved them hundreds of kilometers away. Family members were sometimes split up and taken to different places, without informing anyone of their location. Their homes were burned, their water tanks overturned, and the only water source that they had, a borehole that took water from deep below the sand, was stripped of its gas-powered pump with cutting torches and sealed with cement. Now he was back, but some of his relatives were still in the resettlement villages because they needed permits and a means of transport to reenter the reserve without risking arrest. "We do not trust the government," he said. "When they promise development we end up suffering … The government does not respect its own law." Another elderly man reminded me, "I refused to be resettled by the government. I never left my home." He recalled that, when he was a child during the time of the British Protectorate, the area where he lived had been declared a game reserve. He and his family were not consulted about the decision to create this reserve, and he did not believe it was right for the government to suddenly announce that people could not live there anymore "just because of what they called it."

As they talked about their lives, a pattern, or at least a common theme, emerged. At almost every turn, they were faced with a regulation, a rule, a demand for information that they did not have, or a thumbprint indicating their consent on documents that they could not read. The women who made crafts needed licenses to collect ostrich eggs, which they did not have and were not able to obtain. Crossing the gate to leave the reserve to visit relatives in one of the relocation villages, guards would search their belongings for meat. They were not sure whether this was arbitrary or indicated a new pattern of enforcement of a hunting prohibition that applied to them. In an interview with three young men in Molapo, a village in the Central Kalahari, they made their concern clear. "People are afraid to hunt" and "We do not know what we can hunt," they said (Sapignoli 2012: 14). This was not a casual concern, but was ultimately connected to whether or not they and their families would have enough to eat.

These stories revealed a great deal about the extent to which these peoples' lives, experiences, and emotions have been shaped by the presence of the state, in the form of legislation, gates, permits, political decisions, ministerial visits, meetings, game scouts, and police patrolling

the land that they considered theirs. But certainly the state was not the only presence in the reserve, and not the only one interested in its resources and inhabitants. Tourists and tour guides, employees of mining companies, researchers, journalists, lawyers, United Nations and African Union delegates, and representatives of international and national NGOs, just to mention a few of the many kinds of people who have populated the reserve over time to explore the environment, extract its resources, gather information, document human rights violations, bring assistance, or just discover the "true" Bushmen.

In the encroachment of state law and government politics into their lives, however, the San were not mere spectators or passive victims. In collaboration with lawyers and a broad network of support, they have pursued a range of grievances through legal activism and litigation, organizing their struggle with the creation of NGOs, networks, and committees. Largely as an outcome of the San's decades-long public struggles against their dispossession, the Central Kalahari region is now known as a highly political place, the source of a "place-based struggle" (Escobar 2008: 7), rich in diamonds and other minerals, a place where human rights are violated, and where indigenous resistance has occurred – and recurs.

A year later, I returned to the CKGR, this time traveling to the village of Mothomelo to meet Matsipane Mosetlhanyane, a Mokgalagadi (*sing.* of Bakgalagadi), the first applicant, or plaintiff, of a case over water rights that had concluded with a victory for the San in the Court of Appeal a few months earlier. I had first met him in 2006 when he was a witness and applicant in the famous *Sesana and Others v. the Attorney General* case of 2002–2006. He welcomed me warmly and proudly told me that he was happy about the various court cases that they had initiated against their government, adding, "We now have papers; we can show them to the government when they tell us to move again." I asked him how things had changed with the new borehole, and he offered to take me to see it. As we were walking to the borehole site he pointed out some bony goats and donkeys, barely clinging to life. He explained that there was an especially acute shortage of water for the animals, and that the water that was being pumped was not quite enough to sustain even the people from Mothomelo and the other villages with which they were sharing water. "My horses are in Kaudwane because here they will die," he said, "A horse died a few days ago because we did not have enough water. The pump was broken."

While he was talking, I noticed a copper sign erected in the middle of the sparse vegetation, standing slightly out of kilter in the midst of sand

and goat dung, which read: *This borehole celebrates the struggle of the people of the CKGR for survival, and for their right to their ancestral land. It was made possible by thousands of supporters around the world. For tribal peoples – for all our humanity*. This sign had been erected by Survival International, a London-based indigenous and tribal peoples advocacy NGO, to celebrate a court victory that gave the communities of the CKGR the right to drill their own boreholes, at their own expense, to meet their needs for water. It is an artifact that materializes the community's connection with an international justice campaign, representing not only an international NGO's (somewhat premature) claim of victory, but also drawing attention to the village in the Central Kalahari as a globalized space where contestations over human rights and fundamental political values play out. In its optimistic and celebratory tone, it stood in incongruous contrast to the struggles that remained a daily part of people's' lives in the village.

Yet, hope remained in Mosetlhanyane's earlier remark, "now we have papers," almost as though as a source of life the documents had as much significance as water. The CKGR, in other words, had become a place where documents were wanted and needed, as part of the San's and Bakgalagadi's legal engagements with the state. Files, understood in the broad sense of documents, law, and policies, the products of development workers, anthropologists, and bureaucratized struggles, are today used to document their diversity and indigeneity and to assert their identity as hunters. They have been enabling – and disabling – instruments in legal contests, and reference points for rights and formalized identities. Files have also been used to dispossess them, to violate or take away their rights. They have become an essential part of life, among the obstacles to be faced and sources of the will and the means to survive.

As we will see, the San are today "subjects" of law as topics of legal definitions and debates, subjected to law as the state and its courts redefined who they are and what rights they can claim, and at the same time subjects of their own making as they reappropriate legal institutions and standards to assert their rights and represent their core collective values.

JUSTICE IN (AND BEYOND) THE "LEGAL"

This book represents an effort to document the indigenous peoples' engagement with and resistance to dominant normative systems in order to arrive at a more ethnographically grounded approach to justice and injustice. I explore how people practice, experience, and translate

notions of rights and justice after many years of engagement in legal struggle, activism, and collaboration with lawyers and organizations, and how this impacts their sense of self as individuals and collectivities. My approach is based on a premise that I share with Falk and Brunnegger (2016: 4), who write, "What is at stake in the anthropology of justice is a deeper recognition of the multiple ways in which 'justice' is understood." The ethnographically grounded approach to questions of justice – including what it is and how best to achieve it – invites us to begin with how it is characterized by individual actors and within activist networks. Our focus should not be restricted to the formal systems, institutions, or processes of law, but should range further, to the aspirations and intimate subjectivities of those whose sense of injustice has been activated and who are acting on justice claims.

An anthropological approach, through its attention to the subjective and the everyday, is especially attuned to the "disjunctions between the demands for justice and 'legal cultures'" (Falk and Brunnegger 2016: 5). The "legal cultures" in question should not be restricted to those of courts or institutions of global governance, but can extend to the very advocacy networks on which indigenous campaigns for justice often depend, and with which they occasionally find themselves in conflict. Human rights networks, Mark Goodale argues, have a tendency to become "imperial" through "the evacuation of alternative discourses on the basis of what the imperial power believes – earnestly or not – is the correct, or morally superior, or economically more advantageous set of perspectives and practices" (Goodale 2009: 108). In other words, in human rights campaigns the appeal to universal moral values runs the risk of evacuating alternative conceptions of justice.

The ethnography of justice activism is able to shed light on observations of the kind made by Goodale by bringing attention to how, and the extent to which, actors are constrained by the authoritative legal knowledge and practice that they employ. But, it can also shed light on their space for institutional manoever as they "talk back" with discourse and action that constitute a critical response to the structures that limit their aspirations to justice. The actors' use of multiple layers of activism translates into different practices and visions of justice that open alternative strategic pathways when dealing with the moral imperialism of dominant discourse and institutional structures.

One of my goals in this book is to come to grips with the changed spaces of justice activism, by depicting a more complete range of legal engagements than has previously been done in the ethnography of

the San, to offer a comprehensive discussion of the San people and their claims making through formal institutions. In doing so, I maintain consistent attention to the "law talk" that takes place in response to the encroachments of the state and the opportunities inherent in new indigenous advocacy networks. I focus on the claims-making processes or on the specific sites where claims take place (such as courts or international meetings), as well as on parallel and interconnected forms of activism (publicity campaigns, protests, lobbying, etc.) and the implications these have for the everyday lives of rights claimants and the peoples they work for. In taking this approach, I hope to add substance and detail to accounts of the growing influence of law and its embeddedness into local and international politics and societies. The ethnography I present here thus takes the concept of juridification outside the court and other formal legal venues and into the everyday lives of the people who are engaged in and affected by justice claims and activism. This includes the somatic effects of the sense of injustice, the ways that state-sanctioned arbitrariness and illegality are expressed in bodily experience, the sense of sickness, pain, and uncleanliness that follows directly from, and is associated with, government policies and practices.

JUDICIALIZATION AND JURIDIFICATION

The San's complex legal subjectivity compels us to evaluate the consequences of the increased recourse to formal legal processes, especially for how people come to see themselves as legal subjects. Certain authors in the political science and anthropological literatures (e.g. Couso et al. 2013) see the phenomenon of increasingly frequent use of courts as part of a global transformation in the uses and influence of law, and have referred to it (largely critically and negatively) as *judicialization*, or the "transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts" (Vallinder 1994: 91). Ran Hirschl considers this transformation on a grand scale, noting a constitution-reforming dimension to the way that national courts and supranational entities are engaging in "the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies" (Hirschl 2008: 94).

The approach taken here builds on these observations by being attentive to a wide range of consequences that follow from growing recourse to state and international law, whether as a source of state

domination and control or as an instrument of judicial review. The authority of judicial review represents a significant pathway toward the correction of the abuses of state governments by underrepresented people seeking justice through state courts. The emphasis on what law does in practice is perhaps best represented by the concept of *juridification*, which is fast becoming a key concept of analysis in efforts to understand the changing relationship between law and politics (Eckert et al. 2014, Kirsch 2014a). Yet, the concept itself is unclear, and empirical knowledge of the social implications of various processes that might apply to it is insubstantial (Magnussen and Banasiak 2013: 325). This is where an account of the San's many-sided engagements with law can help. The fact that legal oppression and activism have taken form in so many aspects of their lives provides us with a guide to how the concept of juridification might be unpacked and applied comparatively.

One significant consequence of the increased recourse to law – juridification as legal framing – can be seen in the process by which people increasingly tend to think of themselves and others as legal subjects (Blichner and Molander 2008: 39), a process that emerges with particular clarity in indigenous rights claims. This approach to the influence of law includes a wide spectrum of legal institutions and procedures, with a focus on the experiences and perspectives of rights claimants. It considers law as entrenched in the everyday, as generative, as part of the way relationships are created and identities and expertise developed. Mahmood Mamdani argues that this generative power of law can clearly be seen in the period of indirect rule, when the British preoccupation with defining and managing difference led to the consolidation of racial and tribal categories (Mamdani 2012: 3). However, this is not a process that ends with the rise of anticolonial nationalism and the promotion of a common humanity. Even in circumstances of postcolonial nation building, there is a tendency for group identities to be defined, enumerated, and formalized through legal and administrative processes, with important implications for rights claimants and their causes. In the Kalahari legal cases, for example, the judicial process called for particular formulations of the "applicants" rights and identities, and assigned specific roles to those who pursued their rights through the court and those who did not.

The manner in which the San's pursuit of justice was channeled through NGOs, partly as a condition of having an organized and recognized voice, offers another key example of the formalization of collective action, producing contested visions and insecurity in the relationships