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Intellectual Property Rights and Indigenous Peoples; A Case Study of the San in Southern Africa

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Abstract

The debate about intellectual property rights and indigenous knowledge is not new, but this study proposes two fundamental changes to further this debate. First, it is crucial to 'localise' the debate in the social, economic and political context in which indigenous peoples are actually living. Second, oversimplifying and romanticising indigenous realities might prevent a breakthrough in the debate and therefore it is important to recognise that so far the debate has been too much based on generalisations (e.g. pristine hunter gatherers), assumptions (e.g. dichotomy between communal versus individual property rights and implicit presumption that indigenous peoples have to take up, or otherwise adapt to the western property model). A case study approach, based on the San in Southern Africa, reveals new findings and tensions that have received far too little attention to date. Besides re-evaluating the moral basis of our current intellectual property rights approach, it is necessary to address the question of the basis on which property rights can be allocated: is it justifiable or even feasible to allocate property rights on the basis of identity or ethnicity?

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Foreword & Acknowledgements

This working paper has been produced as part of my doctoral research on intellectual property rights and traditional knowledge. It contains many of the results of my first fieldwork, carried out in Namibia and South Africa in August, September and October 2004. The purpose of this working paper is to share and communicate work in progress.

I wish to thank the following people for their advice and opinions: Professor Roland Clift and Dr Walter Wehrmeyer (my PhD supervisors), Dr Dan van der Horst and Tim Hart. I want to thank in particular Professor Marilyn Strathern, Dr Eric Hirsch and Dr Thomas Widlok for the open manner in which they shared their knowledge and advice about anthropological research and fieldwork. I also want to acknowledge Axel Thoma, Roger Chennells and Jeroen Kwant for their support during the fieldwork. Most importantly, I want to pay tribute to the San communities who made me feel welcome; without their support this research could never have taken place. A special word of thanks to Frans, Willem, Annetta, Benjamin, Ala, Paulus, Mbazo and Foster for their tremendous translation efforts. My deepest debt and respect is for Karabas who showed me a glimpse of the old days. Finally, I am grateful to the EPSRC (a research council funded by the UK government) for providing me with a scholarship for this study.

Saskia Vermeylen, 18/07/2005

1 Introduction

1.1 Indigenous Peoples and their Plant Knowledge; the Issue of Ownership

For centuries, indigenous peoples have been marginalized as a voiceless underclass, and they are now struggling to regain their rights to land, resources and traditional knowledge. Their rights are now recognised in some international agreements such as the Convention on Biological Diversity (CBD). The CBD demands equitable benefit sharing from the use of biodiversity and in recent years pharmaceutical companies who have patented medicines based on indigenous knowledge are increasingly accepting the idea that those indigenous peoples must be financially compensated. Some companies even adopt a more integrated approach to benefit sharing and offer both monetary and non-monetary benefits over different time periods (ten Kate and Laird, 1999). While such distributive agreements are clearly a great improvement on the previous practices of outright theft, there are still questions to be raised about the moral validity and the actual social consequences of this important approach to bioprospecting, i.e. the commercialisation of *indigenous* knowledge of plants and animals.

Key concerns in the literature on bioprospecting include the legal status of traditional knowledge and an assessment of the instruments that must safeguard, protect and balance biodiversity, sustainable development and traditional knowledge. The impact of intellectual property rights on indigenous peoples and biological diversity in particular has been researched extensively, followed by the examination of the tension between the Trade Related Intellectual Property Rights Agreement (TRIPs) and the Convention on Biological Diversity (CBD) which are the main international agreements that are governing the control over biodiversity, indigenous knowledge and intellectual property rights (Zerbe, 2002). It is widely agreed in the literature that granting intellectual property rights would have an adverse impact on biological diversity and consequently impose a serious threat for the local and indigenous peoples whose lifestyle and knowledge base is highly dependent on biological diversity (e.g. Anuradha, 2001; Posey, 2002).

Some anthropologists have argued that the main discourse about intellectual property rights and the protection of traditional knowledge is too much centred around an Euro-American view of what constitutes a community and how this community ‘regulates’ principles like sharing. According to Dutfield (2000) opponents of intellectual property rights are reluctant to ascribe concepts of ownership and property to indigenous communities. They find the whole idea of applying the concept to indigenous peoples pointless and think it will distort the holistic nature of indigenous realties. Anthropologists such as Strathern (2000) on the other hand, argue that there is a counterpart to property in an indigenous context. Concepts such as ownership and property rights or equivalents do exist in indigenous communities, but it would be wrong to assume that there is a generic form of collective or community based intellectual property rights system. This would not do justice to the diverse proprietary systems of indigenous peoples (Dutfield, 2000; 2004). From an ethical point of view, critiques about the dangers of individual property rights and commercialism are valuable, but it would be wrong to transfer these critiques to a

specific context without verification on the ground. Examining indigenous peoples' points of view would add richness, complexity and a different kind of realism to both sides of the debate (Strathern, 2000).

This working paper seeks to contribute to the debate by reporting on the San of Southern Africa and their views and experiences with the concept of sharing their traditional knowledge of medicinal plants[1]. The following sections will provide an overview of the main discourses around intellectual property rights and indigenous knowledge, identify what is seen in the literature as the way forward and consequently formulate the objectives of the fieldwork with the San.

1.2 Legalistic and Anthropological Approaches

There are two main approaches to the discourse around intellectual property rights and indigenous knowledge. The first and most frequent way of addressing this topic is the 'legalistic' one, which takes the existing intellectual property rights framework as a starting point and examines to what extent the current system can be used to protect traditional knowledge. The other option is more characterised by a cultural or anthropological approach. Instead of focusing on the existing intellectual property regime, this approach analyses traditional knowledge within a cultural context in order to formulate a possible solution. Consequently, this method requires field research in indigenous communities (Heath and Weidlich, 2003). Recently, legal scholars such as Von Lewinski (2004) have admitted that a purely legal approach which does not cover the topic from an indigenous point of view can hardly do justice to the complexities at stake.

The dichotomy between legal and anthropological approaches to property rights merits further attention. According to Singer, a Harvard Law professor, it is conventionally believed that protecting *private property* is and should be the corner stone of our law and culture (Singer, 2000a). He points out the discrepancy between the prevalent economic and legal institutions and our actual moral intuitions and norms. On one side, there is a commitment towards principles and norms of deregulation, private property rights, liberty and autonomy. On the other side (e.g. in our personal lives) there is a moral acknowledgement of values such as equality, human dignity, compassion and responsibility (*ibid.*). Over the last two centuries, the values that are used to define the contours of legal property rights have become imbedded in the liberal paradigm of free market economy and private property rights. In this context it is remarkable that a system based on the segregation of our economic self-interest and moral obligation of sharing is extended to a new domain – viz. protection over traditional knowledge – in the hope that it can redistribute economic losses, protect cultural rights and restore social justice. Singer (2000a, 2000b) believes that such an extension is feasible, but only if we address a number of questions which have been overlooked in the legalistic debate, namely how the relationships between morality and property and between rights and obligations can be 'regulated'. Although it is not a new debate, against the background of new economic realities

[1] Of the almost 500 species of local plants (both medicinal and non-medicinal) and animals known and named by the San, some use is found for 150 species of plants and 100 species of animals (Yellen and Lee, 1998). As a result of their extensive knowledge of the environment, the San have been for a very long time self-sufficient, with the exception of iron for blades, knifes and arrowheads (*ibid.*).

Singer (2000b) insists that it is timely to ask with renewed urgency: What is property; how is it regulated; how should regulations be constructed and on the basis of what sort of values?

Answering the above questions is beyond the scope of this paper, but closing the gap between moral obligations and economic and legal rights might be easier when property is examined as an 'institution' that regulates a social relationship between people (Hann, 1998). From an anthropological perspective, Hann (1998) manages to capture the essence of the property debate when he questions whether our desire to acquire objects and own them exclusively is a universal trait among humans or whether this possessive individualism is a specific product of modern Euro-American societies. Studying other cultures might help to determine whether there are alternative ways of organising social relations and institutions than the presently dominant private property model (Hann, 1998). The danger with this ethnographic approach, however, is the risk that assumptions and generalisations are made without taking into account the historical, temporal and cultural context of such studies (Hitchcock, 1987; Hann, 1998; Kent, 2002), perhaps even perpetuating the 'noble savage' myth (Lee, 2003). In terms of property relations, anthropologists have for too long emphasised the difference in meaning and symbols between different cultures while ignoring sociological factors and power relations (Hann, 1998). When studying other cultures, like hunter-gatherers, all too often the external circumstances or in other words the contact between traditional and modern societies have been neglected (Guenther, 1999). This approach bears the risk of denying the humanity or true identity of the people under scrutiny when they are turned into the exotic 'other' (Katz *et al*, 1997). This 'great divide' between traditional and modern societies is now no longer accepted by most contemporary anthropologists (Hann, 1998).

However, the romantic notion of the 'great divide' has not fully died out yet. Indigenous peoples have been examined as a collective embodying the alternative of a 'consumerist and materialist West', or what has been called 'worldly nativeness'. The image of indigenous peoples has been romanticised partly to deal with issues of guilt (Gordon and Douglas, 2000). The rather simplistic arguments that have been used in the mainstream debate around traditional knowledge and intellectual property rights provide a good example of this view of worldly nativeness. The issue at stake goes further than whether it is morally wrong to impose our individual property model on a society with a community based property model. It should also be questioned, as for example Hann (1998) does, why some societies seem to be able to organise property models in such a way that reproduction of the moral values of that society prevail over the impersonal, competitive and individualistic behavioural model that is dominant in modern Euro-American societies.

1.3 New Angles of Enquiry

In an implicit recognition of the need to address the gap between the legalistic and anthropological approaches, a number of authors have underlined the limitations of existing research and have called for new angles of enquiry in future research. The evolving discourse on intellectual property rights and traditional knowledge should first of all be placed in the local social and economic context in which indigenous peoples are living (Strathern, 2000). Heath and Weidlich (2003) add that more

attention must be given to the customary law practices of intellectual property rights. Also it is important to guard against oversimplifying and romanticising indigenous realities and to start probing beneath the 'false' generalisations[2] that are currently made to support or oppose intellectual property rights in the context of appropriating traditional knowledge (Greene, 2004; Strathern, 2000). Furthermore, the search for new mechanisms to protect indigenous peoples' traditional knowledge and culture must be built from the bottom up and not top down (Moran *et al* 2001; Tobin, 2000). Answers to the problems of using or misusing traditional knowledge can only come from indigenous peoples themselves (Riley, 2004) and solutions can only be formulated after rigorous evaluations of actual cases (Greene, 2004). Finally, when researching new mechanisms, it is important to recognise that indigenous peoples do not speak with one voice. The current literature does not allow for a diversity in indigenous peoples' values and needs. Neither does it acknowledge the threats of conflicts within indigenous communities about the ways in which they choose to interact with outsiders and the international community (King and Eyzaguirre, 1999). In reality some indigenous peoples have the opportunity to raise their voice and step onto the political stage, while others are marginalised or silenced (cf. Castree in Greene, 2004: 227). Obviously, addressing these new requirements demands conducting fieldwork during which indigenous peoples' opinion about intellectual property rights can be explored.

The above critique allows the identification of shortcomings in past representations of indigenous peoples as the custodians of the environment in the sustainable development debate. It is certainly true that some indigenous peoples assume a level of 'stewardship' of their environment and it has been proven that their lifestyle can be environmentally sustainable. However, the way indigenous peoples are represented in the academic discourse about their societies may not necessarily coincide with their self-identity (Takeshita, 2001). Generalising and making broad assumptions about indigenous peoples' environmental values is in fact unacceptable because it implicitly places an unfair burden of responsibility on them and denies their right to develop according to their own preferences (Dutfield, 2000).

Catering for the high level of cultural and social diversity is precisely one of the great challenges in studying indigenous issues (Von Lewinski, 2004). Examining traditional knowledge in the context of intellectual property rights demands a thorough understanding of, for instance, status of indigenous peoples within the state; level of assimilation; economic means; experiences with other cultures and societies; respect for traditions and customs; moral needs and customary law.

1.4 Objectives

The work set out in this paper is intended to address these problems in understanding the interaction between conceptions of property rights and the rights of indigenous

[2] For example, those who oppose intellectual property rights argue that introducing intellectual property rights in developing countries will expose indigenous peoples to market mechanisms and threaten their pristine subsistence strategies. Those in favour of intellectual property rights argue, for example, that introducing intellectual property rights to developing countries will stimulate economic development and innovation.

peoples by examining a specific current case. The main objective of this paper is to ascertain whether and how the San themselves wish to protect their traditional knowledge congruent with the political, economic and social realities of the San. As mentioned previously by Tobin (2000) it is important, prior to developing a new protection mechanism, to consider first the reasons why indigenous peoples seek protection over their knowledge - assuming for a moment that, as the current literature suggests, this is indeed what indigenous peoples are seeking. Do the San want protection to prevent (ab)use, to stimulate economic development or to promote innovation? Or do they want protection because they perceive their struggle for rights to land, natural resources and intellectual property as one single battle in their quest to gain self-determination rights and restore their human dignity? The second objective is to use the research findings, based on fieldwork with the San in Southern Africa, to inform the current debate over traditional knowledge and intellectual property rights. Thirdly, the San must be given a chance to air their expectations and concerns about bioprospecting. Finally, the fieldwork serves to examine the mechanisms that are currently in place to protect the traditional knowledge of indigenous peoples. In this respect, the fairness of benefit-sharing and participation rights as the mechanisms set out by the Convention on Biological Diversity (CBD) to safeguard the traditional knowledge of indigenous peoples will be scrutinised. This will be done on the basis of an evaluation of the San's perception of the success or failure of an existing benefit sharing agreement (regarding the Hoodia plant) that has been signed by San representatives.

1.5 Structure of the Paper

This paper is structured as follows. In order to provide the background for the first objective and the material for comparison with fieldwork results (for the second objective), the following section will outline the current debate in the literature about the possible mechanisms for managing indigenous knowledge and their flaws and shortcomings, especially in terms of generalising indigenous realities and experiences. Section three provides an overview, based predominantly on anthropological literature, of the role of property in San communities where hunter gathering is (or was) still important. Section four describes the San communities where the fieldwork took place. Section five provides an analysis of the San's position regarding traditional knowledge and intellectual property rights, based on data collected in the field. Section six is also based on field data and evaluates the Hoodia benefit sharing agreement. The final section contains a general discussion and conclusion of this paper.

2 Analysis of the Current Debate: Different Opinions and Solutions for Managing Indigenous Knowledge

2.1 Different Types of Rights and Different Views on Claiming Rights

Indigenous peoples fighting to regain their rights are faced with -often stark- choices over what type of rights they should prioritise and focus their claims on. In recent years cultural property claims[3] have gained in importance to such an extent that, according to Greene (2004), they have become more prominent on the political agenda of some indigenous groups than concerns over territorial and land claims. Greene argues that *" in some instances cultural property claims have surpassed in importance the concerns over territory and land rights that have historically been central to indigenous mobilisation"* (2004: 212) while *"many indigenous peoples are plagued more by problems of territorial invasion, loss, dislocation, and marginalisation by their own state elites than by the appropriation of their traditional knowledge by bio-pirates from the North"* (2004: 214). Nevertheless, the latter is of great importance because indigenous knowledge might be the last 'resource' they actually possess. Greene's point of view is important (and will be revisited in following sections of this chapter) because his wording here seems to suggest that these different resources are inseparable. This point of view is shared by Riley (2004a) who argues that for indigenous peoples[4], intellectual property rights are related to other rights such as rights to land, rights to natural resources, rights to self-determination and ultimately rights to control the transmission of collective indigenous knowledge and culture. Furthermore, indigenous peoples perceive the 'appropriation'[5] of ancestral land, natural resources or traditional knowledge, by non-indigenous peoples, as a loss of their cultural heritage and therefore wonder whether having protection over intellectual property rights could be useful if it is not linked to land and self-determination rights (Halewood, 1999; Tucker, 2004).

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[3] For example, Crazy Horse malt liquor has been the target of a campaign aiming to end the demeaning use of an American Indian leader's name. The descendants of Crazy Horse brought a suit against the manufacturers, after the company's refusal to abandon the name, alleging defamation, emotional harm and a violation of the right of publicity – meaning the right of a person to control the commercial use of a name and image (Brown, 2003). In 2001, the chairman of the brewing company, SBC Holdings, reached a settelement after he went to South Dakota and offered the descendants of Crazo Horse 32 blankets, 32 braids of sweet grass, 32 twists of tobacco, seven thoroughbred racehorses and an apology (*ibid.*). The brand Crazy Horse Malt Liquor, though, was already withdrawn from the market in the late 1990s. Another example is the case of *Milpurrurru v. Indofurn Pty Ltd*, dealing with the import of Vietnamese carpets that were reproduced without permission using parts of well-known works of indigenous artists. The artists successfully claimed infringement of their copyright. When estimating the damages, the court recognised the concepts of cultural harm and aggregated damages, therefore taking at least the same account of the historical, ethical and religious aspects of the copied subject matter (Leistner, 2004).

[4] See for example indigenous peoples' statements in the final document of the Second International Indigenous Forum on Biodiversity, 1997; COICA and UNDP Regional Meeting on Intellectual Property Rights and Biodiversity. Extracts of these statements can be found in Posey and Dutfield (1996).

[5] The term 'appropriation' is frequently used in literature on cultural property rights to denote contestable claims of ownership by western companies over traditional knowledge.

The triangular relationship between land rights, self-determination rights and intellectual property rights demands further examination. The right to land is not simply an issue of land ownership but deals, according to indigenous peoples, with rights 'to define property and manage land and its resources in ways congruent with indigenous knowledge, cultural heritage and livelihood needs' (Tucker, 2004: 129); or in other words with their own intellectual property rights system. The indigenous knowledge that provides the basis of 'indigenous intellectual property rights' is closely related to specific natural resources and land rights. Therefore, it is almost impossible to protect indigenous intellectual property without acknowledging its intimate link with land and resource rights.

'Cultural property claims' denote attempts by indigenous peoples to reclaim both tangible and intangible elements of their culture on the basis that the appropriation of these corporeals and incorporeals entails a "sacrilege and defamation" of their culture (Greene, 2004). Indigenous peoples are striving to gain more direct control over their cultural property by challenging the (mis)-use, possession and commercial exploitation of their heritage by non-indigenous peoples. Their political actions are primarily guided by identity-based strategies, heavily imbedded in the indigenous rights rhetoric, while economic concerns seem to be a secondary driving force (*ibid.*)

Another form of appropriation, viz. pharmaceutical bioprospecting[6], draws more attention to the economic value of traditional culture than, for example, the unauthorised use of indigenous symbols. In this respect, it is interesting to examine whether indigenous peoples condemn this practice and what sort of strategy they use to contest ownership issues over traditional medicinal knowledge, especially since bioprospecting is interlinked with the sensitive and core issue of indigenous peoples' rights to land and natural resources (Hayden, 2003).

As with the opinion of academics (see section 1.1), the opinions amongst indigenous peoples tend to differ. Some embrace the idea that traditional knowledge should be protected as intellectual property; others react more sceptically and condemn the current intellectual property rights framework for imposing a Euro-American property model without taking into consideration any alternative property models (Greene, 2004). They are concerned that only one type of intellectual property rights system is being universalised at the expense of all other models (Dutfield, 2000).

Indigenous peoples' views on the appropriate action and legislation that has to be taken in order to protect their traditional knowledge also tend to differ. While some indigenous peoples call for the development of special legislation to protect indigenous rights, there are others who favour a purely customary law solution (Tobin, 2001; Drahos, 1998). Others demand a more drastic solution and are opposed to any form of commercialisation of genetic resources and traditional knowledge and therefore are also against any development of *sui generis*[7] legislation for their

[6] This refers to the pharmaceutical companies' use of traditional plants and knowledge as leads for the research and development of new drugs (Hayden, 2003). Bioprospecting is a much bigger issue for indigenous peoples in Africa and Latin America, while the unauthorised use of indigenous symbols seems a bigger issue for indigenous peoples in North America, Australia and New Zealand.

[7] *Sui generis* law means a legal system of protection for knowledge that shares some characteristics with intellectual property law, but differs in specific ways because it has to protect the new subject-matter of indigenous peoples' ecological and biological knowledge (Halewood, 1999).

protection (*ibid.*). According to Coombe (1998) indigenous peoples in the West (e.g. New Zealand, Australia, Hawaii) and from the South (mainly Asia, Africa and Latin America) are developing different opinions about intellectual property rights. This division can be explained on the basis of the different social and political contexts in which these groups live. The claims of the Western indigenous peoples are increasingly recognised in national and international law (Coombe, 1998); for them intellectual property rights are an integral part of their claims to self-determination. The indigenous peoples from Asia and Africa on the other hand are still struggling to get their status as indigenous recognised nationally and internationally. Legal recognition of their sovereign rights over resources and territory seems more unlikely. Therefore, they have taken a more pragmatic approach and see short-term benefits in the use of intellectual property rights as a tool to alleviate poverty.

Besides indigenous peoples, academics (e.g. anthropologists, legal scholars and ethnobiologists) and activists also have debated the possibility of defining traditional knowledge as a new form of intellectual property (for a concise overview of this debate see e.g. Martin and Vermeylen, 2005). The concerns raised in this debate have also been related to the question of how to compensate indigenous peoples for the use of their resources (Hayden, 2003). This discourse has attracted ideological and political positioning from both the left and the right (Greene, 2004). Those at the left spectrum of the debate argue that intellectual property rights are imbedded in market economic thinking and therefore consider it unsuitable as a mechanism to protect the traditional knowledge of indigenous peoples (see e.g. Shiva, 2001). Those academics and activists at the right, on the other hand, think that intellectual property rights make it possible to privatise open access goods and see no harm caused by patents when used to protect tangible and intangible cultural resources (see e.g. Moran *et al*, 2001).

Just as indigenous peoples tend to disagree, academics and activists also have identified different options by which indigenous peoples could take control over the use of their biological resources and knowledge. One way is to increase the participation of indigenous communities in bioprospecting contracts, such as 'fair and equitable' access and benefit sharing agreements (for general comments see e.g. ten Kate and Laird, 1999; Laird and ten Kate, 2002; Tobin, 2002; Gollin, 2002; Guerin-McManus *et al*, 2002; for context specific comments see e.g. Greene, 2004 on Peru; Anuradha, 2001 on India; Aguilar, 2001 on Costa Rica). Another way to limit the unapproved use of indigenous knowledge is to change the reporting requirements in the patent applications (Tobin, 2000). A final major option to protect traditional knowledge is through the creation of *sui generis* intellectual property laws (for general comments see e.g. Halewood, 1999; Cantuaria Marin, 2002; for context specific comments see e.g. Tobin, 2001).

The first proposal fits, to a certain extent, within the framework of the CBD[8]. In the name of sustainable development and redistributive justice, pharmaceutical and

[8] Article 8(j) of the CBD requires that each contracting party promote the wider application of "knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity". In addition, article 8(j) states that governments should "encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices". The force of these obligations can be criticised because it is undermined by the conditions: "as far as possible and as appropriate" (Article 8 of the Convention on Biological Diversity, supra note 2, 1992).

biotechnology companies must share part of their economic benefits with source nations and communities. Criticism has been voiced that this is at the very least a fragile mandate, fraught with difficulties at the community level because of the indigenous peoples' exclusion from the contracting process (Hayden, 2003; cf. Brush in Greene, 2004: 226). This makes resource appropriation a political problem: the CBD's success is dependent on the political climate of the government under which indigenous groups live (Moran *et al*, 2001); i.e. the political and social position of indigenous groups within their own countries influences their ability to participate in benefit sharing schemes (King and Eyzaguirre, 1999).

When customary law is going to play a more important role in the protection and regulation of traditional knowledge, it becomes a necessity to recognise that the current debate must be placed in a local context because the legal standing of indigenous peoples around the world tend to differ greatly. Some indigenous people, like the Australian aboriginals, have a relatively strong legal basis for demanding protection of their rights on the basis of their customary law and practice. For example, in 1992, Australia's High Court came to a decision in the *Mabo and Others v. Queensland* case, which reversed more than a century of legal thinking about native title. The High Court recognised the pre-existing common law rights of native title held by indigenous peoples prior to European contact and, in some cases, held through to the present day. The decision reversed prior thinking in Australia, which assumed that lands were under the power of the Crown except in cases where the native population could prove traditional ownership. With *Mabo*, the burden of proof shifted to the government (Brown, 2003). The theoretical significance of the *Mabo* case, together with the *Wik* case, and the link with the wider philosophical debate about indigenous land rights, property rights and indigenous justice is thoroughly explained by Dodds (1998). Others, like African and Asian indigenous groups, are still struggling to get their basic human rights recognised (Tobin, 2001). Therefore, any proposed solution, like a *sui generis* intellectual property rights system, is doomed to fail if it does not take into consideration the rights of indigenous peoples in relation to the nation states of which they are citizens (Whimp and Busse, 2000).

From a human rights perspective, the protection of indigenous peoples' traditional knowledge through intellectual property can only be successful when national governments recognise their obligations towards indigenous peoples, especially if a solution is sought in *sui generis* legislation (Coombe, 1998, Tobin, 2001; Dutfield, 2004). Or in other words, from a human rights perspective, intellectual property rights can only be protected if human rights are a priori recognised and protected.

Given the above criticism and requirements in the use of intellectual property, including any *sui generis* system, as a tool to protect the traditional knowledge of indigenous peoples, alternative solutions have been developed. One approach that comes closest to addressing the most poignant needs of indigenous peoples when addressing the issue of intellectual property rights and traditional knowledge is Posey and Dutfield's (1996) concept of traditional resource rights. Their ideas have been summarised by Green (2002) as follows: traditional knowledge should not be seen in terms of intellectual property, but rather as a traditional resource among other resources used by indigenous peoples to sustain themselves. *"The change in terminology from intellectual property rights to traditional resource rights reflects an attempt to build on the concept of intellectual property protection and compensation,*

while recognising that traditional resources – both tangible and intangible – are also covered under a significant number of international agreements that can be used to form the basis of a sui generis system" (Posey and Dutfield, 1996: 95).

Both Simpson (1997) and Green (2002) argue that, although not to the same extent as the concept of intellectual property rights, the concept of traditional resource rights is still too much based on a Euro-American view of the world in which both tangibles and intangibles are transformed into exploitable materials. Therefore, Green (2002) suggests, instead, to focus on territorial rights for indigenous peoples. He explains that the concept of territoriality is not a new one; for decades it has played a central role in indigenous peoples' struggles for land rights. Without secure and defendable access to land, indigenousness is undermined and as a result local culture can be destroyed. In that sense, the material claim to land is linked to the political and moral claim to self-determination. According to this principle of territoriality, it might be better to define traditional knowledge in terms of access to territory rather than to knowledge. Using a strategy of territorial rights for the protection of traditional knowledge could be beneficial in three ways. First, it reinforces explicitly the politics of self-determination that indigenous peoples are already demanding. Second, the focus on territoriality could stimulate in some cases a much-needed political confrontation with the state. Third, it stimulates them to ask some fundamental questions about what should and should not be considered as a resource or what should or should not become accessible to market concepts of property and commercialisation. In short, *"reframing the debate over traditional knowledge and bioprospecting to a language of rights to territory is in fact an attempt to readjust the focus towards rights claims largely still in process and with considerable challenges"* (Greene, 2002: 245).

Greene (2002) shares Simpson's (1997) concerns about the term 'resource', which signifies that the value of an object can only be materialised when it is brought into the market place. However, Simpson (1997) has also identified other problems with the concept of traditional resource rights. First, he has problems with the word 'traditional' because the term undermines the principles upon which indigenous cultural and intellectual property rights are based. The term 'traditional' does not correspond to indigenous peoples' realities because it suggests that indigenous peoples' cultural rights are defined by, and limited to, past practices and beliefs. However, indigenous culture is not frozen in time; on the contrary, it continues to survive and develop despite continuous pressure on indigenous culture. Second, Simpson (1997) argues that the international agreements that have been suggested by Posey and Dutfield (1996) as relevant for guiding the process of protecting traditional resource rights do not specifically refer to indigenous peoples and their rights. Therefore, he questions whether these agreements can live up to the expectations to provide protection of the rights of indigenous peoples. Furthermore, some of the proposed agreements, such as the ILO Convention 169, are actually subject to some fierce criticism by indigenous peoples because, whereas on paper they may look like rights-based documents, in reality states can still make indigenous peoples subject to integrating policies. International law and human rights are connected to our colonial history and as a result some people, like indigenous peoples, have been voiceless in the human rights debate. Wright (2001) and Balakrishnan (2003) argue that when indigenous peoples are brought within the reach of western rationalist narratives, they are treated as static and unchanging objects, while their development depends on tradition and the helping hand of the 'white' man.

2.2 The Danger of Oversimplifying and Romanticising Indigenous Realities

So far, the mechanisms proposed to regulate the protection of traditional knowledge are mostly based on the assumption that all traditional knowledge is communally owned without considering any nuances in the organisation of property in a local context (Simet, 2000). For example, Cottier writes: *"the idea of appropriation is strange to [indigenous peoples] and therefore it is argued by indigenous organisations that the approach of modern IPRs is not suitable"*(Cottier, 1998:572). Or according to Kahlil, *"one important distinction between the West's property system and that of indigenous communities in developing countries is that whereas that of the West is founded on the spirit of individualism, the former is grounded on notions of collective ownership"* (Khalil, 1995: 241).

Reality tells a different story: individual property rights over knowledge are not necessarily absent from many traditional societies, but these individual rights are often accompanied by certain duties. In indigenous societies each member has individual rights and collective responsibilities and both rights are inextricably linked. Therefore, the failure of the current intellectual property rights system to protect indigenous knowledge is at least as much related to the lack of defined responsibilities as to the supposedly collective nature of customary rights over traditional knowledge (Dutfield, 2004). Furthermore, individual ownership in indigenous communities is not just limited to tangibles (e.g. canoes, gardens, fruit, etc.), but can also be related to intangibles (e.g. songs dances, healing practices, etc. – see e.g. Morphy, 1997; Keen, 1997). Examples of group ownership over tangible property could be hunting land and fishing grounds and examples of community-based ownership over intangible property are oral history of the clan and designs of jewellery (Simet, 2000).

The danger is that oversimplifying property relationships in indigenous societies may lead to policy prescriptions of little value once they are applied in a particular case. But opponents of intellectual property rights persist in their argument that paying for cultural property rights would erode and ultimately destroy the unique character of indigenous societies, which is the basis on which these communities produce anything of significant value to the rest of the world (cf. Dove, in Kirsch, 2004). But as Kirsch (2004) points out, such a conclusion can only stand when the opinion of indigenous peoples is ignored or when erroneous assumptions are made, including ignoring the widespread desire of some indigenous peoples for greater participation in the global economy. As argued by O' Faircheallaigh (1998) for the resource development industry: *"the policy prescriptions in the general literature are also of limited utility in the current context, either because they imply a complete uncoupling from the world capitalist system, an option not available to most indigenous communities, or because they assume control of the apparatus of the state, which indigenous peoples do not enjoy"* (O'Faircheallaigh 1998: 386). Each group, whether indigenous or not, must have the option to determine to what extent and under which circumstances they want to enter into market economies (Posey, 1990).

Indigenous peoples continue to find themselves dominated by Western cultural underpinnings, either as the 'noble savage myth' or 'development' myth (Blaser *et al*, 2004). As put forward by Blaser (2004), there is the risk that generalisations lead to the situation whereby the needs of indigenous peoples are defined in association with dominant and prevailing images of indigenousness. For example, if indigenousness is defined as a state of backwardness, indigenous peoples' needs might be translated into progress and development. But if indigenousness is presented as in harmony with the state of nature, indigenous peoples' needs are associated with preserving the conservation of their culture and knowledge (Blaser, 2004). With regards to bioprospecting, the latter is more commonly used.

Using different definitional perspectives for portraying indigenous peoples as part of opposing political perspectives is not a new phenomenon. In the 17th Century, Hobbes (1651) typified hunter-gatherers as 'the primeval state of humanity, living lives described as solitary, poor, nasty, brutish and short' (Panter-Brick, Layton *et al*, 2001: 5). Dryden (1670), on the other hand, defined foragers as 'living in a state of grace from which the rest of humanity had fallen, using the famous phrase *the noble savage* to describe them' (Panter-Brick, Layton *et al*, 2001: 5). Later, Rousseau romanticised further the idea of 'noble savage' with moral overtones to contrast the corruption of Western society (Schrire, 1984)

The danger of politicising indigenousness is that indigenous peoples increasingly have to rely on claims of authenticity in their struggle for legitimacy, even when the persistent dominant image does not reflect the real identity of indigenous peoples. In that respect indigenous culture and indeed indigenous identity needs to be 'demystified and decolonised' (Battiste and Henderson, 2000). Euro-American perspectives on culture, be it cultural differences or policies, must always be approached with the *"all-pervasive, unavoidable imperial setting"* (cf. Said, 1993 in Battiste and Henderson, 2000: 14). To conclude, the need arises to 'decolonise' the rhetoric of the current bioprospecting debate. The only way to do this appropriately is to, first, 'demystify' in general property relationships in indigenous societies and in particular hunter-gatherer communities and, second, to revisit the current debate about intellectual property rights and traditional knowledge in local settings, viz. the San in Southern Africa. This will be done in subsequent sections.

3 Property Relations in Hunter Gatherer-Communities

3.1 First Myth – Pristine Hunter-Gatherers

The previous section concluded that there is a need to demystify property relationships in hunter-gatherer communities. Especially in the case of the San, a number of popular and persistent myths need to be addressed. This section will use secondary, mainly anthropological, research findings to explore in more depth the San's identity and their view on property relations in general.

The first myth that has to be dealt with is the popular belief that pristine hunter-gatherers live separately and isolated from the rest of humanity. This can be best illustrated with the following anecdote. While an elderly San hunter deep in the Kalahari was putting poison on his arrows, he asked a Western visitor whether he believed that O.J. Simpson, who was then on trial in the US for murder, was guilty (Panter-Brick, Layton *et al*, 2001). Without wanting to divert this paper into an anthropological study of the San, at this point it is beneficial to reflect on the question whether the San are still pristine hunter-gatherers with their own autonomous culture and lifestyle?

The reason for taking this little detour is twofold. First, as mentioned in the introduction, the current debate about intellectual property rights and traditional knowledge is flawed because it is not strongly placed in the local economic, political and social context in which indigenous peoples are living. Furthermore, the debate is too much based on simplified and romanticised generalisation and assumptions. Therefore, it is only reasonable to examine in more detail the social, political and economic position of the San. Second, creating an unrealistic or manipulated identity is a common mistake that even experienced anthropologists make. The so-called 'Kalahari debate'[9] will be used as an example to demonstrate how the construction of two opposite San identities can shape the San's struggle for political, social and economic recognition in different ways.

The Kalahari debate started because scholars have, for a long time, neglected the possibility that the San's cultural identity is multi-layered and complex (Kent, 2002a) and were in some sort of denial that the San have become increasingly drawn into the local if not world economy (Lee, 2003). The crux in the debate is whether the San, both historically and in contemporary settings, could still be labelled as hunter-gatherers.

The revisionists (e.g. Wilmsen, 1989) do not recognise the San as hunter-gatherers. For them the San are impoverished, marginalised and cattleless peasants who have been dominated by their neighbours ever since the Bantu moved into their territory roughly two thousand years ago. The San were forced to hunt and gather because they were poor. As result the San lost their cultural autonomy long before the arrival of European colonialists. The poverty and exploitation of the San is not a recent phenomenon, but a continuity of the past. For thousands of years the San's foraging

[9] For a thorough overview of the Kalahari debate; see e.g. Kent (1992)

culture has been rooted in poverty and it has long ceased to be connected with their ancestral, pre-iron age, culture[10].

The traditionalists, on the other hand, argue that the San's 'slave-like' position was not created by the arrival of the Bantu, but the European settlers. During their interaction with the Bantu, the San were able to maintain their cultural autonomy. The San's hunter-gatherer culture only came under pressure where they had to compete with the European settlers for the scarce resources and land (Kent, 2002c). Kent (2002b, 2002c) argues that the interactions between the San and the Bantu and the San and the Europeans differed because the contact between the latter was influenced by the introduction of advanced technology, racism, ethnocentrism, missionaries and intolerance of cultural diversity.

According to Lee (2003), who originally belonged to the camp of the traditionalists, neither of these two visions do justice to the realities of the San. *"The difficult position of the San today cannot be projected to their entire history and the San did not stop being a people when the last hunter laid down his bow and picked up a transistor radio"* (Lee, 2003: 194). In the context of this paper, it is argued that the opinion of the anthropologists may be beside the point. After all, when talking about the past, the San identify themselves as an autonomous group of foragers who lived, until a few decades ago, on their own without agriculture or domesticated animals (Lee, 2002), a point of view shared by the Bantu (Kent, 2002a). In more recent settings, the San consider themselves as both First People and a marginalised stigmatised minority (Hitchcock, 2002).

The relevance of the Kalahari debate lies in the recognition that representing the San culture as autonomous hunter-gatherers is in tension with their highly dependent underclass status (Sylvain, 2003). Another reason why the Kalahari debate merits further attention is that it has shown that the authentic San have disappeared as a result of two major trends: first, as a result of the politics of colonialism, they were forced to abandon their traditional lifestyle; second, they became increasingly part of the political economy and modern nation state system (*ibid.*).

Unravelling the somewhat mythical San identity reveals that different San societies have been characterised by a diverse set of cultural and social characteristics[11] (Guenther,1999). At one end of the spectrum, there are the nomadic family-based foragers who have lived, until recently, in relative isolation. At the other side of the divide, there are the more sedentary multi-band and politically more organised groups who have lived, for hundreds of years, in political and economic association with their agro-pastoral neighbouring groups (*ibid.*). For the latter group, the foraging mode of subsistence and the socio-political organisation underwent some significant changes: from hunting-gathering to gathering-hunting, from foraging-farming to farming-foraging and from labour for cattle to labour for cash (Guenther, 2002). But throughout these changes, the foraging mode of existence, although eroded, continued to be maintained. This shows the remarkable resilience and adaptability of the San as society (*ibid.*). The more nomadic foragers, like the Ju/'hoansi in Nyae Nyae

[10] Two major anthropological works that can be categorised as revisionists are *Land Filled With Flies* (Wilmsen, 1989) and *The Bushman Myth* (Gordon and Douglas, 2000).
[11] For a concise ethnographic overview of the cultural and social differences between various Khoisan peoples; see e.g. Barnard (1992).

(Namibia) and the Ju/'hoansi in Dobe (Botswana), were able to resist for a longer time the effects of Western colonisation. Eventually, they too fell victim to the introduction of the Western style nation-state[12], Christianity and new technology (Kent, 2002c). Just like most of the other San, the Nyae Nyae and Dobe San became clients, proletarians and labourers dependent upon local, national and even world economics (Lee, 2002).

To conclude, both the rhetoric (San as identity – the view expressed by the traditionalists or San as class – the view expressed by the revisionists) and the historical facts of the Kalahari debate (impact of colonialism), illustrate that the colonial settlers as anthropologists have made a distinction between 'wild' hunter-gatherer San[13] and 'tame' farm labouring San[14] (Sylvain, 2003). As a result of this classification, the San find themselves in a no-win situation. The San who have been labelled as 'wild' hunter- gatherers are excluded from state politics and economic transactions, while those characterised as 'tame' farm labourers have lost their recognition as real San (*ibid.*). The consequences for the San are tragic. The San may be denied rights as an ethnic group on the grounds that their underclass status dissolves their cultural authenticity; and they may be denied rights as modern citizens on the grounds that their authentic cultural identity is defined by pre-modern, pre-political primitivism (*ibid.*).

Referring back to the current literature about intellectual property rights and traditional knowledge, two observations can be made. First, scholars and activists who oppose intellectual property rights on the basis that this concept distorts the holistic nature of indigenous realities, might actually deny the basic right of indigenous people, like the San, the right to develop their own cultural identity. This is not to say that there are no moral problems with the concept of intellectual property rights. As argued elsewhere (see Martin and Vermeylen, 2005) the globalisation of the Western intellectual property regime has to be opposed for the sake of controlling the further expansion of Western neo-liberal property rights. But criticising the application of global intellectual property rights to traditional knowledge on the basis of holistic realities of indigenous peoples, as pristine hunter-gatherers, might not do justice to the truth, especially since this identity is a mythical one. The assumption of one coherent indigenous identity may exclude indigenous peoples whose history has transformed their identity from pristine hunter-gatherers to a more hybrid form. The San themselves realise that their traditional way of life has been corrupted and that their future does not lie in the 'Plastic Stone Age' (Lee, 2003).

The question could be asked whether the identity crisis of the San is unique? As mentioned earlier in this paper, history and the socio-political and economic local

[12] Brooks (2002) shares this vision that the most dramatic transformation of foragers has been instigated by the advent of the nation-state and its attempt to settle nomadic people within clearly defined territories. Brooks (2002) backs up this statement with examples from Tanzania and the D.R Congo where either through adoption of socialism or failure to create a state-level society, nomadic people were able to continue their traditional forager lifestyle.

[13] For example, the San of what is now the Otjozondjupa region were placed in reserves and ethnic homelands during the colonial period and under apartheid. In these homelands the San continued their foraging lifestyle for a longer time (Sylvain, 2003).

[14] For example, the San in the Omaheke region were dispossessed of their land during the colonial period and incorporated as an underclass in the mainstream economic society (Sylvain, 2003).

context make every situation unique. However, there are indications that in other local contexts the representation of indigenous identity has also been problematic, aggravated by the fact that the regulatory structures for recognising indigenous peoples' interests have failed to account for the diversity of their interests and identity (Bern and Dodds, 2000) For example, in Australia *"regulatory mechanisms for recognition of land interests may, paradoxically, fail to recognise certain kinds of interests in land. In particular, the emphasis on continuity of physical association in the Native Title Act, and on descent and spiritual responsibility in the Aboriginal Land Rights Act, discriminates against people whose historical associations are post-contact, and those who retain an affinity to their traditional territory but not a physical presence"* (Bern and Dodds, 2000: 165).

In an attempt to give more recognition to indigenous peoples, researchers have mainly focused on the difference between indigenous and non-indigenous peoples. However, downplaying or simply ignoring the cultural differences, interests and political agenda between indigenous peoples themselves can result in ignorance or at the very least underestimate subtle, although, crucial differences between different groups of indigenous peoples.

3.2 Second Myth - Individual Versus Community Based Property Rights

In general terms, property rights give social control over 'things' while simultaneously restricting other people's control over these same 'things'. In other words, property rights, either individually or jointly owned, are held in opposition to those who do not hold such rights because they restrict or exclude the rights of others. In that respect property rights regulate relations between people. Property rights are also surrounded by rules to define and enforce them and by ideologies to justify and legitimise them (Ingold *et al*, 1997b; Hann, 1998). It is argued in this paper that, contrary to most 'mainstream' arguments, the division between indigenous peoples and non-indigenous peoples with regards to property rights does not lie in the distinction between individual versus community based property rights. The great dividing line is rather based on different norms and values that support, justify and legitimise property rights in the respective societies.

Contrary to popular beliefs, property rights exist in all societies (Ingold *et al*, 1997a). Furthermore, in most societies a distinction can be identified in the categorisation of tangible and intangible property. As will be exemplified next, even 'primitive' societies like hunter-gatherers have some sort of classification of property which, in terms of its classification, is perhaps not that different from the Euro-American model. Following the model of Ingold, Riches and Woodburn (1997), five different property categories can be identified in hunter-gatherers societies.

The first category consists of the rights over land, water sources and ungarnered resources (like fixed assets, ritual sites, dwelling sites, hunting sites, pit traps, etc). Access to this type of property is, in principle, equal to all, but can become restricted when there is fierce competition over use of scarce resources. The second type includes rights over movable property such as weapons, clothing, cooking pots, beads, etc. This kind of property is personally owned, but is constrained by custom. For example, an important rule is that people are not allowed to accumulate movable

property beyond what they need; anything they posses in excess must be shared with others - this is a moral obligation. A third form of property rights applies to rights over meat, vegetables and other harvested food. For this sort of property the same rules apply as for the previous category: initially, food belongs to the person who has worked for it, but food must be shared when more is harvested than is needed for immediate consumption. The fourth category of property rights is the right over certain capacities of specific people (e.g. rights over hunting labour, sexual capacity, reproductive capacity, etc.). Such rights are not very common in immediate-return systems[15], where kinship is not a mechanism used to control rights over other peoples; for example, men do not have any special authority over their wives. The final form of property rights is the right over knowledge and intellectual property, like rights over dances, songs, sacred knowledge, ritual designs, etc. Contrary to delayed-return systems, in immediate-return systems, knowledge is more often freely shared.

In what respect then do the norms and values that underlie property rights differ between hunter-gatherer societies and Euro-American societies? With regards to rights over territory, hunter-gatherers, and in this particular case the San, lack the right of alienation (Barnard, 1992). In western legal systems, the right of alienation is arguably more important than the right of access. In this respect, the western definition of ownership and property is more narrowly defined than the concept of property in hunter-gatherer societies (*ibid.*). For example, the San have certain rights of special access to particular territories, but they cannot dispose of areas which they occupy or have special access to, neither can they sell or give those away. They can only utilise the resources, permit others to utilise them and, in some cases only, deny or discourage access (*ibid.*). The basic ethos with regards to land rights is based on the principle of reciprocal access to resources, rather than territorial exclusiveness (Guenther,1999).

Ownership for the San is a form of stewardship rather than a form of exclusive rights; or in other words, ownership means the ability to share (Katz *et al*, 1997). This is very different from Euro-American societies where privatisation of resources and encouragement of individual enterprise are key principles in the regulation of ownership and property rights (*ibid.*). Although some of the San consider themselves as owners of a particular area (for example, the !Kung call this k”ausi and the Ju’/hoansi N!ore) and in particular owners over food and water, other people still have

[15] Immediate-return systems are characterised by the following: people obtain direct and immediate return from their labour (e.g. gathering food); the food they obtain by gathering or hunting is consumed within the same day; food is neither elaborately stored or processed and simple tools are used for gathering and hunting. Furthermore, immediate-return systems promote equality and are socially organised in the following way: social groupings are flexible and constantly changing; individuals have a free choice with whom they associate (e.g. when hunting or exchanging goods); people are not dependant on other people for the acquisition of basic requirements and the relationship between people is based on the principles of sharing and mutuality, but not in the same long-term style as in delayed-return systems. Immediate-return systems place minimal emphasis on property rights (Barnard and Woodburn, 1997). In the past, some of the San societies provided examples of intermediate-return systems, like the Ju’/hoansi in Nyae Nyae and the Dobe area (Woodburn, 1982).
The biggest contrast between delayed-return systems and immediate-return systems is that in the former people hold special rights over valued assets; the return for labour is spread over time; people are more dependant on each other in order to maintain relations for finding food or sharing (Woodburn, 1982). Hunter-gatherers with delayed-return systems place more emphasis on property rights, rights which are usually linked with delayed yields on labour. Hunter-gatherers from the north (e.g. the Inuit) classically have delayed-return systems (Barnard and Woodburn, 1997).

access to this area and can use the resources. The notion of ownership for the San has nothing in common with the narrow definition of ownership as possession or exclusive rights over something; instead, it signifies an association with a particular area and its resources. In that sense, association with an area means that one can identify her/himself with other people so it helps to map out social relationships spatially (Woodburn, 1982).

But, unlike the Australian aboriginals, the San are not ritually or spiritually linked to a particular stretch of land (Widlok, 1999). The fact that individuals are not specifically or emotionally linked to a particular piece of land is all part of the San's attempt to disengage people from property. The San want to avoid property rights in the sense that they want to avoid creating a relationship of dependency, but above all maintain a specific form of egalitarianism (Woodburn, 1982). This is not to argue that the San do not value land rights. Their inability to establish land rights has been perceived by the San as a serious obstacle to leading a dignified and self-sufficient life. Without land rights, they argue, they can aspire to nothing more than political clienthood (Katz *et al*, 1997).

But as mentioned previously, the hunter-gatherer lifestyle of the San has been increasingly eroded over the years. The San have been transformed from foragers (although some worked on farms and some were herders) to small-holders making a living by herding, farming and craft production along with some basic hunting and gathering (Lee, 2003). This shift had repercussions on their property relations: the central focus moved from a reliance on each other to a reliance on material property like cattle (*ibid.*). Although the move to a cash economy has certainly brought many changes, even within this new environment egalitarianism and sharing remain strong virtues in the San culture. Obligations to others are still more important than personal needs. People who have moved from foraging to herding and farming are expected to share their crops and cattle or goats with their fellow kinspeople. Those who try to break away from this principle of reciprocity and sharing have been criticised by fellow community members (*ibid.*).

To conclude, the norms and values that guide the lifestyle and relations to property of hunter-gatherers, like the San, are mainly characterised by the sharing of resources, egalitarian personal relationships and a harmony of purposes between individuals and the community. This is very different from the individualistic, possessive and wealth creating norms and values advocated in Euro-American societies. The two key normative values that continue to direct the social structure and culture of the San are equality and sharing. Each is reinforced by the complementary values of humility, generosity and reciprocity. All these values add up to a strong ethos of sociability or communalism (Guenther,1999). Just as in any other society, the San's mainstream values counteract with other values; i.e. communalism against self-reliance, autonomy and independence. Nevertheless, both the communalist and individualistic value systems are directed by an overwhelming sense of egalitarianism. Different forms of levelling mechanisms suppress individual ambition. Humility, self-depreciation and modesty are important traits to support egalitarianism which can be found in all different stratospheres of the organisational structure. (Kent, 1993; Guenther, 1998).

Decolonising and demystifying the rhetoric of the current bioprospecting debate has revealed that the biggest difference in property rights between indigenous peoples and

non-indigenous people, *in casu* the San, can be found in the underlying values and norms that direct property relations in society. It is argued that the biggest obstacle to applying the current intellectual property rights framework to 'other' cultures is not so much the dichotomy between individual and community-based property rights or spoiling the pristine hunting-gatherer identity. Rather, the lack of normative, compassionate and ethical values in our Euro-American property system will make it difficult to transfer the current intellectual property rights framework to societies like the San, especially since we also want to superimpose our western value of wealth maximisation. Besides, the schism between individual and communal property rights is very much a product of the dominant liberal paradigm and difficult to transfer into another context (Hann, 1998).

Bioprospecting has been labelled as a new form of neo-colonialism and intellectual property rights as a synonym of information feudalism (see Drahos, and Braithwaite, 2002) but, as argued by Posey and Dutfield (1996), intellectual property rights are here to stay. Indigenous peoples are increasingly confronted with the expansion of intellectual property rights. As been argued above, there is a need to revisit the current debate in local settings and this is precisely what will be done in subsequent parts of this paper. On the basis of fieldwork studies, involving three San communities in Namibia and one in South Africa, the polemic of intellectual property rights and the appropriation of traditional knowledge will be further examined. The following questions stood central in the fieldwork. How successful or detrimental is the current intellectual property rights framework on the ground? Do the San want to protect their traditional knowledge? If affirmative, how do they want to protect it, against whom and what do they hope to achieve?

The San provide a particularly good context to start evaluating intellectual property rights, given the recent Hoodia benefit sharing agreement and bioprospecting agreement between CSIR and the South African Council.

3.3 Intellectual Property Rights and the Traditional Knowledge of the San

Anthropological literature was used in the previous section to examine the San's attitudes towards property. Although this body of literature is extensive, very little is directly related to intellectual property rights of traditional medicines. This dearth of direct evidence necessitates the collection of primary data on the San's attitudes towards intellectual property of traditional medicines through dedicated fieldwork on these specific issues. Such dedicated fieldwork is also required for deontological reasons. First of all, much of the anthropological evidence is collected through participant observations by outsiders and is thus limited by what the outsider has been able to observe and what she or he has been able to interpret. The issue of data interpretation aside, observations on current activities alone may not provide sufficient information to predict San attitudes and behaviour towards new challenges that may emerge from the global reach of intellectual property rights.

Secondly, any evidence of behaviour that is gleaned through observation does not equate to giving the San a voice. Both from a methodological and ethical point of view, there is no substitute for inviting the San to express their views on intellectual

property rights and to ask them directly if and under what conditions they may be willing to share their knowledge of traditional medicines.

Thirdly, the range of anthropological studies cited above could be seen to represent a generalized body of literature as these studies have been carried out in different San communities in different local and national contexts over a long period of time. As argued above, there is a need to embed property relations in the local context, so evidence that is 'aggregated' across a number of differing anthropological studies should be supplemented by more focused and context specific material which is collected at the level of social organization that is most relevant to the San's daily existence, namely the community level.

4 The Fieldwork

The fieldwork was carried out in three San communities in Namibia and one in South Africa in the period July-October 2004 (for a map see Figure 1). The communities were selected to capture some of the diversity of circumstances in which the San may find themselves, including culture, geography, the situation with regards to land rights and general socio-economic conditions[16]. Five to twelve days were spent at each community and data gathering methods ranged from participant observation and informal conversations to semi-structured interviews and a survey regarding preferred scenarios for knowledge and benefit sharing. Except when people indicated a preference to express themselves in English or Afrikaans, translation was provided by other members of the community. The description of the selected communities (below) is predominantly based on field data.

4.1 Omatako Community

Omatako is the largest settlement in West Tsumkwe District, east of the city of Grootfontein. This is one of the few areas in Namibia where the San are in the majority and it is still often referred to as 'Bushman Land', as it was called prior to Namibia's independence (under the Apartheid system it was designated as a homeland for the 'Bushmen'). East Tsumkwe is inhabited by the Ju'/hoansi, probably the most extensively studied San group, characterized by a relatively strong sense of cultural heritage and uniquely protected against land hungry pastoralists. The San in Omatako and in West Tsumkwe in general are much more diverse in origin and include Ju/'hoansi and !Kung who have always lived in that wider area, Vasekele from Angola who were resettled there by the South African army from the 1970s onwards, San from the Kavango region and some Hai||om whose ancestral lands are to the west of Grootfontein. Post independence, the area has also experienced an important influx of Herero and Damara pastoralists who brought large herds of cattle with them. The different San groups interact extensively and intermarry but there are some visible divisions in culture and level of empowerment. For example, the Vasekele and Kavango grow millet and live in huts that are similar to those of their Bantu-speaking neighbours in the areas where they originated. The Hai||om are only a small group but appear to be relatively well-off with one family having 30 head of cattle and about 150 goats. The Ju/'hoansi can be recognized by their traditional jewelry. The !Kung appear to be the most materially impoverished (some living in open-sided shelters that can hardly be called huts) and least interested in growing crops; however they are the most powerful group in the local authority (the traditional !Kung authority) and there are rumours that some of them have accumulated cattle that are kept by the non-San pastoralist newcomers (possibly received as payment from these newcomers to be allowed to settle). A few of the San settlers are of more entrepreneurial spirit and have clearly been attracted to the area because of the economic opportunities provided by the abundance of land. The Chief of the !Kung Traditional Authority, whose father was a relatively wealthy Herero farmer, had his formal ethnicity (as stated on his identity card) changed from Herero to San in order

[16] Initial advice on target communities was provided by WIMSA (Working group of Indigenous Minorities in Southern Africa), the main San NGO across Southern Africa.

to be allowed to settle in the area in the time of South Africa's occupation[17]. One ambitious family that arrived only recently has been planting such large fields that they had to hire other members of the Omatako community to help them with the harvest. There is much resentment towards some of the powerful pastoralist newcomers who have been accused of acts of violence, damage to the land due to overgrazing, damage to San crops and illegal fencing. Despite the damage caused by the cattle in the areas around the settlements, bushfood is relatively abundant and widely collected. Beyond the immediate vicinity of the settlements there is still a fair amount of game to hunt, which the San are entitled to do provided they use traditional methods (bow and arrow). However, very few people (all !Kung San) have retained their hunting skills.

4.2 Vergenoeg and Blouberg Communities

Vergenoeg and Blouberg communities lie in the Omaheke Region, close to the Botswana border crossing of Buitepos, due east of Windhoek. Vergenoeg is a San community of !Xoo and some Nharo while Blouberg is exclusively a !Xoo community. These two communities are based on resettlement farms. These are cattle farms that were previously owned by white farmers and that were obtained by the government for the purpose of resettling landless people. These resettlement farms are not exclusively for the San and in both cases the San are the most marginalized group on the farm, with Herero and Damara settlers making the most of the opportunity to engage in cattle and goat raising. In comparison to Omatako, the land resources are heavily used and rainfall is sparser than in the Tsumkwe district so that the options of growing millet or other crops are more limited. Bushfood is less plentiful and hunting is nonexistent. Both communities are noticeably poorer than Omatako with little differentiation in socio-economic status of the community members and a very low level of ownership of husbandry. Most, if not all of the older members of these communities have been working on white-owned farms for much of their lives. However there has been a decline in the number of white-owned farms and the increase in minimum wage has made labour more expensive so that this potential source of income is becoming scarcer. In Vergenoeg, the only other regular option for generating cash lies in the collection of the Devil's Claw, a medicinal plant that is used in the west for treating arthritis. This plant is harvested across rural Namibia. In Vergenoeg the harvest is regulated by the Centre for Research Information Action in Africa and Southern African Development and Consulting (CRIAA SA-DC)[18]. This NGO aims to cut out the middleman and give the harvesters a fair share of the profit. CRIAA SA-DC agrees contracts with individual harvesters for set quantities, pays a

[17] Other members of the Omatako community provided this information.

[18] The Devil's Claw is traditionally used by the San as a digestive tonic, for headaches, fever ad allergies, and as an ointment to relieve pain during childbirth. Its 'medicinal' properties were 'discovered' by Mehnert in 1907. More recent clinical trials have established that the Devil's Claw has anti-inflammatory and anti-arthritic properties for patients with degenerative joint disease. The Devil's Claw has become an increasingly popular herbal remedy (e.g. in 2000, 400 tons were exported from Namibia). The great majority of harvesting is believed to be undertaken in an unsustainable manner. Furthermore, the low prices generally paid to the collectors – mainly San – (e.g. N$1-8 per kg of dried roots) are a poor reflection of the final value of the medicinal product. The Sustainable Harvested Devil's Claw Project (SHDC), run by CRIAA SA-DC is attempting to address these issues of over-harvesting and unfair prices by paying collectors a reasonable price for sustainable harvested dried roots. For more detailed information about this project see CRIAA SA-DC (2003).

guaranteed price for the harvest and promotes sustainable harvesting methods; in the case of the Devil's Claw, the main vertical root of the plant must remain undisturbed and only the regenerative side-shoots must be harvested.

In Blouberg CRIAA SA-DC is not active and collection of the Devil's Claw is not a relevant activity. Blouberg lies only 18km from Buitepos where the shop, petrol station and camping site provide some job opportunities for this community.

4.3 Andriesvale Community (South Africa)

Andriesvale is located in South Africa's Northern Cape Province, just south of the Kalahari Gemsbok National Park (the South African part of the more recently created Kgalagadi Transfrontier Park) and close to the southernmost corner of Botswana. This is the only remaining San community native to South Africa. The ǂKhomani San who live around Andriesvale are in many ways a unique community. First of all, they had been dispersed by the South African authorities, the last group being evicted from the Kalahari Gemsbok National Park in the early 1970s. They were branded as 'coloureds' under Apartheid. As this new label was at the time more socially acceptable than the stigmatising 'Bushman', most of the community accepted this chance to assimilate and buried their identity, even hiding it from their own children. In the early 1990s the language was thought to be extinct. Only a small group still portrayed themselves as 'bushmen' and lived from selling crafts to tourists on a farm not far from Cape Town (and hundreds of miles from their native land). However the abolition of Apartheid brought new opportunities. This group of 'Bushmen', led by Regopstaan Kruiper and his son David Kruiper, met with Roger Chennells, a human rights lawyer who presented their case to the new ANC government. The ANC in turn were interested in restituting land to this small but highly symbolic group of people (the San being the ethnic group that was worst affected by European colonialisation) in an act that was relatively free of controversy in a time of elections. The government has bought up and handed over to the ǂKhomani San a number of farms around Andriesvale and gave the ǂKhomani certain user rights within the South African part of the Kgalagadi Transfrontier Park. The government did demand that all ǂKhomani San descendants should share the rights to this land and this initiated a search for ǂKhomani descendants across the farms and townships of the Northern Cape. This search resulted in the discovery of a handful of octogenarians who could still speak ǂKhomani, although they had not used the language in decades. These survivors - less than a dozen were still alive in 2004 - hold the key in the struggle to revive the ǂKhomani language, culture and identity.

On the back of the successful land claim, Roger Chennells was also able to persuade CSIR, a research institute owned by the South African government, to sign a benefit sharing agreement with regards to the exploitation of the Hoodia, a plant traditionally used in San medicine[19]. CSIR owns the patent on the active ingredient in the Hoodia which can act as an appetite suppressant. Once commercialised (it is now under research by Unilever), its economic value in the fight against 'globesity' could be astronomical, especially from the perspective of the San.

[19] For a detailed chronology of the commercial development of the San, see Stephenson (2003) and Wynberg (2004b).

The successful land claim had brought together a group of people who shared a common ancestry, though many of them were not aware of it and did not know one-another. They have been brought together in order to win this land claim and as a result it remains to some extent a virtual community. Many have moved to the area around Andriesvale in expectation of economic gain resulting from the land claim and, more recently, the Hoodia benefit sharing agreement. However any gains have been slow to materialise and this has added to the tension within the community, where a handful of unresolved murders have taken place. Despite the limited delivery of economic benefits, the economic conditions of the community are significantly better than in Omatako, and there is clearly a world of difference from the hardship and malnourishment that are evident in Vergenoeg and Blouberg.

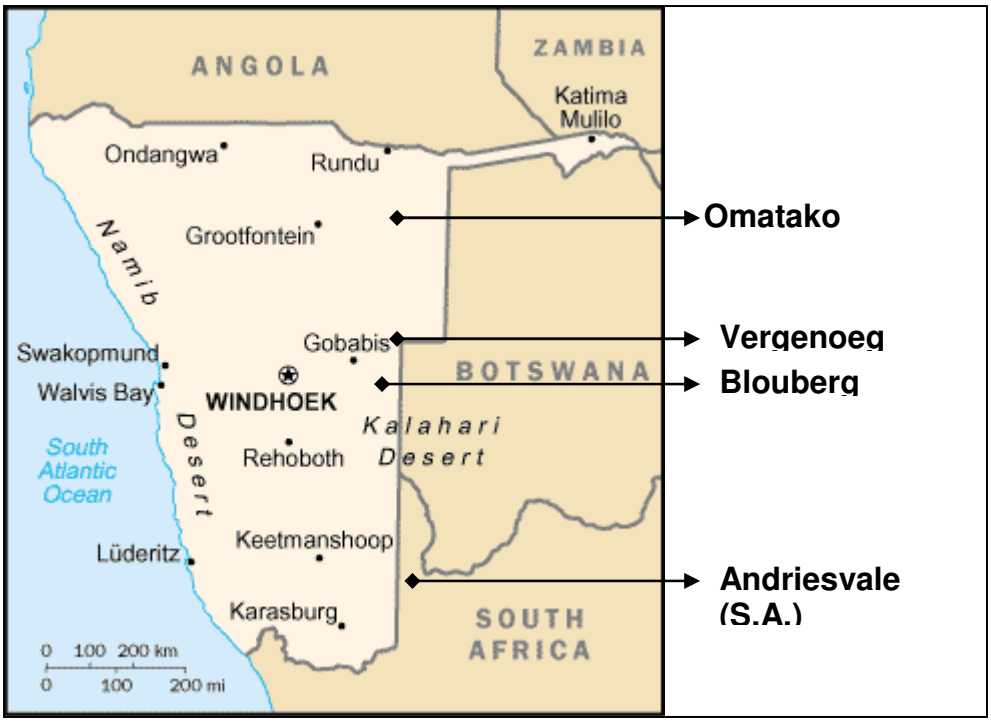

Figure 1: Location of the case study communities

5 Results of the Fieldwork

This sections reports on a number of findings of the fieldwork. The first subsection describes the current status of the San in Namibia and their rights to land and resources. The second subsection is focused on the questions of whether the San recognise the concept of ownership over traditional medicinal plant knowledge and what their view is on sharing this knowledge. The third subsection reports the position and views of the San with regards to the benefit sharing agreement of the Hoodia.

5.1 San Rights to Land and Resources and their Status in Namibia

5.1.1 Land and Resource rights

Bioprospecting has been typified as a form of neo-colonialism (Pretorius, 2002). Although, the San's medicinal knowledge of plants has been targeted by the CSIR, during the fieldwork it was noted that the San's traditional knowledge is more under threat by actions of the government, the lack of having *de jure* land rights and self-determination rights and their bad human rights position.

The San are renowned for their extensive plant knowledge and other people are making use of their knowledge (see e.g. Yellen and Lee, 1998; Leffers, 2003; Smith *et al*, 2000; for San testimonials about their plant knowledge see e.g. Le Roux and White, 2004)[20]. Some San complained that when they gave medicinal plants to other people, like Herero or Afrikaners, often they were not paid for their service. The San are often not respected by other ethnic groups because their social status has been stigmatised as being impoverished and 'not human'.

Another exploitation scheme is the harvesting of the wild devil's claw in Namibia. The San are drawn into the harvesting of the wild devil's claw in the hope that it can provide them with an income. Unfortunately, in the majority of the cases the middlemen, who hardly pay the San for their work, exploit the San. The fact that the San are the most marginalised and economically, socially and politically the most stigmatised community in Namibia lies at the root of their continuing exploitation. The problem is aggravated by the lack of clarity regarding land rights, ownership and access to land for the San. According to CRIAA SA-DC (2003), there is a link between the chain of middlemen, primary producers and product manufacturers on the one hand and the benefits derived by the harvesters on the other. This is a clear indication that the trade in raw natural resources (that are often registered as food supplements or herbal treatments) is at least as exploitative as the practice of seeking materials that might form the basis of patentable pharmaceutical products.

Attention should also be given to the impacts on the San of marketing natural products. The San lack the capacity to deal efficiently with the exploitative behaviour

[20] For example, Leffers (2003) carried out a study about the traditional uses of plants by the Ju'/hoansi. The study identified 238ttraditional plants that are still being used by the Ju'/hoansi for multiple purposes such as: food, medicines, poison, construction materials, cosmetics, tobacco, tanning and dyeing.

of the middlemen and are not aware of their rights in benefit sharing and less exploitative marketing tools, like fair trade mechanisms.

Furthermore, the Namibian government has expressed its concerns that the commercial success of natural products made from harvested wild plants can result in over-harvesting. Plans have been drawn up to start cultivating wild plants. The supply of, for example, commercially cultivated devil's claw can have a very negative impact on the San harvesters. The situation becomes even more uncertain when some of these plants will be listed in the Convention on Trade in Endangered Species of wild Flora and Fauna (CITES[21]), which would mean in practice that cultivated material will be preferred for export over wild-harvested material. It is going to be very difficult for the San to participate in the cultivation projects for a number of reasons, like the unavailability of capital, technology, experience in cultivating crops, but above all the lack of access to land. In the example of the devil's claw, at least the San's moral rights, if not their ownership rights, have been exploited not only by the registration of various patents[22] for the extraction of the active ingredients of the devil's claw, but also by the stimulation of commercial cultivation projects. The same could happen with the Hoodia, which is already listed in CITES (appendix II) and the Namibian government has expressed a serious interest in exploring further the possibilities of commercialising the Hoodia in its natural form and would be prepared if necessary to contest the P57 patent[23]. Stricter regulation and government involvement could potentially lead to a further limitation on the San continuing their customary practice of gathering medicinal and food plants. The list of plants with cultivation potential[24] that the Namibian government has in mind is quite extensive.

With regards to the Hoodia, the San Council of South Africa has negotiated preferential rights for the commercial growing of Hoodia in South Africa as part of the Hoodia benefit sharing deal.

The crucial point is that the San's natural resources and their knowledge are more threatened by problems of territorial invasion, dislocation, marginalisation by the national and regional governments, lack of access to land and unsustainable harvesting and trading of indigenous plants than the appropriation of their traditional knowledge by big pharmaceutical companies from the North. The biggest problem is the lack of access to land and lack of formalised and recognised ownership of natural resources. The devil's claw is an excellent example, illustrating how closely the issues surrounding intellectual property rights are linked to land and resource rights.

Despite the affirmation by the Ministry of Land, Resettlement and Rehabilitation (MLRR) in Namibia that the San should receive special protection and been granted land rights, the San are currently worse off than before independence. Only the San living in former Bushmanland (3%) have *de jure* land rights. The vast majority of the

[21] Plants listed in CITES are protected against overexploitation through trade by subjecting them to certain controls.
[22] See Gruenwald (2003)
[23] Confirmed by senior civil servants who wish to remain anonymous from the Ministry of Agriculture, Namibia and the Ministry of Environment and Tourism, Namibia.
[24] Some example of Namibian plants with cultivation potential: medicines (devil's claw and hoodia), natural dye (brown ivory and spotted aloe), cosmetics (silver cluster-leaf, myrrh and ximenia), fruit and food (marula, mangetti, truffle and monkey orange) (Bennett *et al*, 2004).

San have at best *de facto* land rights, meaning they have existing rights to land for residential or farming purposes, but neither common nor customary rights guarantee these rights. San who only have *de facto* land rights can apply for *de jure* land rights through customary structures, but success of the application depends on the goodwill of the local Traditional Authority[25]. So far, only a handful of cases are known in which Traditional Authorities have formally ceded land to the San. Furthermore, this option is only available for land in communal areas; land used by commercial farms is by definition excluded because these are freehold farms.

The San that were interviewed about intellectual property appealed for the recognition of their land rights. Their landlessness was quoted as the biggest obstacle in their development and of primordial importance in their fight against poverty. The rhetoric the San used to express their desire to secure land rights (with a few exceptions of the San interviewed in South Africa), was different from the discourse used by e.g. Australian aboriginals; none of the San in Vergenoeg and Blouberg made any references to the notion of indigenous rights over ancestral land when they spoke of their desire to secure land rights.

However, gaining land rights is only one side of the problem. The current social, political and economic situation of the ǂKhomani San shows that as long as there are no projects undertaken to empower, educate and alleviate the San from their poverty, the positive effects of gaining land rights might actually be reduced to a moral boost and initial, although, limited restoration of human dignity.

5.1.2 Status of the San in Modern Namibia and the Limitations of Existing Approaches

Restoring the San's human dignity remains a crucial point in the Namibian context. During the fieldwork, especially in Namibia, the San complained that the relation with both government officials and other ethnic groups could be at times very problematic. In the literature, it is often argued that indigenous peoples across the globe face similar problems of marginalisation and stigmatisation. Based on observations and testimonials from both San and non-San, it is argued that the situation of the San (and for that matter some other indigenous peoples in Africa) is distinct in the sense that they are not recognised as indigenous. Namibia is Africa's second youngest state and is still very occupied with the process of nation building. Ethnic, tribal or traditional identities are not recognised as such and are subordinated to the national identity.

[25] The ratification of the Traditional Authorities Act in 1995 did not please all existing traditional authorities in Namibia because it decreased their power in comparison to their mandate during the apartheid era. The Traditional Authorities Act makes limited provisions for the maintenance of separate cultures and identities, and as such reaffirms Namibia's multicultural and poly-ethnic heritage. However, it is acknowledged (see e.g. Suzman, 2001) that the Traditional Authorities Act subordinates traditional authorities to central government by granting traditional leaders only a limited advisory role in state affairs. The duties and functions of recognised traditional authorities are as follows: identification and codification of traditional law; administration and execution of traditional law; preservation and protection of culture and tradition; promotion of affirmative action within their communities; registration of traditional healers; provision of assistance to police and other state organs when necessary; conservation and sustainable use of natural resources; settlement of dispute over customary matters and establishment of community trust funds (Suzman, 2001). Furthermore, the Traditional Authorities Act also reaffirms the fundamental rights of the UN International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights (*ibid.*).

Although the San are recognised as a group with special needs in terms of development, under the Namibian law the collective rights of the San as a minority group are not recognised. Neither is Namibia signatory to any of the international agreements that explicitly recognise the rights of indigenous peoples. The rationale for rejecting the indigenous status of the San is the policy of non-tribalism, which is the result of the post-apartheid political climate.

Traditional institutions, like the Traditional Authorities, have been granted political recognition in the Traditional Authorities Amendment Act of 1997, but customary or traditional law remains subordinated to national law. Governmental policies like affirmative action also fail to make significant changes to the disadvantaged position of the San because the political discourse does not get translated into action on the ground. However, considering Namibia's strong rejection of the recognition of ethnicity as a dimension of social poverty, it can be assumed that any action to meet the San's needs will be taken under a policy of affirmative action rather than ethnic prioritisation.

Namibian law has some special provisions for the recognition of community rights for issues related to traditional leadership, land and education, but due to the impoverished and marginalised position of the San, these provisions are not sufficient for the improvement of the San socio-political situation. The sometimes poor human rights record of the Namibian government, especially regarding treatment of politically weak minority groups, makes it even more questionable whether rights under law will actually be translated into rights on the ground.

Based on the above observations, it must be questioned whether any of the proposed legalistic proposals with regards to protecting traditional knowledge can work for the San. The problem with these legalistic approaches is that they are too dependent on the government. Solutions like disclosure of origin, prior art databases, geographical indication and even *sui generis* approaches, all rely on a democratic process. These solutions assume that indigenous peoples have equal rights, are empowered and are involved in the decision-making processes. The daily reality for the San could not be further removed. At present, only one San is represented in the National Assembly and none have seats in the regional councils. Due to their gross under-representation in regional and national bodies, the voice of the San remains unheard; their political status is one of exclusion from the mainstream. Questions should be asked how the San in their current situation could possibly participate in redesigning intellectual property rights legislation, even if the Namibian government would show an interest in granting more power and ownership rights to the San.

Although the anthropological approaches to intellectual property rights and traditional knowledge are more contextualised, their strategy might also be out of tune for the San. As shown earlier in this paper, the identity of the San is multi-layered. The San have repeatedly confirmed during the interviews that traditional values and development could go hand in hand. This vision is contested by some scholars and activists who still believe that being indigenous means living in complete isolation unspoilt by western evils. The San have an utilitarian approach towards intellectual property rights. The majority of the respondents did not seem to have major objections towards sharing their knowledge with western partners as long as they were either recognised as owners of the knowledge and/or received sufficient benefits

for sharing their knowledge. The provisions of either legal protection or sufficient benefits were mentioned as part of a strategy to alleviate poverty and were not part of an indigenous rights discourse. When confronted with opinions of indigenous peoples who condemn sharing knowledge, the San argued that these peoples probably have a better life than them; they would not be hungry or thirsty like the San.

5.2 San Views on IPRs and their Willingness to Share Knowledge

5.2.1 Do the San Recognise the Concept of Intellectual Property Rights?

As noted earlier in this paper, there is a substantial body of literature that assumes that the Euro-American models of property and ownership are the starting points for developing policy and legislation on intellectual property rights and the commercialisation of traditional knowledge. The central theme of the fieldwork was whether the San's way of defining property rights and organising property relationships could be used as the basis for protecting indigenous knowledge. In order to answer this question, it was in fact necessary to examine whether the San have their own system or concept of intellectual property rights.

Contrary to the belief that indigenous peoples are not familiar with the concept of intellectual property rights, meaning attributing ownership rights over knowledge or information, fieldwork with the San has proved the opposite. In all the communities that were visited, people spoke about their knowledge of medicinal plants and their medicinal uses. Apart from the shared community-based knowledge, people also referred to people in the community, usually called traditional healers or traditional medicine men, who have specialist knowledge of medicinal plants. The specialist knowledge of the traditional healers goes further than just knowledge over the plants; it also involves knowledge over rituals and spiritual aspects. The impression is given that the specialist knowledge of traditional healers is a secret, guarded preciously by the traditional healer who decides him or herself to whom this knowledge should be passed on. Both women and men could have specialist traditional knowledge over medicinal plants. When it was attempted to interview traditional healers, on a number of occasions these people refused to answer questions or even to participate in an interview all together. One reason for their refusal, given by other community members, was fear for getting into trouble with either the government or the church; the latter forbids the San to use their traditional medicines by arguing that the healing power of these medicinal plants is the work of the devil. Chief Arnold from West Tsumkwe explained that the church was rather successful in this campaign. Typically, it was also reported by people involved in the harvesting of the devil's claw, a plant used in Europe for treating arthritis, that the church encouraged them to harvest the plant and acted as middle-men in the trade of this extremely popular plant. Numerous harvesters complained that officials from the church, like priests, either refused to pay or paid them very little for a month's work of harvesting.

Besides knowledge of medicinal plants, most people in the community also referred to the tradition of collecting of food plants as part of their livelihood strategy. Some of the collected plants provide water, which is highly important in the arid conditions of the Kalahari. None of the San communities that were visited depend exclusively on hunting-gathering as subsistence strategy; however, it was obvious that gathering food

and medicinal plants remains an important activity and intrinsic part of the San culture. Although most people that were interviewed confirmed that their knowledge was eroding and that their parents and grandparents knew much more, they confirmed their intention to pass on the little knowledge they still possess to the next generation.

The people interviewed in the communities also explained, in addition to the ailment for which each plant is used, how to prepare the medicinal plants. A common practice is, for example, to rub powdered roots and other parts of the plant into incisions in the skin. Older women in particular had black marks on their temples and legs and some of them claimed that this practice was still very commonly used.

In short, during fieldwork it was became clear that the San still have a whole body of traditional knowledge of medicinal plants, including customs, beliefs and opinions about how plants should be harvested, treated and applied. With regards to harvesting, the San believe that plants should be harvested according to traditional practices. For example, when digging out a root one must leave something behind, like a piece of cloth, and cover the hole dug in the ground otherwise the root will not work and could become poisonous. All this information should be considered as intellectual property of the San.

5.2.2 Do the San Want to Share Traditional Medicinal Knowledge?

Anthropological research has revealed that, even in modern times, the San still show some strong signs in the organisation of their social structure that sharing and reciprocity remain two important guiding moral principles of San society. During the fieldwork, it was examined whether the San considered themselves as owners of the traditional resources, like medicinal plants, and if they would be willing to share their knowledge with other people and under what circumstances.

When people were asked whether they considered themselves as owners of the medicinal plants, people automatically made a distinction between the plants (tangible property) and the knowledge over this plant, for example, for which illness and how to prepare the plant (intangible property). With regards to the ownership of the plant, people linked it to the principle of territorial rights. For example, according to San informants at Omatako, a plant that grows on the land of the San belongs to the San and the plant that grows on the land of the Herero belongs to the Herero. However, ownership of the plants is limited to usufruct rights, because ultimately the natural resources belong to the government. The San regretted this and wished that they had complete control over the use of the plants. They realised that forest plants, timber, etc could be used as commodities because of their economic value. In most cases, they showed no signs of reluctance to use their natural resources as an economic resource. They argued that they were in desperate need to improve their economic situation and were convinced that full control over their natural resources could be helpful in their struggle to alleviate their poverty. Especially, the San in the Na Jaqna Conservancy were hopeful that the government would eventually recognise them as owners over their natural resources. This would allow them to start trading timber, medicinal plants, food plants, etc.

With regards to the ownership of the knowledge over medicinal plants, the San were more protective. For example, although a plant can belong to both the San and

Herero, depending on which land the plant grows; the knowledge of the plant belongs unquestionably to the San. They argued that that they are the First People and although the Herero and even other Khoisan (like the Nama and Damara) might have the same knowledge, ultimately the knowledge belongs to the San. The San might have shared their knowledge with other people, but the knowledge belongs and stays with the San. This is a good example of the San having an a priori understanding of intellectual property rights.

It also became clear that the San have some traditional rules governing how knowledge is shared. When other people ask the San for help to cure, for example, stomach cramps, the San will help the person and give them the plant and explain how to prepare the plant. In return, the San expect something back. In the past it could be anything, a piece of cloth, beads, food, iron, etc. For some people it is still of no importance what is given back in exchange, but others mentioned that they now live in a money economy and expect money in return. Especially, women make the connection that when they get tablets in the clinic they have to pay, so why should they give away medicinal plants for free. When nothing is given back in exchange, the medicine will either stop working or worse become poisonous. Not paying for knowledge signifies not showing respect for the San's culture.

People with more specialist knowledge, like traditional healers, seemed more protective about their knowledge. Even when money was offered they were reluctant to share their knowledge. Knowledge should stay with that person. Although, they saw the benefits for the community of generating money by selling their knowledge, they were worried that people would either stop paying them, or the San would not use the money in their best interest. In both cases the money will disappear and the San will have lost their knowledge without gaining any benefits. They argued it would be better to keep the knowledge to themselves so people would have to come back, so that it would be easier to keep control over knowledge and a continuous benefit stream was more guaranteed.

Sharing knowledge with companies seemed more problematic than sharing knowledge with individual people, because companies could not be trusted. As long as individuals fulfil the traditional rules, viz. give the San something back in return, the San were quite willing to share their knowledge. Individuals are also allowed to help their friends and family, as long it is on a small scale and the traditional rules are respected. The San expect that the person who acquires the knowledge from the San and pays for it, will also charge the person he or she is going to help. But if that person is trying to sell the medicine to more people and tries to make a profit, the San do not agree. At least they should get part of the money, but they would still be worried that they lose control over their knowledge so that again they would not trust the operation. It is not good that too many people know about their knowledge. The knowledge could be misused and something might go wrong with the preparation of the medicine because of lack of appropriate information and knowledge. This could have some really bad repercussions for the San.

Taking plants without permission was also considered as a bad omen. Some are less worried about this practice, because they believe in the powers of the medicine and 'robbing' medicines is insulting the knowledge of the San and therefore the medicine could lose its healing powers.

In general, the San thought that, especially with regards to the devil's claw, other people were robbing the San of their knowledge and something needed to be done to protect the knowledge of the San. Either legislation should be in place to prevent the theft or the San should have rights over land and resources so they would be more in control over what happened to their knowledge. Alternatively, if they would decide to use their natural resources as a trading tool, solid contracts must regulate the transactions and guarantee that the San continue to receive money or other benefits, depending on what was agreed in the contract. It is crucial that the contract is fair and equitable, otherwise the agreement could not work.

San expressed objections to selling the devil's claw seeds to commercial farmers who could then start cultivating the devil's claw on a large scale. They argued that the San are at the bottom of the economic ladder and allowing local farmers to make money with the San's knowledge was perceived as unfair and bad for the San.

To conclude, for the San trading in plants is not so much trading in physical commodities, but rather in information that is embodied in physical artefacts. In a way, the San trade in healing and not in plants. Furthermore, the San see the value of the properties of the plant, but believe that it is very difficult to replicate these properties artificially through modern techniques.

5.2.3 Scenario Survey Results

Interviews were carried out in every community, using a person from that community as a guide and translator, except when people were able and happy to speak in Afrikaans or English. The scenario survey was developed on the basis of the findings in the first community (Omatako) and was subsequently replicated in Vergenoeg, Blouberg and Andriesvale. As many people as possible were requested to participate in the scenarios (see below), resulting in a sample of 89 individuals across the three communities. Vergenoeg and Blouberg communities were so small that the sample includes the majority of adults in these communities. Overall people were happy to be interviewed, with repeated expressions of gratitude that their opinions were asked on a matter that was of importance for them. A few elderly individuals were reluctant to be interviewed. According to other community members this was in some cases due to traumatic experiences of cruelty and beatings at the hands of white farmers (Blouberg). In other cases the reluctance to discuss traditional medicine was explained by other members of the community as a result of the teachings of the church, which had denounced traditional medicinal practices (including trance dances) as devil worship (Omatako). The resulting sample was fairly representative in terms of gender and age distribution.

The scenario survey was conducted in order to effectively assess and clarify community attitudes toward proper use of traditional knowledge. The aim of the survey was to document the San peoples' opinion about bioprospecting and benefit sharing. Each scenario was followed by the responses of three fictitious San, and the interviewees were asked to choose the best response and comment on it or give their own response if different. This method was used because intellectual property rights is an obscure and confusing term that is not well known to many people in the community, although most peoples were aware of the basic principles behind the

concept. Although the scenarios presented were fictitious, they described a situation that could easily happen to the San peoples and in fact had already happened to a certain extent with the Hoodia. Two scenario surveys were drafted. The first one deals with the question whether the San want to share their knowledge with the outside world and under what sort of circumstances. The second scenario survey examines what sort of benefit sharing agreement the San would prefer and why.

The three options under scenario one are as follows. In the first option, the San do not want to share their knowledge over the plants; the knowledge belongs to the San and should remain part of their culture. In the second option, the San agree to share their knowledge under the condition that they get a share of the benefits when the company starts selling the plant based medicines. However, when the company patents its new pills they will not acknowledge the San in the patent, neither will the patent be jointly owned; the San will only get part of the profits made (similar situation to the Hoodia). In the third option, the San only want to share their knowledge if they can get legal protection over their knowledge, i.e. some form of intellectual property rights.

Table 1: Number of individuals who expressed preferences for particular knowledge sharing options; a breakdown by gender, income and community.

		Option 1	option 2	option 3	don't know	Sum	Significance (Chi-square)*
Gender	Male	8	5	25	1	39	
	Female	14	20	10	6	50	0.000
Income	Pension	7	3	4	N/A	14	
	Devils claw (V only)	0	0	4	N/A	4	
	Nothing	2	6	2	N/A	10	*(note n=49)*
	Child care (A only)	3	0	5	N/A	8	
	Occasional	1	2	10	N/A	13	0.004
Community	Vergenoeg (Nam)	0	3	15	6	24	
	Blouberg (Nam)	9	19	1	0	29	
	Andriesvale (SA)	13	3	19	1	36	0.000
Country	Namibia	9	22	16	6	53	
	SA	13	3	19	1	36	0.001

* The smaller the significance level, the stronger individual characteristics (variables) can explain the differences in the choice of scenario options. A significance level of (p=) 0.001 in the table means that it can be said with at least 99.9% certainty that individuals who differ with respect to that variable belong to a different 'populations' with regards to their preferences of IPR scenarios (i.e. it is 99.9% sure that the observed difference of opinions is not a coincidence).

Table 1 shows that there are significant differences in the preferences expressed by males and females. Males have a very strong preference for option 3, which is three times more popular than option 1 and five times more popular than option 2. The opinions of females are more spread across the three options, with option 2 being twice as popular as option 3, option 1 lying somewhere in between. Females are also much more likely to say they don't know.

Option 2, which is the equivalent of the Hoodia benefit sharing agreement, is the most popular option for the women interviewed in this survey. When asked why they opted for the benefit sharing, their view was very utilitarian. Generating money was important to feed the children, pay for their school fees and buy clothes. It was thought that by giving the children a decent education, they might be able to rise on

the social ladder and become teachers, civil servants or even members of parliament. It was argued that by becoming part of the political elite, they could get rid of their stigmatised identity and become full and equal citizens.

Another reason for choosing the benefit sharing agreement was that money could give them the possibility of starting their own development projects so they would not be further dependent on government handouts. Starting small farming and agricultural projects topped the list of what could be done with the money. Often, it was also mentioned that in order to start the small cultivating and herding projects, they first had to have access to land and it was hoped that the money would allow them to buy land. They also thought that by having money, other people would take them more seriously and would allow them to buy their own piece of land. It was particularly interesting that buying the land was described as a community project. Buying land, farming and empowerment were all expressed as community-based achievements. It was repeatedly mentioned that they had to work together as a community to achieve something. Even when people chose money as the preferred option, they made it clear that the rationale behind this option was not related to the accumulation of personal wealth; the money was going to be used for community-based development projects such as building schools, hospitals and buying land.

The difference in preference between the three options between men and women also shows that the social and economic position of the San women has eroded. Traditionally, the San community was characterised as showing gender equality. For example, both men and women could participate in the healing dance and although men were traditionally responsible for killing the meat and women for collecting the plants and roots, the men were not more powerful or important in the community because they were the providers of meat. It has been mentioned in anthropological research that ever since the San have been more exposed to other cultures, especially through working as farm labourers, the equal position of men and women has crumbled and the status of the San women has changed considerably (Kent, 1993). San women have lost influence and autonomy as a result of sedentarisation, shift to wage-labour and pastoralism and the influence of male-dominated neighbouring communities (Kent, 1993; Felton and Becker, 2001). Furthermore, the labour market in which the San have been employed (i.e. agriculture) favours males over females. This has pushed the San women further into the margins of the cash economy. Exclusion from the cash economy explains why more women chose the benefit sharing agreement. Since more men than women have access to money, the men also tend to have more control over the financial resources within the family. At the same time, men are becoming les willing to perform household tasks that were previously undertaken together. Childcare and household work are now labelled as predominantly women's work (*ibid.*). Interestingly, subsistence gathering for family sustenance remains a female activity, but the harvesting of natural resources for cash income has become a male activity. The marketing and sale of natural resources is mainly a male activity (*ibid.*). In short, it is expected from San women that they take care of their family, while it is the men who are to a wider extent involved in the cash economy. This could explain, firstly, why women choose option 2 in their drive to regaining autonomy, including financial autonomy. Secondly, this could also explain why a higher proportion of women opted for the first option, not sharing their knowledge. San women realise that their social and economic position was previously better and in the hope that they could restore their social status they might argue that

they have to protect their knowledge so that it cannot be used by men to gain more money, with the subsequent risk of wasting it on alcohol or other non-essential commodities.

The preferred option for men was option 3, intellectual property rights protection. Men seemed very keen to have legal rights and protection. Gaining rights was not limited to property rights over knowledge. When it was discussed what sort of problems the community was facing, the lack of access to land and the lack of rights over natural resources were often mentioned as the two most important causes for their poverty. It was argued by some that gaining rights over knowledge, natural resources and land was crucial in their stride towards restoring their human dignity. Empowerment and development were identified as important goals in order to alleviate poverty. Choosing legal protection was very much imbedded in a rights-based discourse and only a handful of interviewees mentioned that they have special 'indigenous' rights over their traditional and ancestral land. Even men who preferred the first option did this on the basis that keeping their tradition and knowledge alive was their natural right and not because the knowledge was sacred. Men who mentioned that they wanted to keep the knowledge to themselves did this because they were worried that something might go wrong if they started to share the knowledge on a large scale: the medicinal plants could stop working or become poisonous[26]. Furthermore, there was also a strong notion of lack of trust in the benefit sharing option; people would stop paying. There was also a disbelief that legal rights would be granted to the San; after all they are the most marginalised ethnic group in Namibia. Keeping the knowledge for themselves seemed then the safest option, at least they still had the knowledge. On a few occasions, and it was actually more women who said this, it was thought that keeping knowledge to themselves would give them a chance to restore the traditional way of life. The protective behaviour of women could be explained on the basis that, traditionally, women were in charge of collecting plants; perhaps they feel more affiliated with this practice than the men and hence are more protective.

The differences in opinion between the three different communities are also highly significant[27]. Vergenoeg is characterized by a very strong preference for option 3, which is five times more popular than option 2. However, in Vergenoeg, no fewer than one in four found it difficult to chose, a problem that was hardly encountered in the other communities. In Blouberg, two-thirds of the respondents chose option 2 and one third chose option 1. Opinions were most divided in Andriesvale: just over half the respondents chose option 3, just over a third chose option 1 and one in twelve preferred option 2.

Starting with Vergenoeg, the outspoken preference for option 3 is very likely related to the Sustainably Harvested Devil's Claw Project (SHDC), which started as a pilot scheme in 1997 in Vergenoeg. The NGO CRIAA SA-DC started to organise groups of registered harvesters in order to set up networks of knowledge exchange about sustainable resource use and sustainable resource management. Harvesters became

[26] Not only men, but also women used this as an argument for wanting to keep the knowledge to themselves.

27 When the three communities are aggregated over the two countries, the differences in preference remain (unsurprisingly) significant. In Namibia the most popular option is 2, followed by 3, followed by 1. In South Africa, the most popular option is 3, followed by 1, followed by 2.

increasingly involved in ecological surveys to determine sustainable harvesting quotas and to monitor compliance with the surveys and quotas. Prior to the establishment of the SHDC project, the circumstances under which the harvesters had to work has been described by CRIAA SA-DC (2003) as follows. Harvesters could not bargain from a position of strength and were forced to sell at whatever price they could get. Often they only obtained a price of less than N$1.00[28] for a kilo of dried and sliced Devil's Claw. However, harvesters were also paid in alcohol or other consumer goods. The harvesters had no direct contact with the exporters and were abused by a strong force of middlemen. Furthermore, the harvesters had no idea for what purposes the Devil's Claw was being used, outside their own local use; neither did they have an idea where it was going once it was sold. Harvesters were not aware of ecological and sustainability issues and, very importantly, had no voice in the industry or the opportunity to take up issues with other stakeholders. According to CRIAA SA-DC (2003), this situation changed completely when the SHDC project was started. In 2002, the harvesters received a guaranteed minimum of N$20.00 for a kilo of dried and sliced Devil's Claw. Since the installation of the pilot scheme, the harvesters deal directly with the exporters and are able to develop a practical and operational relationship with the exporters. They have an understanding what the product is used for and have in some cases met the importers of their products. It raised the harvesters' profile at national and international Devil's Claw stakeholder forums. It can be concluded that the SHDC project has made the San in Vergenoeg aware that their natural resources are valued in the marketplace and that they have to take control over the harvesting and selling of their products in order to get a fair price. This has made them more attentive to the importance of control and ownership of natural resources and the related knowledge over these resources. The awareness of the commercial value of their knowledge and natural resources might also explain why respondents in Vergenoeg have not opted for the first option, viz. they are not willing to share their knowledge.

The situation in Blouberg confirms earlier findings that extreme poverty and exclusion from the market or cash economy translate into a more pragmatic and utilitarian response, viz. selecting the benefit sharing agreement. Of all the communities visited during the fieldtrip, the situation in Blouberg was most characterised by grinding poverty. On arrival, people claimed that they were without food for days and had to live from handouts. Unlike Vergenoeg, the people in Blouberg did not participate in the CHDC or any other project. Only a few people seem to be employed at the border post with Botswana, but they were not included in the interviews. Sharing knowledge in return for money is considered as a means to end poverty. This attitude is also confirmed when the results are compared against income. The respondents with an income are more likely to choose option 3 and to a lesser extent option 1. However, the interviewees without a source of income opt for the benefit sharing agreement in the hope that this can generate an income. Interestingly, the respondents who receive a pension (they are 65+ of age) seem more protective than the younger generation because they are more likely to pick option 1, not sharing their knowledge. The respondents in Blouberg who opted for not sharing their knowledge were mainly women. As explained previously women seem in

[28] The exchange rate of one Namibian Dollar (N$) is about £0.10 (mid 2004). The Namibian Dollar is pegged to the South African Rand at the rate of 1:1.

general to be more protective than men when it comes to sharing medicinal knowledge.

Finally, the results for Andriesvale are critical in the sense that the community members of Andriesvale have been more involved in the Hoodia benefit sharing agreements than their counterparts in Namibia. As a matter of fact, only a handful of San interviewed in Namibia knew about the Hoodia benefit sharing agreement and they represented what might be labelled the elite San, meaning they are the community members who have been elected as representatives for the community in organisations like the San Council and WIMSA board. The respondents in Andriesvale rejected the benefit sharing option as their preferred solution, which is quite surprising considering the fact that this community was so closely involved in the Hoodia benefit sharing agreement. Interviewees complained that they had not been involved in the procedures and expressed feelings of exclusion and being neglected. The majority of the people interviewed argued that they had no problem with the Hoodia benefit sharing agreement per se, but with the process behind the agreement, which they saw as flawed. The biggest complaint was the lack of communication between the elected representatives and the other community members. Again, the older generation expressed more doubts about sharing the knowledge of the Hoodia with other people and felt they might have made a mistake by losing control over their knowledge.

In general terms it can be concluded that the interviewees in Andriesvale were more aware of the value of their knowledge and natural resources and as a result understood, just like the people in Vergenoeg, that it is crucial to gain more control in the dissemination and commodification of that knowledge[29]. Contrary to Vergenoeg and Blouberg, the respondents in Andriesvale were less concerned with their poverty, but highlighted that gaining control over natural resources and knowledge would empower them and saw it as a recognition of their human rights and identity. Community 'leaders' went one step further and linked it directly to an indigenous rights discourse. In comparison, the people in Andriesvale were relatively not as poor and desperate as the people in Vergenoeg and Blouberg. For example, the pension money was twice as much as the pension money in Namibia and young mothers received money for childcare. Furthermore, many tourists pass through Andriesvale on their way to the National Park, which gives the community a chance to earn an income from organising guided walks and selling handcrafts. Most of the people interviewed also confirmed that winning the land claim has improved their, mainly, social situation. Although, economic improvement remains very limited, the majority agreed that having their own piece of land made them feel proud again to be San and gave them some sense of belonging and encouragement to continue their fight for economic and political approval in mainstream South African society.

5.3 San Views on the Hoodia Benefit Sharing Agreement

This section reports on the case study of the Hoodia cactus, which is the only existing benefit sharing agreement over a traditional medicinal plant used by the San (see 4.3

[29] However, it must be noted that the people in both communities were more aware of the issues at stake as a result of the CRIAA SA-DC and Hoodia project respectively.

for more details). The extent to which this agreement can be seen as a model of good practice will be assessed on the basis of four criteria: procedural justice, distributive justice, social impacts, and the views of the San obtained through a scenario survey.

5.3.1 Background

The Hoodia benefit sharing agreement is a good example of the exploitative character of the current patent system. First, the San's traditional and customary knowledge of the useful characteristics of the Hoodia cannot be patented, while explaining scientifically the Hoodia's effectiveness is sufficient to merit the award of a patent (Dutfield, 2004). Second, the Hoodia patent also fails to refer to the relevant traditional knowledge of the San (*ibid.*). Advocates of the agreement, like WIMSA, argue that the San peoples have now their rights to traditional knowledge recognised through the Hoodia benefit sharing agreement. This is a rather distorted view for three reasons. First, the agreement came into being post-facto. Second, the patent has not been contested while the San are not acknowledged in the patent as the holders or custodians of the traditional knowledge. Third, providing monetary compensation for the appropriation of knowledge does not equate to a formal recognition of property rights over this knowledge. Therefore, it must be concluded that the Hoodia benefit sharing can, at best, be labelled as a compensatory agreement, but then the question arises whether it is a fair and just agreement.

This is not to say that there are no positive impacts of the Hoodia benefit sharing. The San have been engaged in a long and draining struggle to get their land and resource rights recognised by their respective Southern African governments (Hitchcock, 2002). This battle is part of their efforts for access to human rights and social justice. The San believe they have every right to be involved in decision-making about their land, natural resources, identities and political participation (*ibid.*). In this respect, the Hoodia benefit sharing agreement could be applauded as a small, but nevertheless important victory in their continuing fight for justice. The San people that were interviewed in South Africa applauded the agreement for the fact that it gave them the opportunity to raise their voice: the Hoodia case attracted worldwide attention and has put the San and their struggle for recognition on the world map. They were proud that they, an economic and political underclass, were able to enforce an agreement with an institution like the CSIR. They argued that the closure of the Hoodia agreement was mainly the result of the successful land claim. Gaining access to land has built up their confidence and gave them the courage to start negotiating with the CSIR for fair and just compensation.

Wynberg (2004a) has identified a number of concerns for the Hoodia benefit sharing agreement. In more general terms, she argues that one of the main problems is the absence of effective legislation and institutions that are powerful enough to control access and enforce conditions for benefit sharing. This lack of power in terms of implementation is reinforced by the weak role the government has played in the process. The South African government has failed to provide guidance in matters that are deemed to be crucial if an equitable and optimum outcome is aspired.

Wynberg (2004a) further argues that the benefit sharing agreement also failed in getting prior informed consent from the holders of traditional knowledge, in this case the San. Instead, the San closed the benefit sharing agreement with CSIR

retrospectively. This is an indication that the process of this case can hardly be called fair and equitable and shows how precarious the process of reaching a benefit sharing agreement is when one of the parties are indigenous peoples whose legal and human rights have been completely eroded over the years. Wynberg (2004a) poses fundamental questions such as: *"Who qualifies as the rightful community or group from whom consent should be obtained? Can knowledge be attributed to a single group or individual? Is the privatisation of traditional knowledge through intellectual property rights not contrary to the belief of many communities that such knowledge is collectively held, for the benefit of the broader community? Can bioprospecting in fact deliver development benefits and social justice* (Wynberg, 2004a: 241)*?"*

In order to address these concerns more empirical research was needed and during the fieldwork an answer was sought to the following questions: to what extent can the outcomes and procedures of the benefit-sharing process be regarded as fair, just and equitable to the San peoples? What are the social implications of the benefit sharing agreement for the San communities?

From examination of the procedures and outcomes of the Hoodia benefit sharing agreement, the following observations have been made.

5.3.2 Procedural Justice

With regards to procedural justice[30] two major concerns can be identified. First, doubts must be expressed to what extent the process can be characterised as participatory. For example, in Namibia only a handful people amongst the interviewees knew about the Hoodia benefit sharing agreement; not only had their opinion not been sought prior to the signing of the agreement, the vast majority of the people interviewed had never even heard about it. As mentioned previously, the interviewees in Namibia who have heard about the agreement are what can be labelled the 'elite' San or in other words the community members who have been elected as representatives for the community in organisations like the San Council and WIMSA board. The situation in South Africa was slightly better. The community members who were interviewed knew about the agreement, but the majority complained that their opinion was not sought prior to signing the agreement. They lamented the lack of communication between the 'elite' San and the majority of the community. Apart from a vague notion of the existence of the agreement, the community members did not know its exact details. For example, they did not know that the royalties ought to be shared equally between the San in South Africa, Namibia, Botswana and Angola. They did not know for what purposes the Hoodia was going to be used. They were not aware that Pfizer had pulled out of the deal. Neither were they involved in the new negotiations between CSIR and Unilever. The lack of participation of the community members has resulted in signing an agreement that in retrospect does not reflect the wishes and aspirations of the people in the three communities, but this will be further discussed in more detail in the subsequent sections (the scenario survey).

[30] As identified by Whiteman and Mamen (2002), procedural justice (in the context of indigenous' justice claims) *"emphasises the importance of the perceived fairness in the process used to arrive at a decision or settlement, and is based on the finding that people will be more likely to accept a non-favorable outcome if they feel it was arrived at through fair means"* (Whiteman and Mamen, 2002: 301).

Apart from being non-participatory, the process can also be criticised for its failure to create an environment that could have assisted the San in their negotiations. As confirmed by Wynberg's (2004a) observations, communities dealing with bioprospecting and benefit sharing agreements require legal and strategic assistance in dealing with these issues. This has clearly been absent in the case of the Hoodia agreement. Only a few people were selected to represent the interests of their communities and they lacked the appropriate knowledge and skills for effective negotiation of intellectual property rights and benefit sharing agreements. It is very unlikely that the San, who are one of the most marginalised and impoverished ethnic groups in Southern Africa, could negotiate with the CSIR on equal terms. During the fieldwork, people who are part of the Hoodia Trust Fund complained that they were not adequately trained by the CSIR to manage the project and the potentially high amounts of money that can be accrued once the Hoodia product is commercialised. Stories were told that it took them two years to open a bank account and none of the Hoodia Trust Fund members had any knowledge in accountancy. They further complained that their requests for training and assistance were denied by the CSIR. Complaints were also voiced about their representatives, like WIMSA and Roger Chennells, that they have no clear understanding what benefit sharing agreements entail. After attending a workshop, organised by academics, about the pros and cons of benefit sharing agreements, people involved in the Hoodia Trust Fund argued that they have made crucial mistakes and that neither the San nor WIMSA or Roger Chennells knew about alternative non-monetary benefits. High profile leaders in the community complained that the agreement was closed under conditions set out by non-San peoples and that the San's opinion was not respected nor even asked for.

5.3.3 Distributive Justice

Looking at distributive justice[31] three comments can be made. First, the benefits that the San will receive from the milestone payments (8% of the payments that CSIR will receive from Phytopharm) and the royalties (6% of the payments that CSIR will receive from Phytopharm) may sound reasonable at first, but their actual value is not at all clear[32]. Bioprospecting agreements are generally characterised by low payments to the original owners of the knowledge. For example, Posey and Dutfield (1996) estimate that less than 0.001 percent of the profits from drugs that originates from traditional plants or herbs have gone back to the original source – the indigenous peoples. The low percentage of benefits that will flow back to the San is becoming increasingly problematic because the Hoodia will no longer be commercialised as a drug, but as a food supplement. It is expected that the total market value of food supplements is going to be lower than the market value of an anti-obesity drug. The San do not seem in the position to re-negotiate the percentages of royalties. To conclude, even before the first royalty payments are paid to the San, it is already very likely that the San will receive less money than they thought they had originally agreed upon.

[31] As identified by Whiteman and Mamen (2002), the main concern of distributive justice (in the context of indigenous' justice claims) is *"the equity, or fairness, of the outcome of a settlement or decision-making process in the eyes of the individuals or groups affected by the decision"* (Whiteman and Mamen, 2002: 297).

[32] At the moment it is not clear how much money CSIR will receive from Phytopharm.

Wynberg (2004b) estimates that the San will receive between 0.03 percent and 1.2 percent of net sales of the product and she argues that the benefit sharing agreement explicitly protects Phytopharm from any other financial demands by the San. Furthermore, the San are, as mentioned in the agreement, not allowed to use their knowledge of the Hoodia in any other commercial applications. This will prevent the San from using their knowledge in other viable commercialisation options such as non-patented herbal medicines. In practice this means that the San are now not allowed to claim any benefits of the dozens of new Hoodia-based products that are currently on the market and that are overtly using the San's traditional knowledge in their product marketing strategy (Wynberg, 2004b).

The second concern that needs to be raised with regards to distributive justice is the fact that the San who have been interviewed were not so much interested in monetary benefits, but would rather receive non-monetary benefits (like schools, hospitals, access to land, agricultural projects, housing, etc.). They argued that distributing money was problematic for two reasons. First, they were worried that the money would not be used for the right purposes and would be mainly wasted on alcohol. Second, they were also worried that even when the money was managed through a trust fund, this could raise problems because the management of the trust fund was so far non-transparent. Third, there was a general consensus that the CSIR, or any other company or third party for that matter, could not be trusted. Especially, the San in Andriesvale argued that in the past they were promised a better economic life by the South African government when their land was returned. They now complained that these were 'empty' pre-election promises. In reality, the economic situation was not further improved and they were still dependent on government aid and were not able to start their own 'development projects'. Furthermore, they argued that in the long-term non-monetary benefits would be more beneficial than monetary benefits because the improvements with non-monetary benefits would be more sustainable and less dependent on issues like trust and dependency. To conclude, the findings based on the fieldwork indicate that those who have been interviewed have a different perception of distributive justice than just monetary benefits alone. For example, questions were asked why they were not more closely involved in the scientific work of the CSIR. They showed a keen interest to learn from the Hoodia project, they wanted to understand the scientific and chemical process behind the P57 compound. Ultimately, they wanted, in due time, to have San researchers working with their own traditional medicinal plants either with or without the support of the CSIR. So far they were disappointed in the level of cooperation between the CSIR and the San community members; they felt themselves to have been left behind by the CSIR.

Lastly, according to some anthropologists (see e.g. Widlok, 1999) the botanical knowledge of the San is not higher than the botanical knowledge of the agriculturalists. Ipso facto they are not more ingenious exploiters of wild resources than agriculturalists neighbours. There is less individual specialist and more general botanical knowledge available among the !Kung than among the agriculturalists. Looking at the specific case of the Hoodia, according to government officials and NGOs in Namibia, the Hoodia grows in Namibia only in areas which are currently not inhabited by the San and therefore are no longer used or known by the San. This has been confirmed by observations in the field. When pictures were shown of the Hoodia, people did not recognise it and were not aware of its special properties. The Nama and Damara in Namibia, on the other hand, are still using the Hoodia and

ultimately it can be questioned to whom belongs the knowledge of the Hoodia? WIMSA argues that it was the San who, in the past, have exchanged their knowledge of the Hoodia for material objects like iron and therefore it cannot be questioned to whom the knowledge belongs. However, the divide between the three groups is subtler, especially with regards to the Nama. The Damara belong to the same linguistic group of Khoisan peoples[33], but are ethnically associated with Bantu-speaking peoples. The Nama, on the other hand, are both ethnically and linguistically related to the San, although they have been pastoralists for more than a thousand years. Anthropologists[34] even doubt whether the San can claim exclusive ownership rights over their rock-art and this has become a widely contested issue since the Nama are also claiming ownership over rock-art. In the case of the Hoodia it is potentially very difficult to allocate 'exclusive' property rights – in the form of a benefit sharing agreement - on the basis of ethnicity. Ultimately this might create potential conflicts between the different ethnic groups and reinforce or aggravate the negative image by other ethnic groups of the San. In extremis, it has been argued[35] that allocating property rights over traditional knowledge on the basis of ethnicity might potentially create a situation whereby ownership rights can only be confirmed through complicated DNA tests. For countries like Namibia and South Africa, that officially do not accept ethnically based policies, this will sound like an untenable situation that must be avoided at all cost. Therefore, it can be argued that controlling the appropriation of knowledge through allocating exclusive property rights might create a volatile situation between different ethnic groups and between ethnic groups and the state. Arguably, instead of concentrating on rethinking the current intellectual property rights framework, more attention should be given to alternative solutions that are not imbedded in complicated and conflict laden property institutions.

5.3.4 Social Impacts

Drawing attention to the social impacts of the agreement, the following conclusions can be drawn. Doubts must be raised if either the outcome of or the process behind the benefit sharing agreement have respected one of the prevailing ethical norms in the San society, viz. egalitarianism. The San's society has been described as one which functions free of hierarchy and power structures and without formal political institutions (Lee, 2003; Guenther, 1999). The San's political and social institutions and processes can be characterised as loose and ambivalent. Consequently, the appointment of leaders is also loosely defined. Often, the community will follow the decision of individuals with strong personality traits and specific expertise (e.g. in hunting or locating medicinal plants). On the other hand, there are San groups who are politically more organised and centralised and in those cases it is often the headman who exercises leadership (Lee, 2003). Even in the more politicised communities, leadership is often limited to specific situations. The weak leadership structure is a result of the undifferentiated access to resources and the absence of the concept of territoriality. Traditionally, there was no need for strong leadership because the communities were relatively small, property was almost non-existent and there was a strong belief in egalitarianism. The social structure of egalitarian societies is based on the principle of 'reverse dominance'. This means that the group has mechanism in place that will limit the authority of those individuals who aspire power and

[33] The Damara language is very closely related to that of the Haillom San.
[34] Pers. comm. with anthropologists from the University of Cologne (18 April 2005).
[35] Pers. comm. with researchers in South Africa (7 October 2004)

leadership within the community (Woodburn, 1982; Guenther, 1998). Decisions are taken through a process of intensive talking and lively discussions or in other words through consensus. The idea is that all members of the community should have the chance to contribute to the debate before a decision is taken. In this way it can be guaranteed that all people have had access to information and each and everyone can contribute to the formation of this information (Guenther, 1998).

Looking at the situation in the field, both in Namibia and South Africa, a schism can be identified between 'ordinary' community members and 'elite' community members. In their struggle for the recognition of their basic human rights the San were pressured by NGOs , donors and governments to organise themselves and appoint leaders. Increasingly, it is expected that the San speak with one voice. During the fieldtrip numerous San have complained about their leaders while the appointment of leaders in the communities was organised according to western democratic principles (e.g. elections). The enforcement of western style managerial and leadership structures is not a new phenomenon. For example, it has been noted that the members who have been elected to participate in the Na Jaqna conservancy management board considered themselves as being more important in comparison to the ordinary community members. During meetings they showed an unwillingness to engage in a debate and they tried to enforce their opinion upon the community. Their behaviour in meetings provided visible evidence of their higher status. For example, when attending community meetings the members of the conservancy board wore ties and name badges and they brought along manuals and books that are not accessible to a large number of community members because they are illiterate. They expected to be offered chairs to sit on which the rest of the community sat on the ground. Meetings were partially conducted in Afrikaans, while outside the meetings people communicated in their native language. It has been reported that using Afrikaans, the language of the whites and the outside world, signifies a certain status[36].

Similar observations can be made for the Hoodia benefit sharing agreement. One of the CSIR's prerequisites for starting the negotiations about the benefit sharing agreement was that the San had to organise themselves in such a way that it was easier for the CSIR to deal with them. They expected that the San would speak with one voice and a few people should represent the entire community. Green (2004) has also identified this phenomenon that indigenous collectives must possess a centralised structure of representative authority when he examined an ethnopharmaceutical project involving the Aguaruna of Peru. As argued previously, the San's identity is highly diversified and, as shown in the scenario results, opinions about intellectual property rights and benefit sharing tend to differ widely across communities. Arguably, it is impossible to negotiate with a group of more than 100.000 people, but enforcing a managerial style that sits uncomfortably with the traditional values of the San has eroded the normative value system of the San. A society that was previously characterised by egalitarianism and avoidance of prestige is now faced with a new sort of San elite who consider themselves superior to other community members. They live in better houses, seem financially better off, have cattle and are accumulating wealth and prestige. Furthermore, the difference between the 'elite' San and the 'ordinary' San has been aggravated through the lack of communication

[36] Afrikaans is still the lingua franca in Namibia but the ability to speak English, the formal language since independence, is now gaining in importance and thus status.

between the two groups. Concerns must be voiced that this process of acculturation will be further fed by the Hoodia benefit sharing agreement. People who were interviewed also expressed their worries that once the money of the Hoodia benefit sharing will be distributed to the communities, through the trust funds, tension will erupt in the community. In short, the way in which the Hoodia benefit sharing agreement came into being shows that it mainly regulates an economic relationship. The main concern was redistribution of money and no attention was given to the social impacts of the agreement.

Finally, it was also noted that the Hoodia benefit sharing agreement has raised high and somewhat unrealistic expectations. The San believe that they are sitting on a potential goldmine and that they will become multimillionaires overnight. The recent signing of a new bioprospecting agreement between the San of Southern Africa and the CSIR has reinforced this feeling. The new agreement regulates a partnership between the South African San Council and the CSIR with regards to researching the indigenous knowledge of the San people on the usage of indigenous plants, to the benefits of both parties, as claimed in the joined press release. The leader of the South African San Council, argues that the agreement is beneficial in the sense that it records the San's indigenous knowledge for the purpose of conservation, proof of ownership and possible use of the San knowledge in future development projects. Two weeks prior to the signing of the agreement, when community members in Andriesvale were questioned about their opinion about this new agreement, they were not aware of it. Furthermore, they seemed reluctant to sign such an agreement for two reasons. First, some argued that the Hoodia benefit sharing agreement has so far shown no concrete results and question why they should already sign a new agreement. Second, some people felt very uncomfortable with the idea of generating together with a third party a database of their traditional knowledge. They felt as if they lost control over their resources and knowledge and had fundamental problems with this concept of joint partnership unless the terms and conditions were clear from the start. Anthropologists have also identified the importance of trust among members of ethnic groups and trust in the system as an important concept in San societies (Hitchcock, 2002). In other words, the new agreement shows the same flaws as the Hoodia benefit sharing, viz. not being participatory. Consistent with what Greene (2004) suggests, it could be argued here that raising the expectations that large sums of money will be transferred to the San, may have been an effective strategy (although there is no proof that it was a deliberate strategy) to persuade local communities to accept the Hoodia benefit sharing agreement and the new bioprospecting agreement.

5.3.5 Scenario Survey Results

With regards to benefit sharing, the scenario survey was used to test what sort of benefit sharing agreement the interviewees would like to negotiate. The three options under scenario two are as follows. In the first option, the San do not get any money back for giving their knowledge to the company. Instead, the company will buy land for the San so they can return to their ancestral land and will have the chance, should they wish, to rebuilt their cultural heritage and traditional way of life. In the second option, the San get some share of the profits, e.g. 5 %, and the San can decide for themselves what they want to do with the money. In the third option, the San will not receive direct monetary benefits as a result of any profits made by the company, but instead a share of the profits will be used by the company to built schools, provide education, employment, housing, etc. for the San.

Table 2: Number of individuals who expressed preferences for particular benefit sharing options; a breakdown by community.

		option 1	option 2	option 3	don't know	Sum	Significance (Chi-square)*
Community	Vergenoeg (Nam)	0	14	9	1	24	(excl. 'don't know')
	Blouberg (Nam)	4	21	2	2	29	(excl. 'don't know')
							(excl. 'don't know')
	Andriesvale (SA)	5	28	3	0	36	0.007

i.e. it is 99.3% sure that the observed difference of opinions between communities is not a coincidence.

For the benefit sharing scenario, the preferences expressed do not differ with gender (p= 0.888) or income type (p = 0.990). However they do differ significantly with community. Option 2 is the most popular option in each community but Vergenoeg stands out as the only community where nobody chooses option 1 and where option 3 is relatively popular (chosen by about two out of five people, as opposed to 1 out of 12-15 people in Blouberg or Andriesvale). Blouberg and Andriesvale are remarkably similar. As a consequence, when Blouberg and Vergenoeg (both in Namibia) are aggregated for a comparison with South Africa (Andriesvale), the difference in expressed preferences is no longer significant (p= 0.195).

The reason why Vergenoeg stands out can probably be sought again in the success of the pilot scheme of the SHDC project. Respondents in Blouberg and Andriesvale argued that lack of trust was the main reason why they did not choose option 3. This lack of trust was both internal and external. Internally, respondents were worried that the money would be wasted on alcohol and they would eventually be worse off. Externally, there was a lack of trust towards the company. Questions were asked whether they would be able to negotiate on an equal basis with the company, would the money be paid out and would the company not stop paying the money?

The people in Vergenoeg were more confident about monetary benefits because over the years they have built up their confidence and trust in such schemes as a result of the positive impacts of the SHDC project. Harvesters are directly involved in the scheme: they are responsible for targeting quotas and supervising the implementation of the quotas and sustainable harvesting practice. They feel included and there is direct contact between the different stakeholders involved in the project. CRIAA SA-

DC visits the community on a regular basis and even exporters have visited the community. Harvesters also praised the project because they noticed a significant improvement in their income, although it was not sufficient to improve their standard of living to any major extent. To summarise, people reacted enthusiastically about the SHDC project to such an extent that they were asking for more sustainable harvesting projects.

6 Discussion and Conclusion

The current 'mainstream' debate about intellectual property rights and traditional knowledge can be synthesised as follows: indigenous peoples are reclaiming both tangible and intangible elements of their culture on the basis that the appropriation of their culture and knowledge entails a sacrilege and defamation. It is widely believed that indigenous peoples are striving to gain more direct control over their tangible and intangible property by challenging the (mis)-use, possession and commercial exploitation of their heritage by non-indigenous peoples. It is argued that these political actions are guided by identity-based strategies, heavily imbedded in the indigenous rights rhetoric, while economic concerns seem to be a secondary driving force. By putting the controversial issues surrounding intellectual property rights and traditional knowledge in the local context and realities as experienced by the San, some interesting discrepancies with the 'mainstream' debate can be identified.

The San who have expressed their opinion in this research seem to have a pragmatic and utilitarian approach towards using their traditional knowledge. Intellectual property rights are not perceived so much as an instrument for conserving knowledge, but as a tool for gaining human dignity and economic development. In their opinion it is understandable that other indigenous groups explore the possibilities of intellectual property rights as a conservation mechanism. However, the San have lost already too much of their cultural heritage and the little that is preserved must now be used as a tool for poverty alleviation, so they argue.

This finding is backed up by extensive anthropological research. For example, Widlok (1999) has observed that the San regret the loss of utilitarian botanical knowledge, but according to him, the San's environmental knowledge does not have much of a function beyond utilitarian use. This is in sharp contrast with the Australian aboriginals (*ibid.*). For the San to know a plant is to be able to eat or to make use of it (e.g. as a medicine). Knowledge about nature is not politically restricted nor is there any obligation to safeguard it or to transmit it. The principle of disengaging individuals from property is also used with regard to non-material assets. Knowledge is not linked to sacredness. Anyone in the communication network is allowed to use shared knowledge to a diversity of uses, add to it or let it fall. Knowledge of plants is therefore easily used for other purposes than subsistence (Widlok, 1999). Some of the natural resources, like the mangetti nut, *"epitomise the resilience of a sophisticated hunting and gathering way. But, as an object of exchange and as the raw material in the production of liquor, the same fruit is also an important factor in the relations of dependency and exploitation in the life of the 'Bushmen' today. Finally, the 'unoccupied' mangetti groves have been the object of desire for an expending cattle industry for almost a century of colonisation"* (Widlok, 1999: 2).

Widlok's quote encapsulates some essential aspects of the San's socio-economic and political situation and how this has influenced their perception and attitude towards the value of their knowledge and natural resources. The San involved in this research, with only a few exceptions, have confirmed that sharing their knowledge with another stakeholder is not *per se* a problematic concept, as long as the commodification of their knowledge improves their social, political and economic position on the ground. The San have strong demands for equity and fairness and for the people to have a

voice in what they see as their own affairs (Hitchcock, 2002). This attitude is also reflected in their opinion about bioprospecting and intellectual property rights. For the San the potential problem with intellectual property rights is not so much that it cannot give them adequate protection over their knowledge. Neither do they criticise intellectual property rights for being an instrument or even product of our market economy. The San aspire to be part of the market economy, but on their own conditions and terms and this is where we run into problems with our current intellectual property rights framework. The fact that the San are now (either willingly or unwillingly) part of the globalised world, has not meant that the San are now keen to abandon their moral principles of egalitarianism, reciprocity and sharing that guide their relationship towards each other and increasingly towards property.

Lee (2003) asks the question what does it mean to the San to be living in a globalised world? Modernity and markets are powerful and pervasive; but looking at the example of the San, it can be questioned whether these concepts are morally persuasive? The San are at the same time enduring, but not unchanging. They are adapting to the world system, but firmly based on their ancestral roots. Their 'secret weapon' for survival is adherence to their ethical values of sharing and egalitarianism. Their ability to reproduce themselves as a society while limiting the accumulation of power and wealth is admirable and give us some valuable insights how to operate within these parameters. The San as a society operate with a metaphorical ceiling and floor: a ceiling above which one may not accumulate wealth and power and a floor below which one may not sink (Lee, 2003). These limits on upward and downward mobility are maintained by powerful social mechanisms and equalising services (*ibid.*). Questions must be asked to what extent our current intellectual property rights framework can live up to the normative expectations of the San.

It has been argued that intellectual property rights can be democratised when they are imbedded in a human rights framework, but based on the findings in the field some strong reservations must be voiced.

If intellectual property rights have to be remedied so they become more equal and just, would it then not be better to avoid them in the first place? Maybe more attention should be given to alternative approaches that aim more directly to empower the San so they become equal citizens in mainstream society. After all, during the interviews, it was repeatedly confirmed that they aspire to become citizens, that they wish to regain their human dignity and that they would like to leave their stigmatised identity behind. CRIAA SA-DC's SHDC project might be a good example of an alternative approach. Using a property institution, like intellectual property rights, that is known for its inequality, as the basis for economic bargaining might not be a good idea when the main objective is readdressing power relations and inequality. A fair negotiation on intellectual property rights requires some preconditions. In this respect the need for civil society is an absolute prerequisite and not a result of intellectual property rights. As long as the San are not perceived as equal citizens in local and national and international contexts, using intellectual property rights as a tool to readdress injustice and equality is doomed to fail. If trading cultural property is seen as a political act in the sense that it is used as a protection tool to conserve traditional knowledge it might make sense to link the intellectual property rights framework to a human rights debate. However, if trading cultural property is seen as an economic act in the sense

that it is used as a tool to alleviate poverty the issues become more problematic for the following reason.

If human rights are going to play a normative role in the debate about intellectual property rights, it is important that it becomes accepted that indigenous peoples have a say in development planning and that they must have the right both as an individual and as a group to make decisions about their own land, natural resources, identities, and political participation (Hitchcock, 2002). The international discourse on indigenous identity is very much based on the assumptions that indigenous peoples are distinguished from other marginalised minorities by their unique relationship to land, the fact that they are different, their 'otherness' or their pre-modern identity (Sylvain, 2003). These assumptions can also be found in the strategic discourse that is used for claiming property rights over traditional culture and knowledge.

If the San are going to be successful in creating and enforcing the necessary institutional infrastructures for gaining rights, it is necessary to accept that their real identity is not a 'primitive' one, but an identity that has been forced upon the San as a result of historical processes and the prevailing political economy. San activism reflects their experiences of dispossession, marginalisation, exploitation and stigmatisation. Acceptance of their emergent identity is critical in the empowerment of the San and the improvement of their material conditions (*ibid.*). This requirement sits uncomfortably with the enforced identity of 'noble savage' that has been created as a prerequisite for claiming cultural property rights. Overemphasising the identity discourse as a requirement for claiming cultural property, especially when it is based on a manipulated or constructed identity, might distract attention from the pressing problems of poverty and economic inequalities. Indigenous issues have become inseparable from class issues. Rights are not just instruments of law; they are also an expression of a moral identity as a people (*ibid.*).

It can be further argued that the crux of the problem with intellectual property rights and traditional knowledge does not lie in the behaviour of multinational companies, but rather how the state will operate towards its indigenous peoples and whether indigenous peoples' identity is perceived as ethnic or national. The result of these opposing identities is an opposite understanding of the role of the state; either as a protector of shared values of the larger society or as a usurper of the values of the indigenous minorities (Barnard and Taylor, 2002). It seems that the San find themselves at the intersection of a discourse on international indigenous rights and a discourse on national and local rights. For the San, asserting their belonging to the international indigenous rights discourse has the potential danger that their aspiration for national citizenship becomes even more meaningless, while presenting themselves only as Namibian citizens would make them less visible and therefore less likely to receive a proportion of any benefit which might be available. The San hanker after a middle-class existence (Gordon and Douglas, 2000), but as long as they appeal, as they have done with the Hoodia benefit sharing agreement, to notions of aboriginality or First People, it is very unlikely that such aspirations will be met in the Namibian context.

Finally, allocating property rights on the basis of ethnicity needs to be further questioned. The San that were interviewed, with the exception of their leaders, have clearly indicated that their quest for recognition of their knowledge and rights over

resources is not linked to their ethnic identity. Besides, in the context of traditional knowledge, claiming property rights over knowledge and culture on the basis of ethnicity means highlighting the 'otherness' and 'pristine' uniqueness of one's own identity. The 'ordinary' San on the ground have not expressed an interest in this option. In order to achieve control over resources and knowledge, social mobility is required and it is highly contestable that further alienating themselves from other social groups will stimulate this process (Widlok, 1999). The San value access to mainstream society without being enforced to further erode what little is left of their cultural traditions, but this does not mean that they show a willingness to use their tradition as a political weapon. Using the vision of the San as First People seems in the context of the Hoodia mainly a strategy adopted by donors and NGOs and its overall effectiveness must be questioned. For one thing, it can be argued on the basis of the fieldwork that it does not reflect the San's opinion or self-image. Secondly, it is a strategy that conflicts with the policy of the Southern African governments; admittedly a policy that is not without problems but a policy that is at least understandable in the context of past experience with the apartheid regime.

On a more practical or implementation level, allocating property rights on basis of ethnicity might be further complicated when this principle is going to be applied to countries with a diverse mix of ethnic identities. Any effort to classify the peoples of Namibia and South Africa with regards to the 'level' of San ancestry is both practically unfeasible (this is not 'just' a case of DNA testing, but it would also require a 'definitive' scientific classification of the different groups of Nama descendants and people of mixed race) and ideologically unsavoury in view of the apartheid legacy. Allocating exclusive property rights to one ethnic group might in reality mean alienating other ethnic groups from the same property rights, who morally speaking might have equal rights. For the San, gaining property rights over resources and knowledge means exercising their basic human rights. In the context of human rights, gaining property rights should be redefined as gaining moral rights on the basis of injustice that has been experienced and/or current marginalisation, instead of gaining exclusive rights on the basis of ethnic identity.

This position that allocating intellectual property rights on the basis of ethnic identity is difficult on a practical or implementation level does not mean that the author agrees with Kuper's (2003) argument that indigenous peoples are not entitled to claim privileged rights over others on the basis of their indigenous status. Involvement in the ongoing debate (see e.g. Kenrick and Lewis, 2004) on rights and the use of the term indigenous is beyond the scope of this working paper, but it is felt necessary to point out, in agreement with scholars like Kenrick and Lewis (2004), that for indigenous peoples seeking to redress, for example, dispossession of land requires them to fit an image that does not stroke with indigenous peoples daily reality; *"they have to display naivety by maintaining a tradition untainted by change"* (Kentick and Lewis, 2004: 8). Indigenous peoples are not using this 'image' to seek privileged rights, but they are *"constrained to present their cultures in ways that reinforce the dominant societies' worldview"* in order to gain equal rights (*ibid.*: 9). A similar strategy can be observed with regards to intellectual property rights. The San do not *per se* believe in exclusive property rights, neither do they think they are entitled to special rights over others on the basis of their indigenous status, but in their search for redressing marginalisation and historical injustice, they have sought with the Hoodia benefit sharing agreement compensation and acknowledgement on the basis of their

indigenous identity. On the basis of field observations (see section 5 of this paper) and anthropological literature (see section 3 of this paper) it can be stated that it is doubtful whether the San, on their own initiative, would claim exclusive ownership rights over the Hoodia knowledge. The significance of this case lies not in the question whether the San have the moral right to claim compensation and some form of ownership rights over the Hoodia knowledge; the San's moral rights and their indigenous status are beyond doubt. What this case shows is that the San in order to get acknowledgement, compensation and restitution must engage in a discourse impregnated with western values, i.e. entitlement of exclusive ownership on the basis of an 'inherited stock of traits' (Kentick and Lewis, 2004: 9), and consequently thereby excluding by definition other ethnic groups who might also have a stake in the Hoodia benefits[37].

When property rights are placed in a human rights context it becomes morally very difficult to accept that property rights equal exclusivity. It can be argued that gaining property rights can only become acceptable when they entail obligations. To conclude, allocating property rights to the San with the purpose of rectifying inequality can only work when rights are paired with obligations imbedded in a normative framework that favours sharing and egalitarianism over exclusiveness and accumulation of wealth. Addressing these normative issues is linked to questioning our legal, economic and political institutions, but above all the failure of the decolonisation process and nation state building in Southern Africa.

[37] Wynberg (2004b) argues that some of the uses of the Hoodia can unquestionably be attributed solely and originally to the San, but she also acknowledges that the wider distribution of certain Hoodia species suggests extensive use by a range of other peoples in the region (e.g. Nama, Damara and Topnaar). She further argues that even identifying beneficiaries amongst the San themselves is already a complicated task as there is no clear record of who has historically been using the Hoodia; a task which is further complicated by the San's history of resettlement and dislocation and the restricted distribution of the Hoodia.

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