Diversity and Multiculturalism Accommodation
The Cultural and (In)Humane Existence of the Indigenous San (Basarwa) Community in Botswana

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ABSTRACT
This article examines and problematises the “rights” of Indigenous communities under multiculturalism debates with reference to the San community popularly known as “Basarwa” or “Bushmen” in Botswana, paying particular attention to the tension between perceived government effort to accommodate this community and the concomitant violence inflicted upon its members. The article refers to the Sesana and Others v Attorney-General (2006) case as a springboard to unravel the two-thronged way in which the law becomes an instrument of violence on the one hand, and a means to correct social injustices on the other. This case deals with the forceful removal of the Basarwa from their ancestral land and the government’s abrupt termination of essential services such as drinking water and primary health-care. The article problematises the rights of the Basarwa under multiculturalism debates and considers questions such as: If the Basarwa community are contenders under modern laws, which are alien to them in terms of the asymmetrical way in which these laws were imposed over their customary laws, what rights do they have that enable us to speak about them as citizens? In what way does the modern state accommodate them and their unique cultural and legal understanding? What resources do they have at their disposal to speak the language of the law? Is the argument that multiculturalism accommodation gives minority groups the choice of maintaining their unique cultural and legal understanding of the world sustainable? Ultimately, I proffer the application of democratic experimentalism as an effective and amicable means of solving disputes between the state and minoritised and marginalised communities such as the Basarwa.

KEYWORDS
The San, Bushmen, Basarwa, identity, cultural diversity, language and culture, disputed rights, democratic experimentalism

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Introduction
There is a lop-sided way in which the law is enforced, and this is often repressive to disadvantaged communities. Of course, the law cannot represent everyone, but unfortunately those that are ordinarily excluded are the subaltern poor. As Spivak observes, “the usually silent victims of pervasive rather than singular and spectacular human rights violations are generally the rural poor” (Spivak, 2001, p. 177). In this normative arrangement, their customs are obliterated while they are pushed beyond the limits of tolerance and margins of citizenship. Botswana is arguably one of Africa’s best-administered countries, and it fares well in terms of political stability and economic growth. I argue, however, that such accomplishments often take attention away from other fundamental issues that are equally important. This point is supported by Cook and Sarkin (2010):

Achievements such as Botswana’s impressive economic growth, political stability, and regular elections often eclipse issues like human rights, which remain on the periphery of most analyses of Botswana. However, human rights issues present a significant threat to Botswana’s positive reputation.

Cook and Sarkin (2010) go further to say that “human rights issues present a significant threat to Botswana’s positive reputation”. It is in this context that I try to see what is potentially at stake and point to the problem of multiculturalism accommodation and how public institutions that are meant to protect the weak can easily become their enemy in disguise. As I will show, the way the law is applied is problematic since it often privileges those in positions of power. For instance, when legal disputes arise, the rich and the powerful usually have resources to access the best legal minds and frustrate any effort by those in the margins. Therefore, modern subjects have a penchant for abusing their legal status to inflict all sorts of violence on the Indigenous people. UN Special Rapporteur on Discrimination against Indigenous Populations, Jose Martinez-Cobo (1986), observes that, in spite of their extensive diversity, Indigenous communities throughout the world have one thing in common, i.e., they all share a history of injustice.

In this article, Indigenous people refer to those communities who inhabited any land they claimed as their own before being displaced by stronger groups or some authorities. Displacement of these communities was particularly prevalent during colonialism, a system that displaced the original inhabitants, especially those that occupied fertile and mineral-rich lands. As defined by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Indigenous communities, peoples and nations are:

Those which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

(Martinez-Cobo, 1986)
According to Martinez-Cobo (ibid.), one prominent feature of the Indigenous communities is that they consider themselves distinct from the societies currently governing their territories. This is a clear case with the Basarwa who form the focus of this article. As the UN points out, the Indigenous peoples of the world are very diverse and live in nearly all countries the world over. In some countries, Indigenous peoples form the majority of the population; in others, they comprise small minorities. Generally, Indigenous peoples are concerned with preserving and protecting their language and culture. Some Indigenous peoples strive to maintain traditional ways of life, while others seek greater participation in the current state structures. Indigenous peoples have been killed, tortured and enslaved. They have been denied the right to participate in governing processes of the existing state institutions. Invasion and colonisation have disparaged and undignified them, denying them the fundamental right of self-determination.

The Basarwa community refers to an Indigenous community found mainly in the central Kalahari region in Botswana. They are also found in various parts of Africa, and according to Brenzinger (2011), the San are native to Namibia, Angola, Botswana, South Africa and Zambia. They have also been referred to as the Bushmen, but in the late 1990s the term “Bushmen” was officially banned in Botswana as it was considered derogatory, and the government instructed that the term “Basarwa” be used instead (see Sunday Standard, 2015). However, the expression Basarwa has also been rejected by one of the subgroups known as the Khwe community. The leader of the Khwedom Council which is a lobby group that advocates for the rights of the Khwe people, Keikabile Mogodu, told the government that the term was equally derogatory (Sunday Standard, 2015).

It is not a self-chosen name and is no different from calling a black South African “kaffir” or a black American “nigger.” Being called “Basarwa” is testament to our position in society because oppressed people are always being given derogatory names by those who lord over them. We have to raise our voices about this practice. We are not Basarwa; we are Khwe. We have different tribes just like Batswana and we want to be referred to by the name of our tribes.

(Mogodu cited in Sunday Standard, 2015)

Brief Background the Sesana and Others v Attorney-General case (2006)

In unravelling the complexities raised in the preceding paragraphs, the Sesana and Others v Attorney-General (2006) case, widely known as the Botswana Bushmen case, seems to be the best place to start. The case deals with the struggle of Basarwa in Botswana. After the government in that country terminated water and health services and other primary services to the San living in the Central Kalahari Game Reserve, Roy Sesana who is a San activist together with other members of the affected community took the government to court.

According to Pariona (2017), Botswana is made up of various ethnic communities dominated by the Batswana ethnic community, which account for 79% of the country’s population. The Batswana people are divided into eight tribes: Bangwato, Barolong, Bakwena, Bakgatla, Batlokwa, Balete, Batawana and BaNgwaketse. In terms of numbers,
Batswana are followed by the Kalanga ethnic community, which accounts for 11% of the population. The Basarwa that this article focuses on is the third largest ethnic group in Botswana and accounts for 3% of that country’s population. According to Pariona (2017), other ethnic groups such as Basubi, Bakgalagadi, Bayei, Bambukushu and Baherero make up only 7% of the population.

It is estimated that nearly 50,000 Basarwa are living in Botswana. Traditionally Basarwa lived in small groups and survived entirely by hunting and gathering veld food. They moved frequently and had no permanent home. Acculturation continues to impact their traditional lifestyle. Since independence in the 1960s, the government has embarked on a large-scale rehabilitation project ostensibly to develop and integrate them into the mainstream modern Batswana society. In some cases, these efforts have been met with hostilities as some of these communities refuse to abandon their culture and way of life. This has resulted in skirmishes and protracted legal cases.

According to Ncube (1996), the Botswana government’s policy generally fosters the “integration” of the Basarwa community into the mainstream Tswana communities. Government considers this to be the best way to address the marginalisation of the Basarwa. As a result, the government took two steps concerning the Basarwa, who lived inside the Central Kalahari Game Reserve since 1961. The first step was to group all of them in one settlement called Xade, inside the game reserve, with the expressed aim of improving services. In 1986, the government took a second step, which was to relocate them outside the game reserve, apparently to have access to land sufficient to carry out development projects they were capable of. Meanwhile, the Basarwa gained social and political consciousness, especially between 1961 and 1986, when many experienced rapid social changes.

Much of the enlightenment began due to the Tribal Land Act of 1968, which gave land rights to members of the different tribes and excluded the Basarwa, whom the Act did not recognise as tribesmen. The inequity of the Tribal Land Act was intensifies by the implementation of the Tribal Grazing Land Policy (TGLP) seven years later, in 1975. This policy allowed ranches to be demarcated into communal grazing areas in districts with enough land. The Basarwa living on such grazing lands were evicted by the ranchers without compensation because, not being members of any tribe, they were regarded as having no rights to the land they occupied. This sparked a land rights movement among the Basarwa. Both

Table 1 Ethnic Groups of Botswana

<table>
<thead>
<tr>
<th>Rank</th>
<th>Ethnic Group</th>
<th>Percentage of population</th>
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<tbody>
<tr>
<td>1</td>
<td>Tswana</td>
<td>79%</td>
</tr>
<tr>
<td>2</td>
<td>Kalanga</td>
<td>11%</td>
</tr>
<tr>
<td>3</td>
<td>Basarwa/San</td>
<td>3%</td>
</tr>
<tr>
<td>4</td>
<td>Others</td>
<td>7%</td>
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in communal and commercial areas of Botswana, they protested the treatment they received, took their complaints to district councils and appealed against allocations of land by the land boards in their areas. Some of them talked to the media, arguing vociferously that they were not being treated fairly. It was at this time that NGOs, both within Botswana and outside, came into the scene trying to defend the Basarwa. The latter were manifestly discriminated against by the government and the dominant Tswana groups.

Partly influenced by organisations in Namibia and with the assistance of foreign groups, the Basarwa established the First People of the Kalahari movement in 1992. This pressure group intended to promote the rights of the Basarwa and consisted of representatives from the different Basarwa groups within Botswana. The organisation met with the government in 1993 to outline important issues affecting its members. Issues such as land rights, political representation in councils, parliament and the house of chiefs, and the right to education in mother-tongue languages for their children were discussed (Survival International, 2010). At the moment, Botswana’s official policy is that only Setswana is recognised and used as the vernacular language in schools. With this as the background, I turn now to human rights concerns.

Human Rights and the Politics of Recognition—Righting Wrongs

Hitchcock and Vinding (2004) cluster human rights concerns of Indigenous peoples in Botswana into the following categories: leadership, education, culture, discrimination and land rights, and the development model. In Botswana, the Basarwa decry the lack of official recognition of their traditional leaders, and the current education system that they say does not recognise or teach their language—a move they see as tantamount to destroying their culture and placing their children at an immediate disadvantage with regards to language discrimination. They see the current educational system as irrelevant to their purpose because they say it does not respond to their immediate needs at a community level and that it erodes their way of life and traditional education. Above all, the Basarwa are particularly concerned about land rights. On the one hand, the government sees the removal of the Basarwa from their Indigenous land as an essential step in uplifting their economic status. On the other hand, the Basarwa see forced removal as a dispossession of land tracts with financial and cultural significance.

As in many countries, including South Africa, the constitution of Botswana provides land rights for all citizens. There are also several relevant policies, such as the Tribal Grazing Land Policy of 1975, which states that all Batswana have the right to sufficient land to meet their specific needs. However, one thing is immediately apparent. The right to adequate land does not seem to apply to the Basarwa, as evidenced by many disputes that often arise. Since the late nineteenth century, the Basarwa have gradually lost their customary land to colonial settlers, cattle farmers, natural parks, game reserves and other government programmes.

According to the International Land Coalition (n.d.), if land rights, land tenure rights and natural resource access rights of Indigenous peoples are not protected or recognised by international and domestic laws, the culture and livelihoods of Indigenous peoples and
pastoralists are likely to disappear. For years the Bushmen lived peacefully in the central Kalahari in Botswana, but this ended in 1980 when a diamond was discovered in the area. In the case of the Central Kalahari Game Reserve, the settlement was created in 1961 when over 2,000 Basarwa were settled there by the government supposedly to protect their traditional way of life. However, after the said diamond discovery, the government notified them that they would have to move to make way for diamond mines. They refused on the ground that it was their ancestral land, but the government was adamant about removing them. This removal started happening by force from 1997. They were resettled in camps, where they were restricted from their hunting activities, which represented a significant source of their livelihood.

Thus, the rights of the Basarwa become so cheap that even those relocated by the government already to make way for game reserves, for instance, continuously faced the prospects of being relocated again whenever the government felt like it—having been pushed way beyond the limits of tolerance the Basarwa eventually took the government to court in 2002. They wanted the court to rule that their eviction was illegal. This led to a protracted and costly court battle. However, as Epp (1998) aptly noted, cases do not come to court as if by magic due to procedural wrangling, evidence did not start to be heard until 2004 and dragged on for years. Although the Bushmen are Botswana’s poorest citizens, the case was said to be the most protracted and most expensive in the country’s history. During this time, many of these people, with their means to provide for themselves destroyed, started dying in great numbers due to hunger and ill health.

In 2006, however, the court finally ruled that their eviction by the government was “unlawful and unconstitutional” and that they have the right to live inside the reserve, on their ancestral land. The court also ruled that the Basarwa have the right to hunt and gather in the reserve and not apply for permits to enter it. Although the Bushmen won the right in court to go back, the government has since been trying to make their return impossible by restraining them from accessing water boreholes, which they used before. For this reason, in 2010, the Basarwa took the government to court again to access the water inside the reserve. However, the judge dismissed their case. It was only in January 2011 that the courts condemned the government’s “degrading treatment of the Bushmen”.

What Does This Mean?
Essentially, this case illustrates that despite the constitutional guarantees, Indigenous people often remain at odds with modern legal instruments, particularly with regard to the land question, leading to further frustrations and marginalisation of these communities. Thus, as Westbrook aptly reminds us, the Indigenous population must typically be asking the hard questions, “If our ways were inadequate and must be changed, who were we? What are we becoming” (Westbrook, 2006: 6). Indeed, such must be the type of question that the Indigenous people often grapple with when faced with modern law, which claims legitimacy over Indigenous law, thereby altering the San’s understanding of citizenship as they find themselves being a pariah in their own land, to borrow Sol Plaatje’s (1913) phrase. To fully grasp the issues being raised here, it is necessary to clarify the significant features of the “Indigenous” peoples and their commonalities throughout the world.
The case affirms the contempt with which the state can frustrate its citizens instead of protecting them, often using taxpayers’ money. It also demonstrates the prejudice that these people often receive; for instance, when the court case was underway, the government approved an application by a mining company to build a multi-billion-dollar diamond mine in the contested area. The case also highlights the importance of non-governmental organisations in fighting for the poor and marginalised rights. Through the generosity of NGOs, the Basarwa successfully challenged the government and the initial court ruling, which prejudiced them. Without successfully challenging this ruling, they would have been thrown off of their traditional land.

Again, what is clear from the case above is that legal disputes by nature are costly. Epp also notes that the process by which individuals make claims about their legal rights and pursue lawsuits to defend or develop those rights is not in any simple way a direct response to opportunities provided by constitutional promises or judicial decisions. “Legal mobilisation also depends on resources, and resources for rights litigation depend on a support structure of rights advocacy lawyers, rights advocacy organisations and sources of financing” (Epp, 1998, p. 18). Therefore, the poor are often at the mercy of humanitarian organisations that also depend on handouts from donors. This negatively affects how some of the cases are handled. Due to financial constraints, some of these organisations are understaffed or staffed by less qualified personnel. If this is the case, then, to what extent do the poor get a fair trial if the process is expensive and tedious? As seen in many claims, the rich may choose to protract the process to frustrate the poor and deplete the resources at their disposal. The following extract from a news article may illustrate the point I am trying to make here:

With their way of life and means to provide for themselves being destroyed, they started dying in great numbers due to hunger and poor health, especially the scourge of HIV and TB. The case dragged on for years and during this time, many of these people died. Although the Bushmen won the right in court to go back to their lands in 2006, the government has done everything to make their return impossible, including banning them from accessing water boreholes, which they used before.

(Survival International, 2010)

The issues highlighted in the above extract are real concerns that the poor Indigenous grapple with. The expensive and lengthy legal battles they can hardly afford and the tendency by the governments to use the power at its disposal to frustrate them. This begs the question; can we confidently say that the nature of the modern-day legal jurisprudence makes it possible for Indigenous peoples and the poor in general to receive justice? What is the use of a favourable ruling if it comes only after the complainants have died? I argue that this is simply the case of “justice denied”. In all these cases discussed, the court ruling came long after many complainants had died.

Another issue that is highlighted is the independence of the judiciary from politics. In order for the rights of the marginalised communities to be protected judicial independence
becomes an important condition. Charles Epp (1998, p. 18) proposes three critical indicators to assess the condition for judicial justice, namely:

- Judicial system’s independence from political pressures
- Courts are structurally independent, salaries not paid by the government
- The presence or absence of constitutional rights guarantees

In terms of the Botswana court structure, the Court of Appeal is at the apex of the Botswana court structure. However, it is the High Court, with its unlimited original jurisdiction, which plays a significant role in the protection of rights, including the rights of Indigenous peoples. The constitution expressly gives the High Court jurisdiction over all matters in which there are allegations of violations of the rights enshrined in the constitution. Thus, everything seems above board except in instances where the government seemed to have been in contempt of court, with nothing very much being done to have it comply with the ruling. For example, the court had ruled that the San must return to their land, but the government did everything in its power to hinder this by preventing them from accessing water wells within their land of origin, as highlighted in the above extract.

**Multiculturalism Accommodation vis-à-vis Citizenship and Nationhood**

In light of the issues discussed above, it is sensible to situate the plight of the Basarwa under the multiculturalism accommodation debates. According to Shachar and Holmes (2001), multicultural accommodation aspires to give minority groups the choice of maintaining “their unique cultural and legal understanding of the world, or their nomos/Custom”. This source defines accommodation in this context as:

> A wide range of state measures is designed to facilitate identity groups’ practices and norms. For example, group members might be exempted from specific laws, or the group’s leader might be awarded some degree of autonomous jurisdiction over the group’s members.

*(Shachar & Holmes, 2001)*

In that sense, the critical question posed here is: how does multiculturalism as a process of a particular form of accommodation empower the Basarwa or obliterate their rights? Although accommodation usually has good intentions, it also poses problems. For instance, multiculturalism becomes a problem whenever state accommodation policies intended to mitigate the difference between groups end up reinforcing the power hierarchies within them. This phenomenon creates the paradox of multicultural vulnerability. And, as in the case of the Basarwa, some categories of at-risk groups end up shouldering a disproportionate share of the costs of multiculturalism. Canadian Philosopher Will Kymlicka (1998) distinguishes two kinds of multicultural accommodation, namely:

1. External protections: those that promote justice between groups,
2. Internal restrictions restrict individuals’ ability to abandon cultural practices.
However, Kymlicka’s distinction between the external and internal aspects of accommodation has been dismissed as just that: a distinction that fails to provide a practical solution for a real-life situation involving accommodated groups. Some of those critical of Kymlicka’s distinction point out that this may do more damage than good, for example, where the external protections meant to promote justice between groups uphold the cultural traditions that sanction the maltreatment of certain vulnerable members as women.

Generally, multiculturalism theorists maintain that democracies must embrace multiple cultures that make up these polities (see Taylor, 1994; Kymlicka, 1998). For Taylor, there is a link between cultural recognition and identity (Taylor, 1994). Baumann (1999) agrees and adds that elites impose their own visions of multiculturalism and culture. This evokes the nationalists’ claim to speak for the ordinary people, thereby rendering the subalterns silent. Here Spivak’s question becomes relevant: Can the subaltern speak? If their ways are obliterated, where is the watchdog?

What Rights, Then, Does the Basarwa Have?

Indigenous peoples usually base their cases on customary law. In Botswana, customary law exists side by side with civil law, provided that the latter is not deemed repugnant to morality. However, as Hitchcock and Vinding (2004) found, the customary law recognised in practice is the ruling group, namely the Tswana tribes. This is because the Indigenous peoples were, and still are, regarded as components of the Tswana tribes or tribal communities. Furthermore, unwritten customary law is administered by chiefs and sub-chiefs, most of whom are from Tswana tribes. In this regard, the customary laws of Indigenous peoples are not recognised in practice.

Customary law, in this case, is also subject to other sources of law, especially the constitution since Botswana adheres to the principle of constitutional supremacy in which all rules may be rendered invalid if they contravene any of the rights enshrined in the constitution. Although the government of Botswana generally respects the courts’ decisions, there are reports that the government has not fully complied with the decision of the High Court in the Sesana case. This naturally should amount to contempt of courts.

Another important source of law in Botswana is the common law which derives from the Roman-Dutch and English common law. In 2006 the High Court of Botswana endorsed an English common law principle in which colonial annexation does not automatically terminate “native title” and found that the Basarwa had native title to the land within the Central Kalahari Game Reserve that government had unlawfully deprived them of. This was the same decision as the Richtersveld Community and Others v Alexkor Ltd and Another (2003) case in South Africa, which also relied on the Mabo v Queensland (1992) case ruling in Australia. This also illustrates the importance of relying on a previous ruling involving similar cases elsewhere to restore and reinforce Indigenous rights.

Legislation is another primary source of law, which has a direct implication for land rights; for example, the transfer of mineral resources from individual tribes to the state was given effect by legislation. The legislation may grant or take away rights. However, legislation must not be in contravention of the constitution; otherwise, it may be struck down by the High Court upon application. Again, another important source of law often considered
is international law. Like most common law countries, Botswana adheres to the dualist law system in terms of which international law does not form part of domestic law unless explicitly incorporated into domestic law.

The Interpretation Act requires the courts to consider any relevant international agreements laid before it when interpreting Acts of Parliament. Some of the conventions pertinent to land rights include the African Charter on Human and Peoples' Rights. The Charter gives rise to the Africa Commission's Working Group on Indigenous peoples in Africa, which has so far urged Botswana to review its policy regarding Indigenous peoples and establish national human rights institutions.

The African Charter provides for the right of every individual to the enjoyment of all the rights and freedoms guaranteed in the Charter without distinction of any kind such as race, ethnicity or another status. The grounds upon which an individual may not be denied the enjoyment of the rights in the African Charter are not exhaustive. This rule protects individuals belonging to groups that identify as Indigenous peoples from discrimination based on their ethnicity. In principle, the Basarwa are therefore protected by this provision. The protection provided in this article could still benefit the Basarwa even if they did not identify themselves as Indigenous peoples. Similarly, the article protects individuals belonging to the Basarwa ethnic group even if they are not recognised as Indigenous peoples by the government of Botswana.

As Shachar and Holmes (2001) rightly observe, unlike members of the majority, whose cultural context of choice is relatively secure, by virtue of the fact of speaking the majority's language, or their belonging to its dominant ethnic, cultural, racial or religious group, members of non-dominant communities do not enjoy the same guarantees. The Basarwa, as a non-dominant community, do not seem to enjoy the same recognition and protection of rights compared to the dominant Tswana-speaking groups. Therefore, Shachar and Holmes' (ibid.) conclusion that minority cultures' traditions, languages, norms, practices and distinct ways of life may face extinction is not far-fetched.

Citizenship—The Right to Have Rights
Given the issues raised in the preceding sections, can we rightly speak of the Basarwa as citizens? "Citizenship", as Earl Warren (cited in Colaiacovo, 2010) famously put it, “is nothing less than the right to have rights”. It defines who belongs to a state and who is entitled to the benefits associated with full and equal membership in that state. Therefore, what kind of rights do they have that enable us to talk about them as citizens? Clearly, in this case, the Basarwa were pushed beyond the margins of citizenship. Yet, according to Shachar and Holmes (2001), a state has the duty to protect the rights of its citizens and residents, irrespective of their group affinity, and is held accountable if such rights are violated under its sovereignty—in some instances, even if it has not actively participated in such violations.

Indeed, if the Basarwa were to be regarded as citizens, they are supposed to enjoy the same protection from the state, just like the main group of the Tswana. According to Hitchcock and Vinding (2004), there is evidence that the Botswana government treats the Basarwa as “second-class citizens or as if they were not citizens at all” (2004, p. 137). What resources, then, do they have at their disposal to speak the language of the law?
After conducting a major study in Botswana, Hitchcock and Vinding (2004) concluded that the San generally find themselves a social group that falls outside the law. They have thus not enjoyed the socio-economic development enjoyed by other ethnic groups, which Botswana has achieved since independence.

The Road Ahead and the Theory of Democratic Experimentalism

On the one hand, the government seems to have good intentions in terms of developing this community, but it appears the problem lies with the approach that fails to take the aspirations of this community into consideration. Therefore, the goal is not to find faults with the government per se but to locate the position of the Basarwa and their struggle within government efforts while attempting to find a middle-road approach leading to a win–win situation. One must never forget that the state has the responsibility to safeguard the welfare of its citizens. Because I am not interested in finding imperfections in the government efforts rather than solutions to the social problems, I apply insights from democratic experimentalism, which I find helpful in “establishing a highly participatory method of policymaking, designed to assimilate as much local expertise as possible, in preference to representative democracy” (Super, 2009, p. 541). Democratic experimentalists claim to offer pragmatic solutions to social problems. Some of their fundamental assumptions are a common goal, consensus, maximising value for stakeholders, inclination to solve problems for the public good, decentralisation of power to enable citizens and other actors to use their local knowledge to fit solutions to their individual circumstances, and respect for constitutional guarantees. Essentially democratic experimentalism aims to democratise public decision-making from within and lessen the burdens on a judiciary that today awkwardly superintends the everyday workings of democracy from an external vantage point (see Dorf & Sabel, 1988).

Democratic experimentalism is very progressive in its effort that challenges paradigms akin to what Paula Freire (2007) refers to as the pedagogy of the oppressed, which imposes an asymmetrical relationship between decision-makers and marginalised communities. It, thus, makes sense to argue that if the government were guided by democratic experimentalism, it might have been able to properly consult the Basarwa through engagements that put them at the centre of the decision-making process as a way to safeguard their interests or aspirations. Perhaps, a consensus would have been reached, enabling the two parties to work towards a common goal for the public good. Instead, the Basarwa were simply seen as the “other” and everything was imposed on them without due regard for their culture, wishes and aspirations as people. Their “othering” ultimately led to symbolic and physical violence. Their voices were invisibilised by the state using resources at its disposal, including the courts. Ironically it was the courts that ultimately restored their rights, although this was delayed justice because it came very late when many of the original claimants had died, hence my advocating of democratic experimentalism as a means to explore equality and democratic alternatives and forge a broad and inclusive national consciousness. The robustness of this theory lies in its strengths to create a space in which “different approaches and institutional arrangements” could be harnessed to address a given problem (Bhbha, 2009).
Conclusion
This article set out to evaluate the veracity of the law in bringing justice to the poor and subaltern citizens with reference to the Basarwa. The article concludes that, in spite of the well-developed language of co-existence and rights, modern institutions have an exceedingly poor capacity to protect the Indigenous and respect them as equal citizens. For instance, despite human rights provisions enshrined in that country’s constitution, the Basarwa were trucked like cattle when forcefully removed from their ancestral land. The legal process is lengthy and very expensive and, as Epp (1998) reminded us, cases do not arrive in supreme courts by the process of osmosis. Legal mobilisation also depends on resources. Resources for rights litigation depend on a support structure of rights advocacy lawyers, rights advocacy organisations and sources of financing, which the poor often struggle to access. Nonetheless, in all three cases that I have referred to, the judiciary must be applauded for ultimately enforcing the rights of the Indigenous people by restoring their land rights as protected by customary law. In light of the apparent violations of the dignity of the Indigenous people in the name of development and related confident pronouncements referred to in this article, I conclude that we must approach the issue of the Indigenous people with caution to re-essentialise Indigenous communities and their struggle.

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