

# LAW AS A NARRATIVE: LEGAL PLURALISM AND RESISTING EURO-AMERICAN (INTELLECTUAL) PROPERTY LAW THROUGH STORIES

Saskia Vermeulen

## Introduction

Through several thousand years of Western history, intellectual property rights have expanded to materialise abstract ideas so that individuals can gain private ownership of them. This expansion is increasingly problematic today, as it is being applied to a range of radically new ideas, such as the ownership over indigenous peoples' knowledge, nature and culture. Indigenous peoples are contesting the universalisation of Western intellectual property law by arguing that the application of Western property law threatens their social and cultural integrity.

This paper focuses on these issues within the context of the San and their struggle to gain cultural and land rights in the landscape of the Kalahari in Southern Africa. In particular, the paper examines the San *Hoodia* case, one of the most famous bioprospecting benefit-sharing agreements to date partly because the case involves the San peoples, the oldest human inhabitants of southern Africa, and relates to the use of *Hoodia*, a plant that may 'cure' western obesity. Bioprospecting can be defined as the exploration of biological resources in the hope of finding commercially valuable components for, amongst others, pharmaceutical development. Proponents of bioprospecting use this neutral definition to demonstrate the positive impacts of bioprospecting, including economic development and the conservation of biodiversity (Brush 1999; Hayden 2003a,b). However, bioprospecting has also attracted some fierce criticism under the

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pejorative banner of biopiracy which relates to the plunder of natural resources and related knowledge of the developing world (Shiva 1997, 2001). This paper examines indigenous peoples' property rights from a socio-legal, anthropological and legal pluralist perspective. This framing allows for an exploration of how overlapping legal systems can interact with each other, but also encourages researchers to embrace the idea of a hybrid legal space where law-making consists of a praxis that interlocks a whole range of legal actors ranging from international institutions to daily localised legal actors.

The attitude of the international community towards indigenous peoples has changed from being 'assimilationist' in the ILO Convention 107 towards being neutral in the ILO Convention 169 and ultimately the recognition of indigenous peoples' self-determination rights in art.1 of the UN Declaration on the Rights of Indigenous Peoples (Charters 2009). Within the context of this research with the San and their tangible and intangible property rights, concepts such as traditional knowledge, commodification, property, indigeneity, customary law and *sui generis*<sup>1</sup> protection are all focal points in the debate about indigenous peoples' property rights and self-determination rights. However, based on observations in the field spanning six years, it is noted that there is a need to define these concepts better based on the simple fact that a lot of the literature and policy frameworks are out of tune with some of the daily realities lived by indigenous peoples. It is indeed crucial to gain a better understanding of what these concepts mean in different contexts and cultural settings. As some of the most prolific anthropologists like Strathern (2004a) and Kirsch (2004) have argued, the meanings of 'traditional knowledge', 'commodities' and 'property' are tainted by a discourse of an international community that has a track record of stereotyping traditional communities as the binary opposite of Western communities, with little regard to the realities of their socio-economic and political life.

It is against this background of exploring frameworks that capture and are consistent with different values and practices, without essentialising and reducing

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<sup>1</sup> *Sui generis* protection or *sui generis* law in the context of this paper refers to a specifically developed legal system that will protect and govern the use of traditional knowledge. While *sui generis* traditional knowledge law shares some characteristics with intellectual property, it is still unique (*sui generis*) in the sense that it protects the new subject matter of indigenous peoples' knowledge; a form of knowledge that under the current intellectual property rights system is not patentable.

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the cultural differences to binary opposites, that the notion of intellectual property rights in the context of appropriating indigenous peoples' knowledge and culture is explored. By embracing pluralistic approaches towards law-making this paper is sceptical about the imposition or expectation of universal legal norms and values. Instead, the recognition of a diversity of values, experiences and cultures is endorsed. Inspired by the work of the legal philosopher, Felix Cohen, who has devoted his scholarship to honouring the values of diverse groups, including protecting the constitutional rights of Indian natives, I incorporate a multiplicity of value systems in the debate about indigenous peoples' intellectual property rights. (See Mitchell 2007 for an overview of Cohen's work on justice.) Cohen's celebration of diversity as an alternative to the classicists' attempt to force uniformity on law through abstract concepts reflects Douzinas and Warrington's (1994) idea that injustice begins at the point when the language of one is imposed upon the other, or when similarity is imposed upon difference.

The paper starts by contextualising the San and the *Hoodia* case followed by an overview of the current shortcomings of the current benefit-sharing and intellectual property rights regime. Next, the paper discusses how the San have both engaged with and contested the western legal discourse on (intellectual) property rights. The last section of the paper focuses on legal pluralism.

### The San

The San are former hunter-gatherers and the oldest inhabitants of Southern Africa. The arrival of pastoralists and agriculturalists of the Bantu-language group (in the last 500-2,500 years) and white settlers (in the last 300 years) has resulted in their marginalization, subordination, and persecution. About 100,000 San survive today in the Kalahari basin. While their physical survival may no longer be at risk, their cultural survival is highly precarious. Although local and regional variation exists, the vast majority of the San have lost their land rights and with that, the opportunity and the skills to hunt and gather food. They are almost invariably poor by local standards. Few can survive on subsistence farming as this requires access to land with suitable soil and capital in the form of livestock and fences. Many depend for their livelihood on seasonal farm work (often paid in kind) and the harvesting of bush food. In countries like Namibia and Botswana food aid from the government is also important. Seen as an archetypical hunting and gathering society, the San have been subjects of numerous ethnographic studies, documentaries, films, and postcards (Suzman 2001).

A number of non-governmental organisations, such as the Kuru Family of Organisations and the South African San Institute are attempting to take on the challenge to bring ‘development’ to the San. In 1996, following the example of the Sami peoples, the San formed their own advocacy organisation, WIMSA, working towards uniting and representing the San communities from Botswana, Namibia, South Africa and Angola (Wynberg and Chennells 2009).

The San have attracted great interest from anthropologists; the ‘Kalahari debate’, focusing on the San’s complex and multi-layered cultural identity, is an apt example. 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 2002) and have failed to acknowledge that the San have become increasingly drawn into the local if not world economy (Lee 2003). The revisionists (e.g. Wilmsen 1989; Gordon and Douglas 2000) do not recognise the San as hunter-gatherers, they see the San as 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 a result the San lost their cultural autonomy long before the arrival of European colonialists. For the revisionists, the poverty and exploitation of the San are not recent phenomena, but a continuity of the past. For thousands of years the San’s foraging culture has been rooted in poverty and it has long ceased to be connected with their ancestral, pre-iron age, culture. The traditionalists, on the other hand, argue that the San were able to maintain their cultural autonomy when they started to interact with the Bantu. 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 2002).

The relevance of the Kalahari debate lies in the recognition that representing the San culture today as the culture of autonomous hunter-gatherers is in tension with their highly dependent underclass status (Sylvain, 2003). Different San societies have been characterised by a diverse set of cultural and social characteristics (Guenther 1999). The distinction that has been made between the identity of San as hunter-gatherer and San as farm labourer has far reaching political implications. The San who have been labelled as hunter-gatherers are excluded from state politics and economic transactions, while those characterised as farm labourers have lost their recognition as real San. 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

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rights as modern citizens on the grounds that their authentic cultural identity is defined by pre-modern, pre-political primitivism (Sylvain 2003).

In recent years, the San have also sparked the imagination of many non-academics. The image of San men walking on the red Kalahari sand dunes has been sent around the world, providing a visual context for the *Hoodia* saga.

While there are many different San language groups, this study focuses mainly on the The ꞛKhomani San, who live around Andriesvale which is located in South Africa's Northern Cape Province. The ꞛKhomani San have been dispersed by the South African authorities and were the last group evicted from the Kalahari Gemsbok 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. The abolition of Apartheid brought new opportunities. A group of 'Bushmen' met with a human rights lawyer who presented their case to the new ANC government. The ANC in turn were interested in restoring land to this small but highly symbolic group of people in an act that was relatively free of controversy in a time of elections. The government bought up the land around Andriesvale and handed it over to the ꞛKhomani San. The government did demand that all ꞛKhomani San descendants should share the rights to this land and this initiated a search for descendants across farms and townships of the Northern Cape. This search resulted in the discovery of a handful of octogenarians who could still speak N|u (the original language of the ꞛKhomani), 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 ꞛKhomani culture and identity. The successful land claim brought together a group of people who shared a related 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 the land claim and as a result it remains to some extent an artificially created community. Many have moved to the area around Andriesvale in expectations of economic gains resulting from the land rights 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.

#### *The Hoodia Case*

The story of *Hoodia* is indeed probably one of the most famous bioprospecting case studies. The use of *Hoodia* species by the San was already documented as a

food and water substitute in colonial botanical accounts. These references inspired the South African Council for Scientific and Industrial Research (CSIR) to start researching edible wild plants, including *Hoodia*, in the region as part of their wider aim to inform the South African Defence Force about the toxic and nutritional properties of wild food (Wynberg and Chennells 2009). While the CSIR identified already in the 1960s the potential of *Hoodia* species as a non-toxic appetite suppressant, lack of technological know-how prevented further progress on isolating and identifying the active ingredients responsible for suppressing appetite. When the CSIR acquired new equipment in the 1980s they finally managed to unravel the molecular structures of *Hoodia* species and in 1995 the CSIR filed a patent application in South Africa for the use of the active components of the plant which were responsible for suppressing appetite<sup>2</sup>.

In 1998, the CSIR signed a license agreement for the further development and commercialisation of *Hoodia* with Phytopharm, a small British company specialised in the development of phytomedicines, and international patents<sup>3</sup> were filed in some countries. This agreement gave Phytopharm an exclusive license to manufacture *Hoodia*-products and to exploit any other part of the CSIR's IPRs relating to *Hoodia* species. Through a programme, named after the molecule 'P57', Phytopharm developed a *Hoodia* drug programme which led in 1998 to a sub-license and royalty agreement with the pharmaceutical company Pfizer. In 2003, Pfizer merged with Pharmacia and had to close its group that was developing a *Hoodia*-based drug. Pfizer returned the license to Phytopharm and in December 2004, Phytopharm granted a new license to develop *Hoodia*-related products to the consumer company Unilever Plc. However, in December 2008, Unilever announced its withdrawal and abandoned its plans to develop *Hoodia*-related products. Unilever stopped its *Hoodia* programme because of safety and efficacy concerns (Wynberg and Chennells 2009). Phytopharm is once again looking for a new partner and more than 10 years after the patent was registered by the CSIR, there are currently no signs that a *Hoodia* product will soon be on the market.

The *Hoodia* case first caught worldwide attention in 2001 when a British newspaper reporting on *Hoodia* as a new appetite suppressant mentioned the extinction of the San. What became clear was that the CSIR had never consulted or obtained consent from the San prior to the patent application and was therefore

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<sup>2</sup> Patent No 983170.

<sup>3</sup> Patent No GB2338235 and WO9846243A2.

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disregarding international requirements such as the ILO Convention 169, the CBD, the African Union's Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources and the Bonn guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilisation (Wynberg and Chennells 2009). The media became heavily involved and the contrasting images of the impoverished San versus pharmaceutical giants strengthened the San's case and encouraged the CSIR to enter into benefit sharing agreements with the San.

The benefit sharing under the initial agreement was structured in monetary terms with benefits going to a trust to raise standards of living and well-being for the San. The share the San would receive from the milestone payments and the royalties - 8% and 6% of the payments made to CSIR respectively - may sound reasonable, but the actual value is not clear at this stage. *Hoodia* was originally intended to be commercialised as a drug, but when the focus shifted to a food supplement, the total market value and thus the absolute benefit share decreased. Now that there is no sublicense agreement with a company to commercialise *Hoodia* as a slimming or dietary product, these expectations must be further lowered. However, as a result of all the publicity for *Hoodia* as an appetite suppressant, the international demand for *Hoodia* as a natural product exploded, with literally hundreds of *Hoodia* dietary products being advertised on the Internet. Poaching and illegal harvesting of the product became a problem to such an extent that in October 2004, *Hoodia* was registered in the Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), but in many areas the protection came too late and uncultivated *Hoodia* became unavailable, cutting off the San in some areas from their 'lifeforce'. On the back of this development, the San were able, in March 2007, to negotiate a new benefit sharing agreement specifically with the *Hoodia* farmers who were organized in the Southern African *Hoodia* Growers Association. While, initially, the agreement entitled the San to a modest £2 per dried kilogram of *Hoodia* exported, at the moment it seems that a *Hoodia* growers' benefit sharing agreement might potentially be - in all its modesty - more 'lucrative' than the initial benefit sharing agreement, but with proceeds distributed just to the farmers rather than the San as a wider community.

Within the context of the intellectual property rights debate, the *Hoodia* benefit sharing agreement has been represented and applauded by many, including the San's legal representatives, as being a victory for the San emphasising that by signing the benefit sharing agreement, the CSIR has recognised the San peoples as

the primary owners of the *Hoodia* knowledge. Furthermore the San-CSIR *Hoodia* benefit sharing agreement covered, in addition to arranging the monetary benefits, also intellectual property rights issues. While these measures were primarily designed to protect the patent of the CSIR, some of the provisions in the agreement allow further insights into the construction of the western discourse of ‘ownership’ as applied to the San and *Hoodia*. For example, in the agreement ‘knowledge’ was defined as:

the traditional knowledge on the uses of the *Hoodia* plant that occurs in Southern Africa, originally in the hands of the San peoples (quoted in Wynberg and Chennells 2009: 108).

Or, in provision 6 of the agreement, it is stated that the San are:

the legal custodian of traditional indigenous knowledge on the use of *Hoodia* (quoted in Wynberg and Chennells 2009: 109).

Interestingly, the agreement also includes a provision on third party claims,

set[ting] out various measures to protect the CSIR against claims by any third party for intellectual property infringement and stipulate[ing] that a successful third-party claim against the CSIR could lead to a review of the agreement to accommodate claimants in the sharing of financial benefits ... requir[ing] the South African San Council to share financial benefits with a third party if the latter were successful in proving a claim (Wynberg and Chennells 2009: 109).

As will be further discussed later in this paper, the above statements are clear indications that the *Hoodia* benefit sharing agreement is firmly embedded in a western property discourse that emphasises the principle of *exclusive ownership*. However, as will be explored hereafter, these provisions in the *Hoodia* benefit sharing agreement are apt illustrations of an international political and legal climate that governs the interface between biodiversity conservation, access and benefit sharing agreements, intellectual property rights and the preservation of traditional knowledge through a discourse of property rights. In particular, through the case study of the *Hoodia* benefit sharing agreement, it can be demonstrated that the idea of intellectual property rights based on communal ownership is fraught with problems.

## International Context

The *Hoodia* benefit sharing agreement must indeed be analysed and understood within the wider context of a legal regime that is looking for an adequate protection mechanism that can redress the imbalanced exploitation of traditional knowledge. For the last two decades, the concern to protect and strengthen traditional knowledge systems has gained in importance at the international level. For example, institutions like the CBD, the World Intellectual Property Organisation's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO-IGC) and the World Trade Organisation (WTO) in the 2001 Doha Declaration have begun to outline the general principles for a system for protection of traditional knowledge. The legal-political context of this debate fits within the wider remit of international law, which is increasingly concerned with natural resource allocation rights (Chander and Sunder 2004). When natural resources become more valuable, society encounters a recurring problem of having to create special protection regimes in order to constrain the one-sided exploitation of these resources. This process of allocating rights over natural resources in the global commons (such as the deep sea bed, Antarctica and outer space) has been guided by ethical values and claims that express and symbolise concerns over equity and distributive inter- and intra-generational justice. Similar issues have been raised when discussing (property) rights over traditional knowledge and, in particular, the CBD has been instrumental in formulating a change of regulation.

Prior to the CBD, access to natural resources (including knowledge) was managed by the 'common heritage of mankind' doctrine, according to which anybody is entitled to access to and use of natural resources. While the CBD formally replaced this doctrine with national sovereignty as the guiding principle to govern control over biodiversity, the CBD is also heavily criticised for its attempt to reconcile the Northern control over biotechnology with the Southern control over biodiversity through a system of access and benefit sharing agreements.

The Trade Related Aspects of Intellectual Property Rights (TRIPS) under the General Agreement on Tariffs and Trade (GATT) and the CBD impose international norms on developing countries to promote trade in biogenetic resources and human knowledge. TRIPS and the CBD assert the benefits of the privatisation of biogenetic resources based on the assumption that exclusive property rights drive the most efficient and sustainable use of biological resources. While TRIPS rests on Lockean notions of unlimited property enforced through

stronger intellectual property rights, CBD recognises the importance of community rights through the recognition of indigenous communities to provide a foundation for biological conservation (Martin and Vermeulen 2005). Though CBD privatises control over biogenetic resources in a more egalitarian manner than TRIPS, it supports a system of exclusive property rights as the best way to guarantee efficient allocation of biodiversity and biogenetic resources. CBD justifies intellectual property as a way to avoid a tragedy of the commons.

Utilitarian arguments, especially biodiversity conservation, are used to justify expanding intellectual property rights to include traditional knowledge of indigenous peoples. The importance that CBD attaches to intellectual property is reflected in the fact that it can be used as a tool to allocate resource rights. Theorists such as Coase (1960) and Demsetz (1967) regard private property as a superior instrument, because it promotes exclusivity and transferability, which, according to capitalist doctrine, leads to the most efficient resource allocation:

According to the theory set out by Demsetz and Coase, as long as biological resources are a public good, society will underinvest in their conservation. The common heritage treatment of biological resources makes them externalities to production cost accounting. The appropriate response to the increased value and ease of identifying biological resources is to create new legal means (i.e. intellectual property rights) or contracts to internalise these qualities (Brush 1996: 158).

In order to deal with the issues of mutually profitable access to biological resources and biodiversity conservation, CBD provides:

the exclusive and transferable rights to genetic resources, species and, if possible, ecosystems to allow the creation of markets guaranteeing their efficient allocation (Boivert and Carron 2002: 152).

CBD achieves this by reiterating the sovereignty of states over their biological resources; promoting the preservation of knowledge, innovation and practices of indigenous and local communities embodying traditional lifestyles; and formally extending the scope of intellectual property to include life forms (Martin and Vermeulen 2005). On the one hand, CBD wants to ensure maintenance of traditions, and it creates incentives to innovate and favour conservation. On the other, it advocates market regulation, which implies appropriation and cultural

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homogenisation. CBD tries to combine biodiversity conservation with genetic resource commodification. In order to resolve this contradiction, it introduces the concept of bilateral market contracts between the holders of traditional knowledge (e.g. states, local communities, intellectual property) and the users of biological resources (e.g. pharmaceutical companies) to enable an optimal allocation of resources and to regulate an equal sharing of the benefits resulting from their preservation. This is problematic, not least because one party to this contract – the local custodians (i.e. the indigenous peoples) – are not recognised as equal partners in the bargaining. There are indications that states want to keep their sovereignty over biogenetic resources and prevent indigenous peoples from participating in the financial benefits that result from their appropriation by third parties (Martin and Vermeulen 2005).

As Wynberg reports ‘a bewildering complexity of policies and laws has emerged in southern African countries to regulate the harvesting, trade, and commercial development of *Hoodia* (Wynberg 2009: 128). The many laws that regulate the interface between biodiversity and access and benefit sharing and intellectual property rights are complex and incoherent. The ‘messiness’ of *Hoodia* regulations is exacerbated because both traditional knowledge and *Hoodia* species cross national borders, involving the governments of South Africa, Namibia and Botswana as well as other local communities, such as the Nama and Damara, in the *Hoodia* case. Each country has developed a distinct regulatory approach towards ABS agreements and the use and conservation of *Hoodia* (Wynberg 2009). Where species and knowledge are crossing national borders, common regional policies should govern the ABS agreements and intellectual property rights regimes.

Within the region, South African’s legislation is the most advanced and the inclusion of prior informed consent in the Biodiversity Act represents a major step forward in an attempt to redress past injustices with regard to the past exploitation of biodiversity and traditional knowledge. However, Wynberg criticises South African’s Biodiversity Act for failing to allocate ownership of genetic resources to the state. According to Wynberg this is mainly driven by a concern that this would infringe communities’ constitutionally protected property rights. Wynberg’s concern highlights again that regulating biodiversity conservation through property rights remains problematic. When ownership over resources and knowledge rests with the state, local communities are excluded. When ownership is vested with local communities, new problems arise such as how to define community and how to establish which community has access to which knowledge and how this knowledge is recorded and protected in the community (Wynberg 2009). The

*Hoodia* benefit sharing agreement is a good example of these wider ownership dilemmas.

*Hoodia and the Rhetorics of 'Ownership'*

The *Hoodia* benefit sharing agreement raises questions about the concept of community ownership. Who are the 'community' to whom justice needs to be done? Some anthropologists (e.g. Widlok 1999) claim that the current botanical knowledge of the San does not surpass that of neighbouring agriculturalists, and that other ethnic groups such the Nama and Damara are familiar with and have used *Hoodia*. While the San are clearly the oldest surviving indigenous group of Southern Africa, botanical knowledge that would have been exclusively theirs has since passed onto other groups of more recent ancestry or arrival.<sup>4</sup> Some of these groups have interacted with the various San groups to the extent that they are ethnically (Nama) or linguistically (Nama and Damara) linked. It should be clear that controlling the appropriation of knowledge by allocating exclusive property rights on the basis of ethnicity is neither practicable (ultimately requiring DNA tests) nor desirable as it can increase racial animosity and tension with the official, non-ethnic policies of post-apartheid states. As publicity around the *Hoodia* benefit sharing agreement has gathered momentum, increasingly other groups such as the Nama (supported by the Namibian government) have raised their voice and in the most recent stakeholder meeting (January 2009) Nama community leaders were invited to explore a San-Nama agreement (personal communication, February 2009). While this symbolic reaching out to the Namas must be applauded, the fact that the Damaras, whose use of *Hoodia currorii* was already reported in 1907 by Vedder and Schultze (Barnard 1992), might further aggravate and expose the problems associated with embedding the concept of biodiversity conservation in a Western framework of exclusive property rights.

The debate about the recognition and compensation of indigenous groups other than the San has been firmly contested by San community leaders and non-San NGO representatives. As witnessed in a workshop on benefit sharing (Cape Town, South Africa 2006), the former chairperson of WIMSA reacted very strongly against any suggestions from academics that the San were not the only custodians

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<sup>4</sup> Wynberg and Chennells (2009) trace back the historical use of *Hoodia* and estimate that the first recorded use of the plant was in all likelihood by the botanist Francis Masson (1741-1805).

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of *Hoodia* knowledge. Since that meeting San leaders and their legal representatives have acknowledged other indigenous groups as knowledge holders and, as mentioned above and confirmed by Wynberg and Chennells (2009), steps have now been taken to include other indigenous groups in initiatives to share benefits from *Hoodia*. But Chennells (the legal representative of the San) maintains that some of the recorded uses of *Hoodia* 'can undoubtedly be attributed exclusively and originally to the San' (Wynberg and Chennells 2009: 94). This is further contextualised by the fact that the Khoi-speaking peoples (including the Nama, Damara and Topnaar) emerged in southern Africa millennia after the San. While Chennells acknowledges that some of these groups will have acquired knowledge from the San, repeatedly referring to the San as the first inhabitants of the region indicates that the San and their legal representative continue to claim primary rights over *Hoodia* on the basis of being the first inhabitants in the region.

As experienced on numerous occasions during fieldwork with the ꞤKhomani San in South Africa, the discourse of exclusive ownership is still widely used and embedded in the rhetorics of the community members when discussing traditional knowledge in general and *Hoodia* in particular:

All the knowledge that Unilever and CSIR have comes from the 'Bushmen' [San] but they have nothing; the knowledge stays ours (ꞤKhomani San informant).

I don't want to hear about recognition, we want our inheritance, we want full ownership, we seek to re-establish our ownership (ꞤKhomani San leader).

We should have more rights, cultural rights ... South Africa belongs to the bushmen, bushmen's land (ꞤKhomani San informant. All Extracts are translated from interviews in Afrikaans with San in October 2004 and June 2007)

Particularly when talking to the elite members of the ꞤKhomani San, *Hoodia* becomes part of their identity as San and indeed is intertwined with the notion of indigeneity. This needs to be understood in context of the ꞤKhomani San land claim when a group of ꞤKhomani San were brought together on their ancestral land. As a result of Apartheid many of the ꞤKhomani San were not aware that they shared their ancestry. They had been brought together in order to win the land claim and while their ancestors might have shared their history together, the latest generation of ꞤKhomani San had lost touch with their ancestral past. They lived

dispersed throughout South Africa and as a result it remains to some extent an artificial community that has been created with the purpose to win the land claim.

For the ꞤKhomani San *Hoodia* epitomises a commodity that belongs to the San and the misappropriation by the CSIR needs to be compensated for. The ꞤKhomani San use the discourse of exclusive ownership rights over *Hoodia* as their rhetorical weapon to fight back many years of subordination and human rights abuses in South Africa. The rhetorical bullets are provided by an international legal regime that forces indigenous peoples to engage with a western discourse of exclusive ownership in order to protect their knowledge, land and identity. Politics of ‘difference’ becomes the rhetorical trigger.

Lessons can be learned from Hayden’s critical appraisal of the notion of community, defined by Hayden as “a bundle of plants, knowledge, territory, and political authority” (Hayden 2007: 737). In her analysis of the International Cooperative Biodiversity Groups (ICBG) project in Chiapas, she concludes that a defining characteristic of benefit-sharing agreements is the allocation of resources to a community so that these resources can then be appropriated well. With bioprospecting the autonomous individual is replaced by the collective as the main actionable subject of ethical behaviour (Hayden 2007) but this standpoint creates its own problem and that is, “who will be included as benefit-recipients and on what grounds” (Hayden 2003b: 360)? For Pottage market-led bioprospecting has led to a situation whereby only the more appropriate recipients receive compensation (Pottage 2006). Looking at the *Hoodia* case and its complex history in the region, suggests that the San were allocated compensation because they were identified as the more appropriate and ready available community. This raises the issue what made the San more appropriate recipients of the *Hoodia* benefits sharing agreement than the Nama or the Damara?

Greene and Rosenthal acknowledge that what constitutes the community is one of the most important challenges that are posed by benefit sharing agreements (Greene 2004; Rosenthal 2006). Rosenthal argues that those parties that can rely on the existence of an established, credible and politically representative system that resembles western-style governance will have a better chance to become part of the benefit sharing partnership (Rosenthal 2006). For the *Hoodia* case, the ꞤKhomani San were definitely better organised than some of the other potential recipients as a result of the land rights case. This might also explain why the ꞤKhomani San in particular were appointed by WIMSA to represent all the San communities during the negotiations with the CSIR about the benefit sharing agreement.

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Pottage argues that law also plays a significant role in this process of privileging (Pottage 2006). As demonstrated with the *Hoodia* case, by turning knowledge and culture into property, their uses and meaning are defined and directed by law, a process that is steered by an international community that influences community members in parroting a western discourse that sits uncomfortably in the daily socio-legal practices of indigenous communities. As argued by Goodale it is inevitable that legal ideas announced and crystallised in western legal fora (such as the CBD, TRIPS, WIPO, etc) will eventually transform local understandings in a profound way (Goodale 2002). After all, developments in technology, communication and other forces of globalisation are providing agency for legal ideas to travel. However, while it would be a romanticised exaggeration to argue that legal ideas only travel in one direction, as it can be illustrated with the *Hoodia* case, dissident voices and narratives – both from San and other indigenous groups – contesting the *Hoodia* benefit sharing agreement remain underrepresented in international fora. In this sense, legal ideas do travel indeed in one way. As the following extract illustrates, rhetorics that define *Hoodia* not as a commodity that needs to be ‘claimed’ as property but as being part of a wider cosmology that connects individuals and communities with the natural world are still, to a large extent, confined to the dunes of the Kalahari:

When you eat *Hoodia* you can feel the supernatural powers coming from above. When you smell *Hoodia* and taste it on your tongue you will feel how it stimulates you, how it controls your hunger, how it gives you power and energy ... When you eat *Hoodia* in the veld [field] you can enjoy the powers of the plant. When I notice some symptoms of cancer, I eat the plant, I talk to the plant; the plant gives me new power and energy and in return I can give all the bad energy back to the plant; the plant knows how to deal with these bad energies ... you cannot experience these powers and energies from *Hoodia* in pills; we have power away for money. Everything we had here is gone because we traded the supernatural powers for money, for simple things ... but *Hoodia* was good for us (‡Khomani San informant).

This quote is symbolic of a wider problem within the context of indigenous peoples’ struggle to gain recognition. While indigenous peoples’ claims to self-determination raise questions about the normative foundation of western notions of political obligation, and theories of property rights and ownership, only specific legalistic ways of arguing tend to have political resonance (Hendrix 2008). The

benefit sharing agreement regime imposes western notions of property and ownership. As the above quote from the ǀKhomani San informants illustrates, western notions of exclusive property rights over natural resources and knowledge fail to take into account the interconnectedness between, on the one hand, individuals and communities, and, on the other hand, humans and the natural world. Despite this omission, indigenous peoples are increasingly engaging with a western language of ownership because it provides them, arguably, with the only powerful leverage for pursuing goals of self-determination and retributive justice for historical wrongs (Hendrix 2008).

Rules and norms that govern culture, knowledge, commodities and properties become standardised and subject to strict legal conditions set out by the more powerful actors. This will restrict the possibility to create and recreate knowledge and culture, which can be highly problematic since knowledge and culture are negotiated, defined and produced through social interactions within and outside communities.

The argument that indigenous peoples should claim property rights over culture on the basis of their identity, assumes that indigenous communities are homogenous and can be represented with one voice. Where society once enforced assimilation on indigenous peoples, it now reinforces re-traditionalisation. With regard to intellectual property claims, this is an example of how indigenous peoples are required to link their relationship with culture and knowledge to concepts of homogenous identity, ethnicity and personhood.

In other words, law continues to influence and shape identity formation and reformulation. Much of the debate on how to protect traditional knowledge is still based on the assumption that there is such a thing as a singular identity in indigenous communities, thus ignoring the facts that, first, indigenous communities often have multiple identities which are susceptible to change and, second, that identity is shaped in a process of intervention and response. If cultural property is considered as a kind of communal right, a bounded body that can claim communal rights must be invented. A new social identity has to be created, defined by its own perceptions of community and based on the rights that it perceives as being part of its common heritage. As such, declaring collective rights over knowledge on the basis that it is part of a distinct culture has become a powerful construct in the politics of identity creation.

For example, whereas Erica-Irene Daes, former Special Rapporteur for the United Nations Working Group on Indigenous Populations (UNWGIP), argues that

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heritage is a communal right associated with a particular family, clan, tribe or kinship group, one of the most respected anthropologists of our time, Marilyn Strathern, argues that the notion of communal rights does not do justice to the complex and socially diverse framework of property rights in the non-Western communities she has researched. Strathern argues that if cultural property is considered as a kind of communal right, a bounded body that can claim communal rights must be invented. A new social entity has to be created, defined by its own perception of 'community' and based on the rights that it perceives as being part of its common heritage (Strathern 2004b). As such, declaring collective rights over knowledge on the basis that it is part of a distinct culture has become a powerful construct in the politics of identity creation (Kalinoe 2004), as illustrated with the *Hoodia* case. While Strathern argues that in principle there is nothing wrong with this because new social entities have come into being throughout history, she reflects that whenever people claim rights over resources, it is never as united a people as Daes would like us to believe.

In other words, allocating property rights over culture on the basis of ethnicity needs to be questioned. In the context of traditional knowledge, claiming property rights over knowledge and culture on the basis of ethnicity means fabricating and highlighting the otherness and pristine uniqueness of one's own identity. In order to achieve control over resources and knowledge, indigenous peoples require social mobility and emancipation. In most societies it is highly contestable that indigenous peoples will be able to achieve this improved social status by highlighting their ethnicity, and thus further distancing themselves from other groups in that society. This practice was played out directly in the *Hoodia* case, demonstrated by the disagreements between Namibia, Botswana and South Africa about the extent to which the San should be recognised as the original holders of traditional knowledge about *Hoodia* and whether or not the San should be the only beneficiaries of benefit sharing agreements (Wynberg 2009).

To summarise, (property) law reinforces an essentialised view of culture and identity and fails to accommodate alternative and more diverse notions of culture which may be experienced by indigenous peoples. Therefore, indigenous peoples need a more flexible framework that is based on quotidian social practices for protecting their traditional knowledge. Legal pluralism can create the theoretical platform from which eventually a new praxis of protecting traditional knowledge can emerge. Property rights are embedded in a wider set of social relations and are contested in a wide variety of different legal systems that can be locally, religiously, territorially or even ethnically defined (although the last – as shown with the *Hoodia* case - is problematic). Embedding the debate about property

rights in a legal pluralist framework adds a new dimension to the debate and shifts the area of attention towards the question whose laws and whose decisions prevail – is it customary law, state law, religious law, international law or a combination thereof that will decide who has what rights over which resource and/or knowledge and how to share the benefits in case of a bioprospecting agreement?

## Legal Pluralism

Attention has recently turned to the *sui generis* laws of indigenous peoples as the normative foundation for developing legal regimes to protect indigenous peoples' knowledge and culture (Riley 2005). Despite some recent evidence that tribal law can influence dominant legal systems, *sui generis* laws of indigenous peoples are limited because they remain unenforceable outside their community. While there seems to be an agreement that importing a western design of intellectual property rights is not going to provide the answer to protect indigenous peoples' cultural heritage from further appropriation, the debate on how to inject tribal law (i.e. *sui generis* indigenous law) into mainstream law remains stuck and lacks theoretical vision. While I acknowledge that advancing tribal law is a tremendous challenge, I would like to argue that it is in the interest of indigenous peoples that intellectual property rights scholars include some much needed theoretical framing in the debate about traditional knowledge and intellectual property rights. I propose that the concept of legal pluralism can provide not only the necessary theoretical platform to further the debate but can also advance a new praxis of lawmaking that facilitates bridge building between western and non-western practices of lawmaking thus moving beyond opposing dichotomies.

As illustrated by the *Hoodia* case, the issue of protecting traditional knowledge cannot escape the context of a tiered system of laws – international, national and tribal. As such the issue of bioprospecting is a textbook example of a legal problem in a world of hybrid legal spaces where a single problem, act or actor is regulated by multiple legal or quasi-legal regimes (Berman 2007; Santos 2002). As Berman argues normative conflicts among overlapping legal systems is increasingly unavoidable and legal pluralism can be used as a source of alternative ideas or as a site to contest hierarchical practices of lawmaking:

although people may never reach agreements on norms, they may at least acquiesce in procedural mechanisms, institutions, or practices that take hybridity seriously, rather than ignoring it

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through assertions of territorially based power or dissolving it through universalist imperatives (Berman 2007: 1164).

This is a poignant issue that can unlock the debate about intellectual property rights and traditional knowledge. For Berman legal pluralism offers a framework through which alternative forms of ordering can be examined; it provides a critical lens through which the limits of the ideological power of formal and positivist legal pronouncements can be discovered. Berman encourages international law scholars to treat the multiple sites of normative authority in the global legal system as a set of interactions, not as problems. I would like to extend this invitation to intellectual property rights scholars. Embracing pluralism allows us to move beyond an essentialist framing of law in general and property in particular.

The *Hoodia* case study highlights that the more elite San have internalised the discourse of bioprospecting and claim exclusive property rights over natural resources and knowledge. However, as observed in the field and exemplified in the above quote, not all San agree with this framing of *Hoodia* as property. This suggests that a broader analytical concept must be applied in order to understand and contextualise the concept of property in non-western societies (Hann 1998; Hirsch 2002). One way of extending the scope of analysis is to include the institutional and cultural context within which property codes operate. In order to unravel these codes it is useful to turn to narratives and stories as a source of legal knowledge (Brooks and Gewirtz 1996). Some of the San's stories can give insights into the social relations that guide property rights and allow for a contextualised and grounded understanding of property rights and benefit sharing in a particular cultural setting.

San narratives that can reveal some of the San's customs with regard to property and benefit sharing are stories that can be associated with certain animals. In particular, stories that feature Hyenas, Jackals and Lions focus on the disputes over food between the three animals. Hewitt recalls the story told by the !Xam about a Hyena that kills a quagga and asks the Jackal to fetch his wife for him so that she too can eat. The Jackal points out that the Hyena's wife will not believe a Jackal and suggests instead that the Hyena fetches his wife himself. Meanwhile, the Jackal will light a fire and build a house of sticks where the Hyena and all his family can come to eat. The Hyena agrees and sets off to fetch his family. The Jackal builds the fire at the foot of a low cliff and the hut on the cliff above. He places stones in the fire and then sits above the cliff with his own wife. He asks his wife to make a long rope out of mice entrails and when the Hyena arrives with his family at the foot of the cliff, asking how he is to get to the food at the top of the

cliff, the Jackal lowers the fragile rope down to the Hyena. The Hyena falls into the fire and the Jackal and his family then consume the quagga meat themselves. (Hewitt 1986.)

This story about the sharing of food gives insight into the basic values that order San life. Distribution of food was the cornerstone of San communities and the significance of sharing is highlighted in these stories. In societies like that of the San which can be arduous, ownership of resources of plant foods and waterholes and the utilisation of them are organised through band affiliation and guided through customs such as meat-sharing (Marshall 1998). What these stories so aptly show is that for the San sharing is not only an economic principle; the strong ethics of sharing food are part of a wider social network that can only exist when strong ethics guide the socio-economic relationship in the community (Kent 1993). Communities like the San which are characterised as being egalitarian can only maintain an ambiance of egalitarianism if activities that can create unequal relations - such as hunting - can be regulated through strong social ethics such as food sharing.

The relevance of the story about the Jackal and the Hyena within the context of legal pluralism and benefit sharing agreements, is to underline that benefit sharing agreements have created a fetishism of exclusive property rights. Benefit sharing agreements are politicised in the sense that they are being “inscribed with new kinds of obligations and opportunities, new kinds of potential claims and exclusions” (Hayden 2003a: 29). However, from a legal pluralist perspective, this is only one side of the debate. As some ꞆKhomani San have argued, framing knowledge as exclusive property needs to be contested, and, as suggested by the older narratives of the San, sharing and reciprocity have been very important ethical concepts in the social organisation of the San. While benefit sharing agreements may give the impression that they create a favourable environment for sharing, I agree with Hayden that the ethics behind these agreements produce exclusions, costs and representational violences of their own (Hayden 2003a: 229). The San’s narratives about the ethics of sharing and reciprocity are inspirational in their ‘alternative’ way of framing benefit-sharing agreements. The *Hoodia* benefit-sharing agreement is an example of indigenous entrepreneurship. It resonates with Greene’s conclusion that treating culture as property is a strategy that indigenous peoples adopt from their western counterparts and transform into a form of politically informed economic activity (Greene 2004: 223). However, not all the San are embracing this strategy to use their group identity as a commodity to ‘privatise’ their knowledge and culture. Traditional and contemporary narratives

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provide an alternative legal framing of property; one that is based on reciprocity and sharing and resists using culture as a propertised commodity.

### Conclusion

The challenge emerging from this paper is to develop national and international traditional knowledge legislation that captures and is consistent with and complementary to contextualised legal practices of indigenous peoples. While current *sui generis* legislation has focused on regulating access and use of traditional knowledge by recognising collective property rights over natural resources and associated traditional knowledge, it is argued in this paper that these regulations are inappropriate because they are embedded in the dominant ideology of a Euro-American legal institutional framework. Principles of equity and a fair distribution of rights and benefits need to be based on a multiplicity of legal regimes, values and processes. While it is acknowledged that legal institutions, like the CBD, have created a more favourable legal environment for indigenous peoples, as argued in this paper, legal regimes continue to function as barriers hindering indigenous peoples in their empowerment and achievement of self-determination. The translation of local life and daily practices of indigenous peoples' legal landscape into formal legal categories has led to policies that dichotomise, simplify and homogenise the complexities of the socio-legal life as experienced by indigenous peoples. A *sui generis* approach to protecting traditional knowledge must focus on discovering the localised practices of law in the form of storytelling. In order to find a 'solution' to the problem of protecting traditional knowledge that works both in a local and international context, it is important that scholars, development workers, lawyers, politicians, NGOs and international institutions come to terms with the fact that indigenous peoples can be at once traditional, modern and postmodern. Engaging with these multiple 'identities' of indigenous peoples seems an impossible task in a formal western legal framework because, ultimately, it is less flexible and fluid than informal law. For law to work it has to be living law, and in order for it to find the space to 'live', it will have to find more flexibility in its practice; this highlights the need to inject the concept of legal pluralism in the debate. To give the final word to the San:

We have our own laws, why do we have to be ruled by western law and regulations? (Petrus Vaalbooi, Andriesvale, South Africa, 3 October 2004.)

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