

Between Law and Lore: The Tragedy of Traditional Knowledge

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Abstract

The commodification of traditional knowledge through intellectual property rights is a topic area that attracts strong and highly divergent views. On the one hand there are campaigners and academics who reject the notion of commercialisation of traditional plant knowledge as 'biopiracy'. Many other researchers treat the concepts embedded in the Trade-related aspects of Intellectual Property Rights (TRIPS) and the Convention of Biological Diversity (CBD) as given and focus instead on the ways in which these existing international agreements may be used to ensure more equitable benefit sharing and a better protection of indigenous knowledge.

This dissertation seeks to open up this polarised debate in two different ways. Firstly, it seeks to unpack underlying concepts such as property, indigeneity, commodification, law and local knowledge by engaging with different theoretical frameworks that explicitly examine these concepts. Secondly, much of the debate is based on 'ideal models' and essentialised representations of indigenous peoples. There is a need to inject more empirical evidence in the debate by exploring the meaning(s) of these concepts for indigenous groups and the enactment of these concepts by indigenous peoples 'on the ground'.

Observations from fieldwork with different San communities in Southern Africa illustrate how, dependent on local social, economic and political conditions, individual and group reflections and positions can vary with regard to intellectual property rights over their traditional knowledge. In order to further the debate about traditional knowledge and the policies designed to use and protect it, stronger contextualisation is required to transcend essentialised thinking by exploring how power imbalances, social relations, politics of identity and issues of scale may shape the conditionalities for the commodification of traditional knowledge.

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I dedicate this dissertation to all of those who willingly or unwillingly, knowingly or unknowingly have honoured me with their company on this rollercoaster ride.

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Chapter 1 - Introduction

For more than five hundred years, the envoys of civilization sailed through storms and hacked through jungles, startling in turn one tribe after another of long-lost human cousins. For an instant, before the inevitable breaking of faith, the two groups would face each other, staring - as innocent, both of them, as children, and blameless as if the world had been born afresh. To live such a moment seems, when we think of it now, to have been one of the most profound experiences that our planet in its vanished immensity once offered. But each time the moment repeated itself on each fresh beach, there was one less island to be found, one less chance to start everything anew. It began to repeat itself less and less often, until there came a time, maybe a century ago, when there were only a few such places left, only a few doors still unopened – Adam Goodheart (2000), The Last Island of the Savages

1 Setting the Scene

With every new year of the 21st Century, the likelihood that any new ‘doors still unopened’ will be found on this planet grows fainter still. However, there are still a few known doors that have not yet been fully opened, that have remained tantalisingly ajar. One of them is the North Sentinel Island¹; although its existence has been known for centuries, its inhabitants – anthropologists call them the Sentinelese – have had virtually no contact with the rest of humanity. Goodheart (2000) argues that it is not certain whether, outside the Andaman Island, there exists any community that has had as little contact with ‘civilisation’ as the Sentinelese. According to the anthropology department of the Indian government there is none, a view shared by several American anthropologists. After more than 20 years of unsuccessful attempts, Pandit, an anthropologist working for the Indian government, made the first contact with the Sentinelese in 1991, but the Indian government had decided to stop the gift dropping-missions in 1996. In all these years, anthropologists have never progressed much further than handing out coconuts to the Sentinelese as they stood on the beach or in the surf. Sometimes the interaction of giving gifts was friendly, but several times the Sentinelese have aimed their arrows at the contact party.

¹ The North Sentinel Island is the western outlier in the Andaman archipelago which belongs to India and stretches between Burma and Sumatra (Goodheart, 2000).

Now, just imagine that through remote observations, scientists have noticed that the Sentinelese are using a particular plant, endemic to North Sentinel Island, for what appear to be medicinal purposes. A research team working for a pharmaceutical company decides to mount an expedition. The researchers land in the middle of the night and, whilst making sure to act without noise or leave any unnecessary traces of their visit, collect a few samples of this plant before returning to their boat without encountering the Sentinelese. The researchers take the plant back home and start their research to extract its medicinal properties. After 5 years of very expensive research in one of the world's best laboratories, there is finally a breakthrough: the team of researchers can extract the active ingredient, a unique molecule. In order to protect their research findings, the pharmaceutical company for whom the researchers work applies for a patent. After the patent office has established that the research findings are 'novel', 'useful' and 'non-obvious', the patent is awarded. During those 5 years that the company was doing tests, they never contacted the Sentinelese to inform them or to ask them permission for carrying out the research and for bringing a commercial drug on the market that is derived from the Sentinelese's use of the medicinal plant.

This fictional account describes an act of 'bioprospecting' which seems to cause no negative impacts on the Sentinelese, and which may yield a medicine to benefit millions of other people around the globe. Does that mean that the act is morally justified?

In neutral terms, bioprospecting can be defined as the exploration of biological resources in the hope of finding commercially valuable compounds for, amongst others, pharmaceutical development. As Takeshita (2001) demonstrates, this neutral definition is used by the proponents of bioprospecting to demonstrate the positive impacts of bioprospecting² (see e.g. Brush, 1999; Hayden, 2003b). They argue that bioprospecting encourages the discovery of new drugs, it stimulates economic development in countries that are rich in natural resources and poor in economic resources and it promotes the conservation of biodiversity. However, while

² Note that most authors who highlight the positive sides of bioprospecting also stress that the positive effects can only be achieved when they are accompanied by critical prerequisites for the realisation of the benefits of bioprospecting.

proponents portray bioprospecting as a 'win-win-win' project, the practice has also attracted some fierce criticism under the pejorative banner of 'biopiracy'. One of the most 'vigorous' opponents of bioprospecting is Shiva (1997; 2001) for whom the process of biopiracy relates to the plunder of natural resources and related knowledge of the developing world, and in particular of indigenous peoples, by powerful industrial countries (e.g. Martínez Alier, 2000 shares Shiva's strong opinion about biopiracy; for a more contextualised debate on biopiracy, see e.g. Stenton, 2004; Mgbeoji, 2006)³.

Besides Shiva, other scholars have also aired their concerns about bioprospecting. For example, there is a growing concern that during this process the intellectual property rights of indigenous peoples have rarely been respected. Indigenous knowledge has often been collected, recorded and placed in the public domain without the prior informed consent⁴ of indigenous peoples (Dutfield, 2002a). Despite the fact that indigenous knowledge is recognised as a valuable source of knowledge, it is still considered to be part of the public domain, freely available for use by anybody (Sahai, 2003; Boyle, 2003). Furthermore, bioprospecting has also been criticised because traditional knowledge is commercially exploited on a large scale and only a fraction of the benefits flow back to the holders of the traditional knowledge (Bellman, Dutfield *et al.*, 2003; Hayden, 2003a). As a result, there is a growing call for traditional knowledge to be protected through international legal measures (Greaves, 1994; Simpson and Jackson, 1998; Weeraworawit, 2003). This gives rise to an obvious question: can intellectual property rights provide such protection?

There is an extensive literature about the appropriateness of intellectual property rights as a tool to protect the traditional knowledge of indigenous peoples (e.g. Posey and Dutfield, 1996; 1998; Dove, 1996; Norchi, 2000). The concept and legal definition of intellectual property rights have been criticised as inadequate and

³ For an overview of the literature on bioprospecting and biopiracy see e.g. Svarstad (2002); Hamilton, (2006).

⁴ Prior informed consent is not clearly defined, but is a concept that is recognised in international law. Posey and Dutfield propose the following definition: "*prior informed consent is consent to an activity that is given after receiving full disclosure regarding the reasons for the activity, the specific procedures the activity would entail, the potential risks involved, and the full implications that can realistically be foreseen. Prior informed consent implies the right to stop the activity from proceeding, and for it to be halted if it is already underway*" (1996: 35).

inappropriate for the protection of traditional knowledge for the following reasons: intellectual property rights recognise individual and not collective rights; they require a specific act of invention; they stimulate commercialisation; they recognise only market values; they are subject to economic powers and manipulation; they are difficult to monitor and enforce and they are expensive, complicated and time consuming (Posey, 2002a). Current intellectual property laws are also perceived as posing a threat not only to the cultural integrity and cultural rights of indigenous peoples, but also to their territorial and resource rights (Posey and Dutfield, 1996; Simpson, 1997; Simpson and Jackson, 1998; Hayden, 2003b; Greene, 2002; 2004; Tucker, 2004; Berman, 2004; Riley, 2004b; Solomon, 2004; Gibson, 2005). Therefore, it is widely believed that conventional intellectual property rights in the current form should not be applied to traditional knowledge (Pretorius, 2002).

In short, much of the current discourse about bioprospecting emphasises the incompatibility between traditional knowledge and intellectual property rights (Hansen & Van Fleet, 2003). The fact that Western companies are using, adapting or directly claiming ownership over indigenous knowledge without acknowledgement or compensation for the indigenous communities that originally developed that knowledge has, so it is argued in the mainstream literature, a negative effect on indigenous communities across the world. It seems impossible to commodify and commercialise indigenous knowledge without posing a serious threat to, or perhaps even destroying, the social structures that have sustained this knowledge on which the livelihoods of indigenous peoples depend (Posey, 1990; Mulligan, 1999). Western companies that are exploiting the traditional knowledge of indigenous peoples contribute to the increasing pressure on indigenous societies to survive. When the appropriation of natural resources and the related knowledge by powerful industrial countries and companies is labelled as a neo-colonial form of exploitation of native peoples (Pretorius, 2002), the fundamental question whether the practice of bioprospecting is morally justifiable becomes even more pertinent.

However, answering this question can be more problematic and complex than is suggested in much of the literature. The reservations that have been aired against bioprospecting and intellectual property rights are comparatively well-defined moral issues in the fictitious Sentinelese example; the plant grows exclusively on

Sentinelese land; knowledge of its use was exclusively developed by and owned by the Sentinelese; who the Sentinelese are, can be easily defined down to the last individual; the remote observations and the bioprospecting took place without any form of consent or even informal contacts. But then this fictional example is unique in its clarity. Issues that appear 'black and white' against the background of the history of the Sentinelese might not be so straightforward when applied in a different and more realistic context. From an ethical point of view, critiques about the dangers of bioprospecting and commodification of traditional knowledge are certainly valuable, but it would be wrong to transfer these more hypothetical critiques to a specific case, without seeking some 'ground truth', notably by seeking to understand the local context and the views of the people whose traditional knowledge is being commercialised.

In this sense, 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 should 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' generalisations⁵ that are currently made to support or oppose intellectual property rights in the context of appropriating traditional knowledge (Strathern, 2000; Greene, 2004). 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, 2004a) and solutions can only be formulated after rigorous evaluations of actual cases (Greene, 2004). Finally, when researching new protection mechanisms, it is important to recognise that indigenous peoples do not speak with one voice. The current literature does not allow for a

⁵ As mentioned earlier in the introduction, 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.

diversity in indigenous peoples' values and needs. Neither does it acknowledge the threats of conflicts within indigenous communities over 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 (Castree, 2003).

2 *Aims*

The need to inject more empirical evidence into the debate about bioprospecting and how to protect traditional knowledge, has been addressed in this thesis by exploring an actual case study. The focus is on the San of Southern Africa, who have recently entered into a benefit-sharing agreement for the commercialisation of the Hoodia, a plant traditionally used for its medicinal properties. The San peoples of the Kalahari desert in Southern Africa have chewed the Hoodia for thousands of years on hunting trips as a thirst quencher and an appetite suppressant. However, a patent was awarded to South Africa's Council for Scientific and Industrial Research (CSIR) in 1998 on these qualities without their knowledge. After campaigning for the rights of the San peoples, a deal was struck so that the San peoples could benefit from commercialisation of the slimming aid 'P57' (the active ingredient) which was being developed. This benefit sharing deal has now been praised by some as a major breakthrough and presented as an example of best practice for indigenous peoples worldwide.

The case study allows a closer look, in a local context, at some of the main concerns that have been raised in the literature about bioprospecting and the legal status of traditional knowledge. As stated above, these include amongst others: (a) the impact of intellectual property rights on the societal structure and organisation of indigenous peoples and their livelihood strategies; (b) the effectiveness of the Convention on Biological Diversity (CBD) which, together with the Trade Related Intellectual Property Rights Agreement⁶ (TRIPs), is one of the main agreements that governs the control over biodiversity, traditional knowledge and intellectual property rights and

⁶ For more information on the debate about TRIPS, intellectual property rights and traditional knowledge, see e.g. McGrath (1996); Correa (2000); Anuradha (2001); Zerbe (2002); Bellmann *et al.* (2003); Dutfield (2002a).

(c) the assessment of the instruments, such as benefit sharing agreements, that must safeguard, protect and balance traditional knowledge.

Furthermore, this case study also makes it possible to examine the issues of traditional knowledge and intellectual property rights in a wider context so particular attention can be paid to, for example, the status of indigenous peoples within the state; the level of assimilation; the economic means of indigenous peoples; the relationship between indigenous peoples and other cultures and societies; the respect by the state and other ethnic groups for indigenous peoples' traditions and customs. In order to fully engage with this case study, fieldwork was carried out in two consecutive years (for more details on the fieldwork and methodology used for the fieldwork see Appendix 1 and 2).

2.1 Original aims of the Fieldwork

The aims of the fieldwork were twofold⁷: first, to map the San's attitude towards the Hoodia benefit sharing agreement and second, to contextualise the current debate about bioprospecting and intellectual property rights and specifically the criticism against it by engaging more closely with the main actors on the ground, viz. indigenous peoples themselves.

With regard to the first aim, the most important task was to evaluate the usefulness and fairness of the concepts of benefit sharing and participation rights as the mechanisms set out by the CBD to safeguard the traditional knowledge of indigenous peoples and consequently the improvement of their participation rights. Although the merits and problems of bioprospecting contracts and benefit sharing agreements have been explored extensively in the literature (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), the scope of analysis of this case study and fieldwork differs from most of the other evaluations in two ways. First, the focus is not so much on the main stakeholders that have been involved in the process and

⁷ While these are the formal aims, the decision to undertake fieldwork was also supported by an ethical concern, raised by some in the literature, about the appropriateness of writing about people without attempting to seek and to hear their own views and opinions.

negotiations of benefit sharing agreements, but mainly on the people on the ground who have not been closely involved in the negotiations. Second, the fieldwork allowed a contextualisation of the notions of 'fair' and 'equitable' (the two cornerstones of the benefit sharing arrangements in the CBD) in a wider discourse of justice and from an indigenous point of view.

With regard to the second aim, the main focus of the research was to contextualise the juxtaposition between traditional and Western value systems. It is argued in most of the critical literature that, in both legal and ethical terms, the issue of bioprospecting is embedded in the Western paradigm of individual property rights through intellectual property rights. Therefore, intellectual property rights are criticised for being exploitative because they ascribe concepts of ownership and property rights only on an individual basis. According to most of the literature on intellectual property rights and traditional knowledge, the property rights and ownership concepts of indigenous peoples are community-based. As such, the tension between individual property rights and community-based property rights must be confronted and placed in context. With these so-called diverging property systems in mind, the first fieldwork served to develop a clearer picture through observation of how indigenous peoples' community-based property system work on the ground and in what sense it differs from an individualised Western property system.

Intermezzo - When reality hits you as a fly on a windscreen

I can still remember going to the cinema with my friends to watch this really peculiar film about a coca cola bottle and a tribe deep down in the Kalahari. We were in our early teens and could not make any sense out of this film, I am not entirely sure, but I think we left the cinema before the end of the film. Little did I know that more than 20 years later, I was actually going to meet the San on their own turf. Even more bizarre was the fact that the theme of the film, viz. how a coca cola bottle – the symbol of our global capitalist system, including its trademark – brings nothing but bad luck to the tribe, was going to be the topic of my PhD.

In anticipation of the fieldwork, I read many books on the San, including the almost mythical stories of Laurens van der Post, but some of the more academic anthropological works were beyond my understanding. Some of these, at that point in

my research, rather abstract discussions about the identity of the San in the so-called 'Kalahari debate' were, just like that film many years ago, completely lost on me. The more I read about the San, the more mythical they became. Obviously, I also engaged with the more specialised literature on intellectual property rights and traditional knowledge. It surprised me that so many of the reoccurring debates in anthropology about identity, property, culture and so forth were not prominently explored in the intellectual property rights literature. I felt rather lost between these two bodies of expertise. Who were these people, what makes them so special, are they special? To confuse me even more, fellow students questioned me whether my research was not going to disturb these people? Would my presence in their communities not upset them? I wondered whether I was going to be like that coca cola bottle?

I finally boarded the plane for Windhoek. I spent two weeks in Windhoek, mostly in the office of the Working Group of Indigenous Minorities in Southern Africa (WIMSA), going through the last preparations for the fieldwork. On the last day before I embarked on the fieldwork, I met unexpectedly what appeared later to be my key informants in the first community I was going to visit. Making the most of this encounter, I made arrangements with them, I informed them that I was planning to visit some communities and was basically testing the waters. So far so good, they invited me to their community and were going to inform the chief of my arrival. We made provisional plans that I was going to arrive on the Saturday. The journey took longer than I anticipated and instead of getting there on the Saturday, I finally got there on the Sunday afternoon. Now, judging from what I had been reading about indigenous peoples' ceremonies and traditions, I expected a different, non-Western welcome. I knew I had to ask permission to the chief for my stay in the community, and I had already acquainted myself with the African handshake, but maybe there was something else that I was soon going to find out? Slightly nervous and shy I climbed out of the car, bracing myself for a quick lesson in traditional greetings, but nothing of the sort. Frans spoke the memorable words: "you are late, where were you, what took you so long?", exactly the same words I hear at home, I am always late. I felt welcome.

2.2 Personal Reflections about the Experience in the Field

The above anecdote illustrates some of the challenges that can be encountered when studying other cultures. While it is certainly important to acknowledge the cultural and social diversity when studying indigenous issues, at the same time it is also important not to overemphasise this difference through untested assumptions. The fieldwork proved to be invaluable in testing my existing assumptions⁸ and bringing to the fore new questions.

While the criticism that is aired in the literature about intellectual property rights and bioprospecting might make sense in either an abstract and theoretical framework, or within the context of the North Sentinel Island, the fieldwork demonstrated that issues which may appear 'black and white' during a desk-based study become much more shaded when encountered in a specific context. The suggestion is made in the literature that indigenous peoples are not only very protective about their knowledge, but that the identity of indigenous peoples' is still firmly rooted in pristine cultural traditions. The commodification of traditional knowledge is mostly presented as an act that (a) indigenous peoples will resist or (b) will be forced upon them and as a result will destroy the cultures that sustain this knowledge. The fieldwork was revealing in the sense that it showed that the literature about traditional knowledge and intellectual property rights is still steeped in the tradition of creating myths when dealing with other cultures and societies. Although the 'noble savage' has long died out in the field, in the literature the 'noble savage' is very much alive.

My fieldwork experience highlighted how the controversies over the commodification and commercialisation of traditional knowledge in the literature tend to project indigenous communities as bounded and discrete whilst simultaneously ignoring the changing environment and circumstances of indigenous peoples. While it was originally anticipated that the fieldwork could give some contextualised guidance and insights into some of the protection mechanisms suggested in the literature (such as community-based property rights and customary-based property rights), in reality it turned out that some of these concepts were based on assumptions that could not be

⁸ Based on the literature review I did prior to the fieldwork (Martin and Vermeylen, 2005) but undoubtedly also coloured by my own cultural framings.

easily justified through field observations. One of the driving forces behind the debates about traditional knowledge is the belief that not only indigenous peoples themselves, but also their knowledge and property system are entirely the opposite of Euro-American knowledge and property systems. While some observations in the field confirmed some differences between traditional knowledge and scientific knowledge or individual and community-based property rights, the difference was not as rigid and sharp as it is sometimes suggested in the literature. Furthermore, on occasions the difference between the San individuals and communities seemed as big as the difference between the San and Euro-American individuals or peoples. The experiences in the field made me realise that the literature about traditional knowledge and intellectual property rights which I had read in the first year (i.e. before the fieldwork) was not doing justice to the variety of ideas and perceptions that can (in the case of the San) be encountered on the ground. The fieldwork did not yield the ultimate 'one' truth about the San, who they are, what they want and how they perceive the world; and yet, that is what the literature tries to convey: There is an insistence in the debate about traditional knowledge that indigenous peoples must represent a coherent and authentic voice; it is portrayed as their sole and maybe last weapon against the advance of Westernisation.

In short, the fieldwork brought up the need to question the source of these persistent assumptions and portrayals of 'coherent communities', 'community-based property rights', 'traditional lifestyles' and 'aversion to commercialising traditional knowledge systems'. In order to trace the origins of these assumptions, the focus of attention needed to shift. In order to fully understand 'the tragedy of traditional knowledge', other angles of enquiry had to be explored. While the aims of the fieldwork did not change significantly, the overall aims of my thesis did change markedly as a result of (reflections on) my fieldwork. In other words, the fieldwork experience strongly informed the direction of my thesis but as a consequence the outcomes of the fieldwork played a smaller direct part in the contents of my thesis.

2.3 Shifting Aims of the Thesis

The fieldwork experience led to a quest for a different angle on the debate, an angle that had more relevance to the situation on the ground. This new angle was eventually

found through, and inspired by, the work of Coombe (1998b). In her acclaimed work *the cultural life of intellectual properties*, Coombe argues that much of the current debate about intellectual property rights tends to be too abstract and has almost been researched in a socio-economic and political vacuum. Especially, the discussion about the expansion of intellectual property rights into new areas (such as traditional knowledge and cultural heritage) must engage with a wider debate that goes further than either justifying or criticising intellectual property rights on the basis of Western philosophical traditions or utilitarian rationales about property rights. These mainstream moral and economic arguments have also been used to comment upon the practice of bioprospecting and have often led to discussions mired in polemics. Coombe suggests that the controversies over intellectual property rights can be better understood and refined when intellectual property rights are examined from a wider angle. The same can also be argued for the debate about traditional knowledge.

There is a need to unpack the underlying concepts such as traditional knowledge, commodification, property and indigeneity. Although these notions are focal points in the debate over whether or not traditional knowledge should be commercialised and whether or not traditional knowledge should be protected through intellectual property rights, most of the time these concepts (traditional knowledge, commodification, property and indigeneity) have only been partially defined. For example, traditional knowledge is (mostly) defined as being the opposite of scientific knowledge; property is defined as being either individually-based or community-based, objects are either gifts or commodities and being indigenous is based on having specific characteristics which are outside Euro-American norms.

It is argued in this thesis that in order to further the debate about traditional knowledge and how it can be used and protected, the first step is to define traditional knowledge, commodification, property and indigeneity in a more refined way. This requires an engagement with different theoretical frameworks across several disciplines that explicitly examine these concepts. Discussing, for example, issues of identity, property rights, knowledge and commodification are core activities in disciplines such as anthropology, political theory, cultural studies and so forth. In contrast to the literature that deals specifically with the problems of traditional knowledge and intellectual property rights, disciplines such as anthropology have

learned to avoid polarisations and are trying to move away from ‘black and white’ discussions. Instead, they focus more on discovering the nuances that will help to built bridges between what seem at first to be two opposing worlds. A similar approach will be followed in this thesis. The debate about traditional knowledge and intellectual property rights will be revisited and deconstructed from new angles. Persistent dichotomies and assumptions will be analysed; where do they come from, can they be avoided and how?

This investigation, i.e. the deconstruction of the assumptions that have been made in the current debate about bioprospecting, traditional knowledge and intellectual property rights, constitute **the first aim of the thesis**. Once these have been unpacked, the question about the appropriateness of the tools to protect traditional knowledge can be revisited; **the second aim of the thesis** is to examine to what extent intellectual property rights are an appropriate tool to protect traditional knowledge. **The third and final aim of the thesis** is to contextualise the current debate by focusing more closely on the case study of the San.

At this point, it is useful to delineate the boundaries of this research. It is argued in this thesis that bioprospecting, commodification and commercialisation of traditional knowledge cannot be rejected or accepted on the basis of a polarised debate. Ideally, as Castree argues “[c]hanging the world entails understanding the world from within not from the dizzy heights of abstract theory and ethical oppositionality” (2001: 52). This would require, according to Castree, examining: “*what kind of bioprospecting, for what kind of benefits and in which context*” (2003: 52)? While this sort of study might make sense in an ‘ideal’ setting such as the one portrayed in the fictional Sentinelese story, in the context of the San there is a danger that this sort of enquiry would lead to a continuation of portraying the issues in a simplified and consequently distorted manner. As observed during the fieldwork, the San cannot be simply represented by one voice; opinions differ from community to community and even within one community people have different opinions depending on their individual lifestory and experience. In this sense, the San’s opinion about bioprospecting and the management and use of traditional knowledge are more personal and anecdotal and ‘hard’ evidence of a community’s united perception is much harder to find. While it is feasible to inject empirical evidence into the debate

about the process of bioprospecting, as has been done in this thesis with the case study of the Hoodia benefit sharing agreement, discussing the higher moral grounds of bioprospecting and intellectual property rights on the basis of empirical research has appeared more difficult than was originally anticipated due to the wide diversity of communities and opinions and the complexity of the topic matter characterised by contradictions, conflicts of interests, doubts, changing motivations, circumstances and needs and so forth. Trying to represent this diversity in one coherent opinion would not do justice to the findings on the ground and could potentially result in making the same mistakes as the current debate, viz. reducing the debate to polarised opinions. While it might be feasible and appropriate to represent these different opinions when dealing with a small and relatively bounded and coherent community (e.g. the Sentinelese or perhaps some of the communities in the Amazon might fulfil these requirements) within the context of the San this task is very difficult; there are more than 100 000 San living across (mainly) Namibia, Botswana, South Africa and Angola.

As a result, the observations that have been collected during the fieldwork have been used in three distinct ways. In the first place, the observations made during the fieldwork gave insights to what extent the current debate has been based on ideal situations or assumptions (something that can be called the ‘North Sentinel Island syndrome’). Second, while it is acknowledged that there is a need for injecting empirical evidence into the theoretical debate about bioprospecting and intellectual property rights, the fieldwork has also shown that this must be done in a careful and self-critical manner. Therefore, the data that have been collected about the San’s opinion about the use and management of traditional knowledge has only been used as an illustration to the theoretical debate. This is also reflected in the way the fieldwork data and observations are presented in this thesis, i.e. mainly through separate narratives in ‘intermezzo’. These intermezzi are used, where appropriate, to exemplify some of the theoretical findings with observations, quotes and anecdotes from the field (for more details on this approach see Appendix 1). In addition, the decision to use the fieldwork data as anecdotal and to represent it as a separate story line has also been influenced by the belief that it is more appropriate to represent the findings on an individual level and the belief that the opinion of an individual must be represented in its original format. Therefore, stories that were told by the San, or the researcher’s

own observation will be included as 'raw material' in the intermezzi. Furthermore, while this sort of research can be seen as theoretical and abstract, the intermezzi are included as a reminder that the research has also a direct bearing on what is, for some people, a very harsh reality. Finally, the observations and data of the fieldwork have also been used in a more direct way for analysing the Hoodia benefit sharing case study because this part of the thesis concerns the evaluation of a process against the background of the CBD requirements, which justifies using the fieldwork data in a more direct way.

3 *Structure of the Thesis*

Given the fact that the fieldwork observations and data have not been used to illustrate the argument in this thesis rather than as central evidence, it is also decided that, following the same logic, the description of the methodology that was used during the fieldwork should not be part of the main body of the thesis; the fieldwork methodology is described in detail in Appendix 1.

The dissertation consists of three distinct parts. The first part deals with the aim to deconstruct the assumptions that have been made in the current debate about bioprospecting, traditional knowledge and intellectual property rights. Chapter 2 sets out to define traditional knowledge and demonstrates that traditional knowledge should not be defined as something that is opposed to scientific knowledge. Instead, it is argued in this chapter that more attention should be given to finding areas of compatibility between the two knowledge systems. Chapter 3 reflects on the commodification debate of traditional knowledge and furthers this debate by approaching this topic from a new angle. It is argued in this chapter that examining the commodification of traditional knowledge from an anthropological perspective can help to deconstruct the current polemics about commodification and show that commodification can have different meanings and can serve different purposes depending on the lifestory of things or knowledge. Chapter 4 deals with one of the most persistent myths in the debate about traditional knowledge and intellectual property rights. This chapter will assess the portrayed dualism between individual and community-based property rights. It is argued in this chapter that examining property relations from a local and contextualised point of view will add richness and a

different kind of 'realism' to the debate about intellectual property rights over traditional knowledge in comparison to a debate that is based on homogenised thinking about property relations, viz. individual versus communal.

The second part of the dissertation relates to the second aim of this thesis and examines to what extent intellectual property rights are an appropriate tool to protect traditional knowledge. Chapter 5 questions whether it is possible for indigenous peoples to use the current intellectual property rights system to their own advantage. The chapter will explore the potential usefulness of the existing intellectual property rights regime as a mechanism to help indigenous peoples to exert control over their knowledge, both when they seek to protect their culture and when they seek to commodify certain aspects of their knowledge. It is argued in this chapter not only that the development of intellectual property rights as a tool to empower disadvantaged and excluded people runs counter to the logic that has driven the development of intellectual property rights to date, but also that the current intellectual property rights framework would trap indigenous peoples in an unrealistically frozen and backward looking identity which may hinder wider aspirations to overcome social and economic exclusion. Chapter 6 provides an overview of the currently proposed protection tools and assesses whether defensive or positive protection mechanisms can redress the imbalanced use of traditional knowledge. It is argued that both these mechanisms are too much embedded in the dominant ideology of a Euro-American legal, institutionalised and formal framework. The challenge emerging from this chapter is to focus on strengthening the recognition of indigenous peoples and their needs without capturing them in an 'essentialised'⁹ framework that is bounded in time, place and tradition.

The final part of the dissertation addresses the third aim of this thesis, viz. it contextualises the current debate by focusing more closely on the case study of the San. Chapter 7 examines whether the CBD can achieve one of its main objectives, viz. ensuring fair and equitable sharing of the benefits, by examining the Hoodia benefit sharing agreement based on observations made during the fieldwork and interviews

⁹ The concept of essentialising will be discussed at great length throughout this thesis, but for the sake of clarity, at this point it can be summarised as over-determining the characteristics of specific identities, in this case indigenous peoples.

with the San. More specifically, this chapter investigates the views and perceptions of the San on what embodies 'fairness' and 'equity' in relation to the Hoodia benefit sharing agreement. This case study underlines a serious weakness in the CBD as it demonstrates how inequities in knowledge and power between indigenous peoples and, for example, companies can result in definitions of fairness and equity that are predominantly shaped by the latter. Chapter 8 examines the feasibility of introducing the concept of legal pluralism into the debate about how to protect traditional knowledge. It is argued in this chapter that those scholars who call for customary law to play a more prominent role in the development of appropriate rules and mechanisms to manage and/or protect the use of traditional knowledge have not so far sufficiently inquired how to define customary law; where to find it; and how to integrate the – as currently portrayed in the literature – two opposing legal frameworks. This raises several wider issues that will be addressed in this chapter: viz. what is the role of law in society and what is the nature of customary law in national and international law? Furthermore, debating the meaning of legal pluralism and the challenges it poses will also highlight the need to revisit and contextualise the relationship between Western powers and indigenous peoples in terms of how Western law and statecraft have affected the rights, dignity, culture and customs of indigenous peoples. Chapter 9 examines the link between traditional knowledge and territorial rights. Using the case study of the San as an example, this chapter focuses specifically on the role of the state as the key actor in the struggle of indigenous peoples to restore their rights over land, resources and knowledge. It is argued that territoriality may in fact be a more useful concept to guide the debate about traditional knowledge and how to protect it than intellectual property rights. Taking the San as an example, it is argued in this chapter that focusing on territoriality also shows that the San confront a socio-political climate that drives them to make claims of authenticity which inhibit them from developing an 'inside-out' identity. Furthermore, in order to grasp the real tragedy of traditional knowledge, attention should be brought back to the local, because a better understanding of socio-cultural, economic and political settings at the local level will help to inform the relevance of the debate at the international level without the latter resulting in essentialising indigeneity. Finally, chapter 10 will present the overall conclusions of this thesis.

PART I

Chapter 2 - 'Us' and 'Them'

Revisiting Definitions of Traditional Knowledge¹⁰

1 Introduction

Since the 1960s there has been an increased interest in the revival of traditional knowledge for romantic and practical reasons. The romantic reason is linked to the political climate of 'counter culture' wherein indigenous peoples are characterised as being in complete harmony with nature contrary to Western people who are increasingly destroying nature through their lifestyle (Ellen and Harris, 2000). On the practical side, traditional knowledge systems are perceived as valid contributors to stimulating rural development, especially since development workers have argued that industrialised knowledge systems have failed to eradicate poverty in the developing countries (Pottier, 2003). For the last two decades, traditional knowledge is also on the radar of researchers and development practitioners who argue that traditional knowledge is in great danger of becoming extinct if no measures are taken to record, protect and preserve traditional knowledge. Looking at these reasons from a discursive perspective, the revival of traditional knowledge is linked to the rhetoric of sustainable development (Escobar, 1998) and conservation of biodiversity (Blakeney, 2000) which in turn anchors the debate in the dialectics about relationships between culture and nature.

Returning to the question of how to protect and preserve traditional knowledge, it is agreed in most of the literature that safeguarding traditional knowledge through the Western legal system of intellectual property rights is challenging the boundaries between divergent socio-legal and economic systems (see e.g. contributions in Greaves, 1994; Brush and Stabinsky, 1996; Åhrén, 2002; Riley, 2004a). Some frame it as a clash between indigenous and non-indigenous cultures or non-Western traditional societies versus Western industrialised societies or traditional versus scientific knowledge (Smith *et al.*, 2000).

¹⁰ The terms traditional knowledge and indigenous knowledge are used interchangeably in the literature while strictly speaking not all traditional knowledge is indigenous knowledge. The common approach to use both terms interchangeably is also followed in this dissertation.

The discussion about appropriate protection mechanisms for traditional knowledge has taken centre stage in international fora like the World Intellectual Property Organisation (WIPO), TRIPS and CBD. While the relevant institutions dealing with intellectual property rights and traditional knowledge have specified the characteristics of traditional knowledge, it remains very difficult to define traditional knowledge in precise legal terms (Gervais, 2003). This opinion is shared by the WIPO which has admitted, after its fact-finding missions with indigenous peoples, that there is a real need for terminological clarity (Leistner, 2004). Dutfield (2002b; 2004) has summarised how experts have solved this definitional dilemma. Some argue it is easier to define what traditional knowledge is not rather than what it is; others highlight the opposite traits of traditional knowledge vis-à-vis scientific knowledge.

In very broad terms, traditional knowledge consists of different categories such as, amongst others: folklore, language, agricultural knowledge, medicinal knowledge, ecological knowledge and heritage. The WIPO also distinguishes between the tangible aspects of traditional knowledge (i.e. genetic resources) and the intangible components (i.e. knowledge itself). For the custodians of traditional knowledge it is especially the intangible component that gives value and meaning to traditional knowledge (Dondolo, 2005).

Based on the definitions as compiled in Table 1, two preliminary impressions emerge. First, both academic literature and relevant international institutions argue that traditional knowledge distinguishes itself from scientific knowledge in the way it is generated, recorded and transmitted. Second, traditional knowledge is to a certain extent culturally bounded in space and time. In other words, the above definitions emphasise two separate categories of knowledge – Western and indigenous – each confined by its own characteristics and divergent worldviews including how culture and nature are constructed (Agrawal, 1995; Escobar, 1998).

Whilst acknowledging that there are obvious differences between indigenous and Western knowledge (see Table 2), it is argued in this chapter that the definitions (as exemplified in Table 1) which overemphasise the difference are dubious. The way in which traditional knowledge is currently characterised is another variation on the debate over modernity versus traditionalism, a discussion which Ellen and Harris

(2000) argue has to be interpreted with caution. The more critical literature engages with the definitional problems of traditional knowledge and concludes that the current definitions of traditional knowledge are too simple, narrow-minded and unnecessarily overemphasise the dichotomy between Western and traditional knowledge (see e.g. Nel, 2005; Wallner, 2005; du Toit, 2005; Ntsoane, 2005).

This chapter will assess in more detail the dualism between traditional and modern knowledge; where does it come from, what are the consequences and can the two, at first sight, opposing knowledge systems be integrated? Exploring the meaning of traditional knowledge is not just an issue of rhetoric or epistemology. The fact that international institutions like the CBD and WIPO promote opposing knowledge systems by setting boundaries around culture has repercussions on the debate over whether and how traditional knowledge should be protected in order to preserve biological and cultural diversity. While cultural studies recognise the reality of change and the fluidity and permeability of knowledge and cultural hybridity of most innovations (see for example Patel, 1996), law, on the other hand, reinforces cultural boundaries by virtue of the legal recognition that traditional knowledge is (culturally) bounded in space and time (Coombe, 1998a). However, cultural perceptions of traditional knowledge might not be as 'innocent' as they may appear at first (Nel, 2005: 7). The whole debate about what is traditional knowledge is determined by underlying epistemologies that in turn are historically and arguably also culturally framed. It is argued in this chapter that defining traditional knowledge on the basis of fixed cultural stereotypes has implications for the welfare and survival of indigenous peoples. The debate about traditional knowledge - what it is and how it should be protected - must be considered as part of a process that Stehr (2003) has called knowledge politics. The essence of knowledge politics lies in the strategic efforts that are undertaken to move the social control of knowledge into cultural, economic and political centres of society. The main concern of knowledge politics is generating rules and sanctions pertaining to the relevant actors to affix property relations and application of knowledge. In this chapter it is argued that the debate about what is traditional knowledge must be located firmly in this context of knowledge politics, a process that is according to Stehr "*interwoven with different cultural, economic and historical traditions, institutional designs and legal arrangements – concerning the*

relations between power and science and of course transnational organisations and movements” (2003: 645).

Table 1: Definitions of traditional knowledge

| |
|--|
| <p>The CBD in Article 8(j), defines traditional knowledge as the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.</p> |
| <p>WIPO defines traditional knowledge as a subset of heritage whereby heritage is defined as “[...] <i>the tradition based literary, artistic or scientific work; performances; inventions; scientific discoveries; designs; marks; names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific or artistic fields</i>” and tradition is defined as “[...] <i>knowledge systems, creations, innovations and cultural expressions that have generally been transmitted from generation to generation, are generally regarded as pertaining to a particular people or its territory and are constantly evolving in response to a changing environment</i>”¹¹ (WIPO, 1998-1999 <i>Intellectual Property Needs and Expectations of Traditional Knowledge Holders</i>, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge, 2001: 25 available at http://www.wipo.int/tk/en/tk/ffm/report/final/pdf/part1.pdf).</p> |
| <p>Traditional knowledge is used to “[...] <i>differentiate knowledge developed by a given community from the international knowledge system as generated through universities, government research centres and industry actors</i>” (Warren, 1998: 13 in Gehl Sampath, 2004: 715).</p> |
| <p>Traditional knowledge or indigenous knowledge is the “[...] <i>unique traditional, local knowledge existing within and developed around the specific conditions of women and men to a particular geographic area</i>” (Grenier, 1998: 1 in Gehl Sampath, 2004: 715).</p> |
| <p>Traditional knowledge is the “[...] <i>systematic information that remains in the informal sector, usually unwritten and preserved in oral tradition rather than texts [...] [It] is cultural[ly] specific, whereas formal knowledge is decultured</i>” (Brush and Stabinsky, 1996: 4 in Kihwelo, 2005: 345).</p> |
| <p>Traditional knowledge is the “[...] <i>knowledge [...] held and used by people who identify themselves as indigenous to a place based on a combination of cultural distinctiveness and prior territorial occupancy relative to a more recently arrived population with its own distinct and subsequently dominant culture</i>” (Mugabe, 1999: 2-3 in Kihwelo, 2005: 346).</p> |

Source: Compiled and sourced from Gervais (2003); Gehl Sampath (2004); Kihwelo (2005).

The chapter will be structured as follows. First, an overview will be given of the way in which traditional knowledge is currently assessed in the mainstream literature.

¹¹ Note that the draft report stated that traditional knowledge is also characterised by being developed in a non-systematic way. Following a comment of the Future Harvest Centres that indigenous and local communities have systematically developed and maintained traditional knowledge to meet changing local conditions, the WIPO has changed the working definition accordingly.

Particular attention will be given to the depiction of indigenous peoples who apprehend the world differently than modern people and how these opposing worldviews have influenced the opposite perceptions about what is knowledge, how it is generated, recorded and transmitted. Next, it will be examined why there is a continuing belief and representation of the different knowledge systems as contrasting pairs of opposites. This will be followed by a closer assessment of whether this representation is an accurate one which will then lead to an examination of the consequences of this misinterpretation. It will be explored whether there is a danger that by emphasising the dualistic opposition between traditional and scientific knowledge, fundamental areas of compatibility are ignored. Finally, it will be examined whether traditional knowledge can be better understood if the focus shifts from opposing it to scientific knowledge to a point of finding areas of integration and influence. While it is argued in this chapter that traditional knowledge is a concept that is difficult to capture in a definition, by deconstructing the current definitions and placing the discussion in a historical and political context, a new understanding of traditional knowledge emerges that ultimately leads to shifting the centre of the argument from traditional to local.

2 *Traditional versus Western Knowledge*

2.1 *Indigenous versus Western Worldviews*

It is widely believed and accepted that indigenous peoples¹² apprehend the world in a different way than 'modern' people. One of the most striking distinctions between these two worldviews is that, in general, indigenous models do not distinguish between the biophysical, human and spiritual worlds. Unlike Western models, indigenous models do not possess, nor believe, in a strong dichotomy between nature and society; instead, the three spheres are tightly grafted in social relations (Escobar, 1998).

Not only are human beings related to non-human living organisms, in some indigenous communities it is believed that humans can be transformed into other living forms through death, rebirth, ritual or shamanism. In other words, ancestral

¹² This argument can be extended to include in more general terms rural communities in developing countries (see for example, Escobar, 1998), but within the scope of this thesis the focus is limited to indigenous peoples only.

spirits continue to manifest themselves through the cosmic connectedness with human and non-human beings. Posey (2002b), one of the greatest experts in indigenous knowledge systems, has argued that it is precisely the local or indigenous knowledge systems that can give insights into how the spiritual is attached to the material or in more generic realms how culture is embedded in land. The indigenous relation to land or the promotion of land as landscape manifests itself in the connectivity between land and “*history, spiritual being, aesthetic meaning, social relations and concepts of nature*” (Abramson and Theodossopoulos, 2000: 1). The link between land, people, spirits and their combined history transforms landscape into a distinctive cultural fact and gives it even a mythical significance (*ibid.*).

Because of the ‘sacred’ balance between life, land and society, knowledge emanates from a spiritual source. It is believed that in the modern worldview knowledge is rooted in a linear and scientific base. In the indigenous worldview, spirits are just as much part of reality as is the material and some would even argue that it is even more powerful. According to Suzuki (1999), “*science can never adequately describe the holism of indigenous knowledge and belief. In fact, science is far behind indigenous knowledge because it still sees nature as only objects for human use and exploitation [...] [and] scientific objectivity tends to mask the moral and ethical implications that emerge from the functionalist anthropocentrism that informs much scientific research*” (Suzuki, 1999: 72-73 in Posey, 2002b: 30).

There is a common belief that Western worldviews differ from indigenous ones in that the latter’s ancestral past is embedded in an immediate present; knowledge is culturally contextualised and indigenous peoples retain, through embodiment of ancestral spirits, hereditary links to particular land (Smith *et al.*, 2000). In other words, different cultures have divergent understandings of the world and how nature and culture is constructed. These opposing worldviews are partly shaped by what, at first sight, looks like contrasting values, beliefs and ideologies exemplified in the scientific, high-tech ‘we’ versus indigenous, low-tech ‘them’ debate (Sillitoe, 2002b), an issue that will be discussed in the following section.

2.2 Scientific versus Traditional Knowledge

Agrawal (1995) has classified the distinctions that are made in the mainstream literature about traditional knowledge into three categories: substantive, methodological/epistemological and contextual. Starting with the substantive elements such as subject matter, it is thought that traditional knowledge is mainly concerned with the daily livelihoods of indigenous peoples, while scientific knowledge focuses on abstract ideas and philosophies. With regards to epistemological and methodological differences, it is argued that science is characterised by being open, systematic, objective, analytical and builds upon previous experiments and experiences; traditional knowledge, on the other hand, is based in, and in fact reinforces, ‘common’ sense. Finally, it is believed that traditional knowledge is contextualised and embedded in the daily life of people, while modern knowledge is perceived as being abstract and not influenced by the lived experiences of the people who generate knowledge. According to this categorisation modern knowledge is created in a social vacuum, remote from the lives of people and context. In short, science in its search for universal truth favours reductionism, while traditional knowledge emphasises the importance of situated knowledges (Curry and McGuire, 2002). As exemplified in Table 2, science is usually depicted as more rational, theoretical, evidence based and better integrated in comparison to traditional knowledge (Sillitoe, 2002a).

Table 2: Indigenous knowledge versus scientific knowledge

| Features | Indigenous | Scientific |
|---------------------------------|------------------------|-------------------|
| Relationships | Subordinate | Dominant |
| Communication | Oral | Written |
| | Teaching through doing | Didactic |
| Dominant mode of thought | Intuitive | Analytical |
| Characteristics | Holistic | Reductionist |
| | Subjective | Objective |
| | Experiential | Positivist |

Source: Sillitoe (2002a): 110

2.3 Culturally Bounded in Space and Time

As briefly touched upon above, suggestions have been made that traditional knowledge is bounded and exists to a certain extent in primordial isolation¹³. Indigenous peoples are depicted as resisting the forces of globalisation by remaining pristine and unchanging. In this respect traditional knowledge is often perceived as ‘local’ knowledge strongly tied to a specific place (Nygren, 1999). Consequently, knowledge can only be passed on from one generation to another while people belonging to another place are excluded from knowledge transfer. In other words, it is believed that traditional knowledge is bounded by culture (Brush, 1996a).

According to Cleveland and Soleri (2002) many researchers differentiate between scientific and traditional knowledge in such a way that the latter is pictured in its essentialised form, viz. being “*organic, holistic, intuitive, local, socially constructed, practical and egalitarian*” (Cleveland and Soleri, 2002: 210). In contrast, scientific knowledge is depicted as “*rationalistic, reductionist, theoretical, abstract, objectively verifiable and imperialistic*” (*ibid.*). While it certainly must be acknowledged that there are numerous differences between the two knowledge systems, the question must be asked whether this dichotomy is actually an accurate description of the reality. There are authors who argue that the polarities between, for example, oral and written, narrative and definitive, fluid and fixed, practical and universal principles are too simplistic (see for example Smith *et al.*, 2000; Sillitoe, 2002b; Nygren, 1999). The question then arises why there is a continuing representation and belief in the validity of depicting different knowledge systems as contrasting pairs of opposites. This question will be examined in the following section.

3 *Modernist and Postmodernist Views of Knowledge Systems*

Pottier (2003) partially answers the above question when he argues that the positivist view that knowledge is unitary and systematised explains why modern scientists continue to regard science as superior to traditional knowledge by emphasising simplified dichotomies devoid of any real social embeddedness. Other defining characteristics have also been attributed to this positivist framework. For example, it

¹³ It is important to note that the definition in the WIPO Report acknowledges that traditional knowledge evolves in response to its changing environment.

is argued that it emphasises competition rather than cooperation, focuses on the individual rather than on the collective and stresses regulation rather than responsibilities (Smith, 2000). These statements merit examination in more detail of the extent to which science has played a role in the history of dichotomising knowledge.

3.1 Modernist View

As summarised by Curry and McGuire (2002), in the 'Age of Reason' it was increasingly believed that everyday knowledge production was inefficient and too much based on subjective imageries. Experiences had to be framed in a more concrete, universal and truthful way. While it was acknowledged that to a certain extent knowledge was a communal product, in the 'Age of Reason' the emphasis in knowledge creation shifted towards the individual. The successes of Francis Bacon, René Descartes, Isaac Newton, to name just a few, offered a new way of producing knowledge which was later tied to David Hume's empiricism. As a result the perceptions of the individual scientist became increasingly more important at the expense of community experiences in the process of knowledge production. In the quest for certitude, science – in its logical positivist form - separated itself from its context and from other forms of knowledge production and, instead, proclaimed divergence between different knowledge systems. The strong emphasis on the empirical foundation of science was used to downplay the communal aspects of knowledge creation. Empiricism could ensure that decision would not be taken on an irrational basis; this had to be avoided at all costs because irrationality was the antidote to 'universal bedrock principles' (Curry and McGuire, 2002).

According to Curry and McGuire (2002), this way of thinking about science had also repercussions in the way society and politics were perceived. Locke and other Enlightenment thinkers universalised European society and its socio-economic and political infrastructure by separating themselves from the non-Europeans they encountered and whom they considered to be less advanced. The Enlightenment philosophical thinking was perceived to be an endpoint in supremacy and anybody else was measured against it (Fitzpatrick, 1992; Curry and McGuire, 2002). In other

words, the Enlightenment measured how far other people were removed from achieving European civilisation.

Enlightenment worldviews supported a technocratic and social science steeped in universal laws of behaviour; *“from then on, social science portrayed the study of a particular place as one that produced a deficient version of knowledge”* (Curry and McGuire 2002: 33). European civilisation universalised its assets, and linked its own *raison d’être* to the perceived and purported inferiority of those on the outside of its civilisation by systematically minimising and distorting the knowledge of ‘others’ (Curry and McGuire, 2002).

According to Niezen (2003), Max Weber has justifiably argued that there is a social and personal cost to be paid for modernity: *“One of the most compelling features of modernity is the overwhelming power of bureaucracy and law over tradition and charisma”* (Niezen, 2003: 141). An authority that adheres to rules and hierarchies replaces the comfort of tradition. In modernity there is no place for the combined existence of these two systems of legitimacy. Universal bureaucracy has to replace the arbitrariness of tradition. According to Weber, Europeans had moved one step closer to achieving their goal of social convergence in which all societies resemble the leading model of modernity (Niezen, 2003). Or to borrow Giddens’ words *“inherent in the idea of modernity is a contrast with tradition”* (Giddens, 2004: 36).

The civilisation equated with modernity came into being because it opposed itself to its antithesis, viz. the savage. *“In order to define ‘us’ there must be a corresponding ‘them’ against whom ‘we’ come to recognise ourselves as different”* (Shore, 1993: 782 in Fitzpatrick, 2001: 63). In order to establish an encompassing modernity, initially the self created an ‘other’ against which modernity is constituted, but although the ‘other’ was in the first instance excluded from modernity, the process of creating an encompassing modernity could only be achieved when the ‘other’ was eventually included in the modern civilisation. In this sense the ‘savage’ or the ‘other’ remains excluded from the origins of modernity. The ‘other’ can never be the same, but at the same time is repelled for its otherness. The ‘other’ is doomed to perpetually strive to attain the status of the modern, but will be denied the achievement on the basis of his intrinsic ‘otherness’ (Fitzpatrick, 2001). To conclude, from the moment of

its existence, modernity and its identity can only be attained if the ordered, civilised and deterministic characteristics of modern worldviews are opposed by the spontaneity and mimetic responsiveness of tradition (*ibid.*). In other words, modernity has created opposing dichotomies in order to allow its own establishment and omnipotence.

Latour (1993) has argued that in order to understand the great divide between ‘them’ and ‘us’ we must refer back to the other great divide, viz. the one between humans and nonhumans. Unlike many other societies, Western civilisation has to a great extent stopped to embrace a symbolic or imaginary representation of nature. There is a total dichotomy between, on the one hand, those who were guided in their knowledge production by their own cultural and distorted vision they had of nature and those, on the other hand, who kept nature and culture completely separate. The initial partition between human and nonhumans or between a thing and a sign has led to a second fracture, viz. between the moderns and the pre-moderns. Latour (and others, see for example Fitzpatrick, 1992; 2001) however, strongly opposes the great divides. Instead, he argues, ‘we’ do not distinguish more between nature and culture than ‘they’ make them overlap. *“Or, more exactly, we can now drop entirely the Us and Them dichotomy and even the distinction between moderns and pre-moderns. We have always built both communities of natures and societies”* (Latour, 1993: 103).

3.2 Postmodernist View

“We Westerners are absolutely different from Others!” – such is the moderns’ victory cry, or protracted lament” (Latour, 1993:97). Although, as argued above, the dichotomy has been mainly based on overemphasised opposites, the great divide, however, continues to obsess. In the postmodern era, Western societies are nostalgically gazing back to a revisionist history and invoked purity of the ‘other’ (Gough, 2000). There is a strong recognition that difference should not lead to dichotomising opposites, but can be part of everyday life. Once drawn, measured and deemed savages, the ‘other’ is now used as a spotlight to highlight rather nostalgically how it once was for Western societies, a process labelled by some as *“a lament of falsely re-collective nostalgia for some lost sense of spiritualism, family, place [and] unity [...]”* (Gough, 2000: 93-94). Precisely this sort of thinking can be found in the

conservationist discourse in which indigenous peoples or the other are portrayed as in perfect harmony with a pristine nature. There is a great danger that imposing an unrealistic and idealised authenticity, to which the postmodern world longs, will create an unjustifiable burden to indigenous identity (*ibid.*). Despite the fact that most indigenous peoples live in circumstances far different from their hunter-gatherer days, in order to establish their genuineness they are compelled to choose between identities defined by others—modernist in which they are backward, or conservationist in which they are in harmony with nature (Martin and Vermeulen, 2006).

Both the modernist and the postmodernist view of knowledge rely on a categorical alienation of traditional knowledge and indigenous worldviews from scientific knowledge and Western worldviews (Agrawal, 1995; Nygren, 1999). In scientific reductionism, traditional knowledge is seen as a resource of information to be validated or nullified by scientists. In the alternative noble savage vision, traditional knowledge is seen as an appropriate tool for development although the two seemingly opposing views, i.e. modernism and postmodernism, share a surprising commonality, viz. sustaining traditional knowledge as the mirror image of scientific knowledge.

The persistent dichotomy between science and traditional knowledge is the result of the ‘human cognitive impulse’ to simplify and divide the world into just two meta categories (Ellen, 2004). The relationship between the two worldviews or knowledge systems is considerably more complex. One of the major problems with such an opposing classification is that it actually reinforces dichotomies. For example, hard-nosed scientists will probably use the dichotomous epistemology to get their argument across that science has a higher value. Simultaneously, romantics of tradition can use the same epistemology and rhetorics to praise indigenous lifestyles (Sillitoe 2002a). In addition, the strong emphasis on differences, which to a certain extent have been artificially created, prevents looking for substantial similarities in the two knowledge systems (Agrawal, 1995). This issue will be further examined in the next part.

4 *Falsified Dualism*

As mentioned previously, some of the asserted characteristics of indigenous knowledge must be acknowledged for its uniqueness, however at the same time it

must be noted that these characteristics are only a crude classification. It may be useful as an initial exercise to characterise traditional knowledge as an opposite to scientific knowledge, but continuously emphasising that traditional knowledge is incompatible to science is not only misleading but also a diversion of the real issues. Anthropologists like Ellen (2004) argue that, in order to preserve traditional knowledge, there is a need for an integrated theory of science which incorporates both traditional and modern knowledge.

4.1 Deconstructing Polarities

Western science's origins are usually traced back to the scientific revolution that started in 17th Century Europe. However, Western science was not just discovered; it built upon existing folk knowledge, both from Europe and later the colonies, through systematically creating more scholarly disciplines in order to categorise in a more scientific way existing folk knowledge (for example, horticulture grew into botany; alchemy grew into chemistry; practical mechanics grew into physics) (Ellen and Harris, 2000). This practice of codifying traditional and folk knowledge continued during the 19th Century and resulted in publications and classifications that, although presented as Western science, resulted from earlier codifications of traditional knowledge (for a concise overview of this practice see for example Ravetz, 1971: 386-397; Barsh, 1999). Only in the early 20th Century were the ties between science and folk tradition disconnected (Ellen, 2002). Once both non-Western and European folk knowledge were sufficiently absorbed in scientific knowledge, local or traditional knowledge was rejected as inferior (Ellen & Harris, 2000). The fact that (some aspects of) traditional knowledge are part of what is now labelled modern or Western science makes it a very difficult task to know where to draw the boundaries between traditional knowledge and science (Ellen and Harris, 2000; Ellen, 2004).

Science and traditional knowledge are not only connected through sharing cognitive practices. Ellen (2004) has argued that both science and traditional knowledge share, to a certain extent, a framework of assumptions about how the world is constructed and how people relate to that world. All human beings in their perception of nature distinguish between the empirically observable and the symbolic and mythical values attached to these observations. Across different cultures examples can be found where

the natural is merged or blurred with the supernatural or spiritual (e.g. animism, construction of monstrous beings). However, within the cultural tradition of science the separation between the symbolic and the technical aspects of science has been introduced to safeguard the rationality of science (Ellen, 2002; Ellen, 2004). It could be argued that science like any other knowledge system has protected the interests of a particular local culture, viz. that of scientists whose work conforms to an institutionalised model exemplified through different methods such as specific language use, specialist terminology, linguistic registers, taxonomic nomenclature, methodological protocols, specialist journals and so forth. This makes scientific knowledge generation, just like traditional knowledge, a political and social practice. Traditional knowledge is the expression of relationships between people, the environment and spirits and these relationships are the basis of maintaining social and economic links with other people and the world at large (Battiste and Henderson, 2000). Although the format and output may be different between science and traditional knowledge (e.g. academic publications versus story telling), the concept of knowledge as a social practice is just as relevant for science as it is for traditional knowledge. Or in the words of Ravetz "*the deepest problems in the understanding of science are social rather than epistemological*" (Ravetz, 1971: 71). He continues that scientific knowledge is the product of an historical process whereby knowledge emerges out of the subjective personal endeavour. He argues that science embodies the paradox of the radical difference between science as a creative, personal and subjective craft and science as an objective, impersonal knowledge-creating mechanism.

The debate about traditional knowledge is not alone in drawing attention to the relationship between knowledge and social relations. The discourse on citizen science has also shown how science has come out of the laboratory and is conducted within the wider remit of social relations (Leach and Fairhead, 2002). Whether it concerns local knowledge, citizen science or high-tech science, all emerge and develop within a particular social and institutional context. Instead of explaining diverging knowledge systems through emphasising fundamental theoretical and epistemological differences, it might be more helpful to acknowledge that knowledge systems are political constructs and represent particular social and institutional relations (*ibid.*)

The acceptance of the idea that all knowledge is socially produced, dissolves the theoretical dichotomy between indigenous and scientific knowledge and reveals particular social and historical relations and practices which might better explain the contestation between different knowledge systems than highly simplified dichotomised epistemologies of knowledges (Leach and Fairhead, 2002). This aspect will be discussed at more length in chapter 3 when the concept of commodification is discussed.

In their study Feldman and Welsh (1995) have argued that by examining knowledge production from a feminist perspective, it becomes clear that science is not so pure as is sometimes presented and is a socially constructed activity. In general, knowledge systems are less homogenous than often claimed, but rather are fragmented by power relations and differences of class, race and gender. In other words, *“greater attention to the nuances posed by feminist perspective can challenge some of the assumptions of a positivist framework [of science], particularly the tendency towards dualist thinking”* (Feldman and Welsh, 1995: 31).

4.2 Deconstructing Boundedness of Traditional Knowledge

Not only has the falsified dualism between traditional and scientific knowledge been questioned, but also the boundedness of local knowledge in time and space must be criticised. Definitions of traditional knowledge are often linked to its temporal border; spatial context and distinctiveness (Nel, 2005). However, traditional knowledge is not stationary or unchanging. Instead, it is ‘syncretic’, meaning that it is in a constant process of change, continuously influenced by outside ideas (Sillitoe, 2002b: 13). Traditional knowledge incorporates interfaces with other knowledge systems and therefore it can be argued that it is socially and culturally embedded (Pottier, 2003). Traditional and scientific knowledge do not exist in a vacuum; both have been transformed as a result of interaction between Western and indigenous cultures since at least the 15th Century (Agrawal, 1995).

Statements that indigenous peoples are still living in the past and are unable to incorporate new challenges and situations in their knowledge systems must be challenged (Smith *et al.*, 2000; Dutfield, 2006). There are examples of indigenous

communities that under the pressure of colonialism have created new practices of culture in order to survive. Most of the indigenous communities that have dealt with colonialism were able to survive (Layton, 2000), and many of them had to change to some extent and adapt to do so.

Emphasising essentialist and oversimplified taxonomies of difference between indigenous peoples and modern people obscures the meaning of traditional knowledge. Ontologically fixing indigenous peoples' identity is a reminder of colonialism and its attempt to 'other' the indigenous (Nel, 2005). In the attempt to reclaim the suppressed identity and knowledge of indigenous peoples, a new form of stereotyping has emerged. Where previously indigeneity was defined on the basis of race, it is now defined on the basis of an essentialised ethnicity (*ibid.*). In other words, traditional knowledge is a difficult concept to define or to understand as long as it is '*captured within the ambits of political rhetoric*' (Nel, 2005: 5).

At this point, it is worthwhile to draw attention to the fact that the United Nations (UN) working definition of indigenous peoples¹⁴ also emphasises the distinctive personality of indigenous peoples: "*Indigenous communities, peoples and nations are those, which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form,*

¹⁴ The definition of the term 'indigenous peoples' has been controversial and no single fixed definition has been agreed (see e.g. Keal, 2003; Niezen, 2003; Kingsbury, 1998). The chairperson-rapporteur of the UN Working Group on Indigenous Populations (UN WGIP) has suggested to use this definition as a working definition. It is argued in this thesis that the concept 'indigenous' is difficult to capture in a definition and can lead to essentialising peoples' identity; an opinion shared by Kingsbury who argues that any formal and strict definition will tend to "*reduce the fluidity and dynamism of social life to distorted and rather static formal categories*" (1998: 414). One of the most controversial points in Cobo's definition is subjection to colonial settlement. This has led to a discussion over whether it is appropriate to extend the status of indigenous to Africa and Asia. This extension has even been resisted by some indigenous leaders from the Western hemisphere who argue that the struggles of the people from the decolonised world (such as Africa and Asia) are not similar to the struggles of, for example, the Aboriginals (Niezen, 2003). Some of the indigenous peoples in the Western hemisphere argue that what makes a people indigenous is a shared history of displacement by alien and dominant powers and not marginalisation by others with equally strong links to national territories. Regardless of this reservation, the concept of indigenous peoples is now more widely accepted in Africa, of which the African Working Group on Indigenous Populations is a good example. In order to address the concern over defining 'indigenous' in the African context, Kenrick and Lewis (2004) suggest that the Cobo definition must also be applied in terms of relationships (e.g. the marginalised position of [former] hunter-gatherers) and processes vis-à-vis other people, rather than as abstract categories. Furthermore, Africans who live in the same area as (former) hunter-gatherers recognise these groups as indigenous relative to themselves and refer to them to as 'first people' (Kenrick and Lewis, 2004).

at present, non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis for their continued existence as peoples, in accordance with their cultural patterns, social institutions and legal systems” (Martinez-Cobo, *Study of the Problem of Discrimination against Indigenous Populations* [UN Doc. E.CN.4/Sub.2/1983/21/Add.] 1983: 5 in Perrin, 2002: 24). This definition is another example of how a focus upon the construction, exclusion, idealisation and exotisation of indigenous peoples locates them outside modernity. As Perrin (2002) argues, this definition essentialises indigenous peoples.

In short, ideal assumptions are in danger of leading to cross-cultural misperceptions and strategic misrepresentations and can result in a theory that misrepresents the context in which knowledge occurs and is experienced. By failing to include broader constitutive processes, such as context and social relations, there is the risk of obscuring and decontextualising local knowledge (Ellen and Harris, 2000).

To recapitulate, it is very unlikely that the true meaning of traditional knowledge will be found as long as the relation between traditional and scientific knowledge is pictured in terms of essentialised binaries of ‘them’ and ‘us’ (Smith *et al.*, 2000). Both are complex constructs embedded in a network of social relations. Based on the above criticisms and findings it can be argued that although traditional knowledge is partially limited by space and time, it is primarily culturally confined. This suggests that in order to clarify the meaning of traditional knowledge, the focus of attention must shift away from an essentialist framing of time and space towards a broader aspect of social relations and context. Ideal assumptions about indigenous peoples’ identity and knowledge systems are leading to misperceptions and are feeding into a theory which decontextualises the way traditional knowledge occurs and is experienced. In this sense the politics of identity are forging a unity and cohesion upon a particular group of people on the basis of encouraging the continuity of a discourse of ‘us’ and ‘them’ which often mirrors a distorted view of the ‘other’ (Dondolo, 2005).

5 *Local Knowledge*

So far, it has been established in this chapter that it would be a great mistake for either indigenous or non-indigenous peoples to continuously compose their relations in terms of essentialised binaries of 'them' and 'us'. Both are complex and interdependent identities and situated in specific historical contexts. Therefore it is important that essentialism is overturned by studying the manner in which colonialist and post-colonialist constructions of indigeneity have formed and deformed indigenous identity. Indigenous identity is anchored in traditional practices, but is simultaneously also continuously changing and adapting to new cultural and political constructions (Nygren, 1999). In this sense, indigeneity has more to do with the encounter with modernity - epitomised in the institutions of the state, capital, science and property - than with timeless and locally bounded identities (Escobar, 1998).

If the primary purpose of defining traditional knowledge is focusing on what constitutes traditional knowledge systems and how they can be appropriately protected, some have argued that the exercise is ill-served by never making explicit the links between power and knowledge (Agrawal, 1995). Scholars engaging with feminist theories have argued that the definitional and oversimplified rhetoric of traditional knowledge versus scientific knowledge has so far failed to address the underlying asymmetries of power and control. However, they argue that it is precisely the notion of distorted power relationships that can be held responsible for the continued marginalisation of indigenous peoples and the oppression of their knowledge systems (Agrawal, 1995). "*What is needed is to find ways to give a voice to local knowledges without smothering them in totalising theories*" (Turnbull, 1991: 572 in Nygren, 1999: 282). How can this be achieved?

This requires, according to Nygren (1999), banning encompassing essentialised divides and, instead, re-orientating towards situated knowledge. The new focus allows for the recognition of the existing heterogeneous status of traditional knowledge whereby it is acknowledged that knowledge is part of an interconnected world and therefore tied to the social, scientific and technical networks with which traditional knowledge interacts (Hassanein and Kloppenburg, 1995). In short, in order to find

appropriate protection mechanisms for traditional knowledge, it is important that first of all a better understanding is gained of the hegemonic discourse which, so far, has allowed an essentialist and opposing representation of knowledge. This, in turn, will require a more realistic understanding of how traditional knowledge interacts with other knowledge systems from the perspective of the people that are studied (Nygren, 1999). Through the interaction with other networks, traditional knowledge is simultaneously situated in the local and the global. This is not to say that traditional knowledge does not exist (Clammer, 2002). By linking the local to the global and vice versa, the fixed boundaries that have been built around traditional knowledge can be removed. This opens a new field of inquiry. The principal focus is, according to scholars like Agrawal and Nygren, no longer the dichotomy between traditional and scientific knowledge, but the hegemonic discourse that authorised essentialist representations through a system of power relations.

It could also be argued that the essentialist portrayal of indigenous peoples and their knowledge system is also a product of postmodern cultural studies that have channelled their attention to culture and context rather than knowledge and substance. Any essentialist definition of culture is focused on the authenticity of identity limited in space and time and ignores the fluid character of culture. However, culture and cultural theory is mainly a Western concept with a contested and complex history and has its roots in the discourse of modernity. The use of cultural theory has also been criticised for allowing the dismantling of discourses of colonialism, oppression, subjugation and marginalisation (Van Staden, 1998). Furthermore, any definition of culture is already culturally determined or, in other words, culture is defined in a specific discourse and serves a specific aim, such as the romanticist discourse on traditional knowledge (*ibid.*).

However, any definition of culture should represent the space that links the past with reality or what Fanon has called "*the space of discursive temporality*" (Fanon 1986: 25 in Nel, 2005: 10) or what Bell (1986) calls "*ways of life*" (in Van Staden, 1998: 17) . As mentioned before, both modern and postmodern scholars make the same assumptions about representation and identity: both define these concepts not only in a social, but also a historical vacuum in their quest to attain ultimate objectivity. However, Wuthnow (2002) has argued that the concepts of knowledge, culture and

identity can only be understood for what they are when subjectivity is re-introduced in the equation. Notions of embodiment, location and history are the antidote to essentialism. In order to understand knowledge production, whether scientific or traditional, the value of historically framed and situated experiences must be authorised and legitimised.

The relation between culture, space and identity is not just a natural characteristic of every human society, be it traditional or modern. Both the other's otherness and the coloniser's own identity are constructed identities and therefore the alleged difference between the two sides of the frontier, i.e. traditional versus scientific knowledge, should not be the point of departure for any definition of knowledge, culture or identity (Boccaro, 2003). More attention should be given to the historical socio-political and economic mechanisms that have created asymmetrical relations in the first place. Any knowledge produced cannot be detached from the circumstances in which it is produced. Any scholar, either in a formal or informal environment, cannot deny the involvement with a particular set of beliefs or social position. Therefore, knowledge should not be understood as an a-political concept (Said, 1993).

The mere fact that some people have been and still are excluded from knowledge production makes knowledge production an act of power (Said, 1993; Clammer, 2002). Knowledge creation is never a neutral process (Kassam, 2002). It is a social and cultural process guided by aspects of, on the one hand, power, authority and legitimacy and, on the other, social struggle, conflict and negotiation (Pottier, 2003).

Instead of defining traditional knowledge on the basis of its essentialised and arguably falsely constructed characteristics, traditional knowledge can be better understood as local¹⁵ knowledge which is practical, situated in reality, while simultaneously recognising that it is constituted in the past but has changed and adapted to new constraints. In this sense local knowledge embodies a history of practices and represents a body of practices in appreciation of the local historical and cultural context. As Ingold has phrased it *"knowledge of the world can be described as a process of enskillment in the context of our practical engagement with the*

¹⁵ Note that in this context the local is not based on an essentialised notion of place (for more details see Wuthnow, 2002).

environment” (Ingold, 1995; 1996 in Escobar, 1998: 62). It could be argued that, in order to appreciate the value of traditional knowledge in discussions of biodiversity conservation and cultural preservation of indigenous peoples and their knowledge system, a broader framework is needed. Rather than focusing on an essentialised coherent indigenous knowledge system, the point of analysis should shift towards the concept that local knowledge is responsive to context-specific challenges (Escobar, 1998).

6 *Conclusion*

There is a danger that influential ideas of what constitutes traditional knowledge are constrained by continuously portraying indigenous peoples as pristine and unchanging. The contemporary lives of indigenous peoples are a far cry from the idealised past. Imposing unrealistic definitions of authentic indigeneity and traditional knowledge might constrain indigenous peoples’ socio-economic and political capabilities. Ultimately, the debate about what is traditional knowledge and how it differs from scientific knowledge is a rhetorical debate that diverts attention from more important issues.

By reducing differences between traditional and scientific knowledge to a dualistic opposition, fundamental areas of compatibility are ignored. It must be questioned whether it is valid to mark any piece of knowledge as indigenous or Western. It might make more sense to acknowledge that the same knowledge can have different logics and epistemologies, depending, for example, on the interests it serves or the manner in which it is generated. This finding could potentially shed new light on the debate over whether or not traditional knowledge should be commodified, how it should be done and how it can have an impact on indigenous communities. These questions will be examined in the next chapter.

As a final comment with regards to terminology, since traditional knowledge and indigenous knowledge have been widely accepted as terms, they will also be used in this dissertation, but this usage in this dissertation should not be read as an acceptance of the essentialising characteristics of these terms.

Intermezzo 1 – Forms of Knowledge A Story about Hyena, Kamagu¹⁶, Paracetamol and Cattle¹⁷

Karabas – I will never forget him for showing me some glimpses of a more heroic past that was never going to be again.

In every community or village there are always stories about a local hero, somebody who is special. It was not any different in Omatako Valley in West Tsumkwe, except maybe that they have two heroes. There was this guy who, so I was told, could still outrun a springbok, which is the traditional way of hunting; the hunter tires the animal by chasing it until the animal is exhausted at which point the hunter can kill the animal with his spear. Unfortunately, when I met, in all likelihood, one of the last hunters, he was shy and refused to speak to me. Can you blame him? He probably suffered from 'Kalahari-itis': being tired of researchers. This must be a widespread 'disease' amongst the San who probably by now know more about social science research methods and the pitfalls of fieldwork than any nascent anthropologist or development worker. However, my key informants kept mentioning that there was one other person who I should meet, Karabas. He lived with his family in Bubi se pos, about 10 kilometres from Omatako village; a beautiful drive through the deep sands of the Kalahari dunes.

We set off on a Sunday, early in the morning after sharing breakfast and a cup of tea. By now, I was used to the fact that I had to perform my morning rituals with a captivating audience, although every time I was brushing my teeth I felt awkward. I didn't like spitting out the foam in the sand, the marks that the toothpaste left in the sand were still visible by the time I left. I came to see them as a symbol of my position as a researcher; when I left, the white marks would disappear and after a few days everything would be back to normal, the same poverty the same daily grind until the next white in 4x4 drives into the village and the people of Omatako will hope that this time everything will change. The driver(s) of this car will leave more behind than just

¹⁶ Kamagu is the local name for devil's claw (see chapter 7 and Appendix 2 for more details on the devil's claw).

¹⁷ Extracts from field diary.

a few perishable white marks in the sand; maybe, just maybe they will be lucky this time.

When we arrived at the homestead of Karabas, he did not look too good, neither was he keen to take me for a walk in the bush to show me the food and medicines that the San were still gathering. He complained that he felt a bit weak. I knew that the San were familiar with 'modern' tablets which they could get from the clinic; some of the people that I interviewed told me that they preferred the tablets from the hospital and they only used their traditional medicines when they did not have the money or they were living too far away from the hospital (but there were also people who told me the opposite and preferred to take traditional medicines). I only had effervescent paracetamol tablets with me and I offered Karabas one so at least I could help to reduce whatever pain he was feeling and maybe we could just sit and talk a bit. When the tablet dissolved in the water with noise and bubbles, Karabas thought that I gave him something magical; he was well impressed and immediately declared the tablets from the clinic to be inferior. After half an hour Karabas was in high spirits. He claimed to feel twenty years younger and told me he was ready to go. He grabbed his leather hunting bag which contained his bow and arrow and I would like to believe him that he never goes in the field without the hunting bag.

Once again we sat off, this time to the 'real wilderness'. This was proper 4x4 country. The faint track was overgrown with the thorniest of bushes who seemed bent on scratching away the £ 5000 deposit on the hire car. Driving was a nerve wrecking experience anyway. It appeared that the San categorised the researchers and development workers who visited the communities according to their driving skills. Somehow, I managed to impress them and I got the nickname Schumacher. It was not so difficult to impress them however. My predecessor, a development worker from WIMSA, was such a bad driver that even the San who were always desperate to hitch a lift refused to get into his car. His bad driving skills were always used in the other stories when people complained about WIMSA and development workers in general: 'he can't even drive, what can you expect'. So every time we set off on a journey, and mostly I had between 10 to 15 people in my car, I felt I was scrutinised and I tried to make the ride as smooth as possible. The bribe of lots of fresh water and oranges in the boot may have helped to smooth the surface.

When we got out of the car, Karabas spotted immediately a spoor of some wild dog. He told me that they are rare, but do live in that area. Again I was happy to believe him; in any case this was too far away from any village so it could not have been the spoor of a domesticated dog - maybe it was the spoor of the hyena; I will never know and maybe that is for the best. It was a vast area and Karabas could tell me exactly where I could find what sort of herb, root, medicine, food, etc. For me everything looked like dry shrubs as far as my eye could see, not for Karabas. He came alive and although the paracetamol may have been partly to blame, it was obvious that Karabas felt more at home in the bush than in his corrugated iron shed. You cannot blame him for that - Karabas' shed is surrounded by cattle of a few wealthy Hereros who have moved in the area. They are farming in an area that has been allocated to the San by the government, but the officials do not seem to mind that the Hereros are taking the land of the San, that their cattle destroy the bush food and medicines of the San, and will leave little grass for the wild animals that will be re-introduced in the conservancy.

I spent one of the most memorable days of my six months' fieldwork with Karabas. We found some Kamagu, and Karabas started to tell me a story about how the priest used San workers to harvest Kamagu. For weeks on end Karabas and other San workers stayed in the field harvesting Kamagu, which is, so I read somewhere, quite dangerous because you have to dig up the root and run the risk of getting bitten by a snake. After a whole month of harvesting in the field, Karabas delivered his harvest to the priest and in return he was paid £5!. The community in West Tsumkwe has decided to stop harvesting the Kamagu because yields were low and other people had harvested the Kamagu in an unsustainable way and now they had to wait for Kamagu to grow back. It seemed that even though for some people harvesting Kamagu was the only source of income, they refrained from harvesting Kamagu.

At the end of the day, my two key informants who were both members of the conservancy management team started to negotiate the sale of a cow while Karabas told me a story about how he fought with a leopard with his bare hands and showed me some impressing bite marks on his arm. This was almost surreal. For days, my key informants have told me stories about how important the conservancy is and how the

future of the San in West Tsumkwe is linked to the success of the conservancy, they want to introduce the 'big five' into the area and reduce the amount of cattle and goats, and now they are buying and selling a cow.

There rests one more story to tell about Karabas, the story of the Hyena. During the first night in Omatako, the first night in my life I slept (or rather tried to sleep) in a tent under African skies, I was listening to the many unfamiliar noises. Some were more frightening than others, but there was one particular noise that sounded really frightening, a noise that awakens a little voice in your head that nags 'what on earth motivated me to come here?' Anyway, the noise sounded as if a herd of cows were in serious distress. I tried to ignore it, but when I woke up the next morning I was told that a Hyena had killed another cow in the village that night. There were two animals that frightened me most, hyenas and snakes (a few weeks later I saw a black mamba and a Cape cobra). During my stay in Omatako, the Hyena returned on a regular basis to kill a cow or a donkey under the cover of darkness, and the villagers talked of little else. When I revisited Omatako village a year later, one of my key informants told me immediately that the Hyena was eventually tracked down and killed with bow and arrow – by none other than old Karabas, forever my local hero.

Chapter 3 - What Are Commodities? Commodifying Traditional Knowledge: Deconstructing Acts of ‘Sacrilige’ and ‘Defamation’

1 Introduction

In the preceding chapter it was argued that traditional knowledge should not be defined on the basis of its presumed ‘essentialised’ character, since it is better understood as local knowledge which is practical and situated in a present reality; traditional knowledge embodies a history of social practices and an appreciation of the local cultural context. A focus on local knowledge allows for the recognition that it is part of an interconnected world, tied to scientific and technical networks with which it interacts. Through such interactions, traditional knowledge can be simultaneously situated in the local and the global. However, the recognition that traditional knowledge is situated in the global also means that it is now also more valuable to the larger world which influences its fate and may threaten its continued existence. For example, as indigenous medical botany increases in commercial value, there is a risk that plants will be decimated by overexploitation, leading to the extinction of species and a loss of biodiversity. The exploitation is also a challenge to the continued traditional utilisation of indigenous knowledge (e.g. as a result of the reduced availability of plants) and thereby threatens the livelihoods and the social and cultural integrity of the indigenous peoples who developed this knowledge.

In other words, the growing interest in traditional knowledge raises the question whether it is possible for traditional knowledge to be commodified, commercialised and become valuable to the larger world without posing a threat to the social structures that sustain this knowledge and the livelihoods of indigenous peoples who depend on it. While some have argued that the CBD champions commercialisation and privatisation of intellectual and biogenetic (traditional) commons as a means to protect and preserve traditional knowledge¹⁸ (see e.g. Zerbe, 2002; 2005; Boisvert and Caron, 2002) the process of commodification of traditional knowledge has been subjected to strong criticism by many academics (see e.g. Nijar, 1996; Dove, 1996;

¹⁸ See chapter 6 for further details.

Shiva, 1997; 2001; Takeshita, 2001; Heath and Weidlich, 2003; Halbert, 2005). Commodification of traditional knowledge has been opposed because commodification is seen as a typical characteristic of a market-based economy and therefore should not be incorporated into the so-called indigenous economies of gifts and reciprocity (see e.g. Gudeman, 1996; Zerda-Sarmiento and Forero-Pineda, 2002; Posey, 2002a). While the very essence of the market-economy is profit accumulation and wealth maximisation, the gift-economy is based on the obligation to give something back in reciprocity (Zerda-Sarmiento and Forero-Pineda, 2002). In other words, the debate over whether traditional knowledge should be commodified has been framed in the discourse of old (anthropological) oppositions between exchange in the West, regulated by the market and the process of commodification, and gift-giving in indigenous communities, regulated by principles of sharing and reciprocity. Some indigenous peoples have rejected the commodification of their natural and intellectual resources on the basis of conflicting values between industrialised and capitalist economies and local (indigenous) practices and have called the (mis)-use, possession and commercial exploitation of their heritage by non-indigenous peoples acts of 'sacrilege' and 'defamation' (Greene, 2004).

The tendency to define commodities in the Marxist tradition, viz. a commodity is a product intended for exchange and commodities have emerged as such in the institutional, psychological and economic conditions of capitalism, has been widely embraced in the literature on traditional knowledge. Publications like Arjun Appadurai's (1986¹⁹) *The Social Life of Things: Commodities in cultural Perspective*, Margaret Radin's²⁰ (1996) *Contested Commodities* and Martha Ertman and Joan Williams' (2005) *Rethinking Commodification* have helped to shed new light on the moral, philosophical and cultural underpinnings of commodification. Appadurai argues that commodities should be more widely defined than purely as products for exchange. He defines commodities in a wider context as things with a particular type of social potential and suggests that even gifts could be seen as commodities. In this respect, commodities can exist in a wide variety of societies, Western and non-Western. Radin rejects the polar opposites of a pure market domain where everything is commodifiable and a pure non-market domain where certain things should never be

¹⁹ Republished in 2005.

²⁰ Republished in 2001.

sold or exchanged. She argues that in some instances commodification is less harmful than non-commodification. Ertman and Williams draw attention to the potentially empowering role of commodification.

The current literature on intellectual property rights and traditional knowledge has largely failed to recognise the relevance and certainly the consequences of these and similar works. Even some of the most recent books on intellectual property rights and traditional knowledge, such as Mgbeoji (2006), Halbert (2005) and Gibson (2005), fail either to engage with or to have an apt understanding of the specialised body of literature on commodification that is exemplified by these three works. The aim of this chapter is to explore the potential impacts of the latest thinking on commodification on the debate regarding intellectual property rights and traditional knowledge.

It is argued in this chapter that the dichotomy between the commodified concept of property in the market and the noncommodified concept of kinship-based property is overemphasised in the debate about the commodification of traditional knowledge through intellectual property rights. The conventional assumption is based on the belief in the existence of two hostile worlds that cannot be reconciled: on the one hand there is the world of an economic arena dominated by self-interest (the market) and on the other hand there is the world dominated by intimacy and altruism that must be protected from the instrumental behaviour of the market (see e.g. Posey, 2002a). The belief that these two worlds cannot be linked has been the ruling discourse both for economic scholars who defend the freedom of the market and contract and for those sceptical of marketisation who oppose a market in sacred things (such as traditional knowledge) and worry about other non-market values such as dignity, solidarity and equality (Ertman and Williams, 2005).

The traditional conviction of these two hostile spheres - the market and the non-market - represents a distorted view of the market by emphasising its negative characteristics of hostility and self-interest while ignoring the more positive characteristics like the relational dimension (e.g. the rules that are designed to create a fair playing field) that is still part of many commercial relationships (e.g. see Williams and Zelizer, 2005). This view is also shared in some of the political and legal theories

of property. For example, there is an argument that property relations are a set of social relations among persons with respect to things. This view is endorsed by earlier legal realists like Cohen (1954) and more recently by critical legal scholars like Singer (see e.g. Singer 2000a; 2000b; Singer and Beermann, 1993) who argues that property is not merely an individual right, and is not based solely on the notion of self-interest or self-reliance. It is, in fact, an “*intensely social institution*” (Singer 2000a: 3)²¹. From a more historical perspective this view is also underpinned by Alexander (1997) who argues that the commodity theory of property²² is only one half of the story. The other half of the dialectic about property, argues Alexander (1997), is the view that property also has another function, viz. to create the material foundation for maintaining the proper social order (i.e. property comes with obligations); Rose (1994) has called this the proprietary role of property. Alexander continues that many scholars have overemphasised the commodity side or market value of property and ignored its proprietary role in the historical meaning and role of property, specifically in American law.

In this chapter the debate on whether or not to commodify traditional knowledge is furthered by examining the commodification debate from a cultural studies²³ approach. This chapter will present the viewpoint that the debate about commodification has so far been positioned too much in the disciplinary framework of law and economics. Therefore it is argued that it is necessary to revisit the debate from a cultural studies perspective and build further upon the concept of the cultural life of things, first introduced by Appadurai in 1986. Instead of viewing commodities and cultures as opposed to each other, the cultural study of commodities focuses on the changing meaning of things (including knowledge) when they pass through various local and global circuits and cultural meanings, including markets (Radin and Sunder, 2005).

²¹ For a concise overview of this theory, together with some of the criticism against this theory, see Munzer (2001).

²² The commodity theory of property is based on the belief that property satisfies individual preferences through the process of market exchange or, to use a legal term, ‘market alienability’.

²³ Note that culture in this context refers to what has been discussed in chapter 2, section 5, as the space that is embedded in ‘reality’ or ‘current way of life’ and does not refer to an essentialised definition of culture, viz. something that refers to the authenticity of identity.

In order to address these issues, this chapter will first examine the contrast between the narrow (economic) and broad (cultural) definition of commodities. After establishing the main arguments that support a wider definition of commodities, attention is turned towards the central debate, viz. can indigenous culture and knowledge be commodified? In order to answer this question, new theoretical concepts of commodification will be examined by introducing the concept of exploring the 'biographical life' of knowledge, culture and things in different cultural settings. It is argued in this chapter that examining the biographical life of a thing or knowledge from an anthropological perspective will help to determine whether the diversion of traditional knowledge from its customary path poses a threat to the social structures that sustain the knowledge upon which the livelihoods of indigenous peoples depend and whether the diversion is in response to particular changes in the socio-economic and political circumstances of indigenous peoples. In short, it will be examined whether commodification can be used as a tool to achieve social and economic equality.

2 *Definitions*

In general, commodification is the term used by scholars to denote the process by which something becomes a commodity. Inspired by the work of Karl Marx, commodities are often defined as something with both use and exchange value. As such, a commodity is just a thing that satisfies human wants and is perceived as being a typical characteristic of capitalism. Appadurai (2005a; 2005b) criticises this definition of commodities as objects of economic value for being too narrow and for associating commodities only with capitalist modes of production. Appadurai believes that commodities can be found in any sort of society, including a non-capitalist one because the value of a thing is not in the function of economic exchange only. A broader understanding of commodities would define them as goods intended for exchange, regardless of the form of exchange. In this sense even things that are exchanged in non-monetary economies can be commodities because commodities must not only be produced materially through exchanging one thing for another in a market place, but must also be perceived as a commodity (see section 3.4 for an example) (Kopytoff, 2005).

Within the remit of the cultural definition of commodities, a thing becomes a commodity when the meaning and the value of the thing itself are deemed appropriate for it to become a commodity. In other words, when a thing becomes valued, then, it becomes a commodity. In order to establish whether things are valuable and meaningful as commodities, the things must be followed through their life cycle because the meaning and value are inscribed in their uses and trajectories throughout the different stages of their life (Appadurai 2005a; 2005b). While in the economic sense a thing becomes a commodity when it has use and exchange value, in the cultural sense a thing is a commodity when it is culturally accepted as a commodity regardless of its use or exchange value.

Following the realisation that commodities can be defined in economic and cultural senses, the next step is to apply these two different approaches to the debate about commodifying traditional knowledge.

2.1 Economic Perspective

To recapitulate, the issue that needs to be addressed is to question what should and should not be in the market and what are contested commodities, i.e. things that should never be exchanged in the market. Answering this question from an economic perspective will lead to a polarised debate. At one end of the spectrum, within the tradition of the Chicago school of economics or neo-liberal economics, it will be argued that everything can be commodified because all things can be exchanged in the marketplace for a price, including some controversial things like babies (see e.g. Landes and Posner, 2005). Neo-liberal economists will argue that commodification is inevitable and good; any legal efforts to prevent the sale of some contested commodities are by definition bad. The moral justification for this economic argument is grounded in the belief of the supremacy of private culture. The market is perceived as a regulating mechanism that maximises individual preferences and returns. However, at the other end of the spectrum the moral neutrality of the market has been questioned by those (see e.g. Radin and Sunder, 2005; Radin, 2005; Radin, 2001) who argue that particular aspects of life should not be for sale (such as freedom, sex, babies, etc.). Scholars like Radin doubt whether the market is in

economic terms a neutral institution since, so she argues, the market has a different outcome for the poor and the rich.

A style of argument similar to the latter has been used in the debate about the commodification of traditional knowledge, stressing that the spirit of the commodity-economy is deeply opposed to the spirit of the gift-economy and therefore traditional knowledge should never be turned into a commodity that can be sold and traded in the market place (see e.g. Nijar; 1996; Dove 1996; Shiva, 1997; 2001; Takeshita 2001; Heath and Weidlich, 2003; Gudeman, 1996; Zerda-Sarmiento and Forero-Pineda 2002; Posey, 2002a). However, as argued in great detail in the previous chapter when discussing the dualism between indigenous and scientific knowledge, the use of such binary typologies (scientific versus traditional knowledge or commodity-economy versus gift-economy) obliterates commonalities and continuities between different types of economies. This dualism between commodity-economy and gift-economy is parallel to the classic typology of social organisation and sensibility – that of rural and urban, provincial and cosmopolitan, agricultural and industrial, folk and society, named *Gemeinschaft und Gesellschaft* by the 19th Century German sociologist Tönnies (2001). However, this ‘*G and G*’ typology cannot be applied usefully to today’s world of postmodernism, suburbanism, mass communication and globalisation. The dualism between traditional and scientific knowledge or commodity-economy and gift-economy arose in the period characterised by the consolidation of Western imperialism and its colonisation of indigenous peoples around the world. As such, it was a defining typology for an emergent modernity. According to Appudarai (2005a), the exaggeration of the contrast between gift and commodity has many sources. For example, there is the tendency to romanticise small-scale societies; underplay the calculative and self-aggrandising characteristics of non-capitalist societies; and forget that capitalist societies too have a social and relational dimension²⁴.

Based on the above arguments, it is argued in this chapter that discussing the commodification of traditional knowledge while using a purely economic definition of commodification restricts the debate. When discussing the definition of traditional

²⁴ This issue will be further discussed in chapter 4, section 3.

knowledge in chapter 2, it was argued that by reducing differences between indigenous and scientific knowledge to a dichotomous opposition, potentially fundamental areas of compatibility are ignored. It was also argued that it makes more sense to assume that knowledge has different logics and horizons, depending on the interests it serves or the manner in which it is generated. A similar argument can be used when discussing the definition of a commodity. Arguing that indigenous peoples' economic systems differ from the capitalist Western economic system reinforces unnecessarily the polarities between indigenous and Western societies. This is not in the best interest of indigenous peoples and the preservation of their knowledge because, as was argued in chapter two, polarities promote hierarchies and rigidity. Therefore it is argued in this chapter that in order to save traditional knowledge from a range of threats, including corporate expropriation, theme park caricature, and extinction, the debate over whether or not to commodify traditional knowledge is better served when commodities are studied from a cultural perspective.

This approach rejects the stark opposition between market-based economies and gift-based economies and it does not rule out the commodity status of traditional knowledge by definition. Instead, it draws attention to what Appadurai (2005a) calls the total trajectory of traditional knowledge through its different life cycles (e.g. from being a sacred non-commodity to a consumable commodity) and a closer examination of the question why traditional knowledge has diverted from its customary path. Is the diversion a sign of creativity or crisis and in case of a crisis was it sparked by economic hardship, war or plunder; or is traditional knowledge culturally, economically and socially transformed as a result of changing markets and ideologies both locally and globally? Furthermore mapping the total trajectory of traditional knowledge also allows examination of whether indigenous peoples have the power and the capacity to restrict or oppose commodification; or whether they are rather embracing commodification and why; or whether traditional knowledge can be both, viz. a commodity in one cultural setting while simultaneously being a sacred non-commodity in another cultural setting? Examining commodities from a cultural studies perspective will allow these questions to be addressed.

2.2 Cultural Perspective

Appadurai (2005a) argues that from a cultural perspective commodities are *“things in a certain situation, a situation that can characterise many different kinds of things at different points in their social lives. This means looking at the commodity potential of all things rather than searching fruitlessly for the magic distinction between commodities and other sorts of things”* (Appadurai, 2005a: 36). Commodities defined in this way, Appadurai (2005a) continues, can be disaggregated into three phases. The first one symbolises the **commodity phase** of the social life of things, meaning things can move in and out of the commodity state, while such movements can be slow or fast, reversible or terminal and normative or deviant. The second stage is the **commodity candidacy**, signifying more of a conceptual than a temporal feature. This refers to the standards and criteria (symbolic, classificatory and moral) that define the exchangeability of things in any particular social and historical context; it is the cultural framework in particular that defines the commodity candidacy of things. The final phase is the **commodity context** in which things may be placed, meaning that different social arenas will link the commodity candidacy of a thing to the commodity phase of its career in various ways. All these different stages in the social life of things emphasise that the process of commodification is heavily influenced by temporal, cultural, social and arguably locational factors.

One of the most important messages in the cultural theory approach towards commodities is that they are not just a certain kind of a thing, but rather that all things have the potential to **become** commodities at some point in their biographical life. Commodification is only one stage in the life of an object and there are certainly cases in which at one time an object is exchanged for some form of compensation (which does not per definition have to be money in order to achieve the commodity status) but as a result of events and circumstances, the same object may be withdrawn from the market and become inalienable. The order of the process can also occur in reverse; an object can first be inalienable and then become a commodity. Kopytoff (2005) has called this phenomenon the ‘biographical’ consideration of commodification as a process, which is part of the anthropological tradition that uses biographical stories (for example, collecting life stories) to understand the cultural settings of a particular society.

In the next part of this chapter several case studies will be used to examine whether the diversion of traditional knowledge from its customary path poses a threat to the social structures that sustain the knowledge upon which the livelihoods of indigenous peoples depend and whether the diversion is a function of particular changes in the socio-economic and political circumstances of indigenous peoples. Kopytoff's (2005) analytical tool, viz. studying the trajectory life of a commodity from its biographical perspective, will be used to analyse the professionalisation of the San's traditional trance dance, followed by a second case study, viz. the changing use of *qat*.

3 *Biographical Life of Knowledge, Culture and Things*

3.1 Professionalisation of the San's Trance Dance

The way in which things, including cultural and spiritual artefacts, can move in and out of commodity status can be exemplified through a case study of the commodification and professionalisation of the San's trance dance, based on anthropological studies by Guenther (1999; 2005) and Katz *et al.* (1997), complemented by the author's own fieldwork in the Omaheke region in Namibia in the summer of 2004.

The trance dance has in recent times undergone some radical changes among some of the contemporary San, moving increasingly towards a commodified and professionalised status. Originally, the dance was performed for its curing ritual, held throughout the night around a fire, in which mostly male dancers, either single or in groups, dance to the chanting and clapping of women. During the dance the dancer reaches a trance stage through which a curing potency (*n/um*) is activated in the dancer's body, which enables the curing of all sorts of illnesses. The San perceive *n/um* to be a personally owned consumable that is shared with the community and is given as an unreciprocated and uncalculated gift to people who require it and may demand it. The dancer's rewards for giving *n/um* are not material but moral, such as personal satisfaction, the love and respect of the family and the gratitude of those he has saved.

The trance dance occupies a very central position within the spiritual and social life of the San. The symbolic salience of the trance dance is so important among the San that those living in an ethnically plural community and who have consequently lost many of their cultural traits have revived the trance dance (such as the †Khomani San in South Africa). However, the quest for the revival of the trance dance already shows signs of the new biographical purpose of the trance dance. For example, the San leader, John Qace Hardbattle, formed his political action group, the *Kgeikani Kweni* (meaning the First People of the Kalahari), under the motto 'political survival through cultural revival', by taking trance dancers to perform at especially strategic meetings with politicians, donors or media representatives.

While a number of the older dancers continue to perform their curing rite in the old fashion, viz. as a communal rite executed in the spirit of sharing and cooperation, others have professionalised the dance by incorporating a number of significant alterations, such as collecting payment, rationalisation and instrumentalisation of healing, employment of self-promoting, status-enhancing ritual and mystical props, and the expansion of the healer's repertoire of healing practices. Especially, collecting payments is a good example of the dance's move towards professionalisation.

For some of the dancers, healing has become regular work and their only source of regular income on which they are dependent to sustain their livelihood. For many farm San, performing the trance dance is work and, within the logic of farm work to which they have been exposed, work is something for which one gets paid (although the trance dancer may make some exceptions when healing their own family members). Furthermore, the San copy the model of other medical specialists they have been in contact with (whom they refer to as Western doctors) and who charge the patient for their services. Not only must the patient pay for the service of the trance dancer, on some occasions the trance dancer expects to collect a fee from people just watching the dance, like tourists.

Sometimes the healer does not get paid for his service, mainly for two reasons. First, people simply do not have the resources to pay him or, secondly, for cultural reasons people continue to believe in the values of the pre-capitalist hunter-gatherers' society,

viz. sharing and reciprocity. Following the logic of these values, the dancer receives either no return payment or the transaction is delayed indefinitely.

Along with the professionalisation of the trance dancer, the trance dance is also becoming commodified in the sense that a monetary value has become attached to the dance. The dance has become a product and service and while, in the past, the motivation and validation to perform the dance was communal, diffuse and indeterminate, now it has become mercenary, tangible and calculable. The commodification of the trance dance plays itself out within a particular social context. When the dance is performed for the other San, the trance dance will still follow, to a great extent, the basic format of the original trance dance and may contain some elements of curing. However, when the dance is performed for Western tourists, the dance is substantially altered and is devoid of any elements of curing and reaching the stage of trance is only simulated. In other words, the trance dance in its original status co-exists, to a certain extent, with the professionalised and commodified trance dance. The trance dance has become commodified to such an extent that non-San business oriented people are now copying the San dances which, in turn, reinforces the commodified nature of the dance.

What is the explanation for the transformation of the trance dance from a ritual performance carried out in the spirit of sharing and moral interaction to a rational service performed for a fee by a professional dancer for a client? Both internal and external factors can explain this. With regards to the latter, over the past decades the San have been confronted with many economic, social and cultural changes and many of the San are now living in a cash economy. Getting money for labour is now a commonly accepted fact in most of the San communities and this has started to displace the traditional sharing ethos. This also had repercussions for the trance dance which is now increasingly validated and transacted through money. Ultimately, this is leading to the objectification and depersonalisation of the dance.

With regard to the internal factors, Guenther (2005) has identified five explanations for the commodification and professionalisation of the dance. The first is the erosion of the sharing ethos as a result of the San becoming part of the cash economy; second, depersonalisation of the relationship between the 'patient' and the trance dancer;

third, disassociation of the professionalised trance dancer from his community; fourth, scepticism in the community of the trance dancer's capabilities; and finally, competition between the trance dancers.

To summarise, the above case study shows that the diversion of a thing from its customary path can be brought about through both internal (e.g. changing symbolic values) and external (e.g. changes in the socio-economic situation) circumstances. Cassanelli's (2005) case study of the changing use of *qat* underwrites this finding.

3.2 The Changing Use of *Qat*

According to Cassanelli (2005), analysing a commodity or a thing from its biographical life leads to the conclusion that a commodity responds to supply and demand in the economic sphere, but equally the symbolic value of a thing or a commodity can also change in response to social and political pressure. Cassanelli illustrates this with a case study of the changing rituals and use of *qat*, a small shrub whose leaves, stem and bark are chewed for their stimulating effect in northeast Africa. Ever since a production, distribution and consumption ban on *qat* was imposed in 1921, both the economic value and the cultural meaning of *qat* have changed from being a customary practice related to spiritual and sacred properties to a more secular use as a form of recreation within a specific social context. While traditionally the cultivation of *qat* was limited and only a few people in the community were allowed to grow it, the use of *qat* as a consumer good has also meant that it is now grown on a much larger scale. Cassanelli argues that the study of the changing economy of *qat* production, trade and consumption allows an ethnohistorical study of the cultural transformation of contemporary northeast Africa, ranging from the changing values of society to changes in agriculture, commerce and family life whereby the biographical life of *qat* has evolved from being a spiritual 'good' towards a consumable commodity.

The above examples show that both the trance dance and *qat* have, what van Binsbergen (2005b) calls, 'parallel life stories'; a phenomenon that van Binsbergen further illustrates with the example of the *sangoma* cult. *Sangomas* are practitioners of herbal medicine and divination in traditional and rural societies throughout Africa,

and the practice is strongly rooted in a belief in ancestral spirits. While the *sangoma* cult can certainly be interpreted as a text-book example of commodification in the urban setting of Francistown in Botswana, at the same time the recent re-introduction of the cult by other people in another area of Francistown has re-established the traditional values of the cult in its sanctification of place and person. The new practitioners of the cult confront, rather than celebrate or embrace, the commodification aspects of the cult. In this way the vital and spiritual meaning of the cult, which has been lost through commodification, so it is argued by the more traditional *Sangomas*, has been restored.

While the first two case studies of the trance dance and the use of *qat* illustrate that something that was originally not a commodity can become a commodity through internal and external changes and pressure, the last example of the *sangoma* cult shows that something that already was a commodity can become decommodified. This raises the question whether the original cultural meaning of a traditional artefact, service or ritual can be restored when the commodity status is reversed.

3.3 Decommodification Process

Harding (2005) examines whether the repatriation of an indigenous artefact could lead to a decommodification process of the artefact²⁵, viz. returning the object to its prior status and context. Consistent with the tradition of the biographical life of things, Harding argues that the value and the meaning of an object are not restricted to the process of the last transaction. Instead, the meaning and value of an object are always the results of its cumulative biography. No matter how questionable it was to remove an artefact from its original settings and subsequently commodify it, simply returning the object will not undo or erase the commodification, argues Harding. She continues that, first, the entire history is embedded in the object and, secondly, the commodification of the object is often one of the main things that makes repatriation so valuable. In this sense the object symbolises a clash between the homogenising

²⁵ For more information on the debate about intellectual property rights and indigenous artefacts, see e.g. Nicolas and Bannister (2004) and for more information about the return of indigenous cultural items, including human remains, to indigenous communities, see e.g. McLaughlin (2002).

forces of a larger society that pushes toward commodification and the heterogeneous singularising²⁶ (i.e. decommodification) tendencies of smaller cultural groups.

However, Harding's argument can be further refined by arguing that whether the process of repatriation can be viewed as proper decommodification depends on the social function of the returned object. For example, when samples of the hair and skin of Truganini (the so called "last Tasmanian") were returned by Britain's College of Surgeons to Bruny Island, these remains were cremated or buried according to the Tasmanian Aboriginal tradition²⁷. Based on this example, it could be argued that the remains of Truganini were decommodified by giving her a ritual cremation. As Harding argues, while repatriated indigenous cultural artefacts displayed in tribal museums are not only a (symbolic) memento of the complete history of the artefacts, including their colonial and commodified status, they also function as a reminder of the fact that indigenous peoples are now actively seeking ownership over their cultural artefacts as part of their search for and creation of a new cultural identity. According to Harding, this process is linked to commodification.

The above case studies have been used to demonstrate that things, including cultural and spiritual artefacts, can move in and out of a commodity status. What remains to be examined in this chapter is whether all things at some stage in their life cycle are potential candidates for commodification. In other words, are some spiritual and cultural objects or symbols indeed sacrosanct and therefore protected from a commodity status? This issue will be discussed next.

3.4 Restrictions on Commodification

Davenport's (2005) comparative study of economic systems in the Eastern Solomon Islands can give new insights. Davenport has built further upon the reasoning of Bronislaw Malinowski, one the greatest anthropologists in the 20th Century, that a distinction must be made between *ordinary commodities*, which are exchanged through the usual channels like markets, and *valuables*, which are only exchanged for

²⁶ The full meaning of the term 'singularisation' will be further explained later in the chapter.

²⁷ Truganini's skeleton was displayed in a Tasmanian museum until 1947. In 1976 her remains were cremated and her ashes scattered on Bruny Island (information on Truganini can be found on the website of the European Network for Indigenous Australian Rights, see <http://www.eniar.org/news/Truganini.html> - accessed on 31 July 2006)

an equal valuable and in a specific ritualised context. Davenport has found that the communities on the Eastern Solomon Islands also attribute two different value systems to objects and symbols. On the one hand there is material and economic value; on the other hand, there is mystical and spiritual value. While economic value is achieved from labour and the object is treated as a commodity that can be bought, sold or traded on the market, spiritual value is still linked with the supernatural and therefore the object is not marketable and subsequently will never achieve a commodity status. While it would be impossible to generalise on the basis of this example, it can be argued that there are indications that some things, throughout their life cycle, remain sacred or spiritual and will, on first sight, never become a commodity. Kopytoff (2005) would agree with this argument. He concludes that every culture or society, including Western societies, mark some parts of their environment as sacred or ensure that some things remain what Kopytoff calls *singular*, meaning that some things can not be commodified.

To recapitulate, by focusing on the social history or the biographical life of things it becomes clear that commodification is certainly not a one-sided process whereby, for example, indigenous communities are forced to submit to commodification as a result of globalisation. Instead, the above case studies have shown that things can slip in and out of a commodity status and that communities like those in the examples can make choices over which aspects of their culture can become commodities and which not. Arguably, external and internal socio-economic changes might pressure people into making such choices, but it would be erroneous to assume that indigenous peoples are by definition helpless victims of the commodification process. Davenport (2005) shows that, while some of the materials and activities he had studied on the Eastern Solomon Islands were clearly valued for their spiritual values, the same materials and activities also had an economic value. The people themselves decided which aspects of the materials and activities had economic value and which parts were set aside for spiritual value and were therefore not part of the commodification process. The same cycle can also be identified in the other case studies. For example, the San's trance dance is for some San (e.g. for the San who have worked for many generations on farms) a professional and commodified dance, while for other San, usually in a more traditional cultural setting, the trance dance is still a non-commodified ritual.

In other words, there is strong evidence that undermines the validity of a generic binary perspective in which small-scale societies (i.e. more traditional) are seen as resisting commodification while complex societies (i.e. more industrialised) not only embrace, but also enforce commodification upon small-scale non-Western societies. However, this is not to argue that small-scale societies will always embrace commodification; there are things or objects that are indeed sacred or special and as such cannot be commodified. While particular cultural settings and meanings might explain why some communities or societies might still resist commodification of various materials and rituals, Kopytoff (2005) argues that in small-scale and to a certain extent uncommercialised (to use a romantic notion) societies the drive towards commodification was restricted by both the absence of a developed monetary system and the lack of technological development to support a commoditised society. The rapid introduction of new technological developments in non-Western societies has opened up previously closed areas to commodification.

However, two further remarks must be made to balance Kopytoff's conclusion. First, the spread of Western capitalism must not be interpreted as the sole culprit in the destruction of pristine indigenous communities. For example, Köhler (2005) argues that long before the arrival of the white colonisers the Baka people (Pygmy people in the northwest part of the Republic of Congo) were already exposed to the concept of commodification through their contact with other local people such as the Bantu. The frequent contact between the Baka hunter-gatherers and the Bantu agriculturalists gradually exposed the Baka to the concept of commodification.

Second, the introduction of money does not automatically mean that people will change their perception about commodities so that the society will subsequently embrace commodification as a generally accepted phenomenon. For example, while money had been part of the French economy for centuries before 1789, it was only with the French Revolution that the French people changed their mind about commodities (Reddy, 2005). This shows that the introduction of money, or any other 'symbol' of capitalism for that matter, is in some cases not enough to cause people to adopt a commodified market system. Reddy's case study shows strong indications that a shift in thinking about some aspects in society, such as political institutions, the social hierarchy, the opinion of 'ordinary' people, ideological control and commercial

dependence contributed to a greater extent to this shift in thinking about commodities than the introduction of money or industrialisation.

The same conclusion can be drawn for the examples used in this chapter. Even when small-scale societies increasingly become embedded in a market economy, this does not necessarily mean that every aspect of that culture will become commodified. On the contrary, based on the examples given in this study, it can be concluded that the underlying social structure of a particular society plays an important role in this process. There will certainly be examples that prove the opposite, viz. that some small-scale societies were forced through external factors such as colonial supremacy to become encapsulated in the first world as an underclass (see e.g. Lee, 2005). However, in order to further the debate about the commodification of traditional knowledge, it is important to acknowledge that indigenous peoples are not just helpless victims who submit to globalisation and commodification, but that they are capable and often participating actors who can make commodification work to their advantage (van Binsbergen 2005a). The focus on commodification as a tool to achieve social and economic equality is a very contested topic and merits more attention. The last part of this chapter will explore this currently emerging debate on commodification (see e.g. Ertman and Williams', 2005 edited volume on rethinking commodification). It will be examined whether their argument that commodification can be a liberating act can make sense in the context of the commodification of traditional knowledge.

4 *Commodification as a Liberating Act*

In their book *Rethinking Commodification*, Martha Ertman and Joan Williams (2005) argue that it is time to change the debate about commodification and go beyond the traditional yes-no question of whether or not to commodify. They argue "[...] *against the [traditional] vision of a world bifurcated into separate hostile spheres whose boundary is policed by commodification anxiety*" (2005: 4). According to the so-called new commodification theory, and under certain conditions, commodification can be an act of empowerment and emancipation.

While previously Radin (2001) argued that poor and subordinated people were likely to engage in 'desperate' exchanges, the latest works on commodification argue that the ability to commodify things is in fact a liberating act but, so they argue, the poor often have neither the ability nor the right to commodify. Early commodification theorists argued that the role of law is either to prevent commodification in some things or at least to regulate trade in a more equal manner. The new commodification scholars, on the other hand, argue that law should facilitate trade in a wide range of things that were previously labelled by the old-style commodification theorists as contested commodities, including sex (i.e. prostitution; see e.g. Nussbaum, 2005; Lucas, 2005), body parts (see e.g. Cohen, 2005) and culture (see e.g. Harding, 2005; Austin, 2005). However, the new commodification scholars also argue that while the range of things that can become commodities should be extended, it is equally important to focus on processes of social change so that some people would not have to engage with 'desperate' exchanges as the last resort to improve their lives.

Radin and Sunder (2005) argue that commodification can only become an act of emancipation and liberation when poor and subordinated people are sufficiently involved in setting out the rules and meaning of the exchange or commodification process. This means that in order for commodification to work in the best interest of indigenous peoples, it is important that local settings are not taken for granted. There is a need to have a critical understanding of historical trajectories and to question underlying power structures that dominate local settings. In practice, this means that the focus of attention should shift from the yes-no question on commodification towards the empowerment of those who want to use their traditional knowledge and resources in order to improve their livelihood. Observations from the first fieldwork (see chapter 1 and Appendix 1 and 2 for more details on the fieldwork) will illustrate this further.

During the fieldwork in Namibia and South Africa, it was established that for the San²⁸ (at least those that were interviewed) many of the natural resources (e.g. forest plants, timber, medicinal plants) and the knowledge over these resources have economic value. The San also realised that other people have or are developing an

²⁸ For more information on the San's perceptions on commodifying and commercialising knowledge, see Appendix 2.

interest in these resources for their economic value. In most cases the interviewees were not reluctant to use their natural resources and their knowledge of these as an economic resource. They argued that they needed to improve their economic situation and were convinced that full control over their natural resources (including trading) could be helpful in their struggle to alleviate their poverty. The San used a similar argument when they decided that instead of contesting the Hoodia patent they would rather get something out of it and started negotiations with CSIR in order to get some of the benefits (for more information on the Hoodia benefit sharing agreement, see chapter 7).

However, at the same time some people, mostly elders, emphasised that while they recognised that the San's medicinal plant knowledge had use and exchange value for outsiders (other local ethnic groups or Euro-Americans), they also continued to value the medicinal plants for symbolic and ritual reasons. This finding chimes with Malinowski (1935) and Davenport's (2005) argument that communities make a distinction between ordinary commodities and valuables and that one thing can simultaneously have an economic or material value and a mythical or spiritual value (for more detail see page 3.4 of this chapter).

In general, most people that were interviewed seemed keen to start using their medicinal knowledge and set up partnerships with other people so they would make some money; however, they were worried that they did not know how to do this and felt ignorant and vulnerable. They argued that in order to start trading their knowledge, they must first feel comfortable that the contract and trading agreement was compatible with their own traditional rules of how knowledge is passed on between different parties. They would not trust an agreement that would not respect the San's traditional rules and customs.

This example shows that some indigenous peoples are willing to use some of their knowledge as a tool for poverty alleviation, while at the same time this knowledge can retain its spiritual or symbolic meaning for their own use. Therefore it can be argued that commodification, when done in a fair and equitable way so people can derive economic and social value from it, is not per definition a bad thing that threatens the social integrity of indigenous peoples. Unfortunately, there are hardly any examples

where commodification of traditional knowledge has unambiguously led to an improvement of the social and economic position of indigenous peoples (see chapter 7). There is a need to shift attention away from the polarised debate on commodification as an act of sacrilege and defamation, and focus instead on examining whether commodification can be or can become an act of empowerment. There are many obstacles that need to be overcome before such empowerment can be achieved. However, as indicated by the San, the first step in the right direction is the recognition of indigenous peoples' own rules and customs of how knowledge is passed on. In short, condemning commodification of traditional knowledge suppresses the possibility for indigenous peoples to contest the current balance of power and inhibits indigenous peoples from gaining control over their own lives and culture.

5 Conclusion

Just as it was concluded in chapter two that there is a danger that influential ideas of what constitutes traditional knowledge are constrained by continuously portraying indigenous peoples as pristine and unchanging, a similar problem occurs in the debate over whether traditional knowledge, customs and cultures should be commodified. By examining the social life or biographical stories of things, it becomes obvious that things are not static and unchanging, but have a rich story line embedded in a complex web of social relations and history. While from an ideal theory approach outright dismissal of commodification might be morally justifiable, from a more pragmatic approach it would be more beneficial to question the socio-economic and political institutions that are responsible for subordinating indigenous peoples. It might very well be that claiming (cultural) property rights through commodification is the only option available to some indigenous peoples to improve their lives.

Chapter 4 – What is Property? ‘Demystifying’ and ‘Decolonising’ Property Relations in non-Western Cultural Settings

1 Introduction

So far this thesis has already exposed and analysed two persistent dichotomies, viz. traditional versus scientific knowledge (see chapter two) and gifts and sharing versus commodities (see chapter three). The language used by multilateral agencies and some academics is framed in oppositional terms following generalisations about the differences between Euro-Americans and indigenous societies. It has been argued in the previous chapters that polarities promote hierarchies and that difference does not necessarily equate to opposition between the two societies; it makes more sense to assume that knowledge (chapter two) and things (chapter three) have different logics and horizons, depending on the interests they serve or the manner in which they are generated both in Western and non-Western cultural settings. Before it can be examined in chapter five whether the current intellectual property rights framework represents the right tool for the protection of traditional knowledge, there remains one more dichotomy to be explored, viz. individual versus community-based property rights. This chapter will assess in more detail the dualism between individual and community-based property rights; where does this dualism come from; what are the consequences and is this bifurcated view of property relations accurate? Furthermore, it is argued in this chapter that examining property relations from a ‘local’ and ‘contextualised’ point of view will add richness and a different kind of realism to the debate about intellectual property rights over traditional knowledge in comparison to a debate that is based on homogenised thinking about property relations, viz. individual versus communal.

Theories about the meaning of ‘traditional knowledge’, ‘commodities’ and ‘property’ are tainted by the discourse of an international community (e.g. Non-Governmental Organisations [NGOs], United Nations Educational, Scientific and Cultural Organisation [UNESCO], WIPO and other multilateral agencies) 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 (Kirsch, 2004; Hirsch and Strathern, 2004). One of the most persistent dichotomies repeatedly used in the rhetoric of cultural property claims is the Euro-American belief that collective or communal rights offer a valid alternative to individual or private rights (Hirsch and Strathern, 2004). The categorical distinction between individual and private ownership on the one hand and communal and collective ownership on the other has its roots firmly established in Euro-American property theory. However, it is very unlikely that an alternative property model in a non-Western cultural framework will resemble the stereotypical communal property model (Strathern, 2004a). As a result of the binary opposition between traditional and scientific knowledge, gift giving and commodities and individual and communal rights, a particular interpretation of indigenous communities perpetuates that is often far removed from reality on the ground (Kirsch, 2004).

For example, whereas Erica-Irene Daes, Special Rapporteur for the United Nations Working Group on Indigenous Populations (UNWGIP), argues that 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 (2004b), 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 (2004b) 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. 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). 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 as people like Daes would like to believe. Every society, even the most egalitarian, will have people with different social positions which will entitle them to special rights over specific resources.

Strathern (2000) makes another interesting point when she argues that both advocates and opponents of intellectual property rights over traditional knowledge have embedded their argument in the framework of Euro-American property theory. While the advocates argue that intellectual property rights are a legal instrument that will allow indigenous communities to assert claims on the international stage that were previously thought impossible, critics argue that not everything can be considered to be owned because ownership implies the right of alienation and would erode the characteristics of collective ownership which is the typical form of ownership among indigenous communities. Strathern argues that criticising intellectual property rights for their individualistic notions strongly resembles the general disapproval of intellectual property rights that has been aired for the last three hundred years. Protesters have been arguing against private intellectual property rights in favour of communal forms of ownership on the basis that ideas are free goods and common property and should therefore not be controlled through a system of private property rights.

The same type of discourse has been used by the international community in the fight against the exploitation of indigenous peoples' tangible and intangible resources and in the remedies they have proposed to stop the 'plundering'. The model of collective rights has been praised as the solution to curb the individualistic notion of intellectual property rights, as a tool to protect specific resources, as well as to preserve the seemingly 'pristine' characteristics of indigenous societies (such as the free sharing of knowledge). 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. As discussed in the previous chapter, commodification of traditional knowledge is not always a one-sided process and the continuous portrayal of indigenous peoples as helpless victims who submit to globalisation is not always accurate. Therefore, the notion that indigenous peoples have a collective model of properties must be questioned against empirical evidence.

What may sound convincing in international fora is not necessarily a valid representation of the relationships which exist on the ground (Strathern, 2000; 2004a; 2004b). For one thing, the dominant discourse on intellectual property rights and

traditional knowledge raises questions about what is a community and who has the right to share. In order to have a proper debate about intellectual property rights and traditional knowledge that eventually will lead to fair and practicable solutions, it is important to have a thorough understanding of the 'real' socio-economic and political life of indigenous communities and how their property systems work. If an appropriate system for the protection of traditional knowledge is to be developed, it is necessary to form a thorough understanding of what property may be in both Western and non-Western cultural settings. This will be the main scope of this chapter.

This chapter will be structured as follows. First, it will be examined how indigenous peoples' property relations are organised followed by how the property relations are portrayed in the current intellectual property rights literature. Next, the framework of individual and community-based property rights will be assessed. The last part of this chapter will introduce a new framework for analysing property models that goes beyond the dichotomous portrayal of individual versus community-based property rights.

2 *Property in Non-Western Cultural Settings*

2.1 Definition of Property

Although the theoretical meaning of property has been researched at great length, there is still not a conclusive and universally accepted definition of what property is (Hann, 1998). One reason why this has proven so difficult is that property rights are surrounded by rules to define and enforce them and by opposing ideologies to justify and legitimise them (Ingold *et al.*, 1997b). Another problem is that property has been examined from different disciplinary perspectives²⁹, with little synthesis across the different perspectives.

²⁹ von Benda-Beckmann *et al.* (2006) offer a good overview of the different disciplinary perspectives on property, which can be summarised as follows. Political theorists like, for example, Locke, Rousseau, Engels and Marx have mainly examined the sources of legitimate property rights, emphasising in their analysis issues like the role of the state, social justice and equity, the relationship between power and property and the balance between the rights and freedom of individuals versus the needs of the collective of which the individuals are part. Legal scholars have also focused on the distinction between private and public property, but have also addressed the question of what sort of social actors should hold property rights and the relationship that (should) exist(s) between the multiple holders of rights in a single good. Anthropologists, on the other hand, have mainly dealt with the problems of comparison across different cultures and societies focusing, for example, on the role of kinship in property management, on situations of legal pluralism, and generally deconstructing many

As discussed already in the previous chapter, there are different views on the idea of property. In general terms, property can be defined in two ways (Pipes, 2000). In the first definition, property refers to the right of the owner(s) to exploit assets to the exclusion of everyone else and to dispose of the assets by sale or otherwise. In the second definition, property is defined not as a right over things, but as relations in respect to things. In this definition property rights refer not to the physical possession or the relation between the owner and a thing, but to the relationship between the owner and other individuals in reference to things. The second definition that describes property relations as social relations between people is almost like a textbook anthropological definition: "*The essential nature of property is to be found in social relations rather than in any inherent attributes of the thing or object that we call property. Property, in other words, is not a thing, but a network of social relations that governs the conduct of people with respect to the use and disposition of things*" (Hoebel, 1966: 424 in Hann, 1998: 4). This chimes with the findings of the previous chapter wherein it was argued that property is a social institution. However, as Hann cautions, the strict demarcation between things and social relations in the anthropological definition may be too restrictive. Therefore, he argues, property relations are social relations whereby "*[t]he word property is best seen as directing attention to a vast field of cultural as well as social relations, to the symbolic as well as material contexts within which things are recognised and personal as well as collective identities made*" (Hann, 1998: 5). The advantage of this definition is that it has less ethnographic 'baggage' and is very similar to the concept of the biographical consideration of commodities discussed in chapter two. Just like with commodities, the biographical story of property relations can be used to gain a better understanding of property as a social institution in a particular environment or society. It will therefore be used as a reference point for the analysis of property in this chapter.

Western assumptions. Finally, economists, have mainly focused on the theoretical significance of property in managing the social and economic effects of managing scarce resources in order to satisfy human needs optimally. Most economists maintain the theoretical distinction between various types of property (open access, common property, private property and state property).

2.2 Property in (Former) Hunter-Gatherer Societies

Contrary to popular beliefs, property as a concept also exists in non-Western societies. Discussion of property rights in hunter-gatherer societies has always been a very popular theme, as exemplified in the work of Ingold *et al.* (1997). Especially the question of whether hunter-gatherers hold property communally or individually has been a very contested area in anthropology. For a very long time the debate was divided between those who agreed with the view of Morgan (1877) that property was held communally, and those who followed Lowie (1928) who argued that property was held individually. However, nowadays anthropologists agree that both group rights and individual rights co-exist in (former) hunter-gatherer societies. Furthermore, it is also argued by anthropologists, following Gluckman's position (1965) that it is often futile to categorise property according to whether it is individually or communally held because, often, both individual and group rights exist for the same item (Barnard and Woodburn, 1997).

Ingold (1986) agrees that this categorisation is essentially meaningless in the context of property in hunter-gatherer societies. He argues that, instead, it makes more sense to isolate particular forms of possession (e.g. land, tools, garnered food, hunted animals, knowledge, artefacts and so forth) and examine how ownership of these resources is defined in each society individually. Distinguishing between different hunter-gatherer societies is important because Woodburn (see e.g. Woodburn, 1982; 1998; 2005) has argued that hunter-gatherers with a simple form of social organisation, viz. immediate-return systems, have different perceptions of property than hunter-gatherers with a more complex social organisation, viz. delayed-return systems. The former type of social organisation is characterised by an economic system in which people usually obtain an immediate return for their labour, and use this return with minimal delay and therefore place minimal emphasis on property rights. In delayed-return systems, on the other hand, people place more value on property rights which are usually linked with delayed yields on labour.

In discussing property rights in hunter-gatherer societies, Barnard and Woodburn (1997) distinguish between five different property categories. Each of these categories

will be briefly discussed, focussing specifically on the rights that are linked to each category and how these rights are organised.

The first category consists of the rights over land, water sources and ungarnered resources (like fixed assets, ritual sites, dwelling sites, hunting sites and so forth). Access to this type of property in immediate-return societies is, in principle, equal to all, but can become restricted when there is fierce competition over use of scarce resources. In general terms, people are naturally endowed with unconditioned rights of personal access to land and ungarnered resources. When access is sought to another person's area, permission must be sought but this is in most cases easily obtained. Although land is divided in separate territorial categories belonging (usually) to one extended family, the land cannot be alienated and it is rare to refuse access to the land to outsiders. Property rights in this first category should not be confused with exclusive possessive rights; instead, possession should be more defined as custodial rights in the sense of having a duty to look after the land and the (ungarnered) resources on behalf of the collectivity (Ingold, 1986). In delayed-return societies (e.g. Australian Aboriginals), on the other hand, access to land is more complicated and restricted because in these systems it is stressed that land and people are not separate entities and as such people draw their subsistence from their links with the land and with the Sacred beings who in their Dreamtime wanderings created both land and people.

The second type includes rights over movable property such as weapons, clothing, cooking pots, beads, and so forth. This kind of property is personally owned, but is constrained by custom. People make their own weapons and other tools, and property rights are allocated to these things on the basis that individuals are entitled to hold property over the things they have produced with their labour (in chapter 5 this principle will be further examined in relation to Locke's labour theory). Another important rule is that people are not allowed to accumulate movable property beyond what they need; anything they possess in excess must be shared with others - this is a moral obligation.

A third form of property rights applies to rights over food, such as meat, vegetables, seeds and nuts 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 or when somebody else in the community is hungry. With regards to large animals more specific rules are applied. For example, when an animal is killed by more than one arrow, usually, the owner of the arrow that first hit the animal is the owner of the animal. However, when the hunter kills an animal with an arrow that he has borrowed from another hunter, usually the animal belongs to the hunter who owns the arrow. However, regardless of who is the initial owner of the carcass, eventually, it is **obligatory** to share the meat with all the people in the community with the owner receiving no more meat than everyone else. The owner receives hardly any social recognition as the provider of the meat. His achievement is often belittled in a practice known as 'insulting the meat'. Sharing the food and in particular large animals is not frequently practiced in delayed-return societies; they usually have methods to store the carcass and the hunters are usually under less social pressure from the other community members to share the meat. When sharing takes place this is usually limited to people with whom there is a kinship relationship and tends to create reciprocal indebtedness. Furthermore, transactions in these societies, like sharing a large animal with kinship, are linked with gaining a higher status position.

The fourth category of property rights applies over certain capacities and functions of specific people (e.g. rights over hunting labour, sexual capacity, reproductive capacity, and so forth). Such rights are not common in immediate-return systems, 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. In delayed-return societies, on the other hand, there are frequent examples where women are treated as jural minors which allows men to have certain rights over the women and the products of their labour.

The final form of property rights has already been discussed to a certain extent in chapter 3 and is the right over knowledge and intellectual property, like rights over dances, songs, sacred knowledge, ritual designs, and so forth. Individual rights over songs, dances and so forth are very common in delayed-return societies. Sometimes such individual rights are held by a person on behalf of a clan or lineage and can only be transferred to another member of the same clan. However, there are also examples

when individuals hold property rights over, for example, songs and rituals on their own behalf (see Morphy (1997) and Keen (1997) for examples of individually owned intellectual property rights and Simet (2000) for an example of group-based intellectual property rights). In immediate-return systems, on the other hand, knowledge is more often freely shared. Even though some people might possess special healing powers (e.g. the San's trance dance – see previous chapter for more details), these powers are also used for the benefit of the entire community. While knowledge can be individually owned, similar to the principles that apply to meat, the individual is obliged to utilise this knowledge for the shared benefit of the community.

To recapitulate, based on the above, it can be argued that the concept of individual property rights over movable property (both tangible and intangible) does exist in (former) hunter-gatherer societies on the basis that labour is recognised as a principle that attributes property rights to individuals. However, other principles, like the obligations of sharing and gift-giving, override this basic one which makes the distinction between individual and community-based property rights very blurred. Just as for immovable property, parts of the land can be individually owned (usually linked to a specific function) but possession is more defined as fulfilling a custodian role for the benefit of the community.

Although this very brief description of the property rights system in hunter-gatherer societies does not do justice to the diversity of different systems in different communities and the complexity (e.g. the range and depth of different property principles) of the principles that guide the development of property rights in any one society, the above illustrates that property in hunter-gatherer societies is based on a broad analytical concept that extends far beyond the dichotomy between individual and community-based property rights. As will be discussed in more detail in section 5 of this chapter, the above examples show that people can have a bundle of rights with regard to different objects. This bundle of rights can vary according to the relationship between different property holders and different property objects and extends beyond having rights only; it also includes obligations. While it has been established that indigenous peoples' property systems are characterised by multifunctional relationships vis-à-vis people and property objects, in the next part of this chapter a

short overview will be given of how indigenous peoples' property rights systems are portrayed in the mainstream literature (especially non-anthropological) on intellectual property rights over traditional knowledge.

3 *The Danger of Oversimplifying and Romanticising Indigenous Realities*

So far the mechanisms proposed to regulate the protection of traditional knowledge have mostly been based on the assumption that traditional knowledge is communally owned (see e.g. Kuruk³⁰, 1999; Rodriguez Stevenson, 2000; Grad, 2003; Godshall, 2003) 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 Khalil (1995: 241) *"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"*. Britz and Lipinski (2001) not only argue that indigenous perceptions of ownership rights are community-based, but also state that in some cultures *"[...] ownership, akin to Western traditions, is antithetical"* (2001: 235).

As discussed above, concepts of ownership or 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 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).

Interestingly, the critical legal scholar, Joseph Singer, has argued in *The Edges of the Field* (2000a) and *Entitlement* (2000b) that even Euro-American property law has

³⁰ Kuruk (1999) focuses mostly on folklore, but also mentions that with regard to rights over land and resources and knowledge there is a tension between individual and communal rights in Africa.

never given owners rights without also giving them responsibilities. However, in what Singer (2000b) calls the *ownership model*, more emphasis is given to the rights owners have over the things they own than to the obligations or limits that come with the property rights of the owners. In other words, while at first sight both indigenous and Euro-American property models are based on the principles of rights and obligations, it can be argued that one way in which the indigenous property model distinguishes itself from the Euro-American one is in the stronger emphasis it places on obligations and duties rather than ownership rights. This difference can be partially explained by the fact that the property rights of indigenous peoples are usually user rights. This concept of *usufruct* implies automatically more a duty of care than ownership rights.

The danger is that oversimplifying or even mystifying property relationships in indigenous societies may lead to policy prescriptions of little value once they are applied in a particular case. One of the recurring themes in this thesis, regardless of whether traditional knowledge (see chapter 2), commodities (see chapter 3) or property relations are discussed, is the observation that indigenous peoples continue to find themselves dominated by Western cultural underpinnings. As discussed in chapter 2, the portrayal of indigenous peoples as the homogenised and idealised ‘other’ leads to a situation whereby the needs of indigenous peoples are defined in association with prevailing generic images of indigenusness. For example, if indigenusness is defined as a state of backwardness, indigenous peoples’ needs might be translated into progress and development. But if indigenusness 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, 2004b). With regards to bioprospecting, the latter perspective is more commonly adopted.

As already mentioned in chapter 2, 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 *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 *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).

However, the danger of politicising indigenes is that indigenous peoples increasingly have to rely on claims of ethnic and cultural 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, are invariably cast in an "*all-pervasive, unavoidable imperial setting*" (Said, 1993 in Battiste and Henderson, 2000: 14). This raises the question: what is the identity of indigenous peoples? There is a central contradiction in attempting to define the identity of indigenous peoples. On the one hand, there is the present status of hunter-gatherers who, as a result of increasing contact with the world, are or are becoming sedentary agriculturalists and semi-proletarian labourers. On the other hand, their knowledge, identity and cultural base remain substantially rooted in their hunter-gatherer histories. This theme will be further discussed in chapter 6 and 8 when an assessment will be made of whether community-based intellectual property rights are an appropriate tool to protect traditional knowledge.

In short, it can be argued that while formal legal codes such as individual and communal property rights may play an important role in Western societies, a broader analytical concept must be applied to understand the concept of property in other societies (Hann, 1998; Hirsch, 2002). One way of extending the scope of analysis is to include the institutional and cultural contexts within which property codes operate. Nevertheless, as argued earlier in this chapter, the dichotomy between individual and communal property rights has become the dominant framework to analyse property relations both in the context of the dominant Western liberal property model and in the context of an alternative property model. The discourse of both the proponents of the liberal paradigm as well as those who criticise the liberal property model is embedded in the dominant view of individual versus communal property. Exporting this rhetorical model to non-Western cultural settings becomes even more problematic when it is considered that the Western rhetorical property model has, even in the Western context, been questioned for its empirical validity. Hann (1998) and von

Benda-Beckmann *et al.* (2006) argue that the Western property model idealises individual ownership and ignores different kinds of rights and obligations linked to different property objects and property holders. As a result, in the Western property model individual property holders have been given far stronger formal rights than they used to have in social and societal contexts where rights are more bounded by association with responsibilities and obligations. Nevertheless, the supremacy of individual ownership is considered to exemplify the ideal property situation to which all property systems, both Western and non-Western, should aspire (*ibid.*). However, as Hirsch (2002) argues, to fully engage with the debate about traditional knowledge and how to protect it requires questioning prejudices and misconceptions about 'others' (i.e. indigenous peoples) and their organisation and perceptions of property (relations).

4 *The Danger of Dichotomising Individual and Communal Property Relationships*

Anthropologists like Malinowski (1935), Polanyi (1957) and Bohannan (1963) have criticised the practice of imposing Western property conceptions in other cultures and argued that pre-capitalist societies should be analysed with a more appropriate set of tools. This view is shared by contemporary anthropologists like the von Benda-Beckmann's who argue that it is crucial to resist the temptation to categorise property with the simple universal typology of private, state, communal and open access (von Benda-Beckmann *et al.*, 2006).

Classifying property into the four categories of open access, private property, communal property and state property and specifically emphasising the dichotomy between individual and communal property are, according to von Benda-Beckmann and von Benda Beckmann (2006), the most misleading concepts in the interpretation of property systems. For a long time, communal property was interpreted as having very negative economic connotations; it was dismissed as backwards in terms of social and legal evolution and it was perceived as an obstacle to economic and commercial development. More recently, the merits of communal property have become more recognised again and it is now often seen as useful for the protection of natural resources and for sustainable resource management. However, von Benda-

Beckmann and von Benda Beckmann (2006) argue that, in general, most policies based on communal property rights have had limited success because they have, so far, not given appropriate attention to the nature and distribution of concrete property relations that connect actual property objects and holders³¹.

The 'practical' meaning of communal property (see section 2 of this chapter) is not easily captured and differs widely from the theoretical meaning. For example, it can incorporate different categories of property relations within the same society, such as a mixture of individual and group rights or a bundle of rights which different people can have over the same property. Under communal property, a wide variety of concretised property relations can exist, ranging from some held by larger and smaller groups, and some held by married couples and individuals. In other words, interpreting communal rights as a homogeneous category distorts the complexity of property relations between different groups and individuals.

The experience of community-based forestry management in Cameroon is a good example of a policy which failed mainly because it was drafted on the basis of a naïve and decontextualised conception of community, indigenusness and property (Burnham, 2000). Aid programmes, sponsored by government donors and local and international NGOs, have promoted community-based forestry activities in the belief that these projects can empower local communities and can contribute to sustainable environmental management. Burnham (2000) argues that the management programmes were based upon prevalent Western notions of pristine rainforests inhabited by indigenous peoples whereby pristine rainforests are defined as 'primeval Edens' only recently being threatened by the demands of modern society; indigenous peoples are portrayed in very restrictive manner which does not reflect their social and political position. Burnham demonstrates that there is ample evidence from around the world that tropical rainforests are often anthropic landscapes, meaning that forests have been altered over the years by human impacts. In short, Burnham argues that despite the fact that government aid agencies and NGOs use the terms 'indigenous

³¹ The distinction that von Benda-Beckmann and von Benda-beckmann (2006) have introduced between categorical and concrete property relations is an important concept. It helps to explain the recurrent failure of property policies that are mostly based on categorical property relations which are theoretical and abstract and do not reflect the concrete, 'real' property relations on the ground that are usually more complex and diverse than the theoretical property frameworks. This aspect will be further discussed in section 5 of this chapter.

peoples', 'community-based conservation' and 'participatory development', they hardly engage with the local situation in the rainforests. According to Burnham, these 'blind spots' for the local social and political environment cannot simply be interpreted as symbols of ignorance or insincerity. Instead, these 'blind spots' are indicators of a strategy that explicitly ignores the local situation and complex contexts when rainforests policies are formulated. Fashionable theories, assumptions and generalisations of community-based property are used as bases "*that serve to oil the wheels of organisational consensus*" (Burnham, 2000: 52). Images of indigenous peoples, common property, community and so forth are used in a timeless and a-historical manner. According to Burnham "*[a] word like community, as presently used in notions of traditional or indigenous communities or community-based conservation or community forest management, serves as a myth like legitimising function in constructing idealised (and often idealistic) de-historicised social scenarios that underpin policy conceptions and discourses. Embodied in these notions of community is an image of small-scale, culturally uniform collectivity, governed by an integrated code of customs or traditions which provide effective mechanisms of sustainable resource allocation and dispute regulation. Absent from this conceptualisation are all the elements of cultural or class difference, of legal pluralism, [...] that would call into question the putative autonomy of this idealised community, or render it problematic for cooption to the project of rainforest conservation and management*" (2000: 54).

Burnham's example calls attention to a few important issues. He argues that, just as in the days of the colonialist regimes, modern day overseas aid and conservation projects employ the legal fiction or myth that 'primitive' societies are living as a coherent homogenous group-based society devoid of any notions of individual property. While in the past these misperceptions were introduced as an excuse to claim so-called 'vacant' land in the absence of a private 'master', in more recent times the fiction of communal property rights serves the economic and political agenda of those who are not living in these environments (i.e. donor agencies and NGOs) (von Benda-Beckmann and von Benda-Beckmann, 2006). Furthermore, this case study also shows that property rights in non-Western cultural settings are embedded in a wider set of social relations and are contested in a wide variety of different legal systems (legal pluralism) that can be locally, ethnically, religiously or territorially defined. These

findings add a new dimension to the property debate and shift the area of attention away from the dichotomy between individual versus communal property rights towards the question of whose laws and whose decisions prevail – e.g. is it customary law³², state law, Islamic law, international law or a combination thereof that will decide who has what rights over which resources?

In other words, regardless of whether it concerns natural resource management or intellectual property rights over traditional knowledge, the crux of the debate does not lie in the dichotomy between individual versus communal property rights. Any sort of policy that is based on simplistic assumptions regarding communal property is doomed to fail for its lack of understanding that there are other issues at stake – such as which and whose legal framework will prevail. It is much more important to consider property regimes as being embedded in larger social, economic, political and legal constructs than to focus narrowly on the proprietary terms of individual versus communal property rights (which is in any case largely a Euro-American construct that was exported, together with other ills of imperialism, to non-Western cultural settings during the colonialist era).

To recapitulate, throughout history European property concepts have been transferred to the colonies where they were subsequently assimilated and given the same legal and social status as in Europe (i.e. individual and communal property rights). This type of practice has been criticised by Bohannan as ‘backward translation’ (1969: 410 in von Benda-Beckmann *et al.* 2006: 13) or ‘jamming into categories’ by Nader (1965 in von Benda-Beckmann *et al.* 2006: 13). As a result any proper understanding of and appreciation for alternative ways of organising property relations has been seriously hampered. To use the words of von Benda-Beckmann, “[g]iven the many substantive and structural differences between cultural and legal systems, such jamming of foreign cultures’ legal concepts and rules into categories of one’s own inevitably leads to a backward translation which distorts the systems of the other” (2000: 151). The Western colonising approach, when describing property and analysing other non-Western property concepts, has led to a situation of ethnocentric bias and distortions

³² The concept of customary law will be examined in more detail in chapter 8; within the remit of this chapter it suffices to define custom as something that consists of contemporary practices which draw on tradition insofar as tradition is part of the present (Strathern, 2004b).

by exporting idealised property models which are not an accurate reflection of the relationships which exist on the ground (this will be further discussed in the next section). There is thus a clear need for a new approach to the comparison of property concepts across different cultures. von Benda-Beckmann *et al.* (2006) argue that new criteria need to be developed for facilitating a cross-cultural comparative analysis of property relationships; the new framework they propose will be further examined in the next section.

5 *A New Analytical Framework for Analysing 'Alternative' Property Relationships*

According to von Benda-Beckmann *et al.* (2006), the lack of a rigorous analytical framework to examine property relations across different cultures can be redressed by returning to earlier foundations such as the concept of property as a bundle of rights. While this concept can be very useful, they argue, it has rarely been used consistently. When used appropriately, a bundle of rights approach can assist in highlighting that property relations are expressed in various ways in different societies and in different periods of history. Such relations are expressed at three levels that include: first, the social units (e.g. individuals, groups, lineages, corporations and states); second, the construction of valuables as property objects; and third, the different sets of rights and obligations social units have with respect to such objects.

In this respect a bundle of rights approach compares with the biographical life story of things, a concept that has been introduced in chapter 3 to argue that things and knowledge can have multiple cultural meanings and functions depending on time and place. Von Benda-Beckmann *et al.* use the metaphor of a bundle of rights to conceptualise: "*first [...] the totality of property rights and duties as conceptualised in any one society and second, [...] any specific form such as ownership, which by itself can be thought of as a bundle*" (2006: 15). They also use the concept to "*first [...] characterise the specific rights bundled in one property object and second, to characterise the different kinds of property held by one society*" (2006: 15).

von Benda-Beckmann *et al.* (2006) also argue that in order to grasp the full meaning of property, it has to be analysed at four different analytical levels or layers at which property manifests itself – i.e. ideologies, legal systems, actual social relationships and social practices (as simplified in Figure 1³³). Property has a different meaning in each of these layers. In previous theoretical frameworks these layers were often reduced to one or two - viz. legal and ideological – while the other two layers – viz. the actual social relationships and social practices - were simply ignored or misinterpreted by jamming them into the imported ideological or legal analytical framework. Furthermore, they argue, it is also important to acknowledge that, within the legal and ideological framework, property can have different sources of legitimacy – i.e. local or traditional law, state law, international law and religious law. All these factors and layers must be taken into account when examining property relations from an empirical, descriptive and analytical approach.

All the layers, as identified above, interact and interrelate in various ways, but a broad distinction can be made between two general types of property (as simplified in Figure 1). The first are what von Benda-Beckmann *et al.* (2006) call *concrete* property objects (first and second layer), relationships and rights which occur when people use, transfer, inherit or dispute a relationship with a property object. Concretised property relations are expressed through actual social relationships between actual property-holders with respect to concrete valuables. The second are *categorical* property objects (third layer). These manifest themselves in laws and rights that are reproduced and changed and in which the nature of property law is explained, discussed or disputed in settings such as courts, parliaments, mass media, academia and local fora. In other words, categorical property relations are linked to a legal-institutional level and include categories of property relations that are constructed by specific property-holders, property objects, and the rights and obligations attached to these.

The fourth layer, *ideological* property relations, falls according to von Benda-Beckmann *et al.* (2006), outside the remit of both categorical and concrete property objects and therefore must be treated as a separate phenomenon. Ideological property relations express themselves through general cultural ideals, ideologies and

³³ In Figure 1 actual social relationships and social practices are bundled into one category, viz. *concretised* property relations.

philosophies. Competing ideologies (e.g. capitalism versus communism or welfare state ideologies versus neoliberalism) differ in their representation and justification of both legal-institutional property relations (categorical) and existing social, quotidian (concrete) property relations.

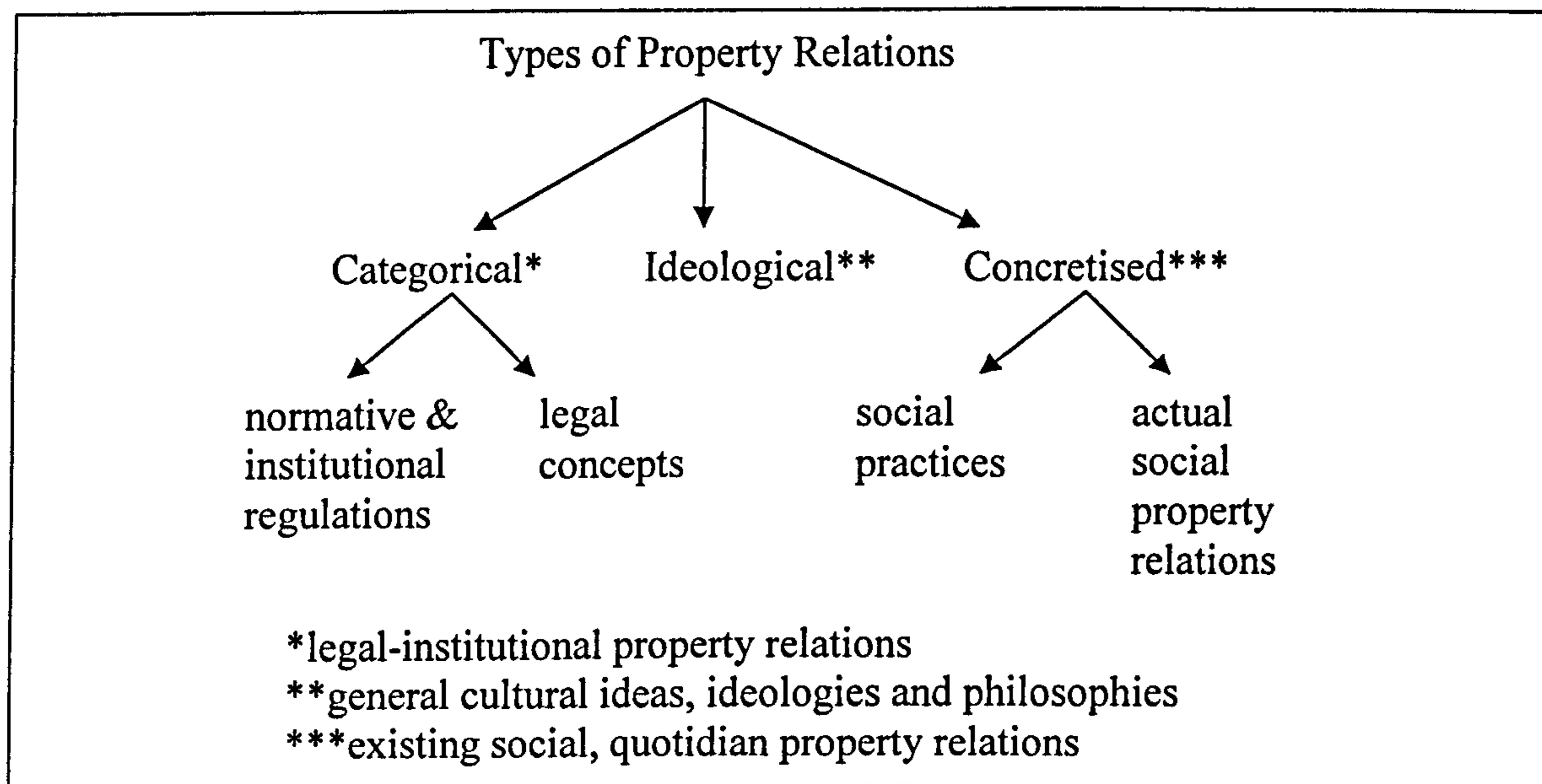


Figure 1: A typology of property relations (adapted from von Benda-Beckman *et al.*, 2006).

As highlighted by von-Benda-Beckmann *et al.* (2006), a bundle of rights approach has many advantages. For example, it allows a detailed identification of who has what rights under a private and communal property rights system and will show that private property actually means much more than just individual ownership, e.g. it can include private property held by groups, associations or corporations while communal property can be held by two people, some or all members of villages or the entire state. Furthermore, it will also allow distinctions between different sorts of rights that can be held under communal property, such as private or ownership rights and use rights. As briefly mentioned earlier, most property scholars have so far failed to distinguish between categorical and concrete property relationships and focus mainly on legal-institutional (categorical) and ideological property relations while ignoring actual, concretised property relations. von Benda-Beckmann *et al.* (2006) argue that both categorical and concrete property relations should be examined; while concretised property relations are to a large extent shaped by categorical property relations, they are different social phenomena and are constrained and enabled by different social interactions (categorical e.g. by changes in land law; concrete e.g. by

influx of new immigrants as a result of drought). Finally, property ideologies, legal institutions and concretised property relations are all part of a wider socio-economic and political context which influences the conditions under which social interaction takes place. While von Benda-Beckmann *et al.* (2006) acknowledge that property ideologies and legal rules are certainly important sources through which people can rationalise and contest their property relations, it is rather the social relationships and daily social practices that will have a greater bearing on people's dealing with property. This issue will be further discussed in chapter 8 wherein different sources and layers of law making are explored.

To summarise with von Benda-Beckman *et al.*'s own words, "*[p]aying attention to the systematic nature of property and to the contexts in which property relationships and property practices are embedded allows one to study property change in its wider contexts [...] The layers have to be analysed in their mutual interdependence, and none should be privileged over the others. We think that such an approach is an advance over institutional approaches that either put too much emphasis on the categorical legal institutional frameworks (rules of the game) or treat institutions as compounds in which complexes of norms, rules and behaviors that serve a collective purpose are lumped*" (2006: 30). Nuijten and Lorenzo (2006) underwrite this more contextualised approach and argue that, indeed, many studies on property rights (such as studies on community-based resource management) assume that in most societies an institution exists that sets out in a formal way the rules with respect to property relations. However, they confirm the earlier findings in this chapter, that property relations are not so direct and linear and are often more complex; so they argue that in order to understand property relations on the ground a more sophisticated framework of analysis is required. Nuijten (2005) sets out, in an earlier study, these requirements which are very similar to the framework that von Benda-Beckmann *et al.* (2006) have suggested for studying property relations in a more contextualised manner. Nuijten (2005) acknowledges the fact that property rights are closely linked to other socio-economic and political conditions and that property relations are embedded in the wider field of social relations. More concretely, Nuijten suggests, that examining property relations on the ground requires mapping and analysing, for example, the power structures between different networks (e.g. different groups claiming rights over the same resource), the influence of formal and informal law and procedures, the

role of formal and informal organisational structures and the role of various organisational structures and different positions of power on the ground between institutions and different groups of people.

In short, the European dichotomy between individual and collective property continues to dominate popular and academic thinking about property. When European colonial powers conquered Africa (and also the Indian subcontinent) they decided that either a native 'chief' was the private landlord of all the territory in his area, or in other cases, the colonialist powers decided that an entire village, tribe or community were the collective owners of this territory (Hann, 2000). Neither of these models captured the actual hierarchy of rights and obligations in these societies. A similar approach can be identified with regards to traditional knowledge. In many cases (see section 3 of this chapter), it is argued that a particular tribe owns collectively their environmental and cultural knowledge without doing any justice to the complex bundles of rights and obligations that prevail, arguably in all societies (see e.g. Hann³⁴ [2000]) but certainly in indigenous peoples' society. As will be demonstrated in other chapters (mainly in chapters 6 and 8) there are other problems with community-based (intellectual) property rights over traditional knowledge, but within the remit of this chapter it can be argued that the investigation of traditional knowledge and property cannot be confined to ideological or legal-institutional approaches. As discussed in this chapter, a contextualised understanding of property is needed and this requires examining property relations in a wider social, legal, cultural and political context. This assessment goes beyond classifying property as either individually or collectively owned, but considers the bundle of rights people actually have in concrete or actual social (property) relationships which are usually more complex and multi-layered than the general and abstract categorisation of individual or community-based property rights (for an example of how property rights are organised in a particular context see section 2.1.4 of chapter 9).

³⁴ Hann (2000) argues that even the most collectivist system still has individual rights over many items of personal property (examples are given in section 2.2 of this chapter), while even the most extreme neo-liberal regimes will still depend on a set of conditions that can only be maintained by the state. As such the notion of ownership cannot just be regulated by private law, but must open up to aspects of authority, citizenship and social cohesion, which are all notions that are regulated through public law.

6 Conclusion

The challenge emerging from this chapter is to further deconstruct and challenge the naïve and idealised portrayal of non-Western property relations that persists amongst many international institutions and property scholarship dealing with intellectual property rights and traditional knowledge. While current theoretical frameworks of property have disembedded property relations from other social relations, it is argued in this chapter that the embeddedness of property in other socio-economic and political frameworks must be reorganised in order to understand the full meaning of property relations in other cultures. The dominant ideology stresses the dichotomy between individual and communal property rights. In this chapter it is argued that this bifurcated view of property relations hampers the unravelling of fuzzy and complicated rules in existing social relations. Therefore it is argued that new approaches to property theory, like the bundle of rights approach by von Benda-Beckmann *et al.* (2006), are needed and must be utilised in order to unravel indigenous peoples' property relations.

The following chapters (and in particular chapter 5 on intellectual property rights, chapter 8 on customary law and chapter 9 on territorial rights) benefit from the suggestion of von Benda-Beckmann *et al.* (2006) that property rights must be examined within their wider socio-economic and political context. Particularly when analysing some of the suggested mechanisms to protect traditional knowledge, attention will be given to the social embeddedness of property in both formal or categorical and informal or concretised institutions. Consequently, any suggested solution to settle disputes about intellectual property rights over traditional knowledge will be a compromise between categorical and concretised property relations that have influenced the (property) relationship between different cultures in the past and the present.

Based on the findings of this chapter, it can be concluded that there is a real danger that any of the protection mechanisms so far proposed in the literature and by international institutions (e.g. community-based intellectual property rights or customary law based intellectual property rights) are based on primarily a legal-

institutional and ideological understanding of indigenous' property relations and therefore portray only, at best, half the truth of the property relations on the ground. At worst, the suggested protection mechanisms portray a distorted and dangerously simplified and naïve view of a complex web of social relations; in that sense, these mechanisms may inadvertently further the colonisation of indigenous property regimes. These issues will be examined next, beginning with the concept of intellectual property rights in chapter 5.

PART II

Chapter 5 – Can Intellectual Property Rights Protect Traditional Knowledge?

1 Introduction

In chapter 3 it was concluded that traditional knowledge can have different meanings in different contexts and as such the commodification or economic use of traditional knowledge is not per definition opposed by indigenous peoples. Some traditional communities acknowledge the economic value of their traditional knowledge and condemn not so much the concept of commodification, but rather the ‘unfair’ exploitation by corporate powers (Tawanda Magaisa, 2006; Cottier and Panizzon, 2004). In other words, indigenous peoples’ acceptance of commodification in principle does not equate to the acceptance of a commodification practice that is driven by more powerful external actors. Where indigenous peoples value traditional knowledge as an economic resource, they are looking for specific protection mechanisms that can help to prevent unauthorised use by third parties and regulate an equitable process of collaboration and compensation for the authorised use of traditional knowledge.

However, it was also argued in chapter 3 that there are some objects that are not perceived as being appropriate for exchange. Rowlands (2005) refers to them as objects in social motion that resist commodification. For such objects, indigenous peoples are looking for protection mechanisms that can restrict access and create legal and technical barriers in order to recognise the exclusive property rights of indigenous peoples over their own cultural property. In both cases – either as a matter of regulating economic justice or protecting cultural integrity – some indigenous peoples, activists and scholars are seeking to use intellectual property law to provide indigenous peoples with the legal rights to have exclusive control over their traditional knowledge.

This chapter will assess in more detail to what extent the concept of intellectual property rights is an appropriate tool to protect traditional knowledge. An assessment will be made both of the protection of traditional knowledge as an economic resource and of the protection of traditional knowledge as an expression of cultural identity or

heritage. The debate about traditional knowledge and intellectual property rights provides an opportunity to examine the boundaries of the meaning of intellectual property rights. Within the current intellectual property system, traditional knowledge does not fulfil the requirements of being patentable. This makes it even more pertinent to question whether the current intellectual property rights framework can be applied to traditional knowledge. Building further upon earlier observations of legal scholars (see e.g. Sunder, 2000) and anthropologists (see e.g. Brown, 1998; 2003; 2005), it is argued in this chapter that claims of intellectual property rights over cultural identity will demand a significant shift in intellectual property law. The main historical purpose of intellectual property law has been to grant an extensive monopoly right over the economic exploitation of ideas, expressions of ideas and distinctive words and symbols in order to protect investments and create incentives for future investments (Abbott *et al.*, 1999). In this sense, it is understandable that indigenous peoples are considering using intellectual property law when they want to protect traditional knowledge as an economic resource. However, using intellectual property rights as a tool to protect culture seems more problematic because, at first sight, intellectual property rights is above all a legal instrument to establish a tradeable commodity: *“Where law has traditionally allocated rights to exclusive control and exclusion over intellectual products in order to provide economic incentives for production, it now contemplates awarding intellectual property rights in order to protect the identity of the property owner³⁵”* (Sunder, 2000: 71) In other words, the underlying purpose of intellectual property rights is to turn knowledge into a marketable commodity and not to conserve knowledge in its cultural context (Heath and Weidlich, 2003).

Depending on what exactly needs to be protected, viz. traditional knowledge as an economic resource or traditional knowledge as an expression of cultural identity and integrity, different issues must be raised and assessed. Starting with traditional knowledge as an economic resource, two concerns are raised in the literature that will be further explored. First, questions are asked about the distributive aspects (i.e. equal wealth distribution) of the increasingly internationalised intellectual property rights system (see e.g. Aoki, 1998; Chander, 2003). Second, prominent intellectual property

³⁵ Note that this quote and in particular the link between intellectual property rights and economic incentive is more relevant for patents than copyrights.

rights scholars like Boyle (2003) and May (1998; 2000) criticise intellectual property law for its capacity to restrict access and use of knowledge or information. Some indigenous peoples oppose this view that traditional knowledge is part of the public domain or global commons and some are demanding more protection of their knowledge through a framework of intellectual property rights (see e.g. Brown, 2005). Open access advocates, on the other hand, regard intellectual property law as an inappropriate constraint on information that leads to overprotecting the public domain, a phenomenon that both May and Boyle call the 'second enclosure movement'.

In other words, using intellectual property rights in order to protect traditional knowledge as an economic resource provokes a debate on two fronts. First, it must be questioned whether intellectual property law can accommodate indigenous peoples' objectives for greater distributional justice. Second, it stimulates a debate on whether the quest of the open access movement to leave knowledge in the public domain is in the best interest of indigenous peoples, especially since some indigenous peoples want to create legal and technical barriers to seal off knowledge.

With regards to protecting traditional knowledge for its cultural integrity, it can be argued that this debate touches upon the binary dilemma between 'open' and 'enclosed' access, but it also raises a new issue. It must be examined whether intellectual property rights is the appropriate tool for indigenous peoples to (re)gain and maintain full control over their culture in the interest of their cultural survival. This issue is linked to a debate similar to that addressed in chapter 2, viz. whether culture is bounded or static or is culture fluid and changing? Following the arguments put forward in chapter 2, it is argued in this chapter that by using intellectual property rights as a tool to protect culture, culture not only becomes bounded but also some aspects of identity politics are introduced. Identity politics may create a discourse that reinforces essentialised identities and cultural orthodoxy and stifles autonomy. There is a real danger that creating intellectual property rights in culture assumes and enforces a cultural homogeneity that, as has been argued in the previous chapters, will rarely exist in the modern world.

In much of the literature this debate has been kept separate, viz. economists and legal scholars have concentrated on the issue of whether intellectual property rights can be

used as a tool to protect the economic value of traditional knowledge, while anthropologists have tended to focus more on the debate over whether special property rights should be granted over culture. However, within the scope of this thesis, both debates will be explored in more depth. From a socio-cultural and historical perspective (see chapter 3 on the biographical life of things and knowledge) there are clear indications that some forms of traditional knowledge (e.g. medicinal knowledge) can be valued simultaneously, for example by the San, for both their spiritual and economic value. Protection is therefore sought for both types of value. Although Coombe (1998a) argues that indigenous peoples in the South (Asia, Latin and South America and Africa) have a more pragmatic approach (i.e. emphasise the short-term economic benefits) towards intellectual property law than indigenous peoples in the North (e.g. Australia, United States, Canada and New Zealand) who are more concerned about their sovereign rights and self-determination³⁶, it is argued in this chapter that the San's quest for protecting traditional knowledge is steered by both the urge for economic justice and sense of self-determination³⁷.

At this point it is important to delineate again the boundaries of this research. The management of indigenous knowledge through intellectual property rights is a topic that attracts strong and highly divergent views. The critics of the commodification of traditional knowledge have portrayed the debate about the divergent socio-legal and economic systems as a clash between indigenous and non-indigenous cultures or non-Western traditional societies versus Western industrialised societies and traditional versus scientific knowledge. As already mentioned in the introduction, the main aim of this research is to open up this polarised debate by unpacking such concepts as knowledge, commodities, property and indigeneity. In the previous chapters it was

³⁶ Although there is no hard evidence, this difference in attitude towards intellectual property rights may be linked to the different socio-political and above all, economic position between these two different (geographical) groups of indigenous peoples.

³⁷ The concept of self-determination and group claims within the UN system and human rights framework is a very difficult and contested topic. Exploring the complexity and contestations is beyond the scope of this chapter and thesis. In general terms, three distinct categories of self-determination or group claims can be identified: a) claims to equality of treatment and satisfaction of basic needs; these claims assert the logic of human dignity and non-discrimination; b) claims to restored, autonomous nationhood expressive of primary political identity that is incompatible with assimilation within existing political entities; c) claims to statehood reflecting a collective struggle to achieve control over distinct territorial units entitled to full membership rights in international society; these claims invoke the logic of self-determination of peoples (Falk, 2000: 127-134). For more information on the debate about the (re-) emergence of indigenous rights in contemporary international law see, for example, Pitty, 2001; Muehlebach, 2003; Bowen, 2000; Ivison, 2002; 2003; Williams, 2003; Sanders, 2003; Wiessner, 2003; Daes, 2003; Venne, 1998).

demonstrated that, by engaging with several theoretical frameworks which have been underexplored in the mainstream literature on intellectual property rights and traditional knowledge, bridges can be built between (what may initially appear to be) polarised concepts. The main message that has been put forward so far in this thesis is that to a large extent the portrayal of polarised worldviews has been based on 'ideal models' and an essentialised representation of indigenous peoples. By contextualising knowledge, commodities and property, a new perspective emerges, viz. that indigenous peoples are not per definition anti-market and the market space is not per definition anti-indigenous. It is argued in this thesis that the acceptance of what are largely artificial and romantic divisions of indigeneity and commercialism results in an *a priori* exclusion of indigenous peoples from the marketplace. Such an exclusion denies them the opportunity to (at least partially) determine their own boundaries with regards to commodifying their knowledge.

The analysis of intellectual property rights in this chapter will limit itself to those topics that are deemed useful within the remit of this thesis. The 'unfairness' of our current economic system in general and intellectual property law in particular has already been examined to a great extent in the existing literature (see e.g. Dutfield, 2002a; 2004; Bellmann *et al.*, 2003; Drahos and Mayne, 2002; Perelman, 2003). Equally, the ('unfairness' of the) technicalities of the patent system (like the requirements and the scope and range of patent matters) are beyond the scope of this chapter; other researchers have covered this already (for recent work see e.g. Mgbeoji, 2006) and it will therefore not be repeated here. Neither will this chapter engage with the polarised criticism that can be found in the biopiracy discourse; for an overview of the literature on biopiracy see e.g. Takeshita (2001); Svarstad (2002); Hamilton (2006); for more critical literature see e.g. Shiva (1997; 2001); Martinez Alier (2000); Stenton (2004). Based on the fieldwork observations (see intermezzi and Appendix 2), it is felt that this thesis can and should contribute more to the debate on traditional knowledge and intellectual property rights by examining to what extent traditional knowledge can be utilised for social justice and economic redress. In this respect it is assumed that the moral, ethical and technical problems of our current intellectual property rights system have been sufficiently addressed elsewhere (for a recent overview see e.g. Gibson, 2004; 2005 and Mgbeoji, 2006). Although this chapter will engage with some of the mainstream criticism, this is always within the remit of the

main research question of this chapter, viz. is it possible for indigenous peoples to use the current intellectual property rights system to their own advantage.

The first part of this chapter will examine whether intellectual property rights can be used as a tool to provide economic justice. In order to answer this question, the history of the legal institution of intellectual property will be explored. Drawing attention to the historical trajectory of intellectual property law is useful for two reasons. First, it will reveal the existence or absence of precedences in the use of intellectual property law to accommodate indigenous peoples' objectives for greater distributional justice. Such a critical analysis of the history of intellectual property law has been largely neglected in the literature on traditional knowledge. Second, much of the mainstream literature on traditional knowledge and intellectual property rights has engaged with a polemical and dichotomised analysis of intellectual property law. This thesis seeks to break with this politicised thinking on intellectual property law and traditional knowledge by examining the issues from new angles which have so far been underexposed in the mainstream literature. Exploring the possibility to develop democratic intellectual property rights by linking intellectual property law to more explicit human rights values will follow the historical analysis. This in turn will be followed by an analysis of the debate on whether or not traditional knowledge should stay in the commons. Next, the debate about using intellectual property rights as a tool to protect culture will be further examined. Finally, the findings of this chapter will be assessed through the lens of von Benda-Beckmann *et al.*'s (2006) typology of property relations (see chapter 4, section 5).

2 *History of International Intellectual Property Law*

2.1 The Greek and Roman Period

The concept of intellectual property has a long history in Western culture³⁸. Its roots can be traced back to classical Roman law, and specifically to the writings of Gaius. Gaius divided law into categories relating to persons, actions or things. He then subdivided them into corporeals that were existent and tangible, e.g. land or gold, and

³⁸ Stengel (2004) points out that intellectual property has existed ever since the early formations of communities. He refers to tribal signs, signalling the tribe to which someone belongs, as the first form of protected signs and, as such, intellectual property.

incorporeals that were non-existent and subsistent, e.g. inheritance (Parry, 2002). Incorporeal things were “*super-imposed by the mind into the corporeal world*” (Drahos, 1996: 16). This Roman categorisation of corporeals and incorporeals is rooted into the Stoic notion of incorporeals.

For the Stoics, four things were considered to be incorporeal: time, space, the void and *lekta*, the latter embodying the meaning of words. In the context of intellectual property rights, it is the notion of *lekta* that demystifies the boundary between corporeals and incorporeals. The Stoics made a clear distinction between the physical form of communication, words (corporeals), and their meaning (incorporeals). Meaning could only be tangible when it was communicated. The Stoics’ belief that the meaning of words can only emerge when physically represented set the path for development of intellectual property rights.

In short, it was already during the Greek and Roman period that one of the most important guiding principles of intellectual property law was established, viz. the process of accrediting new categories of incorporeals, which is needed in order to give them formal recognition as a new class of property (Parry, 2002). Drahos (1996) argues that this evolution shows that property law increasingly has become dematerialised, which has led to the belief that more and more abstractions can become the property of individuals, including the ideas and writings of inventors and writers. Once the law recognised property rights for these abstractions, the way was open for the concept of materiality that governed the property relations of the marketplace.

Although intellectual property in any form (such as patents or copyrights) did not emerge in Greek or Roman society, the conceptual roots of intellectual property law can be traced back to the Greeks and Romans in the sense that they encouraged the notion of the individual as creator of art, which in turn sparked the desire to own ideas and knowledge (May and Sell, 2006).

2.2 The Middle Ages

After the fall of the Roman Empire, the desire to own ideas and knowledge continued to exist (May and Sell, 2006). Newly formed guilds³⁹ recognised that knowledge was valuable; they were looking for rights of exclusive control and exploitation of the specialised knowledge of their own members. A proprietary form of trademark was developed as a method to differentiate between the goods of different guilds. Although the guilds never referred to their craft knowledge as intellectual property, they embraced the idea that the knowledge of their guild could become more valuable by making it scarcer through closer protection mechanisms in the form of a tight system of guild membership and a form of trademark protection.

At the same time, guilds also started to recognise that individual members had an exclusive right to certain knowledge such as a newly designed pattern or figure (*ibid.*). Other members of the same guild could not copy these new patterns. The knowledge that was used to create these new figures and patterns belonged to the individual and had to be recognised as that person's own effort.

At the end of the Middle Ages, sovereigns offered patentlike privileges (called 'letters patent') in order to stimulate the introduction of new processes or practices in their kingdom (*ibid.*). The British monarchs especially encouraged the importation of new skills and techniques because they felt that England was lagging behind in comparison to other European economies. Technology transfer was at the heart of this desire to establish patentlike protection in order to limit import and stimulate export. In other words, the letters patent or letters of protection were in fact a method for encouraging the migration of skilled artisans into the kingdom. Drahos and Braithwaite (2002) argue that, for most of their history, intellectual property rights are not seen as property rights, but rather as a mechanism that grants monopoly privileges. Initially, these monopolies were created by states or kingdoms that used this privilege for their own purposes; in many cases, they were used to fund wars. Through the letters patent, the monarch was given the power to foster the growth of industry. However, over time patents were not only given to reward inventions; patents were also usually given

³⁹ This was particularly important at the end of the 13th Century and beginning of the 14th Century.

to individuals in order to protect their sole right to practice a particular trade, to supervise an industry and to influence certain import and export restrictions.

With regard to early copyrights, after the fall of the Roman Empire recognition of the rights of the artist was abandoned. Copyrights were only recognised during the Renaissance when the innovation of the printing press stimulated the distribution of written knowledge through trade. Until then, literary culture was predominantly an oral culture which, so it has been argued, limited the need of literary rights (what would later become copyright) in the artists' own stories (*ibid.*).

2.3 The Territorial Period

Despite the fact that the idea about owning knowledge can be traced back to earlier periods in history, it was only in the 15th Century (1474) that the first formalised patent system was developed, in Venice. A legal and institutional form of intellectual property rights acknowledged the ownership of knowledge with the main purpose to promote innovation (*ibid.*). For about two centuries, many European countries recognised patents, but the granting of patents was subject to political power and personal relationships until Britain established modern legislation to govern intellectual property by using a systematic method of granting initially patents and later copyrights (the Statute of Anne in 1709). The British Statute of Monopolies (1624) became the model for intellectual property law elsewhere (Machlup, 1999). However, while the Statute took away the monopoly rights of individuals, the privileges of the corporations remained intact (Drahos and Braithwaite, 2002). Although each country had different ideas about the nature of the inventor's legal right⁴⁰, the patent system that was spread to other countries recognised the system of protecting the inventor through statutory law. It was mainly new technologies that spurred the development of legislative innovations. In the early stages, with France being one of the exceptions, intellectual property law was not justified on the basis of moral rights or natural rights of the author or the inventor. Patents emerged in order to

⁴⁰ For example, France recognised the property rights of the inventor in his invention and, deriving from it, his right to obtain a patent; America did not express an opinion about the property question, but recognised the inventor's right to a patent; Britain recognised the monopoly character of the patent and regarded it still as a grant of royal favour but in practice allowed the inventor's claim to receive a patent; and Austria insisted that the inventor had no right to protection but was granted a privilege in the public interest (Machlup, 1999).

allow the distribution of particular technological advances which would benefit the ruling class through wealth creation. It was only later when the range of intellectual property broadened (both geographically and in the scope of protection) that the justifications of moral and natural rights⁴¹ were used in the Anglo model of intellectual property law (Sell and May, 2001). However, patents were also used as a tool for protectionism (Drahos and Braithwaite, 2002).

Between 1850 and 1873 there was the rise of an anti-patent movement (*ibid.*). For example, in Germany several trade associations recommended the abolition of patent law on the basis that it was injurious to common welfare. However, in 1873 the anti-patent movement lost out to the propaganda campaign of the pro-patent movement. The anti-patent movement attacked patents because they posed a threat to the highly valued free trade system (May and Sell, 2006). This was the first time in the history of intellectual property rights that the tension between the two concepts – free trade and intellectual property law – was highlighted. Interestingly, under the current TRIPS regime it is argued that “*a market intervention that permits limited property rights over valuable intangibles is felt to be consistent with rules that promote trade liberalisation*” (Dutfield, 2002a: 18). Just like current intellectual property rights critics, the free trade liberals of the 19th Century criticised the monopoly aspects of intellectual property rights and argued that invention as a process was social, objective and a product of technological change, rather than the product of the invention of an individual’s genius (*ibid.*). Furthermore, they argued that it was not clear whether individuals need the incentive of a patent to invent, an argument that was used by the proponents of intellectual property rights. Only when the patent advocates promised to limit the patentees’ monopoly power through a system of compulsory licensing (i.e. patentees could license others to use the invention at reasonable compensation) did the advocates of free trade accept the idea of patenting (Machlup and Penrose, 1950; Machlup, 1999).

With regard to the protection of intellectual property at an international level, during this period which Drahos (1998) calls the ‘territorial period’, there was an absence of international protection: intellectual property rights did not extend beyond the national

⁴¹ These rights were already used as a justification in, for example, France.

territory of the sovereign who had granted the rights in the first place. Because intellectual property rights in country A did not confer protection in country B, intellectual property owners were faced with a classic free-rider problem. This problem led to a greater interest in international cooperation between different states on intellectual property.

2.4 The International Period

International cooperation manifested itself first in the form of bilateral agreements between countries that were worried about the free-riding problem. For example, Britain found that many of its writers' works were reproduced abroad without granting permission or receiving compensation. Much of the unauthorised reproduction took place in America. Britain responded to this by passing Acts in 1838 and 1844 that protected works first published outside Britain. These Acts were based on a strategy of reciprocity; foreign works would only gain protection in Britain if the relevant state agreed to protect British works. America, on the other hand, took a different turn and it not only granted copyright protection to its own citizens and residents, it also encouraged the piracy of such works^{42,43} (Drahos, 1998; Ben-Atar, 2004).

The international development of intellectual property law was also encouraged by the increasing political acceptance of the idea that patents were justified on the basis of the natural right of inventors to own their invention (May and Sell, 2006). A shift in thinking about intellectual property law and the need for greater protection in order to curb the free-rider problem led to a situation where in 1883, 69 international agreements were in place, most of them dealing with trademarks (Drahos, 1998). However, the bilateral agreements were not sufficiently satisfactory and eventually the Paris Convention of 1883, dealing with industrial property, and the Berne Convention of 1886, dealing with literary and artistic works, were established. Both

⁴² The US position towards intellectual property law has evolved over the years from scepticism to vigorous advocacy for the expansion of global intellectual property law. It is beyond the scope of this chapter to go into detail of this evolution, but more information on this can be found in May and Sell (2006), Ben-Atar (2004) and Drahos and Braithwaite (2002).

⁴³ Prior to the TRIPs agreement, India was another example whose patent system favoured development priorities (Dutfield, 2004). The TRIPs agreement allows India less flexibility in terms of adapting the patent system to national requirements (for more information in India and TRIPs see e.g. Cullet and Raja [2004] and for more information on the Indian Biological Diversity Act of 2002 see e.g. Sagar [2005]).

Conventions were based on the idea that a unified international patent and copyright system was very much needed and both set a minimum standard of rights which states had to recognise. The international secretariats of the two Conventions were merged in 1893 to form the United International Bureau for the Protection of Intellectual Property, which was followed up by a new organisation in 1967, the World Intellectual Property Organisation (WIPO), which became an agency of the United Nations (UN) in 1974.

Although during this period states had agreed upon certain foundational principles, such as the principle of national treatment, there was no harmonisation of technical rules. For example, the US used the 'first to invent' patent system, while other countries used a 'first to file' patent system. Civil code countries recognised the doctrine of moral rights for authors while common law countries did not. It was felt that there was an increasing need to harmonise intellectual property law.

2.5 The Global Period

After the Second World War, more and more developing countries started to join the Paris and Berne Conventions. Governance of these Conventions is under the principle of one-vote-one-state which led to the result that Western states could be outvoted by a coalition of developing countries. Developing countries were hoping that a reformed international intellectual property law system could cater for their development needs. For example, in 1967 India lobbied heavily for signing the Stockholm Protocol which gave developing countries greater access to copyright materials. During the 1980s developing countries also tried to reform the Paris Convention and pushed hard for more liberal provisions on compulsory licensing. Countries like India wanted to have better and more access to technologies (especially in the health care industry) than had been protected through patents. Although the developed countries and specifically the US did not like these developments, free-riding had to be tolerated to some extent because the international intellectual property law system lacked effective enforcement mechanisms, apart from the possibility to appeal to the International Court of Justice.

Prior to settling the enforcement of intellectual property law on an international level, the US addressed this issue through a series of bilateral strategies against countries that the US considered to have inadequate levels of intellectual property protection and enforcement. In 1984, the US added intellectual property to their list of 'Section 301' trade issues: countries that were found to provide insufficient intellectual property protection were filed under 'Section 301' which meant they could face trade sanctions as long as they did not provide adequate protection (Drahos, 1998; Drahos and Braithwaite, 2002; May and Sell, 2006)⁴⁴.

Simultaneously, a number of US industries started to lobby hard for much stronger intellectual property laws. While companies owning luxury brand goods sought better trademark protection, pharmaceutical companies and agricultural chemicals companies sought higher levels of patent protection, followed by music, film and software companies who demanded stronger copyright protection (May and Sell, 2006). Under pressure from these sectors, not only did intellectual property protection become a high priority on the domestic political agenda, these corporations also succeeded in institutionalising their request for better protection mechanisms more globally. Sell (2003) argues that the globalisation of intellectual property law originated in the US. The advocacy of some important industry associations and some well-connected corporate players played a critical role in developing support for a trade-based approach to intellectual property.

Companies like DuPont, Monsanto, Dow, Union Carbide and Pfizer, who had experienced golden years as a result of cartels and price fixing⁴⁵, realised that the price of research and development (R&D) continued to rise and it became harder and harder to invent and introduce new products to the market (Drahos and Braithwaite, 2002). Furthermore, the government started to take stronger antitrust actions. This

⁴⁴ Kuruk (2004) has suggested that a similar principle of reciprocity (i.e. a mutual exchange of privileges) can be put forward by the developing countries to the TRIPs Council in order to demand the inclusion of traditional knowledge protection in the existing intellectual framework on the basis of reciprocity.

⁴⁵ Drahos and Braithwaite (2002) give numerous examples of information cartels across different industries in the period between the two world wars. For example, IG Farben used its stock of patents in synthetic rubber to strike deals with DuPont and Standard for the rubber markets. The tendrils of patent law reached into all aspects of the rubber markets and related chemical industries. IG Farben agreed to pass on to Standard any patents it acquired in the chemical field relevant to the oil business and in exchange Standard offered control to IG Farben of chemical patents that were not strongly related to the oil industry.

made it more difficult for companies to acquire small companies for their knowledge and the big companies had to stop their price fixing and cartel forming behaviour. Instead, they now had to develop their own new products and bear the costs of R&D. Furthermore, established companies (like Pfizer and Monsanto) also faced increasing competition from generic manufacturers. It is important to note that, according to Drahos and Braitwaite (2002), the 'knowledge cartels' were not so much about sharing knowledge or achieving efficiency or avoiding duplication of research as about privatising the knowledge that would give the holder of the patent the power to discipline the market.

By the time of the launch of the Uruguay Round of trade talks in 1986, developed countries' governments, led by the US, were becoming increasingly keen to include intellectual property rights in the negotiations on trade relations. This move was prompted by an increasing awareness of the expanding possibilities for technical appropriation of knowledge, alongside the growing threat of pirated reproduction and distribution of knowledge-based products (May and Sell, 2006). Developed countries were eager to move the intellectual property negotiations from the WIPO into the General Agreement on Trade and Tariffs (GATT) where their negotiating power was better because of the weaker presence of developing countries (Pretorius, 2002; Kuanpoth, 2003). On 15 April 1994, this process concluded in Marrakech with the signing of the Final Act embodying the Result of the Uruguay Round of Multilateral Trade Negotiations. It contained a number of agreements including the establishment of the World Trade Organisation (WTO) and the TRIPS Agreement (TRIPS is an annex to the Agreement which establishes the WTO).

The main purpose of the TRIPS Agreement is to promote the harmonisation of national intellectual property law regimes. The agreement has been made binding on all members of the WTO. As stated in the preamble, TRIPS introduces new rules and disciplines for global trade concerning the provision of: adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights; effective and appropriate means for the enforcement of trade-related property rights and; effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments.

May and Sell (2006) argue that although the TRIPS agreement represents an important moment in the history of governance of intellectual property law, the global intellectual property regime is now more than ever criticised for the fact that all rights seem to reside with the owners of intellectual property, while the duties reside with the users of intellectual property. The Agreement has been accused of regulating technological protectionism aimed at consolidating a situation wherein only Northern countries can generate innovations that Southern countries have to buy at inflated prices (Correa, 2000). In this respect it has been argued that the TRIPS agreement had a negative impact on access to essential drugs in developing countries (see e.g. Balasubramaniam, 2002)⁴⁶. Concerns have also been raised over using trade access as a means of imposing Western intellectual property rights laws through the TRIPS Agreement. There is a danger that this will result in monopoly control by multinationals over production and distribution; that innovation in the public domain will be privatised and commercially exploited; that customary practices of sharing knowledge and skills will be undermined; that the TRIPS Agreement will deepen the North-South rift; that it will facilitate and encourage 'biopiracy'; and that communities and cultures may be damaged by the forced introduction of Western intellectual property rights principles, which in turn might lead to a further erosion of the right of self-determination (Simpson and Jackson, 1998). Furthermore, leading economists from developing countries have also concluded that there is evidence that many of the current social and economic problems in developing countries can be linked to the introduction of stricter intellectual property laws as a result of the implementation of TRIPS (Khor, 2002).

This list of concerns is certainly not exhaustive (for a recent overview of the concerns about TRIPs for developing countries see e.g. Kongolo and Shyllon, 2004). The problems that are listed above have been chosen to highlight that, since the creation of the TRIPS Agreement, questions about the international political economy of intellectual property law have become more pertinent. As Aoki (1998) argues, increasingly doubts are raised whether the flow of benefits of international intellectual

⁴⁶ Through the South African Medicines Act, South Africa was able to take certain regulatory steps to ensure access to HIV/AIDS medication (for more information on this case, see e.g. Halbert [2005: 97-111]).

property protection may be skewed to the advantage of the economies of developed countries.

2.6 Discussion

Looking back at these historic developments, questions must be raised over to which extent the current intellectual property rights system favours the holders of intellectual property rights, i.e. Western multinationals, and to what extent it serves a wider public interest (Aoki, 1998; Khor, 2002). May and Sell argue that "*the history of intellectual property was not (and is still not) a neutral, functionally driven set of improvements towards an 'optimal' legal settlement that is naturally just*" (2006: 204). While technological improvements might have driven the process forward to turn ideas, knowledge and innovations into property, looking at the evolution and history of intellectual property law it becomes clear that strong intellectual property rights regimes have so far mainly served the purpose of wealth maximisation for a few powerful economic actors.

From a historical perspective, it also becomes clear that the basis for the justification for intellectual property rights has evolved. While earlier in history patents were granted to introduce new technologies into the country and monopoly privileges were given not to the inventors but rather to those who brought in the patent, from the late 19th Century patents were usually justified as a direct reward for labour⁴⁷ (Locke), as

⁴⁷ Locke's labour theory is based on the principle that people can claim property rights over products that they have removed from nature and to which they have added value through their labour. Property rights therefore protect individual interests relating to the investment of labour. Furthermore, a person owns his/her body; therefore that person is also entitled to own what he/she does with that body, namely its labour (Hettinger, 1989). Proponents of intellectual property rights have argued that proprietising ideas on the basis of Locke's theory is justified because: "*first ...the production of ideas requires a person's labour; second, ...these ideas are appropriated from a "common" which is not significantly devalued by the idea's removal; and third, ...ideas can be made property without breaching the non-waste condition*" (Hughes, 1988: 300). However, within the context of intellectual property rights, Hettinger (1989) and Spector (1989) argue that the value of an intellectual object does not consist solely of the value of the object on its own and the value added by the labourer, because intellectual objects are social products. Therefore the creation of an idea is not the brainchild of just one person, it is based on the ideas and thoughts of many people. Another problem that Hettinger has identified with the concept of granting intellectual property rights on the basis of the right to the fruit of one's labour is the fact that often the value of the object is disproportionate to the effort that the labourer has put into the object. The value of intellectual work consists of more than just the amount of labour that has been put into the work; it also includes luck and natural talent (Martin, 1995).

part of the rights of individuals to be associated with their innovations⁴⁸ (Hegel) or to ensure that resources were used efficiently (utilitarian). However, the acceptance of the rights of owners to own intellectual property analogous to the rights of owners to own material property can be contested (for more details see footnote 47 and 48). Nevertheless, various groups continue to use the arguments from natural law or from economic efficiency to justify intellectual property rights. May and Sell (2006) argue that philosophical justifications of intellectual property rights are only used to mask the monopolistic interests and political mobilisation behind the development of a legal institution (i.e. intellectual property law) whose main purpose is to create (in the words of Drahos and Braithwaite, 2002) 'knowledge cartels'. As Drahos and Braithwaite argue, a patent system that prevents selling cheap medicines to poor countries cannot be called utilitarian (the greatest happiness of the greatest number). Nor does it make sense to call intellectual property rights 'natural rights' akin to the rights of liberty when these natural rights are owned and traded by corporations. Nor does intellectual property law fulfil the criteria of distributive justice when intellectual property is used to transfer wealth to a small group of rich and developed nations at the expense of other nations. John Rawls' approach to property attempts to address

⁴⁸ The personality or self-developmental justification for intellectual property law draws on the work of Hegel. According to Hegel, property can be justified because it is linked to the existence of the free individual who is recognised as a free individual by others. Other people show respect to the person who owns property by not trespassing on his property, which also reflects their acceptance of him as a person (Resnik, 2003). Ownership over property protects the individual from the unreasonable rights and interests not only of other people in the society but also from state intervention in their lives (Resnik, 2003; May, 1998). Hegel also makes some observations about intellectual property (Drahos, 1996). When products of the mind are externalised, others may produce them because for Hegel the whole purpose of intellectual products is for them to be recognised by others so that they become the basis for learning by others. This point of view is strongly utilitarian; the best way to promote scientific progress and development is to protect scientists from thievery. Hegel further argues that communities themselves have to define their legal appropriation boundaries within the intellectual systems as long as the systems respect the learning needs of others and future generations. In this respect, Hegel recognises the importance of the intellectual commons (Hughes, 1988). Very importantly, Hegel's justification of intellectual property rights shows a striking resemblance not only to the Stoics' and Romans' condition of materialising incorporeals in order to claim property rights and justify intellectual property rights, but also to the concept that intellectual property rights allow monopoly rights over abstract objects that can be bought and sold in the marketplace as commodities. Whether Hegel's self-expression theory can provide a justification for claiming intellectual property rights over knowledge has been questioned for the following reasons. First, intellectual property rights are, according to Hegel, mainly a capital asset, meaning that intellectual property rights have a greater ability than any other property to provide economic security (Hughes, 1988). However, justifying intellectual property rights on the basis of providing economic security is in some respects a very narrow justification: it only focuses on economic utility and excludes social utility. Also, Hegel's self-expression theory as justification for intellectual property rights might not work for everybody; this concept can cause difficulties when it is applied to people who are not recognised by others, including the state, as equal individuals with the same rights and duties as the majority.

problems such as distributive justice in society (Resnik, 2003). Although Rawls allows for some social and economic inequalities in society, these inequalities are strictly not permitted if they interfere with basic liberties or undermine fair equality of opportunities (Rawls, 1971; Resnik, 2003).

While some indigenous peoples, like the San, are showing an interest in the 'conditional' commodification of their knowledge to improve their socio-economic position in society, on the basis of the above historical analysis of intellectual property law, there are no indications that intellectual property rights can fulfil these objectives of equal wealth distribution. As will be shown in chapter 7 when the Hoodia benefit sharing agreement will be discussed in more detail, engaging with intellectual property rights presupposes the possession of power. However, people like the San are turning to intellectual property rights in the hope that they can use their knowledge to redress a historical situation of social, economic and political oppression and subordination. It is highly unlikely that intellectual property rights are going to be the right tool to achieve justice, certainly as long as indigenous peoples are not sufficiently empowered to bargain on their own and on equal terms about their knowledge. Therefore more efforts are required to empower indigenous peoples prior to such negotiations. The weak social and economic position of many indigenous peoples implies the need for an alternative model for intellectual property rights that is more democratic and that serves human rights values. Can the current intellectual property rights system be adjusted to a fairer system when it is linked to a human rights framework? In an ideal world, human rights should guide the development of intellectual property and intellectual property rights should serve to further the development of human rights (Drahos, 1996; Cornides, 2004) and it should serve the interest of the public instead of the interest of only a few already privileged people (Drahos, 1998). The next part of this chapter will explore this ideal model in more depth.

3 *Democratic Intellectual Property Rights*

Some institutions, like the Human Rights Sub-Commission on the Protection and Promotion of Human Rights, argue that there is a conflict between the realisation of the TRIPs Agreement and the protection of economic, social and cultural rights (see

e.g. Tobin, 2001; Helfer, 2003). For the Sub-Commission, human rights law is more important than intellectual property law. In August 2000 it adopted a resolution⁴⁹ that deals with this matter: *“Since the implementation of the TRIPs Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food, and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPs Agreement, on the one hand, and international human rights law, on the other”*⁵⁰ (Commission on Human Rights, 2000).

The statement of the Sub-Commission reveals a concern that the balance between private interests (i.e. the interest of the creator or inventor) and public interests has been lost and that private economic interests are now favoured. Moreover, the expansion of private intellectual property claims into areas that were previously in the public domain, such as the privatisation of works of cultural heritage and the biological and ecological knowledge of indigenous peoples, is also noted as being a potential threat to human rights. Members of the Sub-Committee also reflected that uniform and strict intellectual property models that might be appropriate in developed countries are very likely to disadvantage developing countries because of the high development costs of patents. In relation to this, the Sub-Commission also states that the current intellectual property rights regime favours economic interests, in particular of multinationals, at the expense of the development of developing countries (Chapman, 2002). The WIPO does not share this concern and considers human rights law and intellectual property law as being compatible; the tension is seen as only a question of finding the right balance between granting economic incentives for inventors and authors and access for the public (Helfer, 2003).

In 2001 the Committee on Economic, Social and Cultural Rights (CESCR, 2001) also issued a statement on intellectual property and human rights⁵¹. The key message was

⁴⁹ Intellectual Property Rights and Human Rights’, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-second session, agenda item 4, E/C.4/Sub.2/2000/7, adopted 17 August 2000.

⁵⁰ Resolution on Intellectual Property Rights and Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Commission on Human Rights, UN E/CN.4/Sub.2/2000/7.

⁵¹ Human Rights and Intellectual Property: Statement by the Committee on Economic, Social and Cultural Rights, Follow-up to the day of general discussion on Article 15.1 (C), 26 November 2001. E/C.12/2001/15, 14 December 2001.

that both international trade and intellectual property regulation, including the TRIPS Agreement, must conform to international human rights law (Chapman, 2002). The statement also indicates that the human rights obligations of state parties can by no means be subordinated to international trade or intellectual property agreements. Furthermore, the Committee emphasises that intellectual property regimes must promote and protect all human rights, including those in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the fundamental human rights principles such as: equality of all persons and their equal standing before the law; the right of everyone to be consulted and to participate in significant decision making processes that affect them and the need for accessible, transparent and effective accountability mechanisms. The statement also refers to the principle of self-determination, and in particular national sovereignty over wealth and natural resources. Very importantly for indigenous peoples, the Committee mentions that the human rights approach of intellectual property must focus in particular on the needs of the most disadvantaged and marginalized individuals and communities (Chapman, 2002).

In addition, the ESCR Committee stresses the need to balance the protection of public and private interest in knowledge. Private interests should not be unduly advantaged and public interest in enjoying broad access to knowledge should be given considerable attention. The committee perceives intellectual property rights as instrumental because they are first a means by which states seek to provide an incentive to stimulate innovations and creativity and second they primarily protect business and corporate interests and investments. Human rights on the other hand, are more fundamental because they are derived from the dignity of human beings and, in some cases, groups of individuals and communities (Chapman, 2002).

To summarise these concerns, current intellectual property law serves mainly an economic interest, while from a human rights perspective, intellectual property should seek to balance the protection of the rights of inventors or creators on the one hand and the rights of society on the other. As Chapman (2002) argues, a human rights approach to intellectual property could potentially highlight new goals of intellectual property. It could embody more than just an economic relationship of maximising economic benefits; it could be a social product with a social function of improving

social welfare. But in order for intellectual property rights to comply with the new goals, intellectual property rights must first be consistent with other international human rights frameworks. In this respect Article 15 of the ICESCR can be used as a relevant proxy. Any form or level of intellectual property protection must at least facilitate and promote cultural participation and scientific progress in such a manner that all members of society both on individual and collective level can benefit.

“The right of everyone to enjoy the benefits of scientific progress and its applications” (Article 15.1(b)) consists of three components: first a right of access to beneficial scientific and technological developments; second a right of choice in determining priorities and making decisions about major scientific and technological developments and lastly a right to be protected from possible harmful effects of scientific and technological development, on both individual and collective levels (Chapman, 1998).

According to Chapman (1998), a human rights approach, based on the provision of Article 15.1, to intellectual property rights would demand from state parties a certain form of sensitivity and consideration for those groups who are absent from the decision making process about intellectual property rights. These groups are the poor, the disadvantaged, minorities, women, rural residents, indigenous peoples, and even (arguably) the future generation. Ultimately, intellectual property rights operating in a framework of human rights should improve the status of the vulnerable instead of the current regime of accruing wealth for the affluent and investors. After all, the right of self-determination, which is part of the ICESCR and the International Covenant on Civil and Political Rights (ICCPR), emphasizes the right of all members of society to participate in decision making about their governance and common future. This should also include a human right to participate in societal decision making about the development of science and technology. Reality shows a different picture. Policy on technology and science is very much directed from the top and it is very unlikely that this process will change in the near future, especially with the increasing pressure of economic globalisation. Furthermore, as will be discussed in more detail in chapter 8, section 2.1, the human rights framework in general, has been criticised for its limited liberatory and emancipatory capabilities vis-à-vis the vulnerable. In this sense it is not only the framework of intellectual property rights that is not responsive towards

the needs of indigenous peoples; arguably the whole body of human rights is criticised for its lack of focus on improving the situation of the poor in, for example, Africa (for more details see Appendix 3).

“The right of everyone to benefit from protection of the moral and material interests resulting from any scientific, literary or artistic production of which that person is the author” (Article 15.1(c)) imposes an obligation on state parties to protect the moral and material interests of authors and inventors. In order for patent provisions to be consistent with the human rights norms, the following considerations for intellectual property legislation should be taken on board by state parties: consistent with the understanding of human dignity in the various international human rights instruments and the norms defined therein; promoting scientific progress and access to its benefits; respecting the freedom indispensable for scientific research and creative activity and encouraging the development of international contacts and cooperation in the scientific and cultural fields (Chapman, 1998; Coombe, 1998a).

Unfortunately, as Chapman (1998) concludes, Article 15 of the ICESCR is one of the most neglected provisions within the international human rights framework. Implementation and monitoring of these rights has been difficult for two conceptual and methodological reasons. First, the implications of economic, social and cultural rights are less accepted or understood than the civil and political rights of the (ICCPR). Second, in contrast to civil and political rights (with the exception of labour rights), ICESCR rights are not part of domestic or international jurisprudence. For example, the provisions in Article 15 of the ICESCR (cultural life and scientific advancement) were not considered to be human rights when the UN Declaration was discussed in 1948.

Based on the above, it seems that the first step in reducing the tension between human rights and intellectual property rights consists of finding a right balance between private and public interests. However, economic globalisation and the increasing privatisation of science have made it even more difficult to achieve a balance between private and public interests. Commercialisation has introduced market considerations in the conduct of science and has changed intellectual property from a tool to provide incentives to inventors or creators to an economic mechanism that encourages

investments of the (often corporate) inventor. However, most state parties to the ICESCR report developments in the protection of intellectual property rights, which indicates that there is potentially a customary norm of recognition of intellectual property rights as a cultural right in international human rights law (Coombe, 1998a). In this way, intellectual property rights would place less emphasis on private monopoly rights and would better serve the public interest.

However, defining what is in the best interest of the public is potentially a contested issue (Kansa *et al.*, 2005). In the first place, defining the public interest requires delineating the boundaries of the public domain and questioning the legal construction of the intellectual public domain (Aoki, 1998). Some scholars (see e.g. Boyle, 2003; May, 2000; Halbert, 2005) argue that the public interest is best served by reining in the privatisation and profit maximisation of intellectual property law. Simultaneously, leaving the biological and cultural resources of developing countries and indigenous peoples in the common domain is effectively putting them up for potential exploitation by third parties (mostly from developed countries). In other words, when defining the public interest, a choice must be made between two binary schemes. On the one hand, the traditional knowledge movement seeks recognition for its heritage, knowledge and property through claiming (exclusive) property rights. On the other hand, the open knowledge movement seeks to keep information in the public domain to encourage knowledge sharing and creativity which, so they argue, is in the best interest of the public.

This debate, whether access and use of knowledge should be restricted or opened up, is rooted in the same tradition of dichotomous thinking that has been exposed in the previous chapters. As argued in chapters 2 and 3, this dichotomous thinking denies the recognition that objects and ideas circulate between different, what Christen (2005) calls, social modalities. Just as it was argued in chapter 4 that it is erroneous to divide property rights between private and common, so is it also inappropriate to generalise about knowledge as being either in the public or private domain, a polarised situation that, according to Kansa *et al.* (2005), is reinforced by the current intellectual property rights framework that leaves indigenous peoples only with the choice of 'all-or-nothing' protection. These issues will be further discussed in the next part of this chapter.

4 *Romantic Notion of the Public Domain*

Scholars of the open access movement (see e.g. Boyle, 2003; Halbert, 2005) argue that leaving information and ideas in the public domain enhances a 'semiotic' democracy, by which they mean a world in which all people and not just the powerful have access to empowerment. However, as Chander and Sunder (2004) argue, these scholars (in all likelihood unwittingly) turn a blind eye to the fact that throughout history the public domain has been an 'open' terrain for exploiting the land, resources and knowledge of disempowered and subordinated people. Locke's *terra nullius* argument, in the Second of his Two Treatises of Government, exemplifies this thinking (Martin and Vermeulen, 2005).

Locke⁵² argues that aboriginal people – who appear to lack an established system of property and who limit their activity to hunting and gathering – are in a pre-political stage of nature. Conversely, European society represents the most advanced and civilised stage because of its established legal system of property, political society, and commercial market-oriented agriculture and industry (Locke, 1963).

Locke asserted that aboriginal people have property rights over only the fruits of their labour, such as the fish they catch and the berries they pick, and not over the land itself. Consequently, anyone can appropriate and settle on aboriginal land without consent as long as the land is uncultivated, or vacant (which is land used for hunting and gathering) and there is enough good land left in the commons. If the aboriginals want to defend their property, which they have mistakenly considered theirs for millennia, that is a violation of natural law for which they may be punished and killed. To explain why the Europeans have property systems and institutions like government while the aboriginals lack them, Locke said that aboriginals have no need for them at their level of economic development.

Other Europeans who actually observed and studied hunter-gather societies came to a different conclusion. They recognised that the four criteria of nationhood in

⁵² Locke commented mainly on the European colonisation of the Americas.

international law were present in those societies. There was a permanent population, a form of government, a recognised occupation of territory over time, and the ability to enter into relations with other governments (Tully, 1994). From the aboriginal point of view, the European settlers appropriated land that was part of their nations. The land was not owned in the Western sense, but it was under aboriginal occupation and jurisdiction.

Prior to Locke, there is evidence in the writings of Vitoria (cc. 1486-1546) and Las Casas (1474-1566) that aboriginals were recognised as comprising indigenous societies with distinct political entities and territorial rights (Marks, 2003). Vitoria and Las Casas were members of the Spanish School of the 16th Century, which considered the Spanish presence in the Americas and the subjugation of the Indians. Las Casas was a great defender of the rights of the Indians, and the Spanish School became the foundation of a particular legal tradition that is recognised as one of the first schools of thought on indigenous rights.

Contrary to Locke, both Vitoria and Las Casas believed in the universality of human rights and the equality of humans. Las Casas' views reflected his concern with the material welfare and physical survival of the Indians. For him, indigenous rights included material security, cultural integrity, and political autonomy, comparable to the modern concept of self-determination. He devoted much of his life to the protection of the Indians and the restoration of their former (pre-colonial) status. In recognising that the Indians were equal to the Spanish, Las Casas denied *terra nullius*. He argued that labelling Indians as barbarians in effect created *terra nullius*.

Chander and Sunder argue that the idea that all people can equally use a resource in the public domain presumes a romantic notion of the commons. Scholars like May (2000) and Boyle (2003) argue that leaving information in the public domain stimulates liberal values like free speech and free access as well as innovation. Chander and Sunder (2004) argue that although some aspects of the open access movement must be applauded, at the same time they are concerned that emphasising libertarian values might disregard the claims of particular groups like indigenous peoples who are seeking property rights over information to redress their concerns over equality, wealth distribution and justice in general. No matter how strong is the

evidence that new property claims are encroachments on the public domain, in reality the current construction of the public domain often excludes the most disadvantaged and subordinated groups such as indigenous peoples. It may very well be that claiming property rights over information that is currently held in the commons is the only way for indigenous peoples to take control over their knowledge and satisfy their societal ideals (Chander and Sunder, 2004). Or in other words, indigenous peoples' acceptance of commodification in principle does not equate to the acceptance of a commodification practice that is driven by more powerful external actors.

In other words, assessing whether it is valuable to leave knowledge in the public domain will depend on how the commons are constructed. While scholars (e.g. May, 2000; Boyle, 2003) of the open access movement⁵³ argue that privatising the commons usually leads to breaking down a more communal social order and to handing over the wealth of the commons to a few powerful individuals or corporations, the concept of open access fails to acknowledge sufficiently the lack of ability for all commoners to exercise their control and freedom (*ibid.*). As will be demonstrated in chapter 7, 8 and 9, indigenous peoples often lack basic rights and the power imbalance vis-à-vis indigenous peoples is particularly strong; therefore leaving traditional knowledge in the open domain is not always a favourable option for indigenous peoples. Furthermore, some indigenous peoples may, in all likelihood, oppose the concept of leaving knowledge in the open domain so other people can continue to make use of their knowledge; instead, some indigenous peoples are striving to gain equal (exploitation) rights over their own knowledge and as such leaving knowledge in the public domain would therefore not be an option.

To summarise, it is more important to consider property regimes (as explained in chapter 4) as being embedded in larger social, economic, political and legal constructs instead of focusing on the proprietary terms of individual versus communal property

⁵³ The origins of the open access movement can be traced back to the software industry and in particular the operating system 'Linux' which puts private property and freedom of contract in the service of the public domain through relying on an agreement called the General Public License (GPL). Software licensed under GPL is freely available for others to use, copy, distribute and modify (Chander and Sunder, 2004). Another open access movement is the 'Creative Commons' project which started at the Stanford law school and uses a similar strategy as Linux, viz. structuring the public domain through licences. The Creative Commons allows artists, musicians, academics and so forth, to offer their work to the public domain within predefined terms. In other words, the property rights of, for example, the artist are given up (with some reservations) in favour of public access and use (*ibid.*).

rights. Similarly, it is important to see and define the commons and the public interest as being embedded in realities which exist on the ground rather than concentrating on the dialectic relationship between the public domain and intellectual property. In this sense the open access model is very similar to the *ideological* property model, which has been explained in chapter 4. Both the ideological property model and the ideological definition of the commons are expressed through general cultural ideals, ideologies and philosophies which differ in their presentation from, what has been called in chapter 4, *categorical* and *concretised* property relations or in this case categorical (legal-institutional relationship in the commons) and concretised (i.e. existing and quotidian property relationship in the commons) situation of the commons. From a concretised perspective, it is important to realise that some are better able to exploit the commons than others and as long as the commons are defined in a romantic (or ideological) way, its emancipatory potential will remain largely hidden.

Defining the notion of commons into either open or closed divides indigenous systems into these two categories. As mentioned in chapter 2 and also affirmed by Christen (2005), indigenous systems rely on a continuum. Any regulation that relies on a division between traditional knowledge and scientific knowledge, commodity and non-commodity, individual and communal ownership or open and closed access to the commons reinforces a socio-political landscape which at best limits the options for indigenous peoples and at worst denies them the right to pursue development strategies as they see fit. In this respect, claiming intellectual property rights over cultural identity (in addition to or as opposed to intellectual property rights for economic reasons) raises the concern that this approach would reinforce a fixed meaning or static content of indigenous peoples' identity and knowledge, which is an approach that has so far been contested in this thesis. These issues will be discussed next.

5 *Intellectual Property Rights and Cultural Identity*

As mentioned in the introduction of this chapter and following the findings in chapter 3 that some objects (both tangible and intangible) may resist commodification, indigenous peoples are looking for a protection mechanism that can give them

exclusive property rights over their cultural property. According to Sunder (2000), indigenous peoples are claiming intellectual property rights because, on the one hand, they are concerned that their identity has been misinterpreted by other people and, on the other hand, they fear that the exploitation of their culture by outsiders will ultimately pose a threat to their own cultural survival. Some indigenous peoples, scholars and activists argue that intellectual property rights over culture can act as a source of empowerment and end the oppression of indigenous peoples. Some advocates of intellectual property rights over culture further argue that the claiming of property rights can be seen as a signal of power relations. Claims of property rights over culture are thus seen as acts of empowerment for indigenous peoples because it allows them to prevent foreigners and outsiders from further (mis)using their culture (Sunder, 2000).

The discourse on cultural property rights reflects the current and prominent view of culture as being a concept that is embedded in the continuity and integrity of a group or nation's identity. In this sense, argues Leach (2003), cultural property is 'defined' (e.g. by international institutions like UNESCO) as an inalienable possession of objects that resist transaction (or what has been called in chapter 3 commodification), and only acquires value through other mechanisms than exchange (e.g. as gifts). In other words, the value of cultural property is linked to concepts such as completeness, authenticity and possession by one particular culturally defined group of people and as a result culture is seen as incompatible with any form of commodification.

5.1 Criticising the Bounded View of Culture

However, both Brown (1998; 2003) and Christen (2005) argue that these new forms of cultural property come with certain risks. By turning culture into property, the uses and meaning of culture and property will be defined by and directed by law. The result may be that culture becomes standardised and subject to strict legal conditions. This will restrict the possibility to create and recreate culture, which can be highly problematic since cultures are negotiated, defined and produced through social interaction inside and outside communities (Nagel, 1994). Emphasising the inalienability of culture (a policy that UNESCO endorses) will dissociate the relationship between two parties and so will make culture static and unchanging

(Leach, 2003). Furthermore, treating culture as something that belongs to a particular group emphasises the wholeness of the object (*ibid.*).

Sunder (2000) agrees that intellectual property rights not only legally enforce cultural boundaries, but also privilege essentialised orthodox cultural interpretations over contemporary and more realistic cultural interpretations. In this way, intellectual property rights over culture come to assume a cultural homogeneity that is extremely rare in the modern world. There is a real danger, argues Sunder, that by claiming intellectual property rights in culture, indigenous peoples are seeking cultural survival by turning the clock back to a (distant) past when cultures were still isolated and homogeneous.

In their struggle for empowerment, indigenous peoples confront a socio-political climate that drives them to make claims of authenticity (Vermeulen and Martin, 2006). The discourse, wherein the debate about intellectual property over culture is conducted, is a prime example of such a socio-political and legal construction of authenticity. Although Halbert (2005) argues against intellectual property rights over culture, her rhetoric that indigenous peoples need “*to develop and assert deontological claims about sacredness and the noncommodifiability of life*” (2005:144) is still a good example of a one-sided view of indigeneity and authenticity (see chapter 3 for a more contextualised and empirically grounded debate on commodification).

5.2 Images of Indigeneity

In other words, the needs of indigenous peoples are often defined in accordance with dominant images of indigeneity that serve certain interests (Blaser, 2004a). Depending on whether they are viewed as being in a state of ‘backwardness’ or in ‘harmony with nature’, a discourse of progress or conservation is mobilized by activists, governments, NGOs, and indigenous people themselves. In practice, as argued in chapter 2, this inhibits indigenous peoples from developing an inside-out identity, one that flows organically from their changing status, a status far removed from an idealised primitive past. Their identity is forged in the context of a power asymmetry, so that they have to position themselves between mutually exclusive

identities defined by others, viz. as a backward people in modernist discourse or as a natural people in conservationist discourse.

Those who argue that indigenous people should claim property rights over culture on the basis of their identity continue to believe – erroneously – that indigenous communities are homogenous and can be represented with one voice (on the heterogeneity of communities see Appendix 5). While it is acknowledged in the literature that indigenous societies do not constitute a homogeneous group and can range from groups who live deep down in the Amazon and have little contact with other groups to groups who own casinos (see e.g. Tunney, 1998), such a diversity can also be found in one indigenous group. Where society once enforced assimilation on indigenous peoples, it now enforces 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 (a homogeneous) identity, ethnicity and personhood.

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 individuals and as a group to make decisions about their own land, natural resources, identities, culture 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 indigenous peoples 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 them as a result of historical processes and the prevailing political economy. In the case of the San, their activism reflects their experiences of dispossession, marginalisation, exploitation and stigmatisation. Acceptance of their emergent identity is critical for 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 more 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.*).

Allocating property rights over culture on the basis of ethnicity needs to be questioned. The San that were interviewed (see Appendix 2) have indicated that their quest for recognition of their knowledge and rights over resources is linked to their struggle for gaining equal citizenship. 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 mainly a strategy adopted by donors, NGOs and the elite of tribal politicians (hence the difference made above between leaders and ordinary San⁵⁴) 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 own opinion or self-image.

This position, that allocating intellectual property rights on the basis of ethnic identity is difficult, 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

⁵⁴ The observation that tribal leaders propagate a revived traditionalist ideology has also been noted by Schröder (2003) and Rata (1999; 2000).

chapter. However it is important to point out that, when indigenous peoples seek to redress (for example) appropriation of culture, they often find themselves having to present themselves to the outside world through an image that does not resonate with their 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 (Kentick and Lewis, 2004: 9). A similar strategy can be observed with regards to intellectual property rights.

5.3 Shifting Concepts of Culture

While some indigenous peoples will insist that the right to be different lies within culture, Gray (2004) argues that the controversy over the question as to whether there can be a right to cultural identity remains, regardless of whether that right is granted through intellectual property rights or any other rights-based policy. One reason why claiming intellectual property rights over culture is such a contested phenomenon is the fact that culture is already a shifting concept ranging from culture as a trait (which assumes that culture is tangible, continuous and bounded), culture as a meaning (culture is a web of meanings which must be interpreted) and culture as a process (dynamic view of culture as something that is regularly created) (Gray, 2004). It is argued in this chapter that intellectual property rights in culture still falls within the remit of culture as traits. As exemplified in chapter 2 and 4, some of the UN documents (e.g. the CBD, Working Group in Indigenous Populations) stem from this framework in which it is argued that cultural traits such as knowledge, language, religion and material culture must be protected. However, such an approach with regards to cultural heritage would lead to defining culture as a folkloric, static notion buried in tradition (Gray, 2004).

In other words, there is a real danger that claiming intellectual property rights in culture will reinforce a hegemonic interpretation of culture, in the sense that culture is conceived as a total and coherent body of behaviour and beliefs that normally does not ‘survive’ abrupt alterations (Iverson, 2002). In short, law interprets culture (this will be further discussed in chapter 8, section 3.2) as *“a continuous and integrated set*

of practices and beliefs held by a particular people occupying a distinct territory” (Iverson, 2002: 35). Moreover, significant legal decisions concerning the rights of indigenous peoples (see chapter 9, section 4) have tied recognition of, for example, land rights⁵⁵ to the continuing presence or continuity of a ‘traditional’ or ‘customary’ way of life. In short, both national law and international law dictate the contours and content of the claims and even of indigenous peoples’ identities by defining culture as a trait (Cowan *et al.*, 2001).

However, as Gray (2004) has pointed out, culture can also be defined in a different way, viz. as meaning or as a process. For example, anthropologists argue that culture should be seen as a process, thus emphasising its dynamic and creative character (see e.g. Coombe, 1998b). Anthropological theory now rejects the above concept of culture as something that is integrated, harmonious, consensual and bounded (Merry, 2001: 41). Instead, anthropologists now understand culture as something that is historically produced, globally interconnected, internally contested, and marked with ambiguous boundaries of identity and practice (*ibid.*). However, as argued above, law does not engage with the latter definition and reinforces indigenous peoples to engage with the older concept of culture in their search for self-determination.

Indigenous peoples seek protection over culture to assert their own cultural views and self-determination over and above the views of outsiders. In this sense, claiming rights over culture is for indigenous peoples a socio-political act which includes questioning the invasion of their territories, the disintegration of their identities, their historical position of subordination and becoming an underclass and so forth. In other words, seeking cultural protection is, for indigenous peoples, another aspect of claiming (indigenous) rights. It is very doubtful that intellectual property rights which in their current form are focussing on culture as a trait rather than a process, can be a flexible enough or powerful enough instrument to be of much use in that respect. Therefore other protection measurements and other legal regimes should be reviewed to see if they can deal more appropriately with the problem of how to protect and use traditional knowledge in a more equitable way.

⁵⁵ See for example Clifford’s account of the Masphee Indians’ courtroom battle in order to win a land claim, which so it aspired later, they could only win if they could prove to the courts that they ‘were now’ and ‘have always been’ a tribe (Cowan *et al.*, 2001).

Greene (2002) argues that the protection and use of traditional knowledge should not be seen in terms of intellectual property but suggests focusing instead 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' struggle for land rights. Without sufficient access to (ancestral) land, indigenosity is undermined, local culture cannot be maintained and associated oral knowledge will rapidly degrade. 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 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 commodification. However, it remains to be seen whether Green's concept of territoriality can transcend the essentialisation of indigenous peoples' identities and cultures. This will be examined in chapter 9.

6 Conclusion

This chapter has explored the potential usefulness of the existing intellectual property rights regime as a mechanism to help indigenous peoples to exert control over their indigenous knowledge, both when they seek to protect their culture and when they seek to commodify (certain aspects of) their knowledge. These two potential purposes of intellectual property rights are suggested in the literature, but the analysis presented in this chapter shows that both are problematic. The history of intellectual property rights shows that they were invariably developed as tools to strengthen the exclusive ownership over knowledge by already relatively powerful actors. This means that the development of intellectual property rights as tools to empower disadvantaged and excluded indigenous peoples would require a process that runs counter to the logic that has driven the development of intellectual property rights to date. Similarly, the current intellectual property rights framework is of questionably utility for the cultural

protection of indigenous peoples as it traps them in an unrealistically 'frozen' and 'backward' looking identity which may hinder their wider aspirations to overcome social and economic exclusion. The weak social and economic position of many indigenous peoples implies the need for an alternative model for intellectual property rights that is more democratic and that serves human rights values.

The previous chapter (chapter 4) presented the multi-layered property framework of *ideological, categorical* and *concrete* property relations of von Benda-Beckmann *et al.* (2006). The classification derived from this framework (see Figure 1 in chapter 4) will be used here to draw a number of conclusions about the appropriateness of intellectual property as a protection mechanism for traditional knowledge. Intellectual property rights emphasise the *categorical* (i.e. legal-institutional) property relations over intangibles. In other words, intellectual property law clearly fits within the categorical or legal-institutional framework of property relations. This is one of the main reasons why the debate about protecting traditional knowledge with intellectual property rights has been so difficult. From a strictly legal-institutional perspective, traditional knowledge does not fulfil the criteria for patentability and there seems to be insufficient goodwill among the main players in the WTO to extend the scope and range of intellectual property rights to include traditional knowledge.

Opponents to intellectual property rights, on the other hand, have mostly been concerned with *ideological* property relations (e.g. by focusing the discussion on individual versus community-based property rights). Especially, the debate about whether knowledge should stay in the commons is in principle a debate largely driven by an ideological or, in the terminology of this chapter, a romantic notion of the commons. Attempts to democratise intellectual property law will be challenged by realities on the ground of which power differences and lack of civil society amongst indigenous peoples are two main examples. Looking at the issue from a historical and philosophical perspective, it becomes clear that intellectual property rights are not appropriate tools to create a civil society; it is rather that civil society is a prerequisite for successfully claiming property claims over intangibles (and also tangibles for that matter) by indigenous peoples. This issue is further explored in chapter 9, section 4.3.

Based on fieldwork observations and the more critical literature on culturalism, it can be argued that the San's claims of intellectual property rights over intangibles are mainly driven by utilitarianism (e.g. to improve their livelihoods, to gain more autonomy or to achieve equal citizenship) which is consistent with the *concretised* type of property relations. However, by paying attention to the wider socio-economic and political context within which property relations (i.e. intellectual property rights) are currently expressed, it becomes clear that when expressing their claims, indigenous peoples must contest current property relations and rationalise their claims by focusing on the *ideological* type of property relations.

So while *ideological*, *categorical* and *concretised* property relations are all part of a wider socio-economic context, indigenous peoples have to express their property relations mainly through a rhetoric of *ideological* property relations. This results in a situation wherein 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. Indigenous peoples need a more flexible and *concretised* framework (i.e. based on quotidian social practices) for protecting their traditional knowledge. It is obvious from the above observations that the existing intellectual property regime is not going to be an institution that is sympathetic towards the claims and needs of indigenous peoples. For one thing, intellectual property law is firmly grounded in either *categorical* (i.e. legal-institutional) property relations or, for those who oppose it, it is grounded in *ideological* property relationships. While the former almost rules out the participation of indigenous peoples per definition through power differences, the latter either imposes a re-traditionalisation of indigenous peoples' identity or creates a further impasse by leaving knowledge in the common domain.

Given the above criticism, the conclusion from chapter 4 must be reaffirmed. Using intellectual property rights for the protection of traditional knowledge is a highly contestable and difficult strategy. The current intellectual property rights framework fails to provide adequate protection. This means that other solutions to protect traditional knowledge should be explored and tested. In the next chapter, two diverging strategies will be further analysed, viz. defensive and positive protection mechanisms; the latter requires a new legal system, the former builds further upon the

existing system. In chapter 7 and 8 two positive defensive mechanisms will be analysed in more detail. In chapter 7 the pragmatic approach of compensation will be analysed by examining the fairness of the Hoodia benefit sharing agreement. In chapter 8, a customary law based approach will be further scrutinised. Finally, chapter 9 presents an assessment of the extent to which a strategy outside intellectual property law may better accommodate indigenous peoples' claims and needs.

Chapter 6 – Defensive and Positive Protection Mechanisms of Traditional Knowledge

1 Introduction

It was argued in chapter 5 that the current framework of intellectual property rights fails to provide adequate protection for traditional knowledge; therefore it was suggested that other solutions to protect traditional knowledge must be sought and tested. This chapter provides an overview of the currently proposed protection tools and assesses whether these mechanisms 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, international institutions like the CBD, the WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO-IGC) and the WTO in the 2001 Doha Declaration have begun to outline the general principles for a system for protection of traditional knowledge.

In general terms, the proposed solutions, which are mainly legal ones, can be divided into two categories, viz. defensive and positive protection (see Table 3). The defensive protection measures are modifications or enhancements of the existing intellectual property laws. The positive protection mechanisms, on the other hand, require a completely new system (*sui generis*) which will demand active and committed participation of all the parties involved - such as local and indigenous communities, NGOs, activists, national governments, international community, and so forth – and therefore will be more difficult to achieve in practice than positive defensive protection (Dutfield, 2004). *Sui generis* traditional knowledge protection (sometimes also called 'sui generis intellectual property protection' and often shortened to 'sui generis protection' or 'sui generis law') encompasses a legal system for the protection of knowledge that, although it shares some characteristics with intellectual property, is unique in the sense that it protects the new subject matter of indigenous and local peoples' knowledge (Halewood, 1999).

Some (mostly developing) states have already enacted specific or *sui generis* legislation that governs the use of indigenous and local knowledge. Other states

regulate the protection and use of traditional knowledge through their national access laws (regulated through the CBD) which may incorporate provisions that relate to the use of traditional knowledge. These national regulations about the use of traditional knowledge (both direct legislation or through national access laws), together with international initiatives such as the CBD, increasingly govern the collection and dispersal of traditional knowledge while simultaneously imposing a variety of conditions on potential users or collectors of traditional knowledge (Drahos, 2000). However, the main question remains whether these legislations (both defensive and positive protection measures) will give indigenous peoples sufficient control over the use of their knowledge.

Table 3: Defensive and positive protection mechanisms for traditional knowledge⁵⁶

| | Defensive Protection | Positive Protection |
|---|---|--|
| <p>Inalienability Rules</p> <p>Preventing traditional knowledge from being misappropriated.</p> | <p>1) Traditional Knowledge Prior Art Database</p> <ul style="list-style-type: none"> - Traditional Knowledge Digital Library (e.g. India) - Community Biodiversity Registers (e.g. India) <p>2) Disclosure of Origin</p> | |
| <p>Contract Rules</p> <p>Mainly for situations where there is already a body of traditional knowledge in circulation; based on the principle 'use now, pay later'.</p> | | <p>1) Liability Rules (bioprospecting negotiations)</p> <ul style="list-style-type: none"> - International Collaborative Biodiversity Group Program (ICBG) Agreements (e.g. Peru) |
| <p>Property Rules</p> <p>(Exclusive) rights for owners with a right to refuse, authorise and determine conditions for access to traditional knowledge.</p> | | <p>1) <i>Sui Generis</i> Laws</p> <ul style="list-style-type: none"> - National Statutes for the use of traditional knowledge (Peru) |

⁵⁶ This list is not exhaustive, but covers the main protection mechanisms as identified in the literature (see e.g. Dutfield, 2004).

As argued in chapter 4, the current intellectual property rights framework ignores distributive justice and, instead, emphasises the technological and economic advantage of a few Western (corporate) powers. Therefore, any of the proposed protection mechanisms must at least fulfil the requirement of creating a more equality minded protection framework that will give indigenous peoples equal exploitation and protection rights over their traditional knowledge in comparison with the current users of that knowledge, i.e. corporate powers.

In this respect, Chander and Sunder (2004) argue that international law has recently accepted the fact that some resources (like the global commons such as outer space, deep seas and Antarctica) need special protection regimes in order to constrain the one-sided exploitation of these resources⁵⁷. When natural resources become more valuable, regardless of whether the concern is for oil, minerals or plants, society encounters a reoccurring problem, viz. allocation of rights over these resources (Cottier, 1998). Gradually, this process of allocating rights over natural resources in the global commons has been guided by ethical values and claims that express and symbolise concerns over equity and distributive, inter- and intra-generational justice. Similar issues must be raised and addressed when discussing rights over traditional knowledge.

⁵⁷ For a comparison between, on the one hand, the international law regime of the commons such as the deep ocean bed, outer space and Antarctica and, on the other hand, knowledge in the commons see, for example, Chander (2003). For a more general overview of the international law regulations with regards to the global commons see, for example, Vogler (2000). With regard to the mining of the deep seabed, according to Vogler, the regulations are a good example of a regime that fulfils the needs and desires of developing countries. Developed and developing countries have negotiated extensively over the regime that is to govern the exploitation of the deep seabed. The US proposed a 'first-come first-served' system, with an international involvement limited to the creation of an international registry of claims (to secure the first claimant's property rights) and to setting aside a small percentage of revenues from exploitation for sharing with landlocked states. The developing states objected to this plan and argued that this would principally only be beneficial for the developed states because of their technological advantage. Ultimately, the regime negotiators (with the exception of the US) agreed to a plan that balanced the need to make exploitations worthwhile with the desire to share the benefits of that exploitation with less developed countries. The resulting UN Convention of the Law of the Sea (UNCLOS) declared the high seas and their deep seabed resources to be the common heritage of mankind. Mining would be permitted, but only under a regime that would benefit all states, not just the mining state. Under this regime, a private company seeking a mining permit must first attract a state sponsor and then apply to the International Sea-bed Authority, an international organisation created by the 1982 Convention. Applying the fair division of 'I cut, you choose' the company submits maps of two sites to be mined (I cut) from which the Authority chooses one for itself and the other for the company (you choose). The Authority's development division, the Enterprise, then has the right to develop the site reserved by the Authority. The proceeds from the mining of the Enterprise will be shared equitably among the states of the world, taking into particular consideration the interests and needs of developing states.

This chapter is divided into four parts. Part 1 provides an overview and assessment of the main defensive protection measures with a particular focus on two mechanisms, viz. the requirement of disclosure of origin and prior art databases. Part 2 will examine positive protection tools consisting of, on the one hand, liability rules and, on the other hand, property rules. Part 3 will identify and discuss the shortcomings of the current proposed protection mechanisms vis-à-vis the positions taken and requirements of indigenous peoples and their organisations. The final section, Part 4 will provide a discussion of how to approach the reconciliation between the law's development of protection mechanisms and indigenous peoples' concerns.

2 *Defensive Protection Mechanism*

The two most important defensive protection mechanisms that will be discussed in this chapter are, first, requirement of the patent applicant to disclose the origin of the genetic resources and associated traditional knowledge relevant to the invention and, second, to compile databases of published information on traditional knowledge in order to make it possible for patent examiners to identify potentially novelty-destroying prior art (Dutfield, 2004). Both proposals fall within the remit of the current patent system and, unlike the positive protection mechanisms that will be discussed hereafter, would not require substantially new legislation. The main purposes of these protection mechanisms are twofold. First, they fulfil the requirements of the CBD, viz. to provide proof that the transfer of the resources and associated knowledge has taken place in accordance with the regulations of the CBD and national law. Second, these defensive measurements are also seen as a means of preventing traditional knowledge from being misappropriated.

2.1 Disclosure of Origin

In order to support the CBD's provisions on Access and Benefit Sharing agreements (ABS), proposals have begun to emerge to change the procedures of patent applications (Tobin, 2004). A number of mechanisms have been proposed to ensure that the acquisition of intellectual property rights complies with the principles and objectives of the CBD (Vivas Eugui, 2003), viz. the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. It has been suggested

that applicants for patents must be able to indicate in their application the origin of genetic material used, the extent to which it was used and the conditions under which it was acquired. While the European community has supported this, primarily voluntary, disclosure agreement, developing countries demand more stringent procedures. They argue that patents should only be accepted when evidence of origin and of prior informed consent (permission given by traditional knowledge custodians to use traditional knowledge) for use of genetic resources and traditional knowledge can be given in the patent application. Proposals from developed and developing countries for modifications to international intellectual property law to include disclosure requirements tend to be divided between mandatory and voluntary provisions. For example, Switzerland has recently proposed changes to the Patent Cooperation Treaty (PCT) to incorporate voluntary disclosure requirements, while India and Brazil, for example, have proposed amendments to the TRIPS agreement to include mandatory disclosure requirements (Tobin, 2004).

The disclosure of origin is like an official certificate that recognises the legal origin of or legally authorised access to a particular genetic resource or piece of information linked to traditional knowledge (Vivas Eugui, 2003). In this sense the requirement of disclosure of origin can be used as a tool to prevent illegal access to and use of genetic resources and traditional knowledge by non-authorised third parties within the intellectual property system (*ibid.*).

Not only is disclosure of origin an important protection measurement for developing countries, the Conference of the Parties (COP) of the CBD has also recognised the potential of this mechanism. At the sixth meeting of the COP, the Bonn guidelines were adopted which requested from countries with users of genetic resources under their jurisdiction to consider 'measures to encourage disclosure of the country of origin of the genetic resources and the origin of traditional knowledge, innovations and practices of indigenous and local communities in applications for intellectual property rights'. However, some members of the COP are unconvinced about the need for certification and disclosure of origin, and a few (e.g. Australia and Canada) are opposed, including the US which has only an observer status in the CBD (*ibid.*). Those who oppose the disclosure of origin argue that this measure is incompatible

with the TRIPS agreement. As indicated above, there are various options for disclosure of origin and Vivas Eugui (2003) has identified the following four options:

2.1.1 Mandatory Disclosure Requirement

The mandatory disclosure requirement implies that disclosure of all information available about the genetic resource will be obligatory. This requirement is intended to help realise fair and equitable benefit sharing as required by the CBD. This can be achieved through establishing that that resources and traditional knowledge were acquired in conformity with the biodiversity access and benefit sharing regulations in the source countries and Article 8(j)⁵⁸ of the CBD (Dutfield, 2004). Failure to meet the mandatory disclosure requirement could have three possible legal consequences: abandonment of the procedure; relative nullity⁵⁹ and suspension of the process; and revocation of the patent. The latter approach has been chosen by, for example, India in its Patent Act of 2002⁶⁰ which regulates, *inter alia*, that patents may be revoked on the ground: “*that the complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention*” (Indian Patent Act, 2002 in Vivas Eugui, 2003: 203) and “*that the invention so far as claimed in any claim of the complete specification was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere*” (Indian Patent Act, 2002 in Vivas Eugui, 2003: 204).

2.1.2 Voluntary Disclosure Requirement

The voluntary disclosure requirement is the system that is applied in the 1998 Directive on the Legal Protection of Biotechnological Inventions of the EU. Failure to meet the voluntary disclosure requirement does not result in legal sanctions. The directive indicates in its preamble: “*whereas if an invention is based on biological material of plant or animal origin or if it uses such material, the patent application should, where appropriate, include information on the geographical origin of such material, if known; whereas this is without prejudice to the processing of the patent applications or the validity of rights arising from granted patents*” (Directive on the

⁵⁸ The CBD promotes the negotiation and creation of legal solutions to benefit sharing with indigenous peoples at the national level through Article 8(j). For more detailed information on Article 8(j) see section 3.1 of this chapter and chapter 7 in general.

⁵⁹ Relative nullity means violating a rule intended for the protection of the parties.

⁶⁰ Other regions or countries that have opted for the mandatory requirement are the Andean Community and Brazil.

Legal Protection of Biotechnological Inventions of the EU, 1998 in Vivas Eugui, 2003: 204).

2.1.3 Ex Posteriori Mechanism of Unfair Competition: the Clean Hands Doctrine

According to this approach, when an entity or individual has committed fraud or violated competition rules, this entity or individual will have the right to a patent without the derivative rights (i.e. exclusive rights) until the infractions are corrected. This view is based on the 'clean hands theory' from common law.

2.1.4 Effective and Parallel Follow-Up of the Patent

This option is followed in Denmark and Norway. The disclosure of origin is requested on a voluntary basis, and without the effect of nullity when insufficient information is produced. However, the intellectual property authorities, in conjunction with the environmental authorities, investigate the composition and source of compounds claimed in relevant patent applications. If it turns out that the compounds have been used illicitly, sanctions can be established according to civil, environmental or criminal law.

One of the main problems with the disclosure requirement is the fact that it remains unclear whether it is compatible with the TRIPS agreement. Discussion within the TRIPS Council and the WIPO support both arguments (Vivas Eugui, 2003). Arguments against the requirement of disclosure have been based on the incompatibility of such a requirement with Articles 27.1⁶¹, 29⁶², 30 and 62⁶³ of TRIPS and because it places a new condition on patent filing procedures that is not allowable under the TRIPS regime. Arguments in favour of the disclosure of origin requirement rely on a more interlinked and reasonable interpretation of Articles 1⁶⁴, 8.1⁶⁵, 27, 30 and 62 of the TRIPS which would result in the acceptance of this type of measure.

⁶¹ The disclosure requirement would add another substantive condition to the traditional conditions of novelty, inventive step and industrial application; this would be in breach with Article 27.1.

⁶² Article 29 establishes the formal conditions for granting a patent and disclosing the origin is not necessary or relevant for the majority of cases according to this article.

⁶³ Article 62 establishes the conditions for the acquisition or maintenance of intellectual property rights and it is argued that including the disclosure of origin would impose high and exaggerated administrative costs to patent filing and therefore be an unreasonable requirement.

⁶⁴ Article 1 allows members to apply the provisions of the TRIPS agreement according to their own legal practice and as such would allow the inclusion of the disclosure of origin.

According to Dutfield (2004), the TRIPS agreement would not be violated if it would be required in the patent application, first, to describe in general terms the relevant genetic material and traditional knowledge and, second, to submit documentary evidence that ABS regulations were complied with. However, according to Dutfield, the TRIPS agreement would be violated if the patent application required disclosure of the geographical origin of the relevant genetic material and associated traditional knowledge. This would require a revision of the TRIPS which in all likelihood, would be opposed by countries like the US.

2.2 Traditional Knowledge Prior Art Databases (inalienability)

One of the most important criteria for awarding a patent is novelty. When it can be demonstrated that the subject of the patent for which protection is sought is based on prior art, for example through a published description of the medicinal properties of a particular plant, the requested patent will be denied by the patent office (Sahai, 2003; Chander and Sunder, 2004). However, Western patent offices are usually not aware of prior art relating to medicinal plants or other traditional knowledge and therefore face a difficult challenge in assessing novelty. This can lead to a situation where a patent is mistakenly granted by the patent office even though the patent is based on prior art. The granting of patents to neem-derived products (see Box 1) is a good example of the failure of patent offices to examine prior art related to traditional knowledge.

Box 1: The neem patents (adapted from Dutfield 2002a: 66; 2004: 53).

The neem tree has been the subject of a large number of patents, exceeding 40 in the US alone and at least another 150 worldwide. The inventions described in most of the neem-related patents used public domain traditional knowledge as a starting point of the 'invention'. These patents have provoked a lot of controversy, especially in India, where most of the traditional knowledge custodians live. There have been at least two patent challenges: first, the European Patent Office (EPO) patent for the fungicidal effects of the neem oil (Patent No. 436 257 B1) owned by W.R. Grace & Co and, second, the US patent for a storage-stable azadirachtin formulation (Patent No. 5124349) which is also owned by W.R. Grace & Co. The challenge to the former patent succeeded in 2000 when the EPO revoked the patent on the grounds of lack of novelty and inventive step.

⁶⁵ Article 8.1 allows the flexible interpretation of the agreement in order to provoke measures that serve the public interest.

In order to reduce the risk that patents are awarded for products that are based on traditional knowledge, some countries are creating traditional knowledge databases (TDKs) in which they store information related to heritage and traditional prior art (such as traditional medicinal plant knowledge). The two best-known examples of TDKs are: the Traditional Chinese Medicine Patents Database which records traditional acupuncture, herbal medicines, animal-derived drugs and mineral drugs in a format searchable by patent examiners; and the Indian Traditional Knowledge Digital Library (TKDL) (see Box 2) to record systematically, in digital form, knowledge of Ayurveda which is a traditional Indian system of medicine⁶⁶. Collecting and recording the traditional knowledge in a database prevents the unauthorised use of the traditional knowledge and makes knowledge inalienable from the public domain (Chander and Sunder, 2004). At the international level, the World Bank has started to collect African and other regional indigenous knowledge in a database with the objective of hosting an international storehouse of global prior art.

Box 2: The Indian Traditional Knowledge Digital Library (TKDL) (adapted from Sahai, 2003: 172-173).

To prevent biopiracy, the government of India is developing a digital database of public domain traditional knowledge related to medicinal plants. It is proposed to make this digital database available to patent offices all over the world so that examiners are aware of the prior art relating to a particular medicinal plant. The TKDL project will cut the costs of fighting legal battles against such patents. The cost of contesting a patent at international level over a three to five-year period can be very high. A joint project of the National Institute of Science Communication (NISCOM) and the Central Department of Indian Systems of Medicine and Homeopathy, the TKDL is based on an innovative software program which facilitates the classification of traditional knowledge, making it compatible with the International Patent Classification. An interdisciplinary team of 30 Ayurveda experts, five patent examiners and five IT experts have already transcribed about 8000 formulations of the 35,000 *slokas* pertaining to Ayurveda. The information will be made available in 35 languages including all major Indian and foreign languages. Plants and knowledge that are not in the public domain are not going to be placed in the public domain. In addition, a National Innovation Foundation (NIF) has been set up with the intention of building a national register of innovations, mobilising intellectual property protection, setting up incubators for converting innovations into viable business opportunities, and helping in nationwide dissemination.

Besides storing traditional knowledge in the TKDL, India is also documenting indigenous knowledge through Community Biodiversity Registers (CBRs), also

⁶⁶ The database also includes knowledge about yoga, unani and siddha.

called People's Biodiversity Registers (PRBs) (Sahai, 2003; Utkarsh, 2003), in which people's knowledge of conservation and sustainable use of natural resources are recorded in the hope that these registers can protect the intellectual property of the community members and can promote equitable commercialisation of the knowledge through benefit sharing agreements (Utkarsh, 2003). The CBRs or PBRs are databases collated on village level, usually developed by a team of local school teachers, students, NGO researchers and villagers (see Box 3). Biodiversity registers from villages can also be put together at the level of *talukas* (counties), districts, states and the whole nation, in the form of computerised databases. The CBRs or PBRs are recognised by the Indian Biological Diversity Bill as a way to ensure access and benefit sharing.

Box 3: An example of a Community Biodiversity Register (CBRs) (adapted from Sahai, 2003: 172).

Gene Campaign has undertaken work on recording indigenous knowledge among three indigenous groups (the Mundas and Oraons in South Bihar, the Bhils of Madhya Pradesh and the Tharus of the Terai region). Medicinal plants and knowledge of their use for human and veterinary care has been collected with the help of educated tribal youths. Elders in the villages, medicinal practitioners and traditional healers were consulted in the process of collating and interpreting information. The documented knowledge has been put into manuals for the local peoples who now use them as practical healing guides. During the data collection exercise, Gene Campaign also conducted a public education programme, informing community members about new national and international developments that are aiming to prevent the unauthorised use of traditional knowledge. Gene Campaign has made the local peoples more aware of their rights so that they are now aware that their knowledge belongs to them and cannot be used without their permission.

According to Utkarsh (2003), the development of PBRs or CBRs offers a number of advantages and important lessons for other countries. First, traditional knowledge can be better protected from biopiracy through publicity (claims of prior art) rather than through secrecy. Second, the community-based registers can help to promote sustainable local use and trade. Third, compiling the registers can help to revitalise local traditions that are on the verge of extinction. Fourth, the exercise of collecting the information will help to promote the preservation and sharing of knowledge within the community. Fifth, in order to capitalise on the usefulness of the community registers, the knowledge must also be computerised at the national level so it can serve as a database of prior art.

However, according to Chander and Sunder (2004), the traditional knowledge database approach carries a significant risk. They argue that by placing the traditional knowledge in the public domain, it becomes easier for companies to use this knowledge as an unauthorised stepping-stone for new inventions. TKDL can only prevent patents that cover products that are based on straightforward copying of traditional knowledge, but cannot prevent patents for products that have used traditional knowledge to invent substantially new products even though the initial ideas come from traditional usage. Therefore India has decided to make the TKDL only available to patent offices and under a non-disclosure agreement. In other words, the TKDL approach offers both advantages and disadvantages. It establishes the ingenuity of traditional communities and prevents the patenting of at least some of the knowledge they hold. On the other hand, improvements upon traditional knowledge may still be patentable. Moreover, according to Chander and Sunder (2004), by preventing monopoly rights in certain information through patents, the TKDL approach might reduce the economic value of traditional knowledge and therefore reduces the possibility of benefit sharing agreements between local communities and companies.

Dutfield (2004) also doubts whether traditional knowledge databases can stop patents being granted to third parties who have used traditional knowledge for their invention. While it can certainly stop patents like the turmeric patent⁶⁷ that was characterised by the absence of novelty, in most cases the patent is based on building further upon traditional knowledge and it remains uncertain whether traditional knowledge can be described in such a way that it constitutes novelty-defeating prior art. Tobin (2004) and Mgbeoji (2001) further argue that databases and registers alone will not provide sufficient protection of traditional knowledge. They state that these databases and registers should be seen rather as one element in a wider system of traditional knowledge governance together with other measurements such as customary law and *sui generis* law and policy.

⁶⁷ In 1995, a US patent was awarded to the University of Mississippi Medical Center. The patent covered a method of promoting wound healing by administering turmeric. However, in India the healing properties of the turmeric plant are common knowledge and is known as a 'classic grandmother's remedy' (Dutfield, 2002a). Eventually the patent was revoked on the basis of its lack of novelty (*ibid.*).

Tobin (2004) and Mgbeoji (2001) agree with Chander and Sunder (2004) that placing traditional knowledge in the public domain as a protection tool against biopiracy can effectively amount to the renunciation of rights over such knowledge. Furthermore, Tobin (2004) argues, community registers developed and maintained by local and indigenous communities can indeed facilitate the process of defining rights over community knowledge **within** a community; however their legal effect as a means for protection of traditional knowledge outside the community is limited in the absence of recognition of the status of most of the community registers under national (India is an exception) and/or international law. Tobin (2004) also highlights that, to date, the majority of traditional knowledge held in databases is not under the control of indigenous and local communities. Third parties such as research institutes, national archives, NGOs, commercial organisations and international bodies manage the registers, often without any specific agreement or input of indigenous peoples regarding their use.

3 *Positive Protection Mechanism*

While the defensive protection mechanisms, as discussed above, have tried to adapt the existing forms of intellectual property rights in order to protect traditional knowledge, an alternative approach is the development of a *sui generis* regime. This is a legal regime of its own kind that is specifically adapted to the nature and characteristics of traditional knowledge. Many academics and NGOs have argued that it is very unlikely that defensive protection mechanisms will provide adequate measurements “*because of the inherent mismatch between the protection that was created for finite, inanimate objects coming out of industrial activity, and the flowing, mutable and variable properties of biological materials and associated indigenous knowledge*” (Sahai, 2003: 173). Although the TRIPS agreement refers specifically to the possibility of a *sui generis* intellectual property rights system and, consequently, the concept has received considerable attention in the literature, little progress has been made in terms of actually implementing this kind of protection. In the next section of this chapter two different *sui generis* approaches will be discussed, viz. liability or contract rules and property rules.

3.1 Liability or Contract Rules

The positive protection measurements are based on an entitlement theory which operates either as a property regime or a liability regime. While a property regime (which will be further discussed in section 3.2) vests exclusive property rights in the owners who have the right to refuse, authorise and determine the conditions for access to the property in question, a liability regime is based on a compensatory 'use now, pay later' approach (Dutfield, 2004). According to Dutfield (2004) a *sui generis* based liability regime is useful in particular in countries where a body of traditional knowledge is already in the public domain. He argues that in such a situation a property regime would not be able to prevent (mis)appropriation because traditional knowledge which has fallen into the public domain can no longer be controlled by its original holders or custodians through a property regime. In that case a pragmatic approach will be more beneficial. One option is to allow and regulate the use of traditional knowledge on the condition that the original holders or custodians are compensated for the use of their knowledge.

There are different ways to organise such compensation schemes. One of the most popular ways is through contracts between indigenous communities and research institutions (see Box 4 for an overview of some cases). Biodiversity Prospecting Contracts (BPCs) are most frequently used for regulating formally binding relationships between providers and users of genetic resources (Tobin, 2002). The scope of the contracts varies and includes material transfer agreements, licensing regimes, memoranda of understanding and sale of raw material (Gollin, 2002).

Determining whether BPCs fulfil the criteria of the CBD has been the subject of a polarised debate. While some argue that BPCs are just another tool that encourages biopiracy because of the huge power imbalance during negotiations between (multinational) companies on the one hand and indigenous peoples or source countries on the other (see e.g. Zerda-Sarmiento and Forero-Pineda, 2002), others have argued that BPCs provide the means by which source countries and indigenous communities can achieve more equitable sharing of the benefits derived from the utilisation of their resources and knowledge (see e.g. Tobin, 2002). Tobin (2002) argues that there are examples of BPCs that have created new opportunities for indigenous peoples to take

increased control over their knowledge and have stimulated capacity building for both the source country in general and indigenous peoples in particular. Furthermore, some of the BPCs promote awareness of both the commercial and non-commercial (e.g. local needs) value of genetic resources and related knowledge. In other words, BPCs have the potential to fulfil the requirements of the CBD. One example of a BPC agreement is the Peruvian ICBG agreement (see Box 5).

Although indigenous peoples were involved in the negotiations of the ICBG agreement, not all Aguaruna federations welcomed the agreement. This led, in turn, to a concerted effort by a number of NGOs to further undermine the agreement (Tobin, 2004). One of its most controversial aspects was the fact that not all of the relevant indigenous groups were part of the negotiations and as a result some of them objected to the agreement. ICBG tried to rectify the situation by arguing that it would ensure that the benefits would be equitably shared between the Aguaruna, Huambisa and Jivaro peoples, some of whom were not part of the original negotiations.

Box 4: Some cases of contracts between indigenous communities and institutions (adapted from Zerda-Sarmiento and Forero-Pineda, 2002: 106).

A Quichua community in Ecuador was compensated with the building of an airport in exchange for shamans' knowledge. The airport was also needed by the business itself (Shaman Pharmaceuticals from California) for the transport of tropical forest plants to its headquarters, where they were used in research for pain relief and diabetes medicines.

In 1992, Merck laboratories signed a contract with the Biological Institute of Costa Rica (INBIO), by which services of collection and preparation of a great variety of plant and micro-organism biodiversity were sold. The exact terms of the contract regarding economic contribution, amount of samples, and the role of indigenous communities, are kept a secret. Critics of the agreement argue that it will not guarantee a halt to deforestation and genetic erosion in Costa Rica, nor in neighbouring countries that share the same genetic resources.

In the 1970s, the University of Illinois started research on medical plants in biodiversity-rich tropical countries, to examine the possibility of developing medicines. Since 1990, the University of Illinois has used letters of intention and letters of collection to formalise relationships with indigenous communities, as well as contracts defining shares in royalties in case of commercial results from research. Research on agents against cancer, undertaken in conjunction with the National Cancer Institute, and the acquisition of plants for biological evaluation, with the participation of Glaxo Laboratories, have been two of its projects. The recognition of intellectual property rights on the use of traditional medicine may go to the consultant who collects the information, to the indigenous community, or to a medicine man, shaman or any member of the community.

Recent anthropological studies and evaluations of the ICBG agreement in Peru (Greene, 2002; 2004; Rosenthal, 2006) have come to the conclusion that bioprospecting agreements are very complex and face many challenges such as: the identification of appropriate representation of community interests; the engagement with different cultures, politics, local governance and identity; the social context; the identification of the relevant social unit (defining the community) with which to collaborate (e.g. is it the village, municipality, the clan, the entire language group, those who inhabit the bioregion). One of the most critical issues that needs to be dealt with in these bioprospecting contracts, and which is also a requirement of the CBD, is how to get consent of indigenous peoples to use their knowledge. Again, this raises a whole new debate with questions such as: what is consent; how does one obtain it; from whom does one obtain it; what constitutes evidence that one has obtained it; and who decides that consent has been achieved?

Box 5: The case of the Peruvian ICBG agreement (adapted from Tobin, 2004: 4-8).

One early example of indigenous participation in bioprospecting negotiations came within the framework of the International Collaborative Biodiversity Group Program (ICBG), coordinated by the US National Institute of Health. The ICBG program has funded collaborative bioprospecting arrangements in many parts of the world, involving a wide range of academic, commercial and community partners. The program promotes amongst other things the collection of genetic resources with traditional use for the development of new medicinal products. In the early years of the program a number of projects were established involving traditional knowledge, including projects in Peru, Nigeria and Suriname. In the latter two cases intermediaries negotiated agreements in a manner which created benefit sharing opportunities for indigenous peoples. However, only the Peru ICBG actively involved indigenous peoples' organisations in the negotiation process itself. The Peru ICBG agreements were negotiated in 1994-1996 in a largely unregulated environment. The agreements involved a number of US and Peruvian research institutions. The Peru ICBG agreements are a complex set of related contracts, including an overarching bioprospecting agreement involving the research parties and the Aguaruna federations, and a license option between the research parties and Searle & Co. The agreement reflects the concern for: protecting the rights of the indigenous organisations which are part of the agreement; securing equitable benefit sharing; and establishing precedents to redefine the nature of property rights over knowledge and prevent its use contrary to the morals of its indigenous custodians.

In his recent study of probably the two most prolific bioprospecting agreements – the Peruvian ICBG Agreement with the Aguaruna people and the Mexican ICBG Agreement with the Maya people in Chiapas (for more information on the Chiapas case see e.g. Berlin and Berlin, 2003; 2004; Hayden, 2003a; 2003b) - Rosenthal

(2006) has drawn a number of conclusions regarding the success and failure of contract based *sui generis* protection mechanisms and in particular of bioprospecting agreements. First, the existence and role of (pre)existing representative indigenous governance is very important in order for the agreement to be participatory and successful in terms of meeting the needs of the communities involved. Second, getting consent is linked to the formation of Western-style organisational structures amongst indigenous groups that can be held accountable and are perceived to be authoritative amongst the community members. Third, it is important that indigenous communities can get themselves organised so there is no need to be represented by other (non-indigenous) parties in the negotiations. The latter tend to be rather paternalistic and often misrepresent the needs and demands of the peoples they represent (Rosenthal, 2006) which leads, as argued in chapter 2 (section 4.2) and chapter 5 (section 5.2), to essentialising images of indigeness. Therefore it is better to work with autonomous indigenous representational authorities rather than working through nationally defined institutions. Finally, it can be argued that it is better to distinguish between consent for use of traditional knowledge and consent for sharing of benefits. For the latter a western style democratic governance structure might be more appropriate than for the former. Gaining consent for the use of traditional knowledge should be more embedded in traditional governance structures.

In other words, it remains a challenge to ensure that contractual agreements serve the local needs of indigenous peoples while simultaneously achieving the national (through national access and benefit sharing laws) and international (through the CBD) requirements of promoting equitable partnerships. As will be discussed in more detail in chapter 7, and as can be concluded from Rosenthal's analysis, much of the debate around bioprospecting and benefit sharing agreements is still embedded in a Western style framework which not only complicates but hinders building up a relationship with indigenous peoples. Tobin (2002) argues that a range of issues will affect the outcome of any negotiation including: what induces parties to negotiate agreements; the negotiating strengths and weaknesses of the parties; and whether there is clear national legislation regarding ownership of resources. With regards to the latter the Expert Panel on Access and Benefit-Sharing, a body of 50 international experts meeting at the invitation of the Secretariat to the CBD in Costa Rica in 1999, came to the conclusion that legislative and administrative frameworks are essential

prerequisites for the successful implementation of contractual *sui generis* agreements (Tobin, 2002).

In this respect BPCs can act as an incentive to legislation to develop national access and benefit sharing (ABS) measures. According to Tobin (2002) ABS legislation appears to have developed faster in those countries where highly visible biodiversity prospecting activities have led to increased public interest and national debate⁶⁸. For example, in Costa Rica, interests and concerns that have been raised about the activities of the National Institute of Biodiversity (INBio) helped to stimulate a participatory national debate which eventually led to the adoption of a comprehensive national biodiversity law in 1999. Something similar happened in Cameroon. The need to ensure adequate protection of medicinal plants in an agreement with the US National Cancer Institute led to the inclusion of access and benefit sharing provisions for genetic resources in the new 1994 Forestry Law. And as will be discussed in more detail in the next section, in Peru, the ICBG project has strongly influenced the preparation of a *sui generis* law for the protection of indigenous collective property rights.

⁶⁸ For an overview of national access and benefit sharing laws, see, for example, Thomas (2005), but the existing and draft access legislation can be summarised in five basic approaches that countries are taking (see Table 4).

Table 4: Legislative options for genetic resources access and benefit-sharing, and selected countries considering or pursuing each option (adapted from Glowka, 1998 in Barber *et al.*, 2002: 376).

| Access and Benefit Sharing Legislative Strategy Options | Selected Countries Pursuing these Options |
|--|--|
| General environmental framework laws (which only enable future legislation on ABS) | Gambia, Kenya, Republic of Korea, Uganda |
| Framework sustainable development, nature conservation or biodiversity laws (which establish some ABS principles but require further legislation) | Costa Rica, Eritrea, Fiji, Mexico, Peru |
| Specific stand-alone national laws or executive orders that regulate access to genetic resources | The Philippines, and at the state level, Sarawak (Malaysia) |
| Modification of existing laws and regulations – such as those governing wildlife, national parks, forestry and fisheries – to include ABS provisions | Nigeria, Malaysia and at the state level West Australia |
| Regional framework legislation (establishing common principles and procedures but requiring follow-up national legislation) | Countries of the Andean Pact; regional framework agreements or legislation also under discussion by countries grouped in the Association of South-East Asian Networks (ASEAN) and the Organisation of African Unity (OAU). |

3.2 Sui Generis Property Rules

Although the CBD has been criticised for not explicitly recognising the existence of property rights and not explicitly creating property rights over traditional knowledge (see e.g. Tobin, 2001), Article 8(j) of the CBD requires states to take active measures to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities; to promote wider use of traditional knowledge with the approval of and involvement of the holders of the relevant knowledge; and to encourage the equitable sharing of the benefits. Nevertheless, there are only a very few countries who have passed legislation providing positive *sui generis* protection measurements for traditional knowledge⁶⁹. Peru is one of these few (for legislation in African countries see Box 6). In 2002 the Peruvian Government agency (the National Institute for the Defence of Competition and Intellectual Property [INDECOPI]) passed legislation, known as the Regime of Protection of the Collective Knowledge of Indigenous Peoples (see Box 7), to protect the collective knowledge of the Peruvian indigenous peoples (Dutfield, 2004). The idea for developing national legislation to protect traditional knowledge in Peru was based on earlier attempts by the Andean Community (Bolivia, Colombia, Ecuador, Peru and Venezuela) which had in 1996 adopted in Decision 391 a Common System on Access to Genetic Resources. Article 7 of Decision 391 recognises the rights of indigenous, local and Afro-American communities to control access to and use of their traditional knowledge, subject to

⁶⁹ For a comparative summary of existing national *sui generis* measures and laws for the protection of traditional knowledge see WIPO document WIPO/GRTKF/IC/5/INF/4 (http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf_ic_5_inf_4.pdf - accessed on 14 February 2007). This survey documents and compares the existing *sui generis* measures and policy options that have been implemented by the following member states: African Union (African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources of 2000 [for more details see Box 6]); Brasil (Provisional Measure NO. 2186-16 of 2001 Regulating Access to the Genetic Heritage, Protection of and Access to Associated Traditional Knowledge); China (The Patent Law of 2000 and the Regulations on the Protection of Varieties of Chinese Traditional Medicine); Costa Rica (Law No. 7788 of 1998 on Biodiversity); India (Biological Diversity Act of 2002); Peru (Law No. 27,811 of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources); Philippines (Indigenous Peoples Rights Act of 1997); Portugal (Decree Law No. 118 of 2002 Establishing a Legal Regime of Registration, Conservation, Legal Custody and Transfer of Plant Endogenous Material); Thailand (Act on Protection and Promotion of Traditional Thai Medicinal Knowledge, B.E. 2542) and USA (Indian Arts and Crafts Act of 1990 and other Relevant Measures). Other relevant WIPO documents are: 1) WIPO/GRTKF/IC/5/7 which surveys national experience (http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf_ic_5_7.pdf - accessed on 14 February 2007) and 2) WIPO/GRTKF/IC/5/8 which develops a general understanding of principles of *sui generis* protection (http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf_ic_5_8.pdf - accessed on 14 February 2007).

national law (for more information on Decision 391, see for example Tobin, 2001; Ruiz, 2003; Dutfield, 2004).

Box 6: Legislative developments in African countries

The African Model Legislation for the Regulation of Access and to Biological Resources⁷⁰ requires communities' consent as a condition for the access to genetic resources and traditional knowledge. The African Model Legislation is especially interesting in the sense that it not only regulates access, but also intellectual property rights in its model law. Furthermore, the African governments participating in drafting the model law shared the view that the concept of intellectual property rights as expressed in the TRIPS is alien to Africa's understanding of property and rights (Ekpere, 2003). The African model law is supposed to be used as a model for the development of national legislation in African countries. However, the development of national laws based on this model has been slow even though the idea of developing *sui generis* legislation has been accepted by most African states (*ibid.*). In terms of developing, implementing and adopting the model law on a national level, four categories can be identified. The first category comprises countries (South Africa, Egypt, Namibia and Zimbabwe) with several variants of *sui generis* systems, embodying components of the model law and having internal capacity for their implementation. For example, Namibia drafted in 2003 the Access to Genetic Resources and Associated Traditional Knowledge Bill, which explicitly recognises in Article 3 that the ownership of all traditional knowledge and technologies associated with any genetic resource vests in the local community who holds such knowledge and identifies in Article 4 (2)(d,e) several Community Intellectual (property) rights relating to traditional knowledge and technologies with genetic resources. The process of enacting legislation in South Africa to promote, develop and protect indigenous knowledge systems is a lengthy one. An initial draft bill was tabled in parliament in 1997, with a new draft appearing in 2000. A further draft is currently being prepared, together with a draft policy (for more information on South Africa see, for example, Wolson, 2003). The second category consists of countries having enabling legislation pending in parliament, such as Kenya (see for more information Otieno-Odek, 2003; Dutfield, 2004), Uganda and Nigeria. The third group are countries of French-speaking West and Central Africa that are members of the Organisation Africaine de la Propriété Intellectuelle (OAPI). Legislation common to all OAPI members states was signed in 1977 to protect intellectual property in 16 countries of West and Central Africa (for more information on the agreement see for example Zoundjihekpon, 2003). Through the revision and ratification of the Bangui Agreement the OAPI members are adopting the *sui generis* system based on the International Union for the Protection of New Varieties of Plants (UPOV). The last category are those countries that are contemplating the possibility of developing a *sui generis* system of protection similar to the African model law or other forms of legislation. The majority of African countries belong to this category.

⁷⁰ http://www.wipo.int/tk/en/laws/pdf/oau_modellaw.pdf - accessed on 14 February 2007. For an analysis of the drafting and implementation see e.g. Zerbe (2005).

Despite the protection provisions for traditional knowledge in the Peruvian law, it has not received wide support from the Peruvian indigenous peoples. The indigenous communities regret the limited opportunity for their informed participation in the preparation of the law. Right from the initial drafting procedures, indigenous peoples have drawn attention to the limits of the process of securing indigenous participation (Tobin, 2001; 2004).

The legislation has also been criticised for the fact that it pays more attention to the establishment, regulation, facilitation and commercialisation of traditional knowledge rather than to the recuperation, consolidation and strengthening of traditional knowledge, the latter being more important for the Peruvian indigenous peoples (Tobin, 2001). Tobin argues that the proposed legislation has failed to secure better human rights for indigenous peoples prior to or as a precondition to developing access and benefit sharing mechanisms. Prior to the development of any access or benefit sharing agreements, indigenous peoples should have been sufficiently informed and consulted in order to develop regimes which reflect indigenous peoples' aspirations, interests, needs and customary practices and laws. Instead of focusing on improving the human rights position and empowerment of indigenous peoples, the Peruvian legislation has rather focused on the objectives, form and technical content of *sui generis* legislation.

Furthermore, the scope of the law does not cover traditional knowledge as a whole, but only the collective knowledge of indigenous peoples relating to the properties, uses and characteristics of biological diversity (Venero Aguirre, 2003). In this respect, according to Tobin (2001; 2004), the Peruvian legislation only incorporates the protection of Western style know-how, inventions and processes and ignores indigenous innovative practices. Or in other words, the Peruvian legislation, by emphasising the protection of only the **properties, uses and characteristics** of traditional knowledge has categorised traditional knowledge in Western intellectual property terms and has thereby dismembered traditional knowledge from its local context. As discussed in chapter 2, one of the main characteristics of traditional knowledge is its embeddedness in a changing local context that is responsive to new needs and innovations. However, defining traditional knowledge in an intellectual property rights discourse (i.e. properties, uses and characteristics) reduces it to static

and fragmented knowledge devoid of any interrelationship between the various elements that make traditional knowledge so valuable for indigenous peoples.

Finally, Tobin (2001) argues that any *sui generis* legislation should, in the first instance, have as its primary objective the strengthening of traditional knowledge and innovations systems in their local context. Instead of focusing only on the commercial application of traditional knowledge with third parties in the *sui generis* legislation, more attention should be given to the development of appropriate incentives for recovery, protection and promotion of the wider use of traditional knowledge within the communities and local contexts.

Box 7: The Peruvian regime of protection of the collective knowledge of indigenous peoples (adapted from Tobin, 2004: 8-9).

In 2002 Peru adopted the first comprehensive legal regime for the protection of the collective rights of indigenous peoples over traditional knowledge relating to biological diversity. The law recognises that rights over traditional knowledge spring not from any act of government but from the existence of the knowledge itself. The law declares traditional knowledge to be the cultural patrimony of indigenous peoples, thereby recognising intergenerational and intragenerational rights and responsibilities relating to it. Access to and use of knowledge which is not yet in the public domain requires prior informed consent and a license for commercial use. According to the law, the benefits accrued from the use of traditional knowledge must be shared not only with the contracting indigenous communities but also with the wider indigenous community through an Indigenous Development Fund, managed by indigenous peoples. A highly significant aspect of the law is its recognition of a right for indigenous peoples to share in the benefits derived from the use of their traditional knowledge which has already fallen into the public domain. This is an important precedent, in essence supporting the proposition that the rights of indigenous peoples over their traditional knowledge are not necessarily exhausted by the fact that such knowledge has somehow found its way into the public domain. The Peruvian law gives the national INDECOPI the responsibility to help indigenous peoples to protect their knowledge by establishing both an open and a confidential register of knowledge.

This would require that protecting and promoting traditional knowledge should be read in conjunction with human rights law (see chapter 5, section 3 for the link between protecting traditional knowledge and human rights) and customary law (see chapter 8). Appropriate protection must not only result in the prevention of unapproved use of traditional knowledge; it must also, as Tobin (2001) argues, prevent the erosion of knowledge. *Sui generis* legislation certainly can fulfil the first

requirement; however, as demonstrated by the Peruvian legislation, the current proposals of *sui generis* legislation treat traditional knowledge as static in the same manner as, for example, the CBD and WIPO (see chapter 2 for a critique on the definition of traditional knowledge in the CBD and WIPO). Therefore, Tobin argues “[the] protection of traditional knowledge requires the development of mechanisms which enhance the ongoing utilisation of knowledge” (2001: 63). This makes it even more important that indigenous peoples are closely involved in legislation or rule making; indigenous peoples must be the final arbiters of what happens to their knowledge and the form of the protection mechanisms. Examples from national *sui generis* legislation, however, show that legislative proposals are imposed upon indigenous peoples without their (appropriate) consent and as a result, this *sui generis* legislation is at risk of being counterproductive.

The Philippines 1997 Indigenous Peoples Rights Act (IPRA) is another case in point. While the IPRA is one of the strongest national laws protecting indigenous rights and one of the most comprehensive examples of a national legislation attempting to implement the principles found in the CBD Article 8(j) (Barber *et al.*, 2002), in a recent workshop on benefit sharing⁷¹ Professor Alvarez Castillo (2006) has argued that there are some serious issues for concern with regard to genuine prior voluntary and informed consent in the Philippines concerning indigenous peoples. Even though the two examples (the B’laan and Mangyan case) analysed by Alvarez Castillo relate to agreements between mining companies and indigenous communities, the conclusions drawn by Alvarez Castillo are illustrative of the problems and issues indigenous peoples face with *sui generis* legislation in general and access and benefit sharing agreements in particular. In both cases the mining companies with the (indirect) support of the state and its agencies have violated the requirements of the laws in the Philippines dealing with indigenous peoples (i.e. the Constitution, the Mining Act and the IPRA). The vulnerable position of indigenous peoples, resulting inevitably from their illiteracy, poverty and disempowerment, compromises their agency and autonomy to discuss the agreement on equal terms. When indigenous peoples can display sufficient autonomy and agency and, as in the case of the

⁷¹ Workshop on Prior Informed Consent and Benefit Sharing (funded by the Wellcome Trust). June 2006: Kalk Bay, South Africa.

Mangyan people, vote against the mining agreement, the state will facilitate and support the commercial interest of the company even if this requires violating the Philippines' national laws concerning the rights of indigenous peoples. These examples show that protecting traditional knowledge goes further than just 'protecting' traditional knowledge from unauthorised use; protecting traditional knowledge is in the realm of a wider struggle of indigenous peoples for democratic rights and equal citizenship. These issues will be further discussed in the last part of this chapter.

4 *Discussion*

The main question that still needs to be addressed is whether the positive *sui generis* protection measures will give indigenous peoples sufficient control over the use and management of their knowledge. The answer is partially given by a Canadian indigenous peoples' organisation, the Four Directions Council, in a paper that the Council submitted to the Secretariat of the CBD in 1996 in which they argued that: "*indigenous peoples possess their own locally-specific systems of jurisprudence with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing knowledge, and the rights and responsibilities which attach to possessing knowledge, all of which are embedded uniquely in each culture and its language [and for this reason] any attempts to devise uniform guidelines for the recognition and protection of indigenous peoples' knowledge runs the risk of collapsing this rich jurisprudential diversity into a single model that will not fit the values, conceptions or laws of any indigenous society*" (Four Directions Council, 1996 in Dutfield, 2004: 124).

In other words, there is a real danger that the proposed institutional *sui generis* systems are inappropriate for the protection of traditional knowledge for the following reason. The essential element for any new form of protection must be flexible enough to accommodate, what the indigenous peoples of the Four Directions Council have called, the *jurisprudential diversity*. This conclusion resonates with earlier research findings. For example, Simpson (1997) has argued that any *sui generis* regime should be based on the rights of indigenous peoples to create this regime based on their own customary practices and laws, and that the essential element of a *sui generis* regime

should be the creation of an entirely new approach to the protection and management of indigenous peoples' knowledge and culture. It would be erroneous or even a contradiction in terms to assume that the new *sui generis* regime should be a continuation of or be founded on pre-existing or previously imposed rights. The meaning and strength of a *sui generis* regime should lie in the fact that it allows for revival and reinvigoration of the principles and laws that have protected indigenous peoples' patrimony and knowledge for thousands of years. In other words, the purpose of a *sui generis* approach should not be the creation of laws in the tradition of Western jurisprudence.

Simpson's observations and conclusions reflect the findings in chapter 4 that any policy that is based on largely a Euro-American legal construct is flawed and likely to fail. The novelty of the currently proposed *sui generis* regimes does not lie in the fact that they recognise indigenous peoples' customary law, but lies in the fact that they recognise **collective** rights over knowledge and as such try to protect them. This approach of *sui generis* **community**-based intellectual property rights, is a protection mechanism that has also been advocated by a number of authors (see for example, Mgbeoji, 2001, 2006; Gibson, 2004, 2005; Zerda-Sarmiento and Forero-Pineda, 2002; Aguilar, 2001).

Gibson's (2005) work on community resources merits further attention. Although Gibson recognises the need for a legal framework that vests the authority for management and regulations of ownership of traditional resources in the community and according to customary laws, she then goes on to argue that her community resource model will achieve legitimacy through adherence to the existing international and legal system. Furthermore, Gibson also argues that her model allows that "*those seeking access to, or commercialisation of, community resources may rebut the validity of the claim made by a particular community. This may be a rebuttal of the claim to community (and therefore necessarily a rebuttal of the presumption that the knowledge is traditional), and/or a rebuttal of the presumption of traditional knowledge. It is necessary for a just and acceptable international law that this is possible.*" (2005: 287-288).

Gibson's first statement - that her community resource model will achieve legitimacy through the existing international and legal system - is at best an ungrounded claim or conjecture. By contrast, other researchers who have specialised in studying the socio-political and economic position of indigenous peoples in the national and international arena (for example, Keal, 2003; Widlok and Tadesse, 2005; Wright, 2001; Mamdani, 2005) have suggested that indigenous peoples have struggled to preserve their identity in their encounters with colonialism and postcolonial nation states, both on a national and international level. These scholars further argue that these encounters have resulted in marginalising indigenous peoples which raises questions about the moral capacity of our institutions that regulate the relationship with indigenous peoples (this issue will be further explored in chapter 8, section 2.2).

Gibson also claims that those who seek commercialisation of traditional knowledge can (under a 'just and acceptable international law') try to rebut concepts of community and/or traditional knowledge. This is a dubious claim, both in the light of Gibson's professed wish to put indigenous peoples on an equal footing with commercial third parties, and in view of indigenous peoples' marginalised and subordinate position in society. As is demonstrated by the example of the Philippines where the government simply chose to overrule the consent of indigenous peoples, it would be naïve to rely on such legislation. Gibson's arguments are further undermined by the lack of uniform interpretation of 'equity' or 'justice' in international law, the differing value systems between indigenous cultures and international law (both are discussed in chapter 7), and the debatable meaning(s) of community (see chapter 9).

In more general terms, and analogous to the findings in chapter 4, the concept of *sui generis* community-based intellectual property rights (as proposed in national *sui generis* law and in the literature) unnecessarily emphasises the dichotomy between communal and individual property rights. As argued in chapter 4, the crux of the debate about how to protect and manage traditional knowledge does not lie in this bifurcated view of individual versus community-based property rights, but rather in the question of whose legal framework will prevail in drafting the measures to protect and manage traditional knowledge. The protection mechanisms that have been proposed so far, both in national *sui generis* law and in the literature, are a

continuation of an institutional and legal Euro-American construct that ignores the local context of law making and regulation. As argued by Dutfield (2004), any *sui generis* regime that fails to collaborate very closely with indigenous peoples and to incorporate their own legal system is doomed to fail.

However, there are strong indications that as long as indigenous peoples' socio-political and economic position remains precarious, it is very unlikely that they will be able to take control of their own destinies and to benefit from the use and commercialisation of their own knowledge. Simpson (1997) argues that the development of a *sui generis* approach to the protection and management of traditional knowledge is a manifestation of the rights of indigenous peoples to self-determination. The rights claimed by indigenous peoples with respect to access to natural resources and protection of traditional knowledge are part of a bundle of rights claimed by indigenous peoples, including, *inter alia*: rights of ownership of lands and territories; rights to self-determination; rights to exercise customary law in accordance with their social and cultural practice; the right to be legally and politically represented by their own institutions; and the right to control the ownership of traditional knowledge (Aguilar, 2003). In this respect, it has been assumed (see for example Dutfield, 2004; Greene, 2002, 2004; Tucker, 2004) that indigenous peoples empowered with rights to control access to their lands have a better chance of preventing misappropriation of their knowledge and of negotiating more favourable bioprospecting agreements. However, the measures that have been discussed in this chapter fail to incorporate the demands for land and self-determination and as such might potentially further erode the socio-economic and political position of indigenous peoples and could therefore be considered as counterproductive.

Arguably, and as observed by leading anthropologists (see for example Tobin, 2004; Greene, 2002, 2004) and the author's own fieldwork, biopiracy is only one of the many threats to traditional knowledge and may be for that matter not be the most urgent or dangerous one. As will be demonstrated in chapter 9, one of the most serious threats to traditional knowledge is the continuous loss of land: indigenous peoples are displaced from their environment associated with their knowledge or their local habitat is being degraded by more powerful ethnic groups moving into the area (see chapter 9). In both cases the environment associated with their knowledge is lost

to them. Therefore, any policy that wants to redress this unsustainable situation needs to go beyond intellectual property protection and should focus on strengthening the recognition of indigenous peoples and their needs without, as argued in chapter 2 and 3, capturing them in an essentialised framework that is bounded in time, place and tradition.

5 *Conclusion*

The challenge emerging from this chapter is to develop national and international traditional knowledge legislation that captures and is consistent with and complementary to customary law and practices of indigenous communities. 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 chapter that these regulations are inappropriate because they are embedded in the dominant ideology of a Euro-American legal institutional framework. Principles of equity or a fair distribution of rights and benefits need to be based on a multiplicity of legal regimes and values. Legal institutions like, for example, the Convention on Biological Diversity certainly have their utility, but at the same time, as indicated in the above analysis, legal regimes can also function as barriers which will hinder indigenous peoples in their empowerment and achievement of self-determination. In this respect, it will be examined in chapter 7 whether the CBD can achieve one of its main objectives, viz. ensuring 'fair' and 'equitable' sharing of benefits, by examining the Hoodia benefit sharing agreement based on observations made during the fieldwork and interviews with the San.

PART III

Chapter 7 - Contextualising 'Fair' and 'Equitable': the San's Reflections on the Hoodia Benefit Sharing Agreement

1 Introduction

For centuries, indigenous peoples have been marginalised as a voiceless underclass, whose rights to land, resources and traditional knowledge were violated. Their rights are now better recognised in international agreements such as the Convention on Biological Diversity (CBD). While it has been argued in chapter 6 that legal institutions (like the CBD) are certainly valuable, at the same time it was also argued that such legal regimes and institutions can also function as barriers which hinder indigenous peoples in their empowerment and achievement of self-determination. A good example of such a contested regime is the CBD. Prior to the CBD, access to biological resources was managed by the 'common heritage of mankind' doctrine, i.e. anybody is entitled to access and use 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, on the one hand, sharing genetic resources, technologies and innovations, and on the other hand, the protection of genetic resources by either patents, effective *sui generis* systems or a combination thereof (King & Eyzaguirre 1999; Zerbe, 2002). Furthermore, the fact that the CBD recognises the importance of indigenous peoples in the process of maintaining biological diversity does not mean that their rights over traditional knowledge are now fully recognised (Posey, 2002a), a finding that is also confirmed in chapter 6. On the contrary, the CBD has been criticised for not requiring the participation of indigenous peoples in decisions with regards to access to resources and the use of their traditional knowledge by others (Coombe, 1998a).

While in chapter 6, a general assessment was made of several *sui generis* regimes, this chapter will focus more specifically on the requirements of benefit sharing agreements (which represent one of the *sui generis* options). One of the main objectives of the CBD is equitable benefit sharing from the use of biodiversity. 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 are adopting more integrated approaches 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 practice of uncompensated appropriation, there are still questions over the moral validity and the actual social consequences of these particular approaches to the commodification of indigenous knowledge.

For one thing, while the CBD demands equitable benefit sharing from the use of biodiversity, it falls short of defining fairness or equity. The aim of this chapter is to examine the concepts of 'fair' and 'equitable' within the context of the Hoodia benefit sharing agreement involving the San peoples of Southern Africa, by investigating the views and perceptions of the San communities on what embodies fairness and equity in relation to the agreement. This case study underlines a serious weakness of the CBD as it demonstrates how significant inequities in knowledge and power between indigenous peoples and companies can result in definitions of fairness and equity that are predominantly shaped by the latter.

This chapter will be structured as follows. First, it will discuss how the notions of 'fair' and 'equitable' are described in the CBD. Second, these notions will be contextualised in a wider discourse of justice to investigate common understanding of these terms, followed by mapping fairness and equity from an indigenous point of view based on previous research findings from a case study in the mining industry. Third, it will assess whether the San perceive the Hoodia benefit sharing as a model of good practice. Finally, it will discuss why the Hoodia agreement has failed to fulfil some of the expectations of the San.

2 *Notions of 'Fair' and 'Equitable' in the CBD*

The CBD states that national governments have sovereign rights over their biological resources and requires that access to these resources be conditional on the prior informed consent of source-country governments and on mutually agreed terms (Articles 15.4 and 15.1 respectively). The doctrines of sovereign control and equitable benefit sharing expressed in the CBD are now increasingly incorporated in national

legislation (see Artuso, 2002). Among its objectives, the CBD mentions the 'fair' and 'equitable' sharing of benefits resulting from commercial and other uses of genetic resources (Article 15.7). Article 8(j) stipulates that in cases where the knowledge of indigenous and local people has contributed to the commercial or other uses of biological resources, the benefits must also be shared with the indigenous and local people (Mulligan, 1999). While the CBD creates the obligation to respect, preserve and maintain traditional knowledge, innovations and practices, and promote its wider use, with the approval of indigenous and local communities, it does not describe how this is to be achieved (Tobin, 2001). Therefore, the Convention Secretariat started to collate case study information about the implementation of access and benefit sharing (ABS) programs. However, 'fair' and 'equitable' remain undefined in the CBD and widely divergent opinions continue to exist over the interpretation and implementation of these terms (Henne, 1997; Mugabe *et al.*, 1997; Mulligan, 1999; Artuso, 2002).

In 2002, Article 15 of the CBD was elaborated with the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation ('Bonn guidelines'), which can be applauded for recognising the need for participation of stakeholders, other than governments, in the implementation of the Convention and for introducing a new ethic to the CBD. For example, prior informed consent (PIC) is set as a precondition for access while bottom-up approaches are advocated to promote the direct participation of indigenous communities (Herkenrath, 2002; Tully, 2003). In Appendix 2 of the Bonn guidelines 'fair' and 'equitable' benefit sharing is defined as something that goes beyond financial remuneration to include non-monetary benefits such as access to and transfer of technology, training and joint research, acknowledging sources, reporting research results, scientific cooperation, institutional capacity building, employment opportunities and ongoing relationships (Tully, 2003). Furthermore, it is acknowledged in the Bonn guidelines that the national authorities or the parties that are involved in the specific access and benefit sharing (ABS) agreement decide what is 'fair' and 'equitable'. This recognition, that the ABS agreements should reflect the value system of the parties involved, raises questions about what may constitute 'fair' and 'equitable' compensation or sharing of benefits when the parties' value system diverge.

3 'Fair' and 'Equitable' in Negotiations with Indigenous Peoples

Questioning what is just compensation, how such benefits would be distributed, what 'fair' and 'equitable' mean, and how these objectives might be operationalised opens a Pandora's box (Posey, 1990; Dutfield 2004). Posey (1990) argues that working together with communities, to study the social impacts and to determine what 'just compensation' should mean, would be more effective than hundreds of national and international laws. The United Nations Environment Programme (UNEP, 1998) agrees that defining the objectives 'fair' and 'equitable' depends on the value system upon which the judgment is based. O'Faircheallaigh (1998) stresses that the ability to define inequality from an indigenous point of view requires an understanding of the interaction between indigenous peoples and the companies involved. This implies that it is important for indigenous peoples to understand the process behind benefit sharing agreements as compensation for the commercial use of traditional knowledge by pharmaceutical companies, especially if indigenous peoples' strategy is aimed at maximising the benefits they derive from resource development and minimising the costs imposed on them. O'Faircheallaigh (1998) argues that theoretical insights into what constitutes equitable benefit sharing are indispensable, but at the same time it must also be questioned whether those theoretical frameworks are appropriate for indigenous societies; do they address issues which are important to indigenous communities and on what sort of values are they based? Justice can mean different things for different persons and even different things to the same person in different situations (Bourassa and Strong, 2000) but by contextualising 'fair' and 'equitable' it is possible to highlight common understandings of these terms; this may potentially help to define the notions more precisely in the CBD.

Different benchmarks can be used to define fairness. According to Franck (2002), fairness in international law or any other legal system - i.e. including benefit sharing agreements - is based on substantive or distributive justice (i.e. the 'right' distribution of costs and benefits) and procedural justice (i.e. the 'right' process)⁷². For a system of

⁷² This chapter is not concentrating on what justice means from a general philosophical or ethical point of view, but on the meaning of 'fair' and 'equitable' in the context of the CBD and benefit sharing agreements. This is why an analysis of important works on justice, like Rawls (1971), is beyond the scope of this chapter. Furthermore, as Falk Moore (2005) argues, Rawls theory of justice is based on a hypothetical original condition; Rawls calls this the 'original position' (1971: 12 in Falk Moore, 2005: 9) which does not correspond with an actual historical state of affairs but is purely 'mythical'. By

rules to be fair, it must contain a framework of formal requirements about how rules are made, interpreted and applied. Franck further argues that these rules must operate in a context of community whereby a community is based on a common, conscious system of reciprocity between its members who share a system of not only legal but also moral obligations that arise from the shared moral sense. Lu (1998) supports this view in her description of justice as an image of 'bond' and the requirement to recognise our common humanity despite power differences in society. On a similar note, Byström *et al.* (1999) stress the importance of a 'relation-based' approach, which confirms the central role of ethics in human knowledge, and focuses on the process and the mutual understanding of the desired outcome. From this perspective, a transaction or indeed a benefit sharing agreement will be perceived as 'fair' and 'equitable' when it is judged to be so according to the opinion of all the stakeholders. This requires mutual respect and mutual understanding of each others' world view, which in turn calls upon trust-building and careful identification of representatives to engage in a negotiation.

Western businesses who seek to negotiate with indigenous peoples must somehow operationalise these generic reflections on 'fair' and 'equitable'. Good practice examples on benefit sharing of indigenous plant knowledge are urgently needed, but some useful lessons may be learned from other industries dealing with indigenous peoples. In a mining industry case study, Whiteman and Mamen (2002) argue that not enough attention is given to the degree of perceived fairness of procedures and the process of decision making from an indigenous point of view. They suggest that examining justice from an indigenous cultural perspective requires expanding on the conventional dimensions of distributive, procedural and interactional justice. In practice this means that examining issues of fairness from an indigenous standpoint must go beyond the conventional dimensions and take into account other aspects such

contrast, Falk Moore argues, anthropologists are not concerned with this original position and concentrate on actual situations in existing living situations when examining issues related to justice. Therefore, this chapter draws more on empirical work that examines applied aspects of justice within the context of resource management and benefit sharing between indigenous peoples and other stakeholders. As ethical concepts, 'fair' and 'equitable' are subjective terms and therefore incapable of objective definition. Nevertheless, by contextualising 'fair' and 'equitable' it is possible to highlight common understandings of these terms; this may potentially help to define 'fair' and 'equitable' more precisely in international legal documents such as the CBD.

as the legacy of colonialism, forced assimilation, human rights abuses and loss of land rights (Whiteman and Mamen, 2002).

According to Husted (1998, in Whiteman and Mamen, 2002: 301-302) procedural fairness manifests itself in three ways: choice (whether or not people can choose to participate in decision making), voice (ability to influence decision making) and feedback (explanations given by decision makers to justify their decision). It is important to understand these elements from an indigenous cultural perspective. For example, with choice, decisions should be made in the natural environment of the indigenous community. With regards to voice it is important to recognise that the ability to participate also depends upon language skills. Perceptions of procedural justice are *“further influenced by the degree to which the process incorporates capacity building mechanisms that can educate local peoples and provide them with a full understanding of [e.g. benefit sharing agreement] its impacts, benefits and mitigation options”* (Whiteman and Mamen, 2002: 301).

In addition to voice or input in decision making, shared power in decision making is another key element of procedural justice for indigenous peoples. Hierarchical approaches to decision making (e.g. by government, corporation or NGO without community consent) may ignore the indigenous process of decision making. In terms of feedback, non-indigenous stakeholders (e.g. a pharmaceutical company) must realise that procedures for explanation and justification may also be culturally framed (Whiteman and Mamen, 2002). Indigenous peoples' perceptions of procedural justice will be framed within the tenets of traditional law so appropriate feedback may have to include social, environmental and spiritual reasoning.

While procedural justice encompasses formal structures, interactional justice represents informal interactions between parties. Interactional justice will ensure that stakeholders are treated with social sensitivity. For indigenous peoples this means that they are approached with respect, politeness, kindness, honesty and consideration. Perceptions of trust, transparency and inter-cultural respect will also play an important role. For example, indigenous peoples may demand that their indigenous way of life, culture and spiritual beliefs are respected. Furthermore, indigenous peoples are likely to demand 'compensation' for historical injustice. Indigenous perceptions of

interactional justice may also depend on whether or not previous conflicts over natural resources are acknowledged by the other stakeholders and whether substantial efforts are made to heal and achieve reconciliation (Whiteman and Mamen, 2002).

According to Whiteman and Mamen (2002) the main concern of distributive justice is, on the one hand, the equity or the fairness of the outcome, and on the other hand, the settlement or decision making process in the eyes of the individuals or groups affected by the decision. They propose that an indigenous framework for distributive justice needs to be based on principles of traditional law and should incorporate social, environmental and spiritual dimensions in addition to economic outcomes.

The indigenous sensitivities reported by Whiteman and Mamen (2002) might not necessarily be universal, but their findings (in addition to providing a checklist) highlight the importance of going into the field to elicit, explore and reflect on the views of indigenous peoples who are affected. Unfortunately, recent studies on benefit sharing agreements, such as Wynberg's (2004b) work on the Hoodia benefit sharing agreement, has omitted this crucial contextualising. Therefore, the case study of the Hoodia benefit sharing agreement with the San will be revisited with the aim of examining to what extent the practices and processes arising from that agreement are deemed 'fair' and 'equitable' in the eyes of these indigenous peoples.

4 *San Views on the Hoodia Benefit Sharing Agreement*

As already briefly mentioned in the introduction, San is the collective name for the oldest surviving ethnic groups of Southern Africa. Originally hunter-gatherers, they have lost out (often violently) to successive groups of pastoralists and agriculturalists. Scattered around the Kalahari basin, surviving communities are now amongst the most marginalised and stigmatised in their respective countries. The San have signed a benefit sharing agreement with South Africa's Council for Scientific and Industrial Research (CSIR) regarding the commercialisation of the Hoodia plant, as is detailed in Table 5 (for more information see Stephenson, 2003; Wynberg, 2004a; 2004b; Martin and Vermeulen, 2005)⁷³. The extent to which this agreement can be seen as a

⁷³ The Working Group of Indigenous Minorities in Southern Africa (WIMSA) has assisted the San during the negotiations. WIMSA is a San-owned organisation which was established in 1996 following repeated requests by the San for such an organisation. The main aim of WIMSA is, amongst others, to

model of good practice will be assessed on the basis of procedural, interactional and distributive justice and the community impacts as interpreted by the San.

Table 5: Some key facts of the Hoodia benefit sharing agreement

| Time line Hoodia benefit sharing agreement | Terms of benefit sharing agreement |
|---|---|
| <ul style="list-style-type: none"> - For thousands of years the San have used the Hoodia as an appetite and thirst suppressant. - 1963: knowing about its use by San, CSIR (a state-owned South African research institute) starts researching the Hoodia and “discovers” its appetite suppressant quality P57. - 1996: CSIR begins filing patent applications for P57 around the world. - 1997: CSIR signs contract with Phytopharm, which allows the latter to further develop the P57. - 1998: UK Patent is secured for P57. - 1998: Phytopharm signs sub-licensing agreement with Pfizer to develop and commercialise P57. - 2001: Survival International informs San (WIMSA) about the P57 patent. - 2001: Negotiations start between San and CSIR about the P57 project & apologies from CSIR for not consulting with the San. - 2003: Benefit sharing agreement between CSIR and the San. - 2004: Pfizer pulls out, new agreement with Unilever. | <ul style="list-style-type: none"> - CSIR will pay the San 8% of all the milestone payments it receives from Phytopharm. - CSIR will pay the San 6% of all the royalties that CSIR receives. - San have proposed the following in terms of distribution of the profits from the Hoodia: <ul style="list-style-type: none"> - 75% equally divided between the San of Namibia, Botswana, Angola and SA; - 30% of each country’s money should cover the administration of the country’s San Council - 70% should go to development projects; - 10% as working capital to the Hoodia Benefit Sharing Trust; - 10% to be kept by WIMSA as an emergency reserve; - 5% to WIMSA for administrative purposes. |

4.1 Background and Methodology

Two recent studies have criticised the Hoodia agreement. Dutfield (2004) has noted that the San’s traditional and customary knowledge of the useful characteristics of the Hoodia cannot be patented, while a scientific explanation of the Hoodia’s effectiveness is sufficient to merit the award of a patent. Secondly, he notes that the Hoodia patent fails to refer to the relevant traditional knowledge of the San. Wynberg

assist the San in gaining political recognition at all levels; to assist the San in gaining better access to natural resources (WIMSA, 2004).

(2004a) argues that one of the main problems with regard to benefit sharing agreements is the absence of effective legislation and institutions that are powerful enough to control access and enforce conditions for benefit sharing. She further argues that 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 intended.

Wynberg laments the absence of prior informed consent from the holders of traditional knowledge (the San) and she poses similar questions as have been posed in chapter 6 with regards to consent (see chapter 6, section 3.1): *“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?”* (2004a: 241)

In order to fully and rigorously address these concerns, empirical research is needed. The author carried out fieldwork, inter alia, to find an answer 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?

The fieldwork was carried out in three San communities in Namibia (Omatoko, Vergenoeg and Blouberg) and one San community in South Africa (Andriesvale) in the period July-October 2004. 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. The San’s perceptions of the Hoodia benefit sharing agreement were collected through the use of participant observation, collecting life stories and over 100 informal conversations and interviews (a detailed description of methodology and of the communities visited is provided in Appendix 1).

4.2 Procedural and Interactional Justice

With regard to procedural justice, 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 of all the interviewees knew about the Hoodia benefit sharing agreement; the vast majority of the people interviewed had never heard about it, let alone had their opinion sought prior to signing the agreement. The interviewees in Namibia who have heard about the agreement could be described as the 'elite' San, i.e. the individuals who have been elected as representatives for the community in organisations like the San Council and the Working Group of Indigenous Minorities in Southern Africa (WIMSA). 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 it. They lamented the lack of communication between the 'elite' San and the majority of the community. None of the community members interviewed was able to relate any details of the contents of the agreement. For example, they did not know that the royalties are to be shared equally between the San in South Africa, Namibia, Botswana and Angola⁷⁴; 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; nor were they involved in the new negotiations between CSIR and Unilever.

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; 2004b) policy-based 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. During the fieldwork, people who are part of the Hoodia Trust Fund complained that they were

⁷⁴ In a recent workshop (funded by the Wellcome Trust; September 2006: Andriesvale, South Africa) on the Hoodia benefit sharing agreement which was attended by several San communities from South Africa, Namibia and Botswana, the San from Botswana argued that they were entitled to receive a larger share of the benefits than South Africa considering the fact that the San population in Botswana is considerably larger than the San population in South Africa. Axel Thoma, the previous coordinator of WIMSA, argued that the San of Botswana did not have a say in this and that they had to follow the rules as being set out by WIMSA.

not adequately trained by the CSIR to manage the project and the potentially large amounts of money that could 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 of accountancy. They further complained that their requests for training and assistance were denied by the CSIR. Complaints were also voiced about their (non-San) representatives, that they have no clear understanding what benefit sharing agreements entail. After attending a workshop about the pros and cons of benefit sharing agreements (which was organised by academics), people involved in the Hoodia Trust Fund argued that they have made crucial mistakes and that neither the San nor their representatives knew about alternative ways of organising benefit sharing agreements. 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 only not respected, it was not even sought.

4.3 Distributive Justice

Looking at the agreement from the aspect of distributive justice, 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 clear at this stage. The fact that the Hoodia will no longer be commercialised as a drug (as intended when the benefit agreement was signed) but as a food supplement will lower, in all likelihood, its total market value and thus the benefit share that the San have been expecting.

The second concern that needs to be raised with regard to distributive justice is 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 three 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 some of their land was returned. They now complained that these had been '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.

In short, the findings based on the fieldwork indicate that those who have been interviewed have a different perception of distributive justice than monetary benefits alone. For example, questions were asked about 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 and 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.

In addition to questions about the level and type of benefits, there are questions about the beneficiaries. Some anthropologists (e.g. Widlok, 1999) claim that the current botanical knowledge of the San does not surpass that of neighbouring agriculturalists. Furthermore, the Hoodia grows in Namibia only in areas which are currently not inhabited by the San; fieldwork observations confirmed that it is no longer known to or used by the San. The Nama and Damara in Namibia, on the other hand, are still using the 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 on to other groups of more recent ancestry or arrival. Some of these groups have interacted with the various San groups to the extent that they are

ethnically (Nama) or linguistically (Nama and Damara⁷⁵) linked⁷⁶. It should be clear that controlling the appropriation of knowledge through 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.

4.4 Community Impacts

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 by anthropologists as one which functions free of hierarchy and power structures and without formal political institutions (Lee, 2003; Guenther, 1999; Woodburn, 1982). 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. This guarantees 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 fieldtrips in Namibia, numerous San complained about their leaders. Their behaviour in community meetings provided visible evidence of their higher status. For example, meetings were partially conducted in Afrikaans, while outside the meetings

⁷⁵ The Damara language is very closely linked to that of the Hai//om San who also call themselves in some circumstances Damara.

⁷⁶ WIMSA admitted that in retrospect it would have been better to sign a memorandum of understanding with the Nama people in order to avoid further conflicts about Hoodia ownership issues. The coordinator of WIMSA also mentioned that the San, for future reference, would be willing to share the benefits with other ethnic groups like the Nama in cases where the boundaries of ownership are vague and contested. As a specific example, WIMSA is currently seeking a memorandum of understanding with the Nama and Damara people about ownership of Brandberg rock-art (Personal communication with Joram /Useb from WIMSA, 18 August 2005, Windhoek). The previous coordinator of WIMSA, Axel Thoma, on the contrary, disagrees with /Useb's statement and argues that the knowledge about the Hoodia only belongs to the San; a statement he recently confirmed during a workshop (June 2006: Kalk Bay).

people communicated in their native language. It has been reported by key informants during the fieldwork that using Afrikaans, the language of the whites and the outside world, signifies a certain status.

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 (e.g. setting up a Board of Trustees). They expected that the San would speak with one voice and a few people should represent the entire community. The San's identity is highly diversified and consequently it can be expected that opinions about intellectual property rights and benefit sharing tend to differ widely across communities (for more details see Appendix 2). For example, the San in Vergenoeg were more confident about the results of a monetary benefit sharing agreement than the San in Blouberg. The confidence of the San in Vergenoeg can be attributed to the experience of trust and confidence building, skills the San have built up over the years as the result of the positive impacts of the Sustainable Harvested Devil's Claw Project (SHDC)⁷⁷. Even though this example shows that the San in different communities have previously been exposed to different aspects of commodification and commercialisation of plants and knowledge, they are still

⁷⁷ The SHDC project started as a pilot scheme in 1997 in Vergenoeg. The NGO Centre for Research Information Action in Africa Southern African Development & Consulting (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 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 were 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\$1.00⁷⁷ 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 them. They have an understanding of 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.

expected (see e.g. Chapter 6, section 4 for a discussion on Gibson's (2005) community resource model) to represent themselves as one community sharing the same expectations and beliefs with regards to the commodification and sharing of the benefits of the Hoodia agreement, regardless the fact that the communities have their own unique history and, to a certain extent, identity⁷⁸.

Unravelling the San's identity reveals that different San societies have been characterised by a diverse set of cultural and social characteristics (Guenther, 1999). At one end of the spectrum, there are the nomadic family-based foragers who 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 groups⁷⁹. 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). The more nomadic foragers, like the Ju/'hoansi in Nyae Nyae (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-state⁸⁰, christianity and new technology (Kent, 2002). Just like most of the other San, the Nyae Nyae and

⁷⁸ For a detailed ethnographic overview of the cultural and social differences between various Khoisan peoples, see, for example, Barnard (1992).

⁷⁹ The fact that the San's cultural identity is multi-layered and complex has led to a fierce debate amongst anthropologists, called the Kalahari debate, arguing whether the San - both historically and in more contemporary settings - can be labelled as hunter-gatherers. The revisionists (e.g. Wilmsen 1989; Gordon and Douglas, 2000) 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 a 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 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'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, 2002). For a more detailed overview of the Kalahari debate, see, for example, Kent (1992).

⁸⁰ 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.

Dobe San also eventually became clients, proletarians and labourers dependent upon local, national and even world economics (Lee, 2002).

It may be practically impossible to negotiate with a group of more than 100,000 people, but enforcing a managerial style that sits uncomfortably with their traditional values has led to tensions amongst 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 are visibly better off (houses, cattle) and consider themselves superior to other community members. Furthermore, the difference between the 'elite' San and the 'ordinary' San has been aggravated through the lack of communication 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.

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 joint 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 feared that they would lose 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. This distrust amongst the San towards the concept of generating a traditional database reflects some of the reservations that were identified in chapter 6 (see section 2.2). Anthropologists have also identified the importance of trust among members of ethnic groups and trust in the system as important concepts 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 Greene's (2004) suggestion, it could be argued here that raising the expectations that large sums of money are going to be transferred to the San may have been an effective strategy (although there is no proof of a deliberate strategy) to persuade local communities to accept the Hoodia and the new bioprospecting project.

5 *Discussion*

This assessment shows that the Hoodia benefit sharing agreement, whilst being an improvement on the previous practice of uncompensated appropriation, has not fulfilled the expectations of the San in terms of distributive, procedural and interactional justice. This failure is not simply a cultural misunderstanding. The crux of the problem lies in the power-inequalities between the parties, which is exacerbated by the San's precarious socio-economic position as a stigmatised underclass consisting of impoverished and widely scattered minority communities. The CSIR has stressed the economic concept of distributive justice, while the San's concept of distributive justice clearly extended beyond the financial benefits. The processes behind the benefit sharing negotiations between the San and the CSIR are equally problematic. They failed to incorporate all stakeholders and there is a danger that as a result of the negotiations a schism has been created in a community that until recently was known for its egalitarian structure. The findings in this case study clearly lend support to Moran's (2004) view that a benefit sharing agreement can only be equitable

when all participants have an equal standing when decisions are made and that there is a danger that powerful stakeholders assume that indigenous peoples share the same values, traditions and methods of governance. The findings also chime with Green's (2004) observations in Peru on the problems of indigenous collectives having to develop a centralised representative authority in order to be able to negotiate with 'Western' pharmaceutical businesses.

The breakdown of traditional governance structures and their replacement with Euro-American forms of government is a typical phenomenon that can be found in diverse indigenous' cultural settings. For example, Schröder has examined the structure of the American tribal councils and concluded: *"far from establishing democracy, however, the new tribal government system has obviously privileged two groups [...]: a nouveaux riches elite [...] and an emergent bureaucratic elite [...]. The tribal system, while excluding most tribal members from a realistic chance of running for office, offered these groups the opportunity to consolidate their power in a system of inequality and developing class relations"* (2003: 441). While the San have certainly not reached the stage yet to have a nouveaux riches elite, there are clear indications that a bureaucratic elite is becoming established in some of the more (in the geographical sense) strategically located communities. For example, it was observed during the fieldwork that those communities that are located close to main roads, clinics, schools, tourist facilities (e.g. conservancies) or other governmental facilities usually already have a more regulated leadership structure. Even when the leadership structures in these communities are still partially based on traditional governance structures, the fact that their communities are strategically placed means that these peoples are often more targeted by capacity building exercises led by NGOs and (local, regional and national) government. As a result, these communities are becoming more exposed to Western style governance. It is precisely the leaders from these strategically placed locations that have been either informed about or have participated in the Hoodia benefit sharing negotiations.

In their quest for human rights and social justice, 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). In this respect, the Hoodia benefit sharing agreement could be applauded as a small but important victory

in their continuing fight for justice. The interviewees in Andriesvale applauded the agreement for the opportunity it gave them to raise their voice: the Hoodia case attracted worldwide attention and has put the San and their plight 'on the map'. They were proud that they were able to reach an agreement with an institution like the CSIR. They argued that the closure of the Hoodia agreement was mainly the result of their successful land claim in South Africa⁸¹. Gaining access to land has built up their confidence and gave them the courage to start negotiations with the CSIR. This demonstrates yet again that equitable benefit sharing is difficult to achieve without a wider empowerment of indigenous peoples. Regaining land and resource rights is a key element in this but so is the importance of (respect for) customary law. To paraphrase Petrus Vaalbooi (former chairperson of the South African San Council): "*We have our own laws, why do we have to be ruled by Western law and regulations*"? (Fieldnotes October 2004).

On a broader level, it must be questioned whether achieving 'fair' and 'equitable' benefit sharing agreements are not a myth as long as "*[...] enclosure is the rule as soon as [it is proved that traditional knowledge] has economic value*" (Dutfield, 2004: 59). The CBD must be questioned for its belief that private property rights drive the most efficient and sustainable use of biological resources. It champions commercialisation and privatisation of intellectual and biogenetic commons whilst simultaneously allowing some benefit sharing provisions for the indigenous peoples in the hope that this will allow them either to maintain control over their knowledge, or at the very least to benefit from the commercialisation of this knowledge (Martin and Vermeulen, 2005). The CBD regulates this by combining conservation with commodification through the concept of bilateral market contracts between the holders of traditional knowledge and the users of the traditional knowledge. This approach overlooks the ethical dilemma over whether traditional knowledge has fallen in the public domain or has been appropriated (Dutfield, 2004). Second, as this case study demonstrates, the holders of traditional knowledge (i.e. indigenous peoples) can hardly be described as equal partners in the bargaining when their land and resource rights and their indigenous laws are not already acknowledged. This case study thus highlights the intrinsically problematic nature of the CBD as a construct which on the

⁸¹ For information about the land claim see Robins (2001); Sylvain (2002) and Chennells (2003)

one hand accepts a 'western' notion of exclusive ownership of knowledge and on the other hand seeks to offer justice to indigenous groups whose values and traditions are very different and (consequently) whose position in society is very weak.

The idea that biodiversity and traditional knowledge can be preserved through market mechanisms in general and specifically through efficient bargaining, is a concept that has been inspired by the Coase theorem⁸² (Boisvert and Caron, 2002). While in the past biological and genetic resources have been used and appropriated without any contract between the users and custodians (e.g. local community, farmers, shaman, etc.) of the biological resources, in conformity with the Coase theorem, the CBD appeals to decentralised regulation of resource exploitation (Boisvert and Caron, 2002). In order to deal with the issues of mutually profitable access to biological resources and the conservation of biological diversity, the CBD promotes "*the exclusive and transferable rights to genetic resources, species and, if possible, ecosystems to allow the creation of markets guaranteeing their efficient allocation*" (Boisvert and Caron, 2002: 152). In order to achieve this, the CBD restates the sovereignty of the states over their biological resources (Article 3); promotes the preservation of the knowledge, innovation and practices of indigenous and local

⁸² Coase (1960) examines the contractual relationship between the beneficiary and the harmed person. Coase illustrates this relationship on the basis of different case studies among which the now famous case of the dentist and the confectioner (Sturges v. Bridgman) (Coase, 1960). For many years, a confectioner used in his business specific machinery that caused his neighbour, the dentist, no harm until the dentist started to occupy a new room right next to the confectioner's kitchen where his machinery was installed. The noise and vibrations from the confectioner's machinery prevented the dentist from using the new consultation room. The dentist decided to take legal action in order to prevent further use of the machinery by the confectioner. The court decided that the dentist had the right to prevent the confectioner from using his equipment. Coase (1960) argues that another option would have been available if the two parties had agreed to bargain. The dentist would allow the confectioner to continue using his machinery if the confectioner would have paid the dentist a sum of money which was greater than the loss of income which the dentist would suffer if he had to move to a more costly or less convenient location or from curtailing his activities at this location or from building a separation wall to limit the noise and vibration impact. The confectioner would be willing to pay this amount if the sum that he had to pay to the dentist was less than the fall in income if the confectioner had to move his business to another location. "*The solution of the problem depends essentially on whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's*" (Coase, 1960: 9). Or in other words: "*What has to be decided is whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm*" (Coase, 1960: 27). This will be determined through negotiations until a contract will be closed that regulates both private and social concerns whereby the government, through regulation, will mainly deal with the social concerns (Brush, 1996b). "*Instead of instituting a legal system of rights which can be modified by transactions on the market, the government may impose regulations which state what people must or must not do and which have to be obeyed*" (Coase, 1960: 17).

communities embodying traditional lifestyles with appropriate rights (Article 8j) and formally extends the scope of intellectual property rights to include intellectual property rights over life forms (Article 16.5).

However, it must be questioned whether the Coasian negotiation model is an appropriate model for bioprospecting agreements. The application of the Coase theorem depends on a set of assumptions that are often not met in the case of bioprospecting agreements. For example, the Coasian negotiation model requires, amongst other things, that the interested parties are well defined and property rights are assigned. However, one of the major parties of this contract, the local custodians (i.e. the indigenous peoples) are often not recognised as equal partners in the bargaining and the legal status with regard to property rights over resources and knowledge is often fuzzy and unclear. Although the CBD recognises the need to protect indigenous peoples and their traditional knowledge, no international instrument is currently in place to grant intellectual property rights to the benefit of indigenous peoples (Brush, 1996b). On the contrary, the current practice (see chapter 6) shows that some states want to keep sovereignty over genetic resources and prevent others, such as indigenous peoples, from participating in the financial benefits that can result from the appropriation of biological resources by third parties. Furthermore, the CBD promotes mainly bilateral negotiations between states and private firms to negotiate access to and exploitation of biological resources which results in excluding indigenous peoples from signing contracts on their own terms with (transnational) corporations. In other words, while the outcome of an (equitable) Coasian negotiation model depends on actors reaching a common understanding of the rules and what these rules entail, with regard to bioprospecting agreements the outcome of the negotiations is often the adoption of rules and norms pertaining to one party which is usually the most powerful one. For the negotiations to be successful in achieving equity and efficiency within a market framework, the negotiations should focus on finding workable compromises.

To summarise, the bad implementation of the negotiation model reaffirms the weak status of indigenous peoples. Reality shows that it is very likely that the negotiations will take place between the two most powerful actors, viz. the national state and the multinational corporations, while excluding the weak actor, viz. the indigenous

peoples, from the bargaining table (Brush, 1996b). Besides, mounting transaction cost might prevent or obstruct the bargaining process. For example, prior to starting negotiations with indigenous peoples, it might be necessary to decide who is going to represent the indigenous peoples, where are they located and whether they need education prior to starting the negotiations. In reality, it can be noticed that in order to avoid high transaction costs the negotiations only take place between the most powerful actors, in this case the pharmaceutical company and the national government. This practice is re-affirmed in the CBD, which has drawn a legal framework in which access to biological resources is regulated and controlled by states (Boisvert & Caron, 2002). The mechanisms that are put in place in the CBD to recommend property rules are based on the transfer and exploitation of resources that require prior informed consent and compensation on the basis of bargaining. However, this measure assumes that the power of the actors is equal.

An equal and fair distribution in the market can probably be best achieved when it is proactively linked to democracy (Drahos, 2002). If intellectual property rights and benefit sharing agreements have to live up to the expectation of equal distribution of welfare, it must be argued that this can only be achieved in a democratic regime that allows equitable bargaining between interest groups. This can only be reached when all the parties that are involved in the bargaining process are equally well-resourced and well-informed interest groups. However, as argued in previous chapters (5 and 6) intellectual property rights and benefit sharing agreements promote a regime that bears more the characteristics of coercion than democratic bargaining, a finding that is also shared by Drahos (2002).

6 Conclusion

As demonstrated in this chapter, what constitutes 'fair' and 'equitable' is an ethical judgement. An agreement becomes acceptable only when all the parties that are involved in the agreements agree, on the basis of a common assessment and mutually accepted value statements, that the agreement is indeed 'fair' and 'equitable'. The main problem is that it is difficult to reach a consensus on a set of conditions that are prerequisites for a 'fair' and 'equitable' relationship. Unfortunately, the CBD does not provide any clear guidelines. Assessing the Hoodia benefit sharing has highlighted

that the San have their own perceptions of what embodies distributive, procedural and interactional justice.

As a result of the lack of clear guidelines in the CBD, the definition of 'fair' and 'equitable' is left to the stakeholders to negotiate. There is thus a real danger that the serious inequalities in knowledge and power between indigenous peoples and pharmaceutical companies will result in definitions that are predominantly shaped by the latter. If the CBD is to be truly participatory and democratic, it will have to encourage more inclusive bottom-up approaches that are guided by the values and preferences expressed by indigenous peoples. This will be particularly challenging in the cases where the power imbalance is particularly strong, e.g. where indigenous peoples lack basic ownership rights over land and resources and where indigenous peoples own legal and governance rules are not respected. This suggests that the CBD has further structural flaws in its failure to address issues of, on the one hand, customary law and, on the other hand, land, resource and self-determination rights of indigenous peoples. While the latter will be discussed in chapter 9, chapter 8 will focus on protection mechanisms based in customary law.

Intermezzo 2 – The Blue Doors of the Kalahari⁸³

I had already spent two months in the field in Namibia researching the Hoodia and I still had not even seen a single Hoodia plant. I was eager to go to Andriesvale in South Africa because I knew it was still growing there so I could finally taste the Hoodia. Despite the fact that I had been camping in the Kalahari for two months, I actually had put on some weight from all the peanut butter that I had eaten – little else was available, durable and practicable for lunch in the Kalahari – so I was keen to test the Hoodia. There was also another reason why I was so much looking forward to my visit to the Kalahari in South Africa; I was finally going to meet Petrus Vaalbooi, the chairperson of the South African San Council, and David Kruiper, the so-called 'traditional' leader of the community. These two highly charismatic men played a very dominant role in the BBC documentary on the Hoodia and were portrayed in the video as almost mythical figures in the Hoodia saga.

From Upington (the nearest town and gateway to the Kalahari) I managed to get in touch with my key informant to make the final arrangements for my visit. My instructions for how to find the community could not have been clearer: "after driving for about 100 kilometres, take a right turn and look for the blue garage door". This was a good exercise for some probing, but no matter how hard I tried to ask for better directions, the best I could get was the blue garage door. Once more, I set off. I embarked on what appeared to be one of the most scenic routes on this fieldtrip. High red sand dunes as far as I could see, it was indeed magical. After about 100 kilometres there was a crossing and I could "take a right turn" and miracles do exist; there was a blue garage door, but hang on did my key informant not say on the left side, this blue door was on the right side, I got it wrong. After some enquiries, I found out that I had to drive for another 10 kilometres and there I should find 'my other blue garage door'. In the Kalahari news can travel surprisingly fast and by the time I found the right blue door, people from the community were waiting and making jokes about my bad sense for direction; I definitely would make a bad tracker.

⁸³ Extracts from field diary.

The next day I was going to try to arrange an interview with Petrus Vaalbooi and David Kruiper. I appeared to be lucky in that it was 'pension day'. A heavily armoured vehicle pulled up and government officials started to distribute cash for pensions and child support. Although it was mostly older people and young mothers with their children that were hanging around to get their money, the security measures reminded me of war-zone footage on the evening news. Fortunately it did not take long before my key informant introduced me to Petrus Vaalbooi. I was nervous to meet him but he was very charming and was happy to 'chat' with me (extracts from the conversation are attached below).

I was already told that arranging a meeting with Petrus was going to be easy, but arranging a meeting with David was going to be more challenging. The community was split between two camps, the Vaalbooi 'clan' are perceived as being the modernist, and the Kruiper 'clan', are the more traditional San. My key informant was a member of the Vaalbooi 'clan' and was reluctant to help me to get in touch with David Kruiper. When I saw David collecting his pension money I tried to arrange a meeting. He seemed very disoriented but nevertheless we arranged a time for the next day that I was going to visit him. He lives far away from the community in a 'pan' between two high sand dunes. My key informant refused to assist me in this visit because she was afraid that fights would break out between her and her 'rival' who acted as a 'guardian' for David. She arranged for a little boy to help me find the winding footpath to David's 'house' while she was waiting in the car with the doors firmly locked. David looked frail and ill and he was just not in the mood to talk to me. It did not take long or other people knew I was sitting there with David trying to strike up a conversation. Other people showed up, drunk and aggressive. Before I realised it, fights broke out and the situation got completely out of hand. I felt very disillusioned as I hasted back across the dunes to the car.

For months, I had had very high expectation about my interviews with Petrus and David. I knew from what was portrayed in the literature that these two men have very different ideas about the Hoodia and the benefit sharing agreement and I had hoped for such a long time that I could explore that difference in my research. The whole experience also told me a lesson that with this sort of fieldwork sometimes you have no control of where the research is taking you. For two months, I tried to get

information about the Hoodia benefit sharing in communities that never heard about it, even though WIMSA told me otherwise and when I finally arrived in 'the community' that was central in the Hoodia benefit sharing agreement, I found to the community was split into two and beset with problems. A week after I left the community the South African human rights commission started the long awaited inquest into several unresolved murders and all the other problems the community was facing (see chapter 7 for more details). The community was nervous about this visit from the human rights commission and there were days during my visit when Andriesvale seemed like a pressure cooker about to explode.

My fieldwork was drawing to a close but my key informant insisted that I could not go back to England before I tasted the Hoodia. There was no way my small car could manage the road that would take us to this famous plant. However we managed to arrange transport and on the back of a small open pick-up truck I went for a ride through the Kalahari, joined by some elderly members of the community. A few days earlier the first rains had arrived. The pans were filling up with a few millimetres of water and I could see the first grass sprouting. Great numbers of magnificent birds seemed to have appeared out of nowhere and the men who joined me spotted these birds quicker than my eyes could follow. It was so obvious that for all of us this afternoon drive through the Kalahari was a beautiful and serene experience. For the San there was a huge sense of belonging and they showed how proud they were about their land. For me, it was the first time in three months that I felt a strong bond with the Kalahari and the San and the thought that I had to go back to Cape Town the next day made me sad. The Hoodia had tasted very bitter but somehow the whole experience had awoken in me a taste for more.

I was finally able to revisit the community in Andriesvale a few months ago. Petrus Vaalbooi is no longer the chairperson of the South African San Council and has withdrawn himself from the community. David Kruiper had just lost his wife a few days before I saw him again and was clearly still grieving. This time we talked for a long time but he seemed very tired and had aged a lot. It was obvious that both David and Petrus who were once the most respected elders in the community have now been replaced by a younger generation.

Excerpts from an Interview with Petrus Vaalbooi, a Leading Figure of the ‡Khomani

Getting the land has been the start for us, so we could start talking [...]. the government is putting the bushman together bit by bit. After the signing in 99 we had to wait and wait. Our development plan was lying on the table of the premier in 2000, and it was only signed in November 2003: just before the election. (We were told) all must vote ANC. The ANC signed, the government signed. But they also made the laws. The laws [...] we cannot access them. That is good for those who know how to go beyond the law. That which we have gained they tried to take from us. A policeman was there when a man was shot on our land; that policeman was shooting himself. Until now the murderer has not been named. A man was shot, a bushman on his own land that the government had given him. How do you think a person should feel? How do you think a person would think about the government? They come here with nice stories, but there is no solution, no clarification. We don't know what is going on, they (the police) don't answer.

Finances are our undoing. Our council works from day to day, doing what we can. We are representing 3 different groups. We have problems here, things that have gone wrong and need to be repaired. We need transport to get people together, like the council of elders, to talk about these problems. This is where the benefit sharing agreement can help us. If later there will be profits, then this 6% can be used in the area to everyone's benefit like the Nama, to tackle unemployment.

We have been negotiating over benefit sharing with (the government of) Kwazulu-natal, where the rock art is. There we have realized how strong the laws are, how the laws are 'boss' over what are the belongings of the Bushman. The people we talked with tried to pull us in a certain direction, but we have talked hard, we have talked strong: you are using our belongings, you are using us. You are taking all the decisions, but we want to come and hear, we want to come and share. Our names are there to get the money, but we are not there (i.e. there is all the information and merchandise on 'bushman' rock paintings to attract tourist money, but the San are shut out from the management of this heritage and from benefiting from it).

The government is the key.

In the Gemsbok Park we have now shares, we can exercise commercial and symbolic rights. There is this jointly owned lodge which is supposed to provide benefits to both the San and the Mier communities. But this process is still not coming off the ground. (What happens to) the park is (in the hands of) the minister, the majority (ANC government).

I don't want to hear about 'recognition', we want our inheritance, we want full ownership, we seek evidence to reestablish our ownership. We want to own, we want to talk, we no longer want others to talk over us. There is big difference with CSIR, I can talk to them. We have a good relationship now, it doesn't make me feel bad or feel ashamed. You get to know each other and if something is wrong we contact each other directly to hear what is going on. Dr Horak is a good teacher, we learn from him. The relationship with him is close, right and beautiful – regardless of colour or race- so we are comfortable with each other. He is helping us to talk to the government to try to get the authorisation⁸⁴.

We had a meeting with Dr Boesak, from the Commission of Language and Religion, who was looking into issues about the Nama and the San to report back to the government. But we are the owners of the land, we want to talk to the government ourselves. We can get on that plane in Upington and to for a direct meeting with the government.

I had to leave school [...]. I speak some English but now that I have to represent the San, I try to clarify myself in the language that I can speak best (Afrikaans).

We should have more rights, cultural rights...South Africa belongs to the bushmen, bushmen's land, but accommodation is possible. We had a conflict with park authorities in Capetown on the 13th of December 2000. We were looking for a piece of ground to create a cultural display. They told us we were not allowed to cut down the

⁸⁴ Petrus Vaalbooi's opinion differs from the opinion of other community members. Petrus Vaalbooi has participated in the Hoodia negotiations while the community members who have not directly been involved in the negotiations do not trust the CSIR.

trees or even some branches. I told them we had no problems with trees. Who brought them here? I said let Jan van Riebeek come, grab those trees and go back. We don't lack trees; South Africa used to have trees. And it was the same for land. They introduced other trees and disturbed the tradition. They cut down the (native) trees but now we are not allowed to touch their trees.

Chapter 8 – Myths and Stories Exploring the ‘Real’ Grounds of Customary Law

1 Introduction

It was discussed in chapter 6 that any *sui generis* protection regime should be based on indigenous peoples’ own customary practices and rules. While it was concluded that the currently proposed *sui generis* regime is in fact a continuation of, or is founded on, pre-existing Western property rights system, it was also argued that the true meaning and strength of a *sui generis* regime should lie in revival and reinvigoration of the principles and laws that have protected indigenous peoples’ patrimony and knowledge for thousands of years. The main finding in chapter 6 was that the *sui generis* approach to the protection of traditional knowledge has so far been very limited in scope because it has been too heavily embedded in the tradition of Western jurisprudence. Throughout this thesis it has been argued that a bifurcated view of: scientific versus traditional knowledge (chapter 2), commodity versus gift (chapter 3) and individual versus community-based property rights (chapter 4) unnecessarily emphasises a dichotomy between the global (i.e. Euro-American societies) and the local (i.e. indigenous peoples) and that this ultimately leads to essentialised definitions of tradition, knowledge and indigeneity. It was argued in chapter 4 that this bifurcated view should be abandoned in favour of a debate on the question of whose legal framework will prevail in drafting the measurements to protect and manage traditional knowledge. Analogous to the assessments and findings of the previous chapters, this chapter will examine whether this dichotomy between global law (Euro-American legalistic framework) and local law (customary law) is justified within the debate about how to protect traditional knowledge.

It is certainly tempting to distinguish between Euro-American and indigenous legal systems considering the different history, social organisation and values of these two groups. Nevertheless, such generalisation can be problematic. Borrows (2002) argues that such a bifurcated view distorts and simplifies aboriginal principles with the danger that aboriginal law is portrayed as subjective and, as such, defined as non-legal. Furthermore, he argues, dichotomising between the two legal systems can lead to a misinterpretation of the foundation of law by detaching the Euro-American legal

system from its cultural context. Legal sources – both Western and aboriginal ones – are grounded in the complex spiritual (or religious), political, economic and social conventions and customs of particular societies. Borrows (2002) also argues that a *sui generis* conception of indigenous peoples' rights needs to incorporate both legal perspectives, i.e. Euro-American and aboriginal law. The purpose of a *sui generis* regime would be to establish a new body of law that bridges Western and non-Western (in this case indigenous) legal cultures. In this respect, a *sui generis* regime could contribute to the harmonisation of two cultures by giving equal weight to each perspective and ensure that the new legal regime that incorporates different legal sources (legal pluralism) is impartial and free of bias towards either of the two legal systems.

However, with regards to protecting traditional knowledge and as argued in chapter 6, the current *sui generis* legislation is inappropriate because the proposed regulations are embedded in the dominant ideology of a Euro-American legal institutional framework while it is obvious that, when deciding upon indigenous issues, it is pertinent to draw upon indigenous legal sources more explicitly. In other words, the challenge is to develop a *sui generis* regime that finds a way to incorporate indigenous law into the legal procedures and decision making while avoiding portraying indigenous law as a local customary norm that is culturally bounded, socially constructed (to fit within a Western legal framework) and immutable and therefore perceived as completely the opposite to formal law that is defined (unjustifiably, as will be explained later in this chapter) as rigorous and free from any embeddedness in culture or local context.

A closer examination of the feasibility of introducing the concept of legal pluralism into the debate about how to protect traditional knowledge would raise several wider issues: viz. what is the role of law in society and what is the nature of customary law in national and international law? Furthermore, debating the meaning of legal pluralism and the challenges it poses will also highlight the need to revisit and reassess the relationship between Western powers and indigenous peoples in terms of how Western law and statecraft has affected the rights, dignity, culture and customs of indigenous peoples.

It is argued in this chapter that those scholars who call for customary law to play a more prominent role in the development of appropriate rules and mechanisms to manage and/or protect the use of traditional knowledge have not so far sufficiently inquired how to define customary law; where to find it; and how to integrate the – as is often portrayed in the literature – two ‘opposing’ legal frameworks. It is identified in this chapter that one of the main reasons for this oversight is the fact that most of the literature engages with a one-sided framing of law as having a positivist outlook, i.e. being descriptive and prescriptive. However, it is argued in this thesis that law should be defined from a different angle, namely as something that offers an insight into the community that law is to serve. Linking law more closely to social sciences in general and specifically to anthropology can help to achieve this (Donovan and Anderson, 2003).

According to Falk Moore (2005), an anthropological approach to developing legal systems allows law to be framed in the social, political, economic and cultural context of the enforceable norms. This chimes with the framework that has been proposed in chapter 4 to examine property relations in non-Western cultural settings, viz. examining legal rules that regulate property relations in a wider socio-economic, political and cultural context. Such framing allows, according to Falk Moore (2005), the scope and range of law to be widened to encompass, besides the formal socio-legal juridical institutions in different cultural settings, also law-like activities and processes characterised as informal and unofficial across different societies. The central tenet of this argument is that even in the Euro-American legal setting, formal law is by no means the only source of organisational social order. It is argued in this chapter that this proposition is embedded in a new field of inquiry that examines law as narratives and rhetorics with a specific focus on examining the relationships between stories and legal arguments (for an overview of this field of inquiry see e.g. Brooks and Gewirtz, 1996).

Treating law as a narrative or a rhetoric means, in practice, looking at facts rather than rules. This approach focuses not so much on the norms that are the foundation of law, but rather on how law is constructed and framed and how it can involve its audience. As such, Gewirtz (1996) argues, law is not just a mechanism that draws up policies that shape culture; on the contrary, law becomes almost like an ‘artefact’ that reveals

a specific culture. The central inquiry is about the story of law and not the rule of law. The attention should subsequently be focused on those who are the subject or object of law and specifically to those who, as Wright (2001) argues, have been kept subordinated by formal law such as indigenous peoples, women etc.

In chapter 2 it was argued that traditional knowledge is defined in the international policy arena in a way which enforces an essentialised identity upon indigenous peoples. Similarly it is argued in this chapter that there is a real danger that the international community of policy makers and scholars views customary law as requiring a certain kind of predefined authenticity and representation of indigenous peoples' legal systems. There is a prominent risk that this new layer of essentialising will lead to a situation wherein: "[...] *legal processes open the door to voices only as they represent [in an] "authentic" manner certain prefigured communities or social identities [...]*" (Mertz 1994a). To avoid this situation it is argued in this chapter that, within the tradition of the disciplines of legal anthropology and law and society, more careful attention should be given to the voices of those who have had the least access to the official channels of law making, viz. indigenous peoples.

One way of achieving this is through examination of the stories, ceremonies and traditions of indigenous peoples through which they express their legal norms and values. Borrows (2002) has illustrated that indigenous peoples' narratives reveal the deeper principles of order and disorder of a community and therefore can serve as a source of authority for drawing up customary law that is untainted by colonialist and post-colonialist framing.

The chapter starts by addressing two possible frameworks of law making, viz. a top-down approach and a bottom-up approach. So far, contrary to what they may aspire to, most of the current protection mechanisms that have been proposed in international fora and academic literature fall under the banner of a top-down approach. A critical assessment of the philosophical and historical underpinnings of this top-down approach to law making will reaffirm earlier findings that there are some serious flaws in such an approach towards protecting traditional knowledge. The chapter will, then, examine in section 3 an alternative approach towards law making. Alternative epistemologies will be explored in the search for a legal framework that can support

the claims of indigenous peoples. A postmodern approach to law making offers some possibilities. However it is not without its own problems; both possibilities and challenges of a postmodern approach will be discussed. Finally, sections 4 and 5 will explore in more detail the possibilities, requirements and challenges that are encountered when developing a legal framework that is based on the concept of legal pluralism.

2 *Law Making – the Top-Down Approach*

2.1 Human Rights Framework

One of the major concerns addressed in chapter 6 and 7 is the lack of direct involvement and participation of indigenous peoples in drafting legislation concerning the use and protection of their natural resources and related knowledge. International institutional frameworks like the CBD do not accommodate (sufficiently) the particular needs and interests of indigenous peoples (e.g. land rights). Indeed, according to Young (1990 in Keal, 2003: 174-176) one the main criteria for justice is precisely the facilitation of participation of different groups, including indigenous peoples, in decision making. Young (1990) labels any denial of participation as a form of institutionalised domination and oppression; the latter exemplified by any of the following five forms: exploitation, marginalisation, powerlessness, cultural imperialism and violence. Keal (2003) agrees that as long as the participation of indigenous peoples, both in national and international politics, is not recognised by national governments and the international community, doubts must be raised about the moral legitimacy of the institutions that deal with indigenous peoples; or to phrase it more subtle: the tendency toward ‘Eurocentrism’ in international law needs further questioning. The 1989 ILO Convention 169 in Indigenous and Tribal Peoples is another case in point. Although the Convention recognises the rights of indigenous peoples “*to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use*”⁸⁵, it is still strongly criticised by indigenous peoples for not referring more explicitly to the right of self-determination and its lack of implementation guidelines with regards to the doctrines of consultation, participation and choice (Kingsbury, 1998).

⁸⁵ ILO Convention No. 169, Article 7.

In his recent study of the relationship between international law and third world resistance, Rajagopal (2003) concludes that there is a real need for subordinated groups, like indigenous peoples, to contest the hegemonial power of international law. He argues that international law is still an elitist discipline which is primarily concerned with the consolidation and expansion of its international institutions across the globe, while at the same time ignoring the role of the local as an agent of institutional change. International law's reluctance to engage with mass movements and popular protests has been a central aspect of its history. International law has always been closely linked to the liberal theory of politics (i.e. central focus on state sovereignty). Even though the much acclaimed human rights discourse appears to challenge the liberal conception of politics; modern law, nevertheless, still objects to collective resistances. This liberal legal model has been challenged by the more critical (legal) scholars (such as critical race theorists, critical legal thinkers and feminists) for being a technocratic-rational model of law that fails to engage with the everyday legal challenges of ordinary peoples. While international law remains trapped in an institutional practice, scholars like Rajagopal (2003) and Otto (1996) argue that international law should accommodate the concerns of subaltern communities who could give a new meaning to international law through their own lived action.

So far, indigenous peoples are making use of three well-established frameworks – viz., human rights, self-determination⁸⁶ and minority rights⁸⁷ – when claiming, amongst others, greater participation rights (Kingsbury, 1998). Within the remit of this chapter, more attention will be given to the debate on human rights, while self-determination rights will be further discussed in chapter 9 when land rights and the concept of territorial resource rights will be analysed in more detail.

Rajagopal (2003) laments the fact that one of the main resistance strategies that is perceived as legitimate within the international legal framework is based on a

⁸⁶ Kingsbury (2001) extends this list with two more claims, viz. historic sovereignty claims and 'indigenous peoples' claims. The latter extends beyond existing regimes of human rights and minority rights.

⁸⁷ For a discussion on minority rights in general and more specifically in comparison to indigenous peoples' rights, see for example Kymlicka (1998).

discourse of human rights; a rights-based structure that has been critically assessed by many, as briefly discussed hereafter. One of the most frequently cited problems with human rights is its lack of recognition of group rights and its failure to banish the continued exclusion of indigenous peoples from political, economic and social participation (for an overview of a critical approach to global human rights see Evans, 1998) This will be further expanded in the next part.

One of the more substantial concerns that have been raised in the literature on human rights is the alleged universal nature of human rights (for an overview of different viewpoints, see Hayden, 2001). From a philosophical point of view (see section 2.2 for more details) human rights are supposed to be rights that all humans have simply because they are human. In this view, called universalism, human rights belong to all persons, in all places and at all times. The other view, relativism, argues that moral norms and values are historically and culturally determined and as such human rights cannot be universal. Scholars who advocate relativism think that each society has the right to determine which duties and rights are legitimate; in other words human rights may differ from one society to another. This debate between universalism and relativism has been going on for many years. A full engagement with this debate lies outside the scope of this dissertation but within the remit of this chapter one issue in this debate will be explored in more detail.

While there is a growing consensus in the West that human rights are universal rights, this opinion is opposed by the critics, often from non-Western parts of the world, who argue that economic, cultural and political realities can differ from place to place and this fact should not be ignored or dismissed (Tharoor, 1999). Waltz (2002) agrees that the claim that human rights is a Western concept is hard to deny, but simultaneously argues that until recently, little was actually known about the political history of the Universal Declaration of Human Rights. This hiatus has fostered a number of myths and assumptions, including an exaggeration of the historical role of the larger Western states in advancing human rights norms on a global scale. Waltz argues that recent historical research (see e.g. Morsink, 1999) has shed some new light on the political history of human rights which shows that the Universal Declaration is principally a negotiated text in which many states participated, including those who now claim that human rights are too closely based on Western values and norms.

While Waltz's claim and Morsink's historical research may bear some truth, nevertheless it is difficult to accept the argument of Donnelly (1989) and others that human rights are universally legitimate and inclusive. Questioning the universality of human rights is, according to Donnelly, merely self-interested posturing, concerned not with rights but with regime maintenance, and not with development but with the personal interests of officials (Donnelly, 1989: 189 in Niezen, 2003: 97). However, the opposite can be argued. The research findings of Wright (2001) and Niezen (2003) have shown that indigenous peoples were left out when the process of negotiating human rights standards was started. They argue that none of the representatives of exclusively oral societies, still common in the mid 20th Century, were consulted; the negotiations only involved societies that were accustomed to bureaucracy and formal legal procedures. Defenders of the universal value of human rights have underplayed this divide, but the fact that indigenous peoples' claim for recognition has to be embedded in the human rights rhetoric rekindles the debate about universalism versus relativism.

Closely related to this theme of relativism and rights is the debate about the limited liberatory and emancipatory capabilities of the human rights framework in non-Western cultures (see e.g. Mutua, 2002; An-Na'im and Hammond, 2002; Chanock, 2002; Wright, 2001; Bradley and Petro, 2002; Massa Arzabe, 2001; Steiner and Alston, 2000; Chandler, 2001 – see Appendix 3 for more details on these scholars' arguments with regard to the shortcomings of the human rights framework).

Most of these scholars argue that the Eurocentric history of international law in general and human rights in particular can be held accountable for some of the bias in international law against resistance by various subaltern groups. In order to fully understand and appreciate the debate about international law and human rights it is necessary to examine more closely the historical writings which have shaped this debate. The following short overview of the philosophy of international law and human rights will be mainly based on Hayden's (2001) account of the history and theories of human rights, followed by a more critical assessment based on the work of Henderson (2000) and Douzinas (2000).

2.2 The Philosophy of International Law and Human Rights

Our present thinking about human rights is shaped by the philosophical ideas that characterised the 'Age of Reason' or the 'Enlightenment'. These philosophical ideas, known as the Natural Law doctrine, are grounded in Greek philosophy (e.g. Plato and Aristotle), Judeo-Christian scripture (e.g. Thomas Aquinas) and Roman moral and legal thought (e.g. Cicero). In general terms, natural law theory holds that there are higher laws of nature which are often perceived as being part of the law of God. These laws contain moral norms and prescriptions about the right sort of conduct. Human beings, through their use of reason, are able to act in accordance with the universal values of natural laws. By doing so, human beings bring about the moral and political order which is required for the common good. In other words, natural law thinkers argue that human beings share a common ability to distinguish between right and wrong and are able to deduce rules of moral conduct in harmony with the universal nature of right and wrong.

At the beginning of the 17th Century, natural law theory became secularised by the Dutch legal philosopher, Hugo Grotius, who argued that natural law can be regarded as independent of God. For Grotius, natural law is a mandate of right reason, meaning it conforms to the rational and sociable nature of humanity, including the power and ability of judging what is right. Grotius has been influential for modern thinking about human rights by associating rationality with the idea that each person possesses rights simply by being human.

The idea of reason (or the ability to judge what is right) became an important concept for a new school of philosophers who developed the idea of natural rights. Natural rights thinkers (e.g. John Locke and Thomas Hobbes) argued that some essential features, which are common to all people, grant certain inherent rights in human nature, such as those to life, liberty, property and happiness. One of the core ideas of natural rights theorists is that human beings have some basic rights simply because they are human beings, which makes these rights also universal. It has been argued that these rights existed prior to any form of political society and therefore these rights could not be taken away. This coincided with the idea that the role of government is to protect the natural rights of its subjects. The natural rights philosophy has laid the

foundation for the two key concepts of human rights theory, viz. freedom and equality.

The German philosopher Immanuel Kant proposed a moral and political theory that combined the ideas of reason, equality and freedom into the theory that human beings are an “end in themselves”. In lay terms, this means that human beings should be respected as autonomous persons. Or in other words, civil society must protect each person’s freedom, which the person can exercise under the influence of rationality and as such framed by duties of justice and morality.

Not every philosopher, though, agrees with these concepts of universal rights. For example, Jeremy Bentham and Karl Marx criticised the above rights. Others, like Jean-Jacques Rousseau and John Stuart Mill did support the natural rights theory, but gave a different explanation for the functioning of rights in society. More recent philosophers (e.g. Thomas Pogge, 1995 and Martha Nussbaum, 1997 both reprinted in Hayden, 2001) view human rights as important components of social justice. They define human rights as moral claims or entitlements to social goods such as liberty, income, wealth, education, health care and so forth. The so-called Contemporary European philosophers, better known as postmodernist, have challenged these justificatory arguments for human rights. Starting with Nietzsche’s criticism against the Enlightenment’s humanism and universal moral claims, the metaphysical ideals about human nature and humanity in general have been rejected. The postmodernists argue that the doctrine of human rights cannot be justified by any supposedly theoretical foundation: Part 3.1 of this chapter will explore in more depth a postmodern approach to (international) law.

Regarding the role of government, Henderson (2000) - one of the first North American Indian legal scholars – argues that Hobbes’ construct of the state of nature and the subsequent artificial creation of the modern state have been used as principles that allowed domination and oppression of indigenous peoples. According to Henderson, Hobbes argued that the state of nature consisted of individuals who were free and equal and who lived in natural organisations such as family or household. Even though individuals could live in freedom and equality, the scarcity of resources led to competition, distrust, war and conquest. In order to save individuals from this

state of natural passion and aggressions, a 'man-state' led by an absolute sovereign must be created. Hobbes also argued that the state of nature (characterised by being brutish and a state of war) did not exist everywhere; the 'savages' of America were, according to Hobbes, a good illustration of the negative state of primal chaos and the natural state of war. In this respect Hobbes opposed the state of nature to civil society and pointed out that European society was in danger of remaining in the state of nature through its continued civil wars. The idea⁸⁸ was born that the state of nature had to be given up and a civil society or modern state had to be built in order to refute the state of nature which was now considered to be the antithesis of civilised society.

Hobbes also created the notion of positive law or legal positivism (Henderson, 2000). The purpose was not to show what law is in different places and at different times, but to show what law is in general. In the man-state, law is the command of the sovereign to the sovereign subjects, while in the state of nature there is no proper law making precisely because of the absence of a sovereign. The idea of positive law was also used to promote the concept of colonialism through the work of the legal scholar John Austin (1920) who defined law as the command of a political superior to a political inferior. The subjection was a necessary precondition for political society and law to exist, according to Austin. In other words, positive law depended on the existence of a sovereign. Austin's theory was based on the belief that 'natural society' (based on a general state of savagery) was opposed to 'political society' (based on the concept of having a sovereign who rules over subjects). Within the tradition of Hobbes and Locke, Austin characterised natural society as 'wild' and 'lawless', while the sovereign and his commanding laws gave order and structure to the political society. According to Henderson (2000) it was precisely this concept of the rise of the political society through the artificial creation of the state that accompanied the rise and development of colonialism.

Henderson (2000) argues that wrong assumptions about the lawless and wild state of nature lay at the basis for imposing social and political constructs in the form of subjugating citizens through sovereign power regulated by a positivist legal framework. Henderson states that the Hobbesian view in particular, that the state of

⁸⁸ Political philosophers ranging from Spinoza to Locke, Pufendorf to Rousseau to Kant followed this idea and continued to theorise about the natural law theory of the modern state.

nature characterised by chaos must be replaced by a societal structure that creates order and law from above, continues to be the basis of (international) law that suppresses indigenous peoples. Other studies (for a legal study, see e.g. Riles, 1993; for more generic studies, see e.g. Said, 1993; Wright, 2001) have also suggested that there is a close link between the rise of international law as a mechanism of order and the cultural construction of European identity. The supremacy of European identity in the formation of international law can be found in Thomas Lawrence's⁸⁹ treatise on international law first published in 1885 (for an analysis of his work, see Riles, 1993). Lawrence's work is a good example of such a polemic wherein the creation of an essentialised and coherent European community is defined in dichotomous opposition to non-European 'savages' and wherein the centrality of statehood is built upon this bounded and essentialised conception of culture (Riles, 1993). Henderson (2000) argues that the historical and legal legacy of the state of nature will continue to haunt indigenous peoples as long as (international) law remains embedded in this essentialised thinking of the supremacy of (what can be called) Euro-American identity and as long as essentialising assumptions are made about the societal organisation and rules of other cultures, particularly indigenous peoples. Niezen (2003) has called this the 'Weberian dilemma' of law; for Weber, one of the most defining features of modernity is the overwhelming power of bureaucracy and law over tradition and custom as a way to legitimise authority.

Also, Douzinas (2000) doubts whether the principle and promise of emancipation can be reached through reason and law. In Eurocentric thought the idea of progress and emancipation can only be reached by abandoning myths and replacing these with the reason of law. Douzinas argues that reason and myth, the two opposing principles of the Enlightenment, have been perceived to be in conflict since the age of modernism. This conflict will only come to an end when human rights, which is the principle of reason, becomes the realised 'myth' of postmodern societies. Myths belong to particular societies legitimised through narratives of belonging and stories of origin, while reason and human rights, on the other hand, are universal and are based on the promise of progress and emancipation. In law, traditional order and rules have been undermined by universal principles that eventually destroy, so argues Douzinas, the

⁸⁹ Thomas Lawrence was a legal theorist and professor in international law at the university of Cambridge in the late 19th Century.

pre-modern legal cosmos. Proceduralist and formal concepts of law and order have replaced contextualised concepts of law and order (Fitzpatrick, 1992; 2001; Douzinas, 2000; von Benda-Beckmann *et al.*, 2006). In this sense, legal rules become very positivist and restrict the protection against, what Douzinas calls, the all-devouring legislative and administrative power of the state. As a result, rights are framed by formal legislation that prioritises power and domination and neglects the pluralism of ethical and legal values of different communities. For law to become truly emancipatory, it has to break with its tradition of being embedded in abstract ideals and legal semantics.

Instead, a postmodern approach to law which is based on the belief that law and its rules are rooted in daily life and political rhetorics might prove to be a more liberatory framework for indigenous peoples (Stark, 2000). Stark's belief that law is framed by everyday practices is very similar to the theoretical underpinnings of legal anthropologists who, in contrast to the political philosophers briefly mentioned above, do not believe in what anthropologists refer to as the hypothetical original condition of the philosophers' state of nature. By contrast, they argue, the source of law is not hypothetical, but can be found through observing local practices and listening to stories and explanations (Falk Moore, 2005). In her article on women and globalisation, Stark (2000) has examined how a postmodern approach to law can offer a useful framework for economically subordinated women seeking empowerment. In the next part it will be examined whether such an approach could also be useful for indigenous peoples.

3 Law Making – the Bottom-Up Approach

3.1 The Possibilities of Postmodern International Law for the Empowerment of Indigenous Peoples

While classical legal theorists articulate clear legal standards and develop a normative legal framework, postmodern legal scholars question this normative legal framework by deconstructing it and exposing the (hidden) power relations that drive and reinforce a particular legal system. Different strands of postmodernism interrogate different power structures. For example, critical legal scholars show how international law reinforces existing power structures. Feminists argue then that these power

structures are gender-based; e.g. international law reinforces the distinction between public and private law wherein the world of public law is perceived to have male characteristics and private law is (rather pejoratively) perceived to belong to the world of family and custom, two features of law ascribed to women characteristics. Others, like critical race scholars, argue that power structures differ according to race and describe international law as being 'white' and 'Western'.

However, Stark argues that not all critical legal scholars' work can be labelled as postmodern. What makes some of the work of critical legal scholars postmodern is the belief that even the most well-intended reforms of law reinforce existing power structures and replicate "*the hierarchies of privilege and subordination that infuse power structures of law*" (Stark 2000: 565). In other words, postmodern legal scholars challenge the boundaries of law itself. While, within the remit of this thesis, it is argued that indeed the boundaries of (international) law must be challenged in order to create a (legal) environment that is more supportive towards the protection of traditional knowledge from an indigenous peoples' point of view, simultaneously it is also argued in this thesis that a postmodern approach to law making is not without its own problems; an opinion which is also shared by Stark (2000) and Wicke (1991).

In order to address the ambivalence of postmodernism or the misalliance between postmodernism and law (Wicke, 1991), Stark suggests differentiating between a legal postmodernism of resistance and a legal postmodernism of reaction. While the former questions modernism and the Enlightenment and considers modernity to be a lost cause, the latter favours a more pragmatic approach. Reactionary postmodernists, even though they also challenge to a certain extent the normative framework of law, argue that a continuous process of questioning and deconstructing is not good enough and other alternative approaches towards law making must be sought. To use the example of human rights again, scholars theorising within the reactionary postmodern framework – like Nussbaum with her capabilities framework – argue that human rights do not exist within a socio-economic, legal and political vacuum, but instead they plead that normative and often abstract concepts (such as universal human rights) must be linked to concrete experiences that can vary in place and time.

Stark's (2000) view on how to empower subordinated women in a globalised world is an example of such a reactionary postmodern approach to law making. She rejects the abstract notion of a normative approach (e.g. all women are equal to men) in favour of concrete and contextualised approaches. For Stark, the main question is not "*how women can realise their human rights within an implied context of free market democracy, no[r] how the law can help women become market players equal to men, but how women can use the law to further their own objectives*" (2000: 551). According to Stark, the shift from perceiving law as something abstract and theoretical to perceiving law as something pragmatic and contextualised demands a new focus. Stark's suggestion to examine and use stories as a new medium of law making chimes with Gewirtz' (1996) finding that storytelling is particularly attractive for people outside mainstream society (e.g. racial and religious minorities) as a means to question a particular status quo.

In this sense, according to Gewirtz (1996), storytelling is the methodological tool that postmodernist legal scholars use to give a representative voice to perspectives and experiences of (legal) subjects (e.g. indigenous peoples) that, traditionally, were either left out of legal scholarship or were simply ignored when shaping legal rules. As such, postmodernism is not only a theoretical framework that questions the roots of international law and its normative values (what Stark calls 'postmodernism of resistance'); from a pragmatic perspective a postmodernist approach to law is above all concerned in exposing the facts rather than the rules of law. The facts of law are revealed through examining law as a narrative and rhetoric. In practice, this means not simply looking at the normative foundations of law, but the context in which law is made whereby examining the interaction and relationship between speakers (law makers) and audience (legal subjects) is crucial. In other words, narratives have, first, the ability to expose the concrete and unique experiences of individuals, second, the ability to make 'alternative' voices heard and, finally, the ability to contest the assumptions behind law making (Brooks, 1996; Minow, 1996). Those who argue that stories should be incorporated as a new medium in law making even believe that only through stories "*can the fundamental racist, sexist and homophobic structures of our society be confronted and changed*" (Farber and Sherry, 1996: 37). However, Farber and Sherry also argue that such a strong focus on stories as a factor of change is not

without risk. It may distort the legal debate and, furthermore, stories can be inaccurate, incomplete or atypical.

In other words, a postmodern approach to law exposes the limitations of a normative and positivist legal framework, such as excluding some groups from the process of law making. As discussed in chapter 6, the Peruvian *sui generis* legislation with regards to the protection of traditional knowledge is a good example of such a positivist and normative approach to legal processes. When preparing this legislation, the Peruvian policy makers focused too much on the objectives, form and technical content of the *sui generis* legislation and ignored, to a large extent, the improvement of the human rights position and empowerment of indigenous peoples, the latter two being requests from indigenous peoples themselves. However, a postmodern approach to law has also its drawbacks. Although including subordinated groups (e.g. indigenous peoples) in the process of law making must certainly be applauded, this participatory method also opens up a new debate about the interaction or relationship between law and social identities. As exemplified throughout this thesis, most of the attempts to involve indigenous peoples more closely in the process of developing regulations to protect traditional knowledge have resulted in defining indigenous peoples (chapter 2), traditional knowledge (chapter 2 and 3), property relations (chapter 4 and 5) and protection mechanisms (chapter 6) in an essentialised manner. In other words, the search for an appropriate protection mechanism to regulate the use and protection of traditional knowledge inevitably draws attention to and reinforces the essentialising characteristics of law or, in other words, to the role of law in the construction of social identity; this issue is discussed further below.

3.2 Interaction between Law and Identity

So far, it has been argued in this chapter that, in order to empower indigenous peoples, the process behind regulating the protection of traditional knowledge should be more controlled and steered by indigenous peoples themselves. This process of empowerment is more likely to be successful when law making is approached from a more participatory or ‘bottom-up’ perspective. It is proposed in this chapter that one way of achieving a participatory bottom-up legal framework for the protection of traditional knowledge is by giving indigenous peoples a ‘voice’ and including their

narratives and stories in the process of law making. However, as identified within the discipline of ‘sociolegal’ studies (for a good overview of the issues discussed in this discipline see e.g. Mertz 1994a, 1994b), this approach comes with its own problems and flaws.

Taking the history of law and law making into consideration, sociolegal scholars question whether law as a discipline is capable of **unconditionally** including new groups or communities in the process of law making; will law only open its doors to subaltern groups (e.g. indigenous peoples) when these groups represent themselves and their needs in a specific, preconditioned manner which is easily recognisable by lawmakers? To put it more concretely, when claiming better protection mechanisms for traditional knowledge, must indigenous peoples represent themselves in a prefigured and traditional way in order to be heard by law makers?

Based on the findings so far in this thesis, it can be argued that (national and international) policy makers and law makers and some scholars have influenced, shaped and translated indigenous peoples’ identity when debating protection mechanisms for traditional knowledge. In other words, even in a postmodern legal framework, it must be acknowledged that law will always play a role in the process of identity formation and reformulation and vice versa (Mertz 1994a; Cowan *et al.*, 2005). In her study on the relation between law and culture, Riles comes to a similar conclusion, but her study also supports what has been identified in this thesis as the essentialist characteristics of law when she argues that *“the project of international law rests on an essentialization of culture that privileges the role of international law as a mechanism for bridging the void between cultural boundaries. A challenge to this essentialism, [...], may demand a radical critique of the rhetorical authority of international law”* (1993: 723).

Nevertheless, while it is common knowledge in the domain of sociolegal studies⁹⁰ that both national and international law influence and shape identity formation and reformulation, within the debate about intellectual property rights and traditional

⁹⁰ Besides sociolegal scholars, some anthropologists (see e.g. the work of the legal anthropologists Falk Moore, 2005 and the social anthropologist Geertz, 2005) have also argued that law and legal facts are socially constructed.

knowledge little attention has been given to this aspect. 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 (see e.g. Mgbeoji, 2001; 2006; Zerda-Sarmiento and Forero-Pineda, 2002) ignoring the fact that, first, indigenous communities often have multiple identities (see Appendix 2 and 5) which are susceptible to change and, second, that identity reflects a process of intervention and response. For example, Golberg-Ambrose (1994) has argued that the social structure and identity of Native Americans is based on a 'co-construction' characterised by interventions of the US government that has adapted or even invented tribal governance structures in order to fulfil the needs of the US government (e.g. to identify the so-called tribal leaders who could sign oil and gas deals in the name of the community)⁹¹. In other words, US law has encoded categories of indigenous identity which, in turn, are now used by indigenous peoples themselves as a point of reference in their struggle for empowerment within the legal discursive frameworks even though they know that these legal categories and identities are invented.

Goldberg-Ambrose's (1994) observations reaffirm the central concept of Berger and Luckmann's (1966) classical work in sociology (*The social construction of reality*) that persons and groups interact together in a social system and that these interactions over time change and come to form (mental) representations of each other's actions. Eventually, these interactions become habituated into reciprocal roles played by the different actors in relation to each other. As such, the meaning of reality becomes embedded in the social construction of society, i.e. the roles played by each group conform to the expectations of the other. With regards to the situation of indigenous peoples, Berger and Luckmann's theory can be expanded with Gramsci's (1971) idea of hegemony as ideological dominance. According to Gramsci, the interests of the bourgeoisie are perceived as natural and inevitable, not only in the world of politics and ideologies but also in every day life. This reinforces the hegemonic power of the

⁹¹ Arguably, a similar phenomenon can be identified for the Hoodia agreement which has been negotiated by a delegation of the South African San community who claims to have consulted the other San communities in Namibia and Botswana and to have acted on their behalf. However, as appeared during the fieldwork and as confirmed by a recent workshop (September 2006) only a handful of the community members in Namibia and Botswana knew about the Hoodia negotiations. For more details, see chapter 7.

ruling class and prevents the revolution of the proletariat that has accepted the dominance of the ruling class⁹².

In short, while it can be argued that a proper *sui generis* approach to the protection and management of traditional knowledge should be based on giving a more prominent voice to indigenous peoples, simultaneously it must also be acknowledged that any formal recognition of a category (i.e. indigenous peoples) or concept (empowerment) is not without its own social and cultural framing or social context. Even though including the subaltern (e.g. indigenous communities) in the process of law making is done with the best intention of empowering these local and quite often powerless groups; in reality, such an act of deference results in essentialising these units. In some cases this will result in forms of disempowerment (Mertz, 1994a). One way to avoid this powerlessness from happening is, according to Mertz (1994b), accepting the concept of a moderate social construction of law, as opposed to legal essentialism. Such a stance encourages a more critical view of law⁹³ which is based on empirical observations that do not lead to epistemological or moral nihilism⁹⁴, but lead to an understanding that in many cases: (1) essentialist legal representations of social identities are wrongly portrayed as fixed and coherent; (2) local units in legal discourse are often created from the top-down through interaction between the international, national and local legal discourse, while the former two have the capability to display more power; and (3) concepts such as customary law and authentic indigenous voices also reflect particular social constructions that are often far removed from neutral reflections of reality (Mertz, 1994b).

Mertz's (1994b) observations concerning the construction of identity in legal contexts and the doubtful source of local customary law in the legal discourse are particularly poignant with regards to the development of a *sui generis* approach towards the protection and management of traditional knowledge. Gibson's (2005) proposal to

⁹² Gramsci's concept of hegemonic power of the dominant class will be further discussed and exemplified in chapter 9 when the issue of the San's lack of land rights is discussed.

⁹³ This corresponds with Riles' (1993) observation that challenging this essentialism demands a radical critique of the rhetorics of international law.

⁹⁴ The concept of social constructionism is often criticised for being morally nihilistic. However, within the Critical Legal Studies movement it is believed that law cannot be a-political and objective. Critical legal scholars have undermined the traditional idea that legal reasoning is neutral, objective and rational (Singer, 1984). Singer (1984) argues that the traditional legal theorists have reacted to the critical legal scholars by suggesting that they embrace nihilism.

develop a legal framework that vests the authority for management and regulations of ownership of traditional resources in the community and according to customary law was discussed in chapter 6. In addition to the problems that were identified in section 4 of chapter 6, the above observations reveal further shortcomings of Gibson's call for a community-based approach. Even though Gibson (2005) defines community as a concept based on self-identity, building further upon the work of social constructionists and sociolegal scholars, it can be argued that even the concept of defining community on the basis of self-identity can be problematic since the construction of a collective identity in legal contexts is often, as identified by Mertz (1994b), provisional, fluid, strategic and contested⁹⁵. In this sense, it must be questioned whether a *sui generis* approach that favours a (strictly) legally based communal protection mechanism will be able to accommodate complex, fluid and often constructed identities. Otto (1996) argues that community is largely a European construct that is defined as the oppositional to individualism. The result of this dualism (community versus individualism) means that both are defined by each other. Contrary to what Gibson argues, this actually results in the denial of an alternative approach.

These findings chime with some of the observations in chapter 4 that the actual social relationships and social practices that are reflected in property relations are often ignored or misinterpreted by categorising them into preconceived or constructed legal categories as understood by Western law makers. In other words, a *sui generis* community-based (intellectual) property rights system for the protection of traditional knowledge falls within, what was called in chapter 4, a *categorical* legal framework that is, to a large extent, a constructed category in terms of identification of community, identity and property objects (i.e. community-based property rights). Chapter 4 concluded that a community-based intellectual property rights regime is based primarily on a *categorical* and *ideological* (see Figure 1 in chapter 4 for more details) understanding of indigenous peoples' property relations that is, at best, a distortion and, at worst, naïve. These conclusions are strengthened by the findings of this chapter that the central concept of this proposed protection mechanism (i.e.

⁹⁵ While Gibson contests the representation of community as something that is bounded in space and time, she does not acknowledge that community can be a constructed identity. Consequently, her call for an engagement with the question of community 'for once and for all' (2005: 297) seems rather naïve.

community) is based on a constructed identity that, so it is argued by some sociolegal scholars⁹⁶, is unfortunately a central concept in much of the current legal discourse that focuses on indigenous peoples. Therefore, earlier observations of this chapter must be reiterated, viz. that a proper *sui generis* legal framework for the protection of traditional knowledge must rather be sought outside the formal socio-legal juridical institutions. As was argued in chapter 6, any new form of protection mechanism must be flexible enough to accommodate what the indigenous peoples of the Four Directions Council have called the 'jurisprudential diversity'. In short, a *sui generis* regime should be based on the rights of indigenous peoples to create this regime on the basis of their own customary practices and laws. The meaning and strength of a *sui generis* regime should lie in the fact that it allows for revival and reinvigoration of the principles and laws that have protected indigenous peoples' patrimony and knowledge for thousands of years; this issue will be further discussed in the next section.

4 Customary Law and Legal Pluralism

4.1 Definitional Issues

As mentioned in the introduction, formal state-enforced or institutionalised law is not the only source of law. Especially in pluralist societies, sources should also include a variety of normative orders: not only the formal body of law but also formal and informal legal procedures, customs, symbols and rituals (Nyamu-Musembi, 2002; Sheleff, 2000; von Benda-Beckmann *et al.*, 2005). This multiplicity of formal and informal enforceable rules is often referred to as **legal pluralism**. There is some disagreement about the exact meaning of this term. Some use the term in reference to the differences between colonial law and indigenous law. Others use the term to argue that both official and unofficial rule making are enforceable and as such are both part of the body of law (for an overview of different definitions see Falk Moore, 2005). Within the remit of this chapter and following the approach of Sheleff (2000) and Borrows (2002), the concept of legal pluralism is used in the latter sense, i.e. to allow for greater recognition of the customary laws of indigenous groups in formal national and international law.

⁹⁶ See Mertz 1994a; 1994b for an overview.

However, developing a protection mechanism for traditional knowledge based on customary law is not without its own problems. Just as it is difficult to define community in a non-essentialised way (see section 3.2 of this chapter), it is challenging to define customary law in a non-essentialised manner. Since many of indigenous (legal) practices have been translated, with the risk of being misinterpreted, in official (mostly Western) legal sources, one of the most difficult tasks is to determine which of these practices should be seen as a legitimate and acceptable source of local customary law. In some cases this has led to local custom being reworked or even invented. The translation of local life and daily practices (the main sources of customary law) into formal legal categories has to a great extent altered the local understandings and meanings of these daily practices. In other words, the search for authentic customary law imposes the risk of simplifying and homogenising the complexities of social life which lie precisely at the basis of customary law. Therefore, any legal discourse that gives the appearance of involving 'authentic' concerns and rules must be treated with certain precautions because there is a danger that it masks indifference towards other legal systems or even rejects the local values that it tries to portray. As will be demonstrated in more detail in chapter 9, this rather deceptive characteristic of customary law is to a great extent a by-product of colonialism. In order for local customs to serve the needs of the colonialist powers, the latter have, according to Mertz (1994b), translated, tamed and altered the local customs (for discussion on colonialism and customary law, see chapter 9, section 3).

Although it is argued in this chapter that a proper *sui generis* approach towards the protection of traditional knowledge should be based on customary law, simultaneously it must also be acknowledged that it is going to be very difficult to define customary law as a separate legal category not frozen in time and space. Instead, the potential of local norms and practices lies in the fact that those local legal frameworks are constantly changing. It is important to accept the interrelationship between formal and informal law; official state law and unofficial customary law; and national and local law in order to fully appreciate the value of the 'local' (Nyamu-Musembi, 2002). This approach is based on legal anthropologists' understanding of how local norms operate in the field. For example, Falk Moore (2000) argues that any 'social field' (e.g. a 'local' community) has the capacity to develop its own sphere of

local norms and practices that can govern the conduct of the people living in this social field, but at the same time the rules and decisions from a surrounding and usually larger social field can permeate the norms of the local social field⁹⁷. The anthropologists von Benda-Beckmann *et al.* argue that this process of other legal norms (usually more formal and state law) penetrating local law should be recognised as “*a reciprocal interaction between global and local forces which does not essentialise either in terms of the ‘other’ but rather acknowledges that these initiatives may constrain local initiatives, while at the same time acknowledging that these initiatives may appropriate and transform the global for its own needs*” (2005: 20).

In other words, defining customary law as being in contradiction to other more formal sources of law would introduce the problem of how to identify authentic customary law and would lead to a largely essentialised approach towards customary law. Customary or local law should be seen as a symbiotic relationship between local and formal legal norms that influence and complement each other, but simultaneously are also in tension with each other (Nyamu-Musembi, 2002). Borrows (2002) argues that it is precisely this ambivalence between difference and similarity that needs to be addressed in a *sui generis* approach to interpreting indigenous peoples’ rights.

It is particularly pertinent to look for similarities between formal and customary law when trying to avoid essentialising customary law. Wastell (2001) argues that the debate about legal pluralism and the push for recognising customary law as an alternative source of law poses a challenge to the survival of customary law itself because the recognition of these alternative sources of law is dependent upon the judgement of how ‘pure’ and ‘authentic’ these alternative sources are. Determining how alternative is customary law, is largely done by measuring “*the distance of these alternative practices from the practices of state law*” (Wastell, 2001: 189). This distance is presumed on the basis of, first, how these alternative sources pose a challenge to state law’s monopoly and, second, how informal law itself is under threat of assimilation by formal law. Wastell laments the fact that through this process

⁹⁷ The contributions in von-Benda Beckmann’s *et al.* (2005) edited volume *mobile people, mobile law* discuss the chains of interaction between transnational, national and local actors in legal processes across different societies.

custom is not only referred to, but also defined as something that is under constant threat of being transformed and dominated by formal law. While legal pluralists argue for a greater recognition of alternative sources of law, Wastell points out that they portray the relationship between formal and customary law as one of dialectic opposition and as such they make the recognition of alternative legalities more difficult because formal law remains for them the ultimate measure against which alternative systems are evaluated.

Furthermore, both Riles (1993) and Wastell (2001) argue that essentialism creates hierarchies. The whole idea of essentialising units, in the sense of portraying them as bounded and discrete entities and in contradiction to other bounded entities, serves the purpose of judging which one is better or worse, more or less valuable, dominating or victim of domination. It is true that the historical relationship between formal and informal law has been skewed to the disadvantage of informal law and its custodians. Nevertheless, as is argued by Borrows (2002), any attempt to recover indigenous law can only be successful when the *sui generis* doctrine expresses the confidence that there are similarities between the two, at first sight opposing, legal systems.

4.2 Similarities between Customary Law and Formal Law

In his book, *the future of tradition: customary law, common law and legal pluralism*, Sheleff (2000) dedicates a chapter to the nature of customary law and in particular to the role of custom in any legal system, including – specifically - common law systems. Sheleff (2000) argues that custom is an important source of law for all legal systems. He illustrates the significance of custom in modern legal systems (mostly common law systems⁹⁸) by, first, pointing out that the historical development of

⁹⁸ There is a difference between civil law and common law in terms of sources, concepts and style. In the case of sources civil law gives priority to doctrine over jurisprudence while in common law priority is given to jurisprudence over doctrine; in civil law jurisprudence is only a secondary source of law explanation, while in common law jurisprudence sets out a new specific rule to a new set of facts. In the case of concepts the civil law doctrine's function is to provide both the practice and courts with a guide to solution of particular cases in the future, while the common law doctrine's encourages to distinguish between cases and to extract from these specific rules. In the case of style civil law focuses on legal principles – application of these involves some induction from the existing case law, while common law focuses on fact patterns. While civil law principles, frozen into codes and often rigorous doctrines, are imposed on courts, most common law rules can be changed from time to time, subject to the doctrine of *stare decicis* (or 'reason of authority', meaning lower courts must follow the decision of the higher courts). Although, at first sight, it seems that common law can address changing customs, in reality common law judges are sometimes very reluctant to change a rule. Civil law jurisdictions, on the other hand, are indeed more rigorous and offer less scope for flexibility. Nevertheless there are

common law has its roots in custom and, second, by arguing that from a jurisprudential perspective the nature of rules can also be found in systems that have been neither enacted by statute nor pronounced as precedent by the judiciary.

4.2.1 Historical Developments

Sheleff argues that there is a historical tradition of placing custom at the heart of common law. Two characteristics of the common law system allow for a comparison between common law and customary law. First, in the common law system, the judge is an important source in the development of legal norms and his judgment is largely based on examining and evaluating the customary practices of the realm in which the judge presides. Second, in the common law system the judicial precedent is a recognised component of the legal system and an essential factor in the decision to grant legal recognition to the role of custom. Judges were and still are supposed to act in the interest of the people, meaning the judge must consider the sentiments of the people when seeking justice. Or in other words, the standards and criteria used by the judge must be acceptable to the community. The source of custom in common law can be traced back to the King's court that decided on the validity of a custom that was common to all the people residing in the territory, in contrast to the local customs of a smaller area.

many examples where civil law jurisdictions have made major legal changes after consultation with highly profiled legal scholars. In this sense, civil law is less rigorous and inflexible than it is sometimes suggested. Furthermore, French civil law, for example is not only based on the 'revolutionary Napoleonic Code', but also reflects pre-existing customary law (which existed prior to the Revolution) of France's northern provinces. Finally, some of the mixed jurisdictions (mix of common law and civil law) such as South Africa, and also Scotland, received Roman law over a considerable period of time without ever adopting a code. Nevertheless, the issues that are addressed in this section will be easier to apply in a common law systems (and mixed jurisdictions like Namibia) than in civil law systems. However, the principle that law should be more guided by rules and norms that guide people in everyday life is part of a wider movement which consists of sociolegal scholars (both from common law and civil law systems) who argue for the need for law to be attuned to social reality (see section 3 and 4.2.2. of this chapter) With regard to the case study of this thesis, South Africa and Namibia are both mixed jurisdictions whose legal system reflects elements of civil and common law as well as African tribal customary law. The civil law is a heritage of 'Roman-Dutch Law', brought to the Cape by the first Dutch settlers in 1652. In the new Republic of South Africa, where South African legislation and precedents are lacking, Roman-Dutch and English sources are given approximately equal weighting. Customary law must be applied where applicable, subject to the Constitution and any relevant legislation. Roman-Dutch Law was made applicable in what is now the republic of Namibia when that territory was taken over by South Africa after World War I and has, since attaining independence in 1990, been part of Namibia's mixed (Roman-Dutch, common and tribal law) jurisdiction.

However, while it is pertinent that custom lies at the heart of common law, just as it does for customary law, common law itself has, in the course of history, started to ignore the validity of custom for two reasons. First, common law wanted to distance itself from the habits of 'tribal' people who were perceived as 'primitive'. Second, common law also started to propagate a positivistic doctrine of jurisprudence (see e.g. section 2.2 of this chapter). This resulted not only in disregarding custom as the source of common law, but it has also changed the way custom was perceived in various parts of the British Commonwealth. The customs of indigenous peoples were no longer accepted on their own terms, but defined within a positivistic spectrum. Customs of indigenous peoples became associated with habits of immortal usage. From then onwards, common law judges only accepted custom as law if its origins were unknown. In other words, custom would only be recognised if it had a long-standing usage, and once recognised, it could not be changed. This approach ignored the fact that 'tribal' societies' customary laws also change. Nevertheless, from the moment common law had become firmly embedded in a positivistic jurisprudential framework, custom was perceived as static, even though any type of law, including customary law, changes.

4.2.2 Sociolegal Jurisprudence

According to Sheleff (2000), there are several theoretical perspectives in jurisprudence that do not emphasise in law a judicial precedent, but argue that law consists of the rules and norms that guide people in their everyday life. As mentioned earlier (see section 3), sociolegal scholars have always argued for the need for law to be attuned to social reality. People seek to enforce their rights in terms of those customary practices and patterns of behaviour that have developed in response to similar kinds of problems in the past; Ehrlich (1975 in Sheleff, 2000: 86) calls this 'living law'. Similarly, theorists of the Scandinavian school of legal realism have suggested that legal rules are not markedly different from general social norms. They argue that law should give formal recognition to such general social norms, as these are in fact the customs of the people.

In this context, Sheleff argues, customary law becomes one aspect of a larger movement that seeks flexibility in both the procedural and substantive aspects of law. Customary law, then, should be seen as part of a larger jurisprudential reality, viz. as

an expression of law making that seeks to retain a close link between obligatory norms and popular sentiments attuned to changing circumstances. Customary law, defined as a fluid system that allows particular circumstances or norms to be taken into consideration, then becomes very similar to past definitions of common law. The perception of custom can then change from being a problematic aspect of 'tribal' life into being an integral aspect of a legal system that is accepted by its citizenry, because it is embedded as a living part of their culture.

In this sense, custom emerges from the people, while the task of the judge, chief or headman is to respect the feelings and wishes of the community. These wishes of the community will then determine the norms that the judge or chief will apply in the future when similar situations occur. In this sense, applying custom or judicial precedent is not that different. However, so argues Sheleff, only a few writers have drawn attention to this overlap in approach of common law and the structure of customary law⁹⁹. Zion (1988), for example, has explicitly highlighted the similarities between common law and customary law when examining North American Indian law¹⁰⁰. Bennett (1985 in Sheleff, 1999) has also written persuasively of the commonalities of custom and law in Southern Africa. Bennett (1985) stresses the interconnection between law and custom and argues that the so-called conflict between custom and law is very similar to the conflict between, for example, national and international law.

⁹⁹ Wright goes even one step further and argues that indigenous cultures played an influential role in the constitutional development of the United States: "[i]t can be argued, based on a serious reappraisal of the historical evidence, that the original Euro-American ideals of democracy, equality, liberty, civil rights, local autonomy and federal forms of government were at least partially borrowed from indigenous peoples in the Americas" (2001: 38).

¹⁰⁰ Zion writes: "The discussion is concerned with the Indians of North America [...] and the common law systems of the United States and Canada. Since these two nations largely follow the common law tradition, it makes sense to speak of Indian law in terms of that method. This method of analysis is also useful in the international law context because many of its principles are based upon an international common law. This is not a matter of yet another imposition of alien forms of analysis on Indian cultures because the analysis is aimed at the non-Indian who needs to be convinced that Indians indeed have their own laws. The comparison between Anglo-American common law and Indian common law demonstrates that Indian law has foundations which are understandable to the non-Indian. For the purpose of a rational discussion of Indian customary law, it is best to use the term Indian Common Law. Indian government, law and daily life are founded upon long-standing and strong customs, and since the stated rationale for the English Common Law is that it is a product of custom, that approach may be used for Indian law as well. Indians have every right to assert that their law stands on the same footing as the laws of the United States and Canada. It is unfortunate that the term 'custom' implies something that is somehow less or of a lower degree than 'law'. There are connotations that a 'custom' is somehow outside the 'law' of government, which is powerful and binding. This is an ethnocentric view" (Zion, 1988: 123-124 in Sheleff, 1999:14-15).

Borrows (2002), in his book on the resurgence of indigenous law in Canada, demonstrates that some Canadian courts have recognised that Canadian law when applied to First Nations may use both Aboriginal and common law sources. For example, in the first year of Canada's Confederation, the Quebec Superior Court affirmed the existence of the Cree law on the Prairies and recognised it as being part of the common law¹⁰¹. Even though, at times, indigenous customs and conventions have been incorporated into Canadian law, in the majority of the cases the Canadian Courts have favoured non-Aboriginal law over Aboriginal law. Borrows (2002) gives the example of the case *Sheldon v. Ramsay* in 1852, famous for its *obiter dicta* that common law is not part savage and part civilised. This case portrays that, in general, Aboriginal or customary law is not applied because it is perceived as being inferior to and incompatible with common law as the former is labelled as 'personal', 'usufructuary' and 'dependent' on the goodwill of a sovereign. Nevertheless, there are examples wherein the Canadian courts have argued that the pre-existing rights of First Nations can co-exist alongside Western legal principles¹⁰²; in other words, the task for the courts is to find more appropriate terminology to describe indigenous laws so that they are no longer dismissed as being primitive and bounded in time and space (Borrows, 2002).

¹⁰¹ Justice Monk wrote the following about his decision: "*Will it be contended that the territorial rights, political organisation such as it was, or the laws and usages of Indian tribes were abrogated – that they ceased to exist when these two European nations began to trade with aboriginal occupants? In my opinion it is beyond controversy that they did not – that so far from being abolished, they were left in full force, and were not even modified in the slightest degree [...]*" (quoted in Borrows, 2002: 6).

¹⁰² Borrows (2002) gives an example of another important case; the Stellaquo adoption laws were recognised by the common law and by the constitution of Canada in *Casimel v. Insurance Corporation of British Columbia* (B.C.C.A.), in 1994. The Court held "*that the status conferred by Aboriginal customary adoption will be recognised by the courts for the purposes of application of the principle of the common law and the provisions of statute law to the persons whose status is established by customary adoption*" (quoted in Borrows, 2002: 6-7). Borrows also mentions a parallel line of cases that have incorporated Aboriginal law into Canadian law, for example: *Delgamuukw v. British Columbia* in 1997 concerning land; *R. v. Sioui* in 1990 concerning governance; *R. v. Gladstone* in 1996 concerning trade; and *R. v. Bear's Shin Bone* in 1899 concerning marriage.

4.2.3 Challenges

To recapitulate, even though it has been proposed by some scholars that the best way forward for protecting traditional knowledge is by developing a *sui generis* legal framework that is largely based on customary law, it has been argued in this chapter that defining the body of customary laws is no simple matter. Most scholars in the current debate about traditional knowledge and intellectual property rights have barely engaged with the nature of customary law, let alone analysed customary law within a historical context. Yet it is obvious from the above analysis that the manner in which customary law is perceived is crucial for the possibility of creating a framework that recognises indigenous peoples' participation rights when making decisions on protecting and managing traditional knowledge. While it may sound good in principle to propose a protective framework based on legal pluralism, in reality the development of such a framework will be highly challenging because of the problems and complexities in defining and describing customs. Custom and customary law are perceived as some sort of relic of backward people, or as a habit with a long-standing usage that is static and therefore difficult to change, or as something that is completely the opposite of formal law and as such may not be acceptable by the legal and societal standards as set out by the dominant culture.

However, these challenges do not undermine the importance of drawing upon indigenous legal sources - more often and more explicitly - when deciding upon indigenous issues, including the future of traditional knowledge. Mechanisms need to be identified that would allow for a greater recognition of indigenous peoples' rights and legal systems. So far, it has been argued in this chapter that portraying customary law as the opposite of common law only aggravates the tension between the two. Instead, attention should shift to identifying a concept that would allow indigenous law to function alongside common law. As mentioned before in this chapter and as confirmed by Borrows (2002), the concept of *sui generis* can only work when equal weight is given to each perspective; this equity is the prerequisite to achieve true conciliation between two cultures. A *sui generis* approach should be based on recognising the difference of indigenous peoples without essentialising indigenous peoples' identity, whilst simultaneously promoting cooperation and unity between indigenous and non-indigenous peoples. The ultimate question that then needs to be

addressed is twofold: where/how to discover non-essentialised indigenous law and how to incorporate indigenous law into common law? These two questions will be addressed in the next section.

5 *Discovering Indigenous Law*

The work of Borrows (2002) and his attempt to rediscover cases in which indigenous law was recognised by and incorporated in common law is inspirational and presents a vision of a new political and legal order for indigenous peoples. While Borrows focuses specifically on incorporating indigenous law and legal knowledges into existing legal structures in Canada, some of the concepts that he introduces are valuable and insightful for the central debate in this chapter, viz. what is customary law, where and how can it be found and how can it be incorporated in a *sui generis* framework. Borrows' ideas are used here as a focal point for discussing an alternative approach towards the development of a *sui generis* protection mechanism for traditional knowledge. Although the main focus of Borrows' work is on Canada, some of the concepts he has introduced are certainly valuable and recognisable within a wider context.

Borrows presents an epistemological and ontological paradigm about indigenous law that is very similar to the approach of sociolegal scholars and legal anthropologists (see section 3.1 of this chapter). According to Borrows, indigenous law originates in the political, economic, spiritual and social values of indigenous communities, which are expressed through the teachings and behaviour of knowledgeable and respected elders and individuals. These principles can be found in the stories, ceremonies and traditions of indigenous peoples. Or in short, stories express the law in indigenous communities, reveal the principles of order and disorder, and serve as a source of normative authority. This principle corresponds with the approach of some of the postmodern legal scholars who argue that the source of law can be found through observing local practices and listening to stories and explanations. When stories are used in the sense that they reveal the normative legal structure of a society or community, they are very similar to legal precedent in common law. Both common law precedents and indigenous stories record the patterns of past disputes and resolutions, which can then be used and analysed by people of wisdom as

authoritative sources of knowledge that reveal the underlying principles and values of the community.

However, stories and common law precedents differ in form and content in the way they are recorded and applied. This difference has obscured their similarities and is one of the main reasons why customary law is perceived as different and often inferior to common law. Indigenous peoples do not record their stories in a written form like the recording of cases in common law. Norms and values are passed on through oral transmission that is, contrary perhaps to popular thought, not dependent on an authentic first telling and uncorrupted by subsequent development. An oral system of law is based on reinterpretations of traditions in order to meet new and contemporary needs. Borrows comments that the fluidity of indigenous peoples' oral cultures is arguably greater than the fluidity of common law.

It could be argued that norms and values could get lost when stories change from one telling to the other. However, more importantly, the different versions of the stories show that indigenous peoples' legal systems recognise the principle that context is always changing, and therefore requires a constant reinterpretation of many of the underlying values and norms. In other words, contrary to the portrayal of customary law in the literature and in jurisprudence as static, the fluidity of indigenous peoples' stories reveals that indigenous communities value contextual meanings and are capable of adapting these according to the needs of community members which can change over time.

However, the tendency persists to characterise customary law as rigid, static and traditional in contrast to common law which is seen as fluid, changing and adaptable. The perseverance of this dichotomised thinking can be attributed, according to Borrows, to the fact that the social function of law is still largely underestimated or even overlooked in the common law tradition which remains embedded in a positivistic framework. Formal law has become too detached from its cultural context and it is argued in this chapter that there is a potential danger that something similar will happen to customary law if it is defined in opposition to formal law. While it is not hard to acknowledge that there are indeed, to use the words of Borrows, irreconcilable distinctions between customary law and common law given their

different history and social organisation, it can be argued that a bridge can be built between the two legal systems by paying more attention to the cultural aspects and context of law.

The concept that law has to go back to its original roots is a logical continuation of one of the core messages of this thesis, viz. that the solution to the problem of appropriating traditional knowledge should be more contextualised and localised. Based on the author's own fieldwork observations (see chapter 7 and intermezzo 1 and Appendix 2), and similar findings reported by Greene (2002; 2004) from his research in Peru, protecting traditional knowledge is more of a local problem - and specifically one that is linked to territorial and tenure rights (see chapter 9) - than is currently portrayed in some of the literature on traditional knowledge and intellectual property rights. Some leaders of indigenous peoples (often the new elites) have learned how to present their claims to a global audience in a discourse that is recognisable by that audience, i.e. centring on human rights, self-determination rights and cultural rights. However, a more contextualised approach, through engaging with indigenous peoples in their own settings, can reveal that, contrary to the legal literature and policy documents on the protection of traditional knowledge, an internationally framed formal legal solution is unlikely to solve the problems on the ground. Deconstructing the persistent prejudices about indigenous peoples' identity, knowledge, property and legal system, leads to the conclusion a local solution must be sought. In this respect, a *sui generis* approach means acknowledging that law must be sought in its local and cultural context.

Law making or setting legal boundaries also occur on the ground outside court settings or the UN. As argued by Borrows, communities, politicians, bureaucrats, development workers, NGOs and so forth, all interact with each other on an almost daily basis. Together they draw, erase and redraw legal boundaries to include and/or exclude certain peoples, institutions, ideas and concepts. These engagements are part of the living law and they produce their own forms of customary law and legal geography that are contextualised and grounded in reality, but that have so far been kept hidden or unexplored in the formal system of law. It is precisely these localised practices of law that need to become the focus of attention. It remains a challenge to find an appropriate methodology that allows access to oral traditions and community

knowledge, but this should not prevent the attempt to look for contemporary customary law. As will be explained in more detail in chapter 9, many indigenous peoples are getting more organised. Taking the Namibian context as an example, through conservancy boards, national park management boards, traditional authorities, tourist projects and other cooperation projects with other members of society, indigenous peoples can reveal some of their norms, values and customs with regards to resource and land use¹⁰³.

An interesting case in point is Suzman's (2000) account of the San in Omaheke¹⁰⁴, who he describes as 'impure' San in the sense that they have lost most of their hunting-gathering traditions because for generations they have eked out a living as farm or domestic workers for either white or Herero farmers. In his search for the identity of the Omaheke San, Suzman has collected stories of the Ju/'hoansi in the Omaheke region and has compared these stories with some of the findings of Biesele (1993) who has done research amongst the 'pure' (and more autonomous) Ju/'hoansi San in the Dobe/Nyae-Nyae areas. Biesele (1993) reaffirms the view that stories provide one of the principal means for expressing key issues that affects the San's lives and that although these folk-stories were passed on from one generation to another, the stories deal with the actualities and realities of social experience by constantly making sense of new things. Biesele argues that stories provided the means for the San to reflect upon new situations because narratives allowed some space or freedom to suspend or invert social norms which then allow for action to take place which would otherwise be unacceptable. Suzman's (2000) findings are particularly interesting; he comes to the conclusion that even though the San in the Omaheke have lost most of their traditions, stories and storytelling continue to provide the alternative paradigm through which the Ju/'hoansi express themselves about their social universe, albeit in a less prominent manner than for the Ju/'hoansi in the Dobe/Nyae Nyae area. Furthermore, Suzman notes that although the stories told by the Omaheke San retain most of the narrative and metaphoric devices of the stories told by the Dobe and Nyae

¹⁰³ This is not to argue that there are no problems with institutions like traditional authorities. These problems are discussed in chapter 9. Suffice it is to say in this context that, while these structures may be flawed, they still offer some glimpses of hope.

¹⁰⁴ In the Omaheke region in Namibia live mostly Ju/'hoansi San who for several generations have been living on white-owned commercial farms and former native reserves. For more details on this region, see Appendix 1.

Nyae San, the stories of the Omaheke San are, nevertheless, *“strongly oriented to the present circumstances of Ju/’hoansi life in the Omaheke”* (Suzman, 2000: 142).

It is interesting to note that Borrows (2002) claims, and this is also confirmed by Guenther (1999) for the San, that indigenous peoples’ legal tradition can be best found in the stories of a character known as the ‘trickster’. The trickster offers valuable insights into the norms and values of a particular community through his/her encounters and adventures. The trickster takes on different personae and in some cases even becomes an animal which makes it easier for him/her to escape the structures and cultural order of society. This allows the trickster to explore expanding legal boundaries when confronted with a new situation. According to Borrows, it is precisely *“the [t]rickster’s unique position [that] generates a language bridging Western and Aboriginal accounts of law and incorporating intersecting and oppositional cultural perspectives. [...] The [t]rickster’s incongruous entry into legal discourse permits us to view law from a perspective that falls outside the conventional structure of legal argument and exposes its hidden cultural (dis)order”* (2002: 57).

6 Conclusion

It has been argued in this chapter that defining customary law as being in opposition to other more formal sources of law results in the essentialisation of customary law. This is problematic for a number of reasons. First, it creates a hierarchy in which customary law is defined by being different from and inferior to modern or ‘Western’ law. Second, it makes customary law difficult to identify as it has somehow to be certified as ‘authentic’. Third, it potentially makes customary law less relevant because essentialised customary law reflects the issues of yesterday’s society and may not be able to address current and emerging issues facing indigenous groups, such as the commodification of knowledge.

These problems are not the only reason why this essentialised approach to customary law should be abandoned. The historical observation that prior to colonialism common law in the West was a ‘living law’ very much like customary law, highlights both the shortcomings and the moral flaws of the process of codification which has produced our view of national and international law as immutable. Any effort to write

down customary law can and should be informed by the evolving oral literary traditions of local communities, i.e. by story telling. However this effort should equally be informed by observations of the practice of national and international law as a living process. Customary law should be viewed as the relationship between local and formal legal norms that influence and complement each other, but simultaneously are, or can be, in tension with each other. As Sheleff's (2000) work has demonstrated, it seems that formal law has particular difficulties in dealing with the local and changeable because formal law will always try to translate complexities into understandable and manageable units.

To summarise, it has been argued in this chapter that a *sui generis* approach to protecting traditional knowledge must focus on discovering, precisely, the discourses that exist outside the legal settings such as courts and institutions of the United Nations. In order to find a 'solution' to the problem of protecting traditional knowledge that works in the local context it is important that scholars, development workers, NGOs and institutions like the UN 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 through a formal (i.e. Western) legal framework seems like an impossible task because, ultimately, it is less flexible and fluid than informal law. For customary law to work it has to be living law, and in order for it to find the space to 'live', Western law will have to find more flexibility in its practice. This highlights the importance of local scale, an issue that will be further explored in the next chapter when discussing territorial rights and native title claims.

Intermezzo 3 - Law and Leadership¹⁰⁵

“We want our representatives, we need somebody that can speak on our behalf, we need contact with the government” (San people in Tjaka, 11 August 2005)

To practice our culture we need a chief that is recognised by the government. Our culture is dying out while other tribes’ culture is still very much alive because their chiefs have been recognised by the government” (A San elder in Skoonheid, 8 August 2005).

Our community has some problems because our leaders are not recognised and it is the leaders who know the traditional rules and laws to [govern] the community. According to the Constitution all Namibians are equal so why not the San, we need freedom of speech, we need to be able to give out opinion...Other tribes’ chiefs cannot help the San because they do not know our rules and laws (Chief Langman, Skoonheid area, 8 August 2005).

The traditional laws as recognized or promoted by the Traditional Authority laws are different from the laws of the San; these laws fight with each other (Chief Sofia, Aminuis Korridor, 12 August 2005).

In the past the Traditional Authority did not exist, but I was already a chief; I was always called for a meeting if San people called me to assist with their life. My grandfather was already a chief ‘royal house blood’. My father he was German, Herero, Kung. Mother’s blood, San people call it ‘royal house’. Councilors are elected but the chief, although he is elected, he must have royal blood. The elections were paid for by WIMSA, 6 senior and 6 junior councilors were elected and the chief and secretary.

If people don’t come to you, then you cannot interfere with them as a traditional authority. How do you know, for example, how to punish someone who has stolen a

¹⁰⁵ Extracts from interviews.

chicken? Sometimes you have to look it up; Rules for Traditional Authority are written by the Department of Land and Resettlement.

I am not happy with the rules in that book. My rules (the San rules) and the rules in the book are not the same. For example traditional marriage is not recognized – you must get married in church or in the magistrate court. (Chief Arnold, Omatako, 28 August 2004)

In the old days the San had different sort of leadership structure, besides a leader was a leader it was somebody with respect, now everybody talks about rights and that is where we run into problems. Talking about rights does not give you respect and that is what is needed for a good leader (Chief Sofia, Aminuis Korridor, 12 August).

My desire, as a leader of the San communities, is to understand what is going on at government level. If you don't understand that, how can you serve you community? It doesn't help if we send people who are not capable to represent us. The government has sent people, like commissar [...], who speaks Tswana and English. Our people don't speak these languages. He is trying to clarify what he can't clarify. We need someone here in our San community who can translate, who has a direct link to the office of the prime minister and the government. If we have to unite as a nation, which the government recognizes as the oldest nation, then we need to be connected. (Petrus Vaalbooi, Andriesvale, 3 October 2004)

Chapter 9 – Knowledge in Context¹⁰⁶

The Question of Territorial Rights

1 Introduction

So far, it has been argued in this thesis, and specifically in chapter 5, that indigenous peoples must seek protection over their knowledge and culture so that they can assert their own cultural views and self-determination, free from dominating influences from outside. In this sense, claiming rights over culture and knowledge is a socio-economic and political act for indigenous peoples. This act includes, amongst others, questioning the invasion of their territories, the disintegration of their identities, and the historical process of subordination and their current position as an underclass. In chapter 5, it was concluded that it is very doubtful whether intellectual property rights can be a flexible enough instrument to be of much use in supporting indigenous peoples with these claims. The existing intellectual property rights regime is not, and is unlikely to become, an institution that is sympathetic towards the claims and needs of indigenous peoples. Indigenous peoples need a more flexible framework for protecting their knowledge. This chapter focuses on the role of the state as a key actor in the indigenous peoples' struggle to restore their rights over land, resources and knowledge. Ultimately, it is the nation state that needs to sign and implement the international conventions and declarations that recognise indigenous peoples' rights.

When examining whether traditional knowledge can be protected with intellectual property rights, it is not uncommon in the literature to make an explicit link between rights over land and natural resources and rights over knowledge (Posey and Dutfield, 1996; Simpson, 1997; Greene, 2002; 2004; Tucker, 2004; Berman, 2004; Riley, 2004b; Solomon, 2004; Gibson, 2005). Indigenous peoples regard knowledge as something that is closely tied to land; traditional knowledge is not just part of the body of knowledge, it also encapsulates spiritual experience and relationship with

¹⁰⁶ The main focus in this chapter is on the San in Namibia. Given the fact that the fieldwork was limited by time and budget constraints, only 6 months were spent in the field of which 5 months were spent in Namibia. At the time of the fieldwork the San in Botswana were still heavily involved in the eviction trial (San have been evicted from their ancestral land in the Central Kalahari Game Reserve, only recently they have won this court case and a few hundred have returned to the park) which was a highly politicised court case and therefore (mainly for ethical reasons) inappropriate to include in the research. The research in South Africa with the †Khomani San was focused solely on the Hoodia benefit sharing. The †Khomani San represented all the other San in the negotiations.

land (Barsh, 1999; McGregor, 2004). Agreements¹⁰⁷ drawn up by indigenous peoples themselves highlight that rights to land, traditional institutions, cultural practices and intellectual property rights are inseparable and interrelated, a statement that has also been recognised by some of the UN institutions¹⁰⁸. Not only are indigenous peoples struggling to get their legal rights over land and resources recognised, they also want to have the freedom to make their own decisions about how to use and manage natural and cultural resources (Tucker, 2004). One of the major stumbling blocks in indigenous peoples' quest for recognition of their user and ownership rights over land, resources and knowledge is the fact that throughout colonial history their territory and organisational structure has been perceived as, respectively, *terra nullius* and *res nullius*.

Without a definable and defensible territory, the concepts of indigeneity, the enactment of culture and the maintenance of traditional knowledge can easily be undermined or eroded (Greene, 2002). As a result of colonial and post-colonial expropriation and displacement, indigenous peoples' knowledge systems and cultures are in danger of becoming extinct. The fact is that many forms of indigenous practice, such as harvesting medicinal plants, are intrinsically linked not only to a specific land area but also to a traditional land tenure¹⁰⁹ system of open access (Tucker, 2004). Changes in land tenure systems, like imposing private ownership, will limit access to resources that are not only intrinsically part of indigenous peoples' knowledge base and culture but are often also part of their livelihood strategy and survival skills (i.e. gathering food, medicine, and natural resources that underpin their material culture). Having access to land and being able to exercise rights over it are essential elements in restoring and maintaining indigenous peoples' identity (Keal, 2003).

¹⁰⁷ For example: The Charter of the Indigenous-Tribal Peoples of the Tropical Forests, The Indigenous Peoples' Earth Charter, The Declaration of Principles of the World Council of Indigenous Peoples. More details of these accords can be found in Tucker (2004): 130-131 and Posey and Dutfield (1996): 190-198 and Appendix 6.

¹⁰⁸ For example: Declaration on the Rights of Indigenous Peoples, the COICA-UNDP Regional Meeting on Intellectual Property Rights and Biodiversity, the UNDP Consultation on the Protection and Conservation of Indigenous Knowledge and the International Labour Organisation's Convention 169 on Indigenous and Tribal Peoples. More details of these agreements can be found in Venne, 1998; Swepston, 2003; Posey, 2004).

¹⁰⁹ "Land tenure systems are definitions about rights to land and resources; they encompass concepts and rules (formal and informal) about rights and duties related to land use and access" (Tucker, 2004: 127).

The importance of territorial rights draws attention to the role of the state as the most powerful actor and the ultimate arbitrator of local territorial disputes. By looking at territorial rights as a proxy for the wider struggle to recover from colonial subordination, the debate on the protection of indigenous knowledge can be seen (a) in a wider context of indigenous peoples' needs and (b) in a more relevant setting in terms of their day to day struggle for their livelihoods and cultural survival.

At the end of the day, many indigenous peoples face a more acute threat of encroachment on their territories and livelihoods from more powerful groups in society than from the unauthorised use of their knowledge for corporate pharmaceutical research. The problems of bioprospecting are important but in terms of their overall impacts on the ground, they should not be seen in isolation from other and perhaps more pressing threats to indigenous peoples.

It is argued in this chapter that the protection mechanisms that are currently proposed both internationally (e.g. WIPO, CBD, TRIPS, UNESCO) and nationally (e.g. national protection laws) are not unimportant, but these rather abstract and formal legal mechanisms lack the flexibility and fluidity to deal with the complex history and social realities that some indigenous peoples face on the ground. As will be discussed towards the end of this chapter, this argument encourages a review of the current campaigns of indigenous peoples for recognition which are increasingly based on making use of an international political platform to influence national as well as international decision makers. However, as will be demonstrated in this chapter, the international platform forces some groups of indigenous peoples to engage with a discourse that does not necessarily reflect the 'social realities' as they are experienced by indigenous peoples on the ground. Therefore, it is suggested that for some indigenous peoples a closer attention to local campaigns and local strategies for recognition of their rights over land, resources and knowledge might be more appropriate.

In order to address all these issues this chapter will be structured as follows. Section 2 describes the colonial history of land enclosure. It details how the colonial legacy of the institutions of the Namibian state has limited the state's effectiveness in dealing with post-colonial land reform. Specific attention is drawn to the consequences this

has had for the San. The San were more dispossessed through colonial enclosure than any other African group, yet post-colonial land reform (well-meaning though it was) has largely failed to support them in their quest for restoration of their rights and livelihoods. Section 3 looks more closely at the reasons behind this failure of the state. It investigates the construction of customary law and traditional authority in the colonial and post-colonial era and demonstrates how this evolving institution reflects the dynamics of power relations on the ground. Section 4 examines on what basis the San can attempt to claim back their land, and explores three different strategies; native title claims, generalist rights claims and grass-roots mobilisations.

2 *The Territorial Rights of the San in Post-Independence Namibia*

2.1 The Colonial Legacy of Namibia's Land Reform Policies

2.1.1 Colonial Land Enclosure

As illustrated in chapter 5 (section 4) and chapter 8 (section 2.2), political thinkers such as Locke provided intellectual and ideological justification for colonialisng indigenous peoples and expropriating their territories (Keal, 2003; Scott, 1997). However this expropriation also had a European precedent. The plight of black Africans in colonial times and the contemporary plight of indigenous peoples can be traced back to the land enclosure movement beginning in Western Europe about half a millennium ago. During this period, vast areas of common grazing land were enclosed by landlords and made into private property. Land previously used by villagers on a shared basis became private when landlords erected fences and secured title deeds through the courts. During the second enclosure movement in England, between 1700 and 1845, about 7 million acres of land were enclosed, followed shortly by the General Enclosure Act (Olson, 1990). The new system of free proprietorship released landlords from their traditional duties of stewardship and manorial obligation. Access to land was no longer an entitlement based on usufruct rights. By 1850 agriculture in England had become a capitalist enterprise, mediated through the market. People needing to use land had to rent or buy it from a landowner.

A somewhat similar type of enclosure took place during the colonial period when large parts of Namibia and other African countries with a significant European settler

population were transferred into the hands of individual white settlers. This enforced appropriation of what was typically the best quality land, resulted in many evictions and caused massive social, economic and cultural disruptions for the local African population. Ownership of land and resources by black people was severely restricted; they were allowed access only to communal areas. Through a system of communal land tenure ('native reserves') every household had access to land, but the land allotted was (often deliberately) so small that at least one member of the household had to engage in wage labour. At the same time colonial employers argued that they could pay a wage below the value of labour because the workers and their dependents lived off the land (Werner, 1993). The colonialists regarded the land under the control of Africans as *res nullius* because, so they argued, Africans were incapable of managing it under private ownership.

Just as elsewhere in Southern Africa, land reform in Namibia calls for a redistribution of land. Land redistribution is crucial for making a living in developing economies, for commercial or subsistence farming and grazing. Access to rural land is a major source of affluence. In Namibia a major cause of poverty is the continuing unequal access to land (Smit, 2002). The appropriation of land in the colonial period remains the basis for this inequitable access to land¹¹⁰ (Widlok, 2002).

After independence in 1989, Namibia's state formation was characterised by a constitutional framework based on liberal democratic thinking that embraced concepts of human rights and the rule of law (Erasmus, 2002). The Namibian approach, contrary to the 'truth and reconciliation' policy in South Africa¹¹¹, assumed that the atrocities of colonialism (and apartheid) could best be dealt with by building a unified nation. In Namibia, it was hoped that the Constitution would prevent another 'African

¹¹⁰ While Adolf Luderitz purchased land from the Nama for the first German settlement, the vast majority of the native land in Namibia was acquired through lease, treaties, war and genocide; the German colonial forces exterminated between 70 and 80 per cent of the Herero and about 50 per cent of the Nama during the Herero and Nama war of resistance in 1904 (Werner, 1993: 138). Especially, the records of the agreements and the wars give evidence that the lands in Namibia were not *terra nullius*, i.e. vacant lands that automatically became property of their discoverers. The acquisition of the Namibian land was in all likelihood legal under German, British and South African law of that time. But no modern authority would now perceive these seizures as justified (Harring, 1996). For an overview of the history of land dispossession in Namibia, see Werner (1993); for the specific story of land dispossession of the San, see Gordon and Douglas (2000).

¹¹¹ South Africa adopted the Truth and Reconciliation Commission in the belief that concentrating on 'truth', 'forgiveness', and 'reconciliation' could counter the danger of new inter-ethnic conflicts breaking out after the abolition of the apartheid regime (Erasmus, 2002).

disaster' and instead bring stability and progress. In this respect it could be judged to have been somewhat successful. However, with regard to land reform, the literature is agreed that the Constitution was less successful (Daniels, 2003; Haring, 1996, 2002; Suzman, 2002). The main difficulties were related to the fate of communal land, the taboo of ethnic identity in the land rights debate and the dominant role of the Western model of private ownership in land reform. These are all aspects that are of particular relevance to the San, as will be discussed below.

2.1.2 Land Reform in Communal Areas

One of the key objectives of the Namibian independence struggle was to return the land to the people who had been dispossessed during colonialism. However, according to Daniels (2003), the Constitution perpetuated colonialist policy by explicitly stating that land, water, and natural resources belong to the state if they are not otherwise lawfully (privately) owned (Articles 100 and 124). In other words, communal land became state property. This was underscored by Prime Minister Hage Geingob's statement that "*people in the communal lands have no acknowledged right, independent of the will of the State, to live and farm in the Communal Areas*" (cited in Haring, 1996: 467). This means that the vast majority of Namibians have neither ownership nor tenure security of land, even if they have been living on it for generations.

According to Haring (2002), the Constitution facilitates the continuation of German and South African racist colonial practices. While 70 percent of blacks live in communal areas, hardly any whites do. It is impossible for most blacks to acquire land from whites because they lack the means to buy it. The effect is that poor blacks living on communal lands can move only to other communal lands. This has particular repercussions for San communities living in communal areas. Because of their vulnerable social structure and poverty, communal areas used by San communities are under the threat of land grabbing by stronger and better organized groups (Daniels, 2003). When San complain to the Ministry of Land Resettlement and Rehabilitation about the fencing of communal land by other groups, the official reply is that Namibia needs to prioritise the productive use of land so that it not only feeds small groups of rural dwellers such as San (former) hunter-gatherers, but also the nation at large (Widlok, 2001). Thus, the Namibian government is responsive to

stronger ethnic groups, an ironic continuation of colonial rule through powerful tribal chieftains.

Even in areas where San are allocated communal land, such as resettlement farms, they are still frequently dispossessed because the state does not provide them adequate protection against subsequent encroachment by more powerful groups. As a result, San have argued that land allocated to them should be firmly under their control. The San's desire for a stronger formal protection of their land is motivated in part by the San's awareness that others perceive land that the San use to be open and 'unproductive'. This echoes the colonial practices of *terra nullius* and *res nullius*.¹¹²

2.1.3 Land Reform and Historic Land Claims Linked to Ethnic Identity

The situation for the San is particularly difficult because they have lost more ancestral land than any other group yet the post-colonial government refutes the return of any ancestral land on moral grounds (Widlok, 2002). The government argues that nation building is important to counter ethnic segregation and that it has a moral responsibility to cater for all the members of the population without consideration of ethnic identity. The Namibian government's stance reflects Africa's 'obsession' with nation building which is fed by a well-intended drive to homogenise socio-cultural differences among ethnic groups (Okafar, 2000: 513). The slogan, 'kill the tribe to build the nation', exemplifies the policy of banning ethnicity and was used by FRELIMO, the ruling party in Mozambique in the 1970s. The attempts by African leaders to form cohesive nations out of culturally heterogeneous populations has been inspired by the apparent shape of European-style nation states which combine a tight territorial demarcation with a more monocultural sense of nationhood¹¹³.

Indeed there are no specific provisions in the Constitution that protect the rights of indigenous peoples or minorities, and Namibia is not a signatory to international conventions recognizing the rights of indigenous peoples (Daniels, 2003). Both the Constitution and the urban elite are biased against conceding group rights on the basis of ethnicity. As a result the San are not recognized and there are no government-led

¹¹² See Martin and Vermeulen (2005) for a historical analysis of these practices.

¹¹³ As discussed in chapter 8 section 2.2, this popular, but not necessarily accurate, view of the nation state is also reflected in international law.

affirmative action plans on their behalf (Widlok, 2001)¹¹⁴. The government defines indigeneity by reference to historic European colonialism. Accordingly, almost everyone born in Africa of an African bloodline is indigenous. Furthermore, the Traditional Authorities Act defines all Namibian traditional communities as indigenous. This definition of indigeneity is consistent with the global practice for defining it largely as a product of Western colonialism (see chapter 2, section 4.2 for more details). While colonisation is a necessary factor in understanding the current conditions of indigenous peoples, it is not a sufficient one (see Coates, 2004). For example, it allows the South African Boers to seek indigenous status by virtue of having been colonised by the British. In addition to the San's inability to pursue land claims on the basis of indigeneity, their scope for pursuing such claims on the basis of ancestral inhabitation is equally limited. The 1991 National Land Conference reported unequivocally that the restitution of ancestral land claims by any group or individual would not be entertained in Namibia. This decision was later incorporated in the National Land Policy of 1998. For most San, existing rights to land are therefore *de facto* rights, not guaranteed by customary law. This is most evident on commercial farms, where rights of San workers to residence are contingent on their employment by a farm owner, or by a farmer granting squatting rights. Whereas the majority of rural Namibians can claim at least partial tenure rights in terms of state or customary law, most San (outside the Tsumkwe district) cannot claim such rights.

2.1.4 Limits of the Individual Land Rights Model

The rules and norms of Western law not only influenced African statecraft, they became fundamental building blocks of African nations. Namibia's failure to adequately address the degraded position of the San is clearly not attributable solely to unwillingness on the part of its government. It represents a continuation of norms that have formed an essential part of international law making since the 18th Century. Accordingly, only those people with a similar level of social organisation and agricultural or pastoral practices as those found in European states are entitled to have

¹¹⁴ When the Ministry of Lands, Resettlement and Rehabilitation came into existence in 1990 with the aim to alleviate poverty and improve access to scarce resources (including land), the San were prioritised as one of the key beneficiaries of land reform on the basis of their poverty (not ethnic identity). However, pro-poor resettlement schemes have failed for a number of reasons. The lack of participation of the San in the implementation policy has been identified as one of the main reasons (Harring and Odendaal, 2002).

rights over land. Other people, e.g. hunter-gatherers, who are not 'modern,' have their occupation and use of land nullified. This view states that people like the San do not use land as prescribed in international law, an argument which was used as a justification for colonial powers to take control of their territory (Dodds, 1998). Namibia's post-colonial government has effectively continued this practice.

During colonialism, land tenure security could only be achieved through individual ownership rights. Allocating private rights attached a market value to land, which facilitated its 'development'. In the post-independence period it is still believed that property individualisation contributes to the development process (Bruce, 2000). However, strong doubts have been registered about enforced individualisation in the African context because it is based on Euro-American economic and technocratic views of land (Smit, 2002). The assumption that narrowly defined individual property rights guarantee more secure land rights and more development¹¹⁵ has been criticised (Firmin-Sellers and Sellers, 1999; Platteau, 1996; Bruce, 2000). Economists have argued that a market for land does not exist and anthropologists have criticised individualisation for ignoring the complexities of customary tenure, including that it provides for multiple users to hold rights to a single plot.

Based on the above it is apparent that there is a need for a different approach to land reform. It is unlikely that simply redistributing property (similar to the model used in Zimbabwe) will result in an equitable allocation of land. Dividing the land into small parcels of fee simple land is not economically viable for people like the San and it builds upon the existing system of land ownership, i.e. "*using the model of white agriculture as the implicit model for land reform*" (Harring, 2002: 276).

Chanock (1991a) argues that colonial regimes simplified tenure systems in order to undermine indigenous use of land. They emphasised their communal elements and ignored their more subtle gradations such as various tenure arrangements for land put to individual uses¹¹⁶. However, numerous studies confirm that prior to the colonial

¹¹⁵ Proponents of private (and also government-owned) property argue that private property results in optimal tenure security, improves access to credit and allows owners to capture the benefits from land improvements which eventually will encourage more profitable and sustainable use of land (Tucker, 2004).

¹¹⁶ This issue has also been discussed in chapter 4, section 4.

period native land was not solely communal (Harring, 1996; Mann and Roberts, 1991). Colonial authorities selectively used rules in support of their position that traditional land tenure consisted solely of communal land tenure, including customary law (Chanock, 1991a; 1991b).

The reality is that in indigenous land tenure systems each category of tenure meets the needs of specific community members. Chanock (1991a) describes a community's territory as a landscape divided into areas of land used for various purposes and managed under different tenures. Each area represents a particular tenure niche, a space in which use is governed by a common set of rules. Different niches can be identified within a single area, ranging from open access (grazing areas), through common property (medicinal field plants), to individual property (small agricultural plots).¹¹⁷ To phrase it differently, *"each person in a community had rights of access to the land depending on the specific needs of the person at the time; for example, in any given community, a number of persons could each hold a right or bundle of rights expressing a specific range of functions; a village could claim grazing rights over a parcel, subject to the hunting rights of another, the transit rights of a third and cultivation rights of the fourth"* (Nzioki, 2002:229).

In order to identify different tenure niches it is crucial to ask who uses the resource and on what terms (Bruce, 2000). The legacy of colonialism has made it difficult for the San to answer this question for several reasons. First, the traditional rules of land allocation have eroded, making it difficult to identify who uses what part of the land and for what purpose. The San struggle just to understand what kind of rights they have as occupants of communal lands. Secondly, there is evidence of prejudices against the San.¹¹⁸ Other ethnic groups regard the San's traditional use of land (hunting and gathering) as backward, a view supported by the Namibian government.¹¹⁹ Thirdly, the government is reluctant to recognise alternative forms of

¹¹⁷ For a more detailed overview of various tenure systems among ethnic groups in Southern Africa, see Silitshena (1990).

¹¹⁸ The forms of discrimination against hunter-gatherers like the San include negative stereotyping of their subsistence strategies, denying their basic rights, and segregation. The reasons underlying this discrimination are diverse and have been identified by Woodburn (1997) as the political weakness of hunter-gatherers, as well as the distorted notions that they are impoverished, backward, uncivilized, eaters of revolting food, animal-like, and child-like in their behaviour.

¹¹⁹ For a detailed analysis of the San's socio-political and economic status in Namibia, see Suzman (2001).

social organisation and land holding, and it actively supports modes of subsistence that exploit land through 'labour', which is defined as agricultural or pastoral (Widlok, 2001). Together with the practice of enclosure, Europe's Enlightenment individualism and the idea of independent, self-sufficient farmers were exported to the colonies¹²⁰ (Lemert, 2002). Namibia's post-colonial government has adopted this ideal. Finally, it is common practice in rural Africa that access to land in communal areas is dependent on an applicant's location, culture, social status, and use purpose (Nelson, 2004), eligibility factors which put the San in a strongly disadvantageous position. Both colonial and post-colonial regimes have ignored the rights of former hunter-gatherer groups because they do not 'invest' in the land (e.g. by tilling or grazing) and because they are politically weak.

2.1.5 Applying for Individual Land Rights in Communal Areas

Taking the above criticisms on board could produce a land policy that recognises existing customary tenure rather than one which copies Western private property rights (Firmin-Sellers and Sellers, 1999). Namibia has a policy in place that allows people in rural communal areas to register their customary rights for farming, residential, or other purposes¹²¹. People can exercise these rights for a limited time - a human lifespan.¹²² A Chief or the Traditional Authority allocates or cancels customary land rights, a decision which has to be approved by the Communal Land Board.¹²³ Apart from these land rights based in customary law, people in communal areas can apply for grazing rights and leasehold. The former can be part of customary tenure and are allocated by a Chief or the Traditional Authority, while the latter is for agricultural or tourism projects and must be approved by the Traditional Authority and the Communal Land Board¹²⁴. The following section (notably 3.1 and 3.2) will look more closely at the evolution of traditional authorities and customary law during the colonial and post-colonial period, but in this section the focus is on the

¹²⁰ In the American colonial context, this became the Jeffersonian ideal of a democracy of yeoman farmers.

¹²¹ Namibia has also drafted a bill that regulates Flexible Land Tenure in the urban areas. As far as the author is aware, this bill still needs approval by the Cabinet (LEAD, 2005).

¹²² Joint registration (usually by spouses) is allowed. After the title is expired the land reverts back to the Traditional Authority.

¹²³ For the establishment, functions, and composition of Communal Land Boards, see LAC (2003).

¹²⁴ For more details on establishment, functions and compositions of the Communal Land Boards, see LAC's (2003) *Guide to the Communal Land Reform Act No 5 of 2002*.

effectiveness of existing regulations for the registration of customary land rights in order to improve the position of the San.

So far very few of the San have embraced registration of customary land rights. For one thing, the application needs to be done in writing, a task which is problematic for the largely illiterate San. Secondly, the application has to go through a Chief which puts the San in an awkward position because not all their leaders are recognized as Chiefs and in many areas they would have to ask permission of chiefs of other ethnic groups who are already dominating them. Finally, some San have argued that the maximum size of land right is too small for their needs. Unlike other occupants of communal land, the San want to use it for preserving or reintroducing their traditional lifestyle and 20 hectares is not sufficient for that purpose. Furthermore, by granting customary land rights, more plots will be fenced off in the communal land area which will make it even more difficult for the San to gather field foods (occasionally the only food available) and medicines. In summary, granting property rights modelled on the Western style private property model in the rural communal areas will have a disastrous effect on the San's livelihood strategy. Not only is there a risk that they will be excluded from the process, other peoples' registration will prevent the San from engaging with their way of life (which is usually a mixture of subsistence farming and foraging for food and medicines).

2.1.6 Conclusions

The Namibian government's ownership and management of communal lands represents to some extent a continuation of colonial land policy. As with some other Southern African countries, the Namibian government's efforts to address the colonial land issue is clearly limited by an institutional legacy of colonial rule (Mamdani, 2005). By claiming ownership rights over communal land previously seized by colonial regimes, the government missed an opportunity to rectify an unlawful land seizure. According to Harring: *"no modern authority would cite these seizures of native land as either legal, or justifying modern Namibian land law; the fact is that these land seizures are the modern basis of the idea that the state 'owns' Crown land, and the derivative idea that communally held land is a form of Crown land"* (1996: 469).

While the Constitution states in its preamble that it will deal with the injustices of colonialism, it does not adequately address the legacy of enclosure. As a result, the government's efforts have been of limited benefit, particularly to those who lost most in the colonial enclosure, i.e. the San. The San's current weak socio-economic and political situation is in many respects the product of the process of enclosure. The government's insistence on implementing the post-colonial process of land reform on the basis of a Western-style individual land ownership model or through traditional authorities shaped by colonialism (see next section) have both been detrimental for the San's prospects for restoration of their rights. While in some of its policies the government has attempted to prioritise the landless rural poor as the key beneficiaries of land reform, its deliberate blindness with regards to ethnicity has meant that the plight of a particularly marginalised minority (the San) has been effectively ignored.

3 The Transformation of Customary Rights and Traditional Decision Making Structures

3.1 The Emergence of Customary Law in British Colonial Africa

Customary law is regarded by many as the embodiment of indigenous African legal tradition. However it is, as aptly illustrated and researched by Roberts and Mann (1991), an institution that epitomises the encounter between colonial authorities and African societies. *'European understanding of pre-colonial African systems of law and authority and African collaboration with colonial systems of law and government led to the invention of tradition in Africa and its foundation in customary law and local institutions such as chieftaincy and courts'* (Roberts and Mann, 1991: 4). As discussed in detail in chapter 8, law as a concept reflects changing economic, social and political environments. Consequently, colonialism changed the rules, institutions, procedures and meanings of African law (*ibid.*). Therefore, the meaning of contemporary African law can only be fully understood when examined against the background of its history – how did it change, how was it perceived and understood by both Africans and colonial powers? Tracing back how rituals, symbols and rules were invented will help to understand how Europeans and Africans used law in their struggle for control over resources, land, power and authority. Roberts and Mann (1991) have examined this generic process in detail¹²⁵, as will be summarised below

¹²⁵ Other sources of information will be referenced explicitly.

as it applied to British colonial Africa¹²⁶. Considering the strong variations in colonial history in different parts of Namibia, a more detailed overview of this historic process in Namibia is not attempted here¹²⁷. While many local variations in colonial rule existed at the time, subsequent sections of this chapter will show how this generic process in the British colonies in Africa has been of clear relevance to post-independence Namibia.

Prior to colonialism, Europeans and Africans had already established a legal relationship through the practice of slave trade. Initially the dealings were limited to commercial interaction, but they expanded into areas such as kinship, marriage, labour and inheritance. Initially, the Europeans tolerated the African legal system but from the moment trade became more intense and prolonged, the balance of power between the two parties changed in favour of the Europeans. Industrialisation and evangelical beliefs convinced most Europeans not only of the moral superiority of their own civilisation, but also that exporting their culture to Africa would be beneficial for the Africans. This thinking affected the legal relationship between the Africans and Europeans.

Local legal practices were not further accepted and it was believed that only Western legal arrangements could stimulate the growth of trade and civilisation in Africa. Local practices had to be replaced with new institutions and authorities to regulate dealings with the locals. During the 19th Century, informal commercial imperialism was replaced with formal colonial rule and, eventually, the British Empire introduced common law and statutes to its colonies.

¹²⁶ While there are obvious differences in the British and French legal system (this also counts for the German and Portuguese legal system), in general terms, the construction of customary law is a phenomenon that can be found in most of the African colonies regardless whether they were ruled by the French, British or Portuguese (Roberts and Mann, 1991; Chanock, 1991a). However, there have been differences in the implementation of legal rules. For example, while the indigenous peoples of the Portuguese and French colonies could not take their case to a Portuguese or French court, the local peoples in the British Crown Colonies could take their disputes to the British courts. In other words, while the French and Portuguese operated with different codes and separate courts for French and Portuguese nationals, the British Crown applied indigenous law in British courts.

¹²⁷ German colonial history brought the complete eradication of local laws in some areas (e.g. through genocidal wars against the Herero and the Nama) and left other areas virtually undisturbed; areas north of the 'police line' were not colonised or administered by the Germans and this line is still today the separation between privately (mainly white) owned commercial farms and communal land. North of that police line, where the vast majority of Namibians still live today, colonial rule began in earnest under British South African and subsequent Apartheid rule. In addition several areas south of the police line were later demarcated as ethnic homelands (for Herero, Damara) under the Apartheid Regime.

Partly as the result of colonisation, internal disputes erupted frequently amongst indigenous Africans. Indigenous peoples in the British Crown Colonies could go to the British Courts to settle their disputes. As a result, the authority of the local rulers crumbled. Furthermore, the fact that magistrates and judges in the British Courts were supposed to apply indigenous law in their ruling (as long as it was not repugnant to justice, equity and good conscience) often led to a situation wherein indigenous law was misunderstood by the magistrates and judges of the British Courts. The British officials were unfamiliar with local customs. This created an opportunity for litigants to present their local customs as they saw fit. Often, these 'constructed' local customs were then recorded and published by the British Courts as official customs.

In the early days of British colonialism, the authorities made great use of the local authorities. Simultaneously the authorities were also convinced that they had to reform these barbaric institutions until a civilised level was achieved¹²⁸. This belief in the need for reform was influenced by Maine's (1861) ideology of evolution in Ancient Law. Maine developed a theory of the development of law based on an evolutionary model that placed all human societies on a scale of development, distinguishing between those societies in which legal rights and responsibilities were based upon social status and those in which they rested on contractual agreements between individuals¹²⁹.

¹²⁸ European powers' concern with local laws predates colonial history. From the time of the Roman Empire to medieval times, governments and the church were occupied with the great diversity of European ethnic communities and regions and subsequently with the diversity of their local laws. During those periods the ruling powers were already facing the challenge of dealing with local and standardised laws. In colonial as well as medieval times, law was ultimately the rules of the dominant regime, while customs were the practices of localised subordinate people. The colonial powers argued that in modern states rules of law were deliberate, reflective and rational. By contrast, in traditional societies custom arose *'from the opinions and practices of the people like mists from a marsh'* (Falk Moore, 2000: 14).

¹²⁹ This view was shared by other people. For example, Vinogradoff (1925) states that "[...] *In rudimentary unions, in so-called barbaric tribes, even in feudal societies, rules of conduct are usually established, not by direct and general commands, but by the gradual consolidation of opinion and habits. The historical development of law starts with custom. Rules are not imposed from above by legislative authorities but rise from below, from the society which comes to recognise them. The best opportunities for observing the formation and application of custom are presented when primitive societies are living their life before the eyes and under the control of more advanced nations*" (cited in: Falk Moore, 2000: 14-15).

Pound (1921) developed a similar idea in *The Spirit of Common Law*. He identified four stages in the process of legal evolution, each characterised by a different basis for the allocation of liability. The starting point was the idea that primitive societies were based on reprisals, private war and blood feud. As a result, the first stage of legal evolution was controlling the desire to be avenged. The second stage of law was characterised by 'strict law', meaning an inelastic and inflexible formal system of rules. The third one was the stage of natural law or the stage wherein rules of equity, morality and good conscience became legal duties, while the fourth stage evolved around security (Pound, 1921 in Falk Moore, 2000).

Ideally, the colonial authorities would have liked to reform these primitive blood feud institutions. Budgetary constraints made this reform difficult and, consequently, colonial authorities had to rule through the 'original' indigenous institutions and authorities. However, these so-called indigenous institutions did not resemble the indigenous political system. For example, the chiefs that were appointed were not the locally recognised chiefs and, furthermore, the chiefs were given more power than they ever had under the authentic indigenous system. In places where there were no chiefs, they were invented.

Incorporating indigenous law demanded assistance of liberal anthropologists. The locals could be persuaded to contribute by promising them a place or job in the administration. This contributed further to the instability on the ground because different (ethnic) groups were now more than ever involved in power struggles. As a result, more civil conflicts erupted and when they were fought out in Court each litigant usually professed a different custom. This led to major difficulties in defining what was customary law. Although indigenous law may have influenced customary law, it was not the same thing. Europeans came to Africa with their own beliefs about the Africans and these views have influenced their (legal) policy. However, Africans themselves have also contributed to the process of changing their own legal customs.

The fact that the colonial authorities were governing through indigenous institutions gave them the opportunity to reshape customs often influenced by local struggles over power and resources. Not all native voices carried the same weight in the discourse about custom. Inequalities in power existed and had an impact on the outcome of local

conflicts over rules, regulations, procedures and institutions. The official authorities had to rely on particular individuals, mainly chiefs, to determine custom. There are examples that show that chiefs who cooperated with the colonial powers manipulated customary rules to augment the power of the chief. However, pre-colonial Africa did not have a single customary authority like the chief; usually it had several authorities like age groups, women groups, chiefs, elders etc. (Mamdani, 2005). The colonialist regime recognised only one of these authorities, viz. the chiefs. By only acknowledging the chiefs as the genuine representation of custom, the colonial authorities depicted native custom as something that was unchanging and singular and created an authoritarian version of custom (*ibid.*). Eventually, in some cases the chief's power was characterised by despotic behaviour.

To summarise “*customary law was born of the collaboration of Africans seeking to establish new forms of access to resources and labour and Europeans looking for local authorities to fill positions generated by their concepts of African societies*” (Roberts and Mann, 1991: 23). Under this system conflicts over land and resources intensified because the conflict was now also about who (amongst the natives) had the authority to allocate these resources. While the colonialist regime identified the chiefs as the owners or trustees of land who had the capacity and authority to allocate land on behalf of the community, in reality tenure arrangements were usually governed through a system of kinship (e.g. a family head who was highly respected in the community) that was recognised as the primary organising body that governed access and use of land (Nzioki, 2002).

While the system of indirect rule matured, colonial administrators and anthropologists began to develop models of African societies that linked the importance of family, community and tribe to the collective control of land. Furthermore, these models also gave chiefs and elders the power to allocate land. Under stress of potential spread of individual ownership amongst the locals, the colonial authorities were worried that this trend would undermine the power of the chiefs and started to prohibit land sales and restricted individual ownership amongst the local peoples. Instead a tenure form of communal ownership was promoted that was allocated by the chiefs and could be used individually (usufruct system). Due to agricultural commercialisation, land

became increasingly scarce and debates over ownership became linked to debates over identity and ethnicity.

The colonial state made a distinction between race and ethnicity (Mamdani, 2005). Non-natives were identified according to their race, while natives belonged to certain ethnic groups. Each was ruled by their own legal system. Races were governed through 'civilised' law (i.e. common or civil law) because non-natives were civilised. Ethnicities were governed through customary law; they did not belong to a civilised society and therefore could not be ruled through 'civilised' law. While 'civilised' law spoke the language of rights, customary law was based on tradition. The language of rights prevented uncontrolled expansion of power; it drew boundaries to control power. Customary law, on the other hand, strengthened power.

After independence this duality of the legal system was reproduced in many African countries (Mamdani, 2005). In Namibia, Article 66(1) of the Constitution stipulates that both: *'the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent that such customary or common law does not conflict with this Constitution or any other statutory law'*. Article 66(2) articulates that customary, common and statutory law remain concurrently valid unless statutory law explicitly stipulates that the equivalent common and customary law is repealed. The acceptance of customary law in the Constitution is another example where the Constitution is contradicting itself¹³⁰. Despite Namibia's quest to promote the unification and harmonisation of various legal systems, legal pluralism remains accepted in the Constitution (Hinz, 2003).

3.2 Traditional Authorities and Chiefs in Independent Namibia

The recognition of customary law in the Namibian Constitution also encompasses the recognition of Traditional Authorities, although the Constitution does not pay attention to the role and function of Traditional Authorities and their relationship with

¹³⁰ A similar situation has occurred in South Africa. During the apartheid era, the ANC had declared customary authorities as undemocratic. Now that ANC is the ruling party, it has embraced customary rules as being part of the tradition (Mamdani, 2005). As a result, post-apartheid South Africa has a dual legal structure in the same way as it had during the colonial and apartheid period. *'While the new government has de-racialised civil law, civil society and civil rights; it still works with an ethnicized 'customary' law enforced by an ethnicized native authority'* (Mamdani, 2005: 275). For a detailed overview of the comeback of chieftaincy, custom and culture in South Africa see Oomen (2005)

other governmental structures (Hinz, 2002). Traditional Authorities are, just like customary law, a highly ethnicised institution, while the Namibian government pledges to de-ethnicise the nation.

The importance of the Traditional Authorities¹³¹ in Namibia cannot be underestimated. It has been argued (see for example Suzman, 2002) that in Namibia the functions and duties of traditional leaders far exceed those of similar bodies in many other liberal democracies. This highlights the vital importance for the San to have their traditional authorities formally recognised by the state. While some anthropologists who have studied the San extensively over many years have concluded that San communities '*[...] make group and individual decisions [...] in a society without formal political and juridical institutions [...]*' (Lee, 1979 cited in Hinz, 2003: 75), a member of the Hai//om San community has argued that the San have their own distinct forms of leadership and organisation (/Useb, 2000).

/Useb's description of the history of the Hai//om's leadership structures is to some extent similar to the situation as described by Roberts and Mann (1991) i.e. that prior to colonisation the role of chiefs was less formal and institutionalised. According to the elders of the Hai//om community in the late 1800s each community, which consisted of 20 to 30 families staying at the same waterhole, had their own leader whom they called *!Ari-aub*. He was the *hero* of the community and did some valuable work for the community like lighting the first fire when the community had to move to another place within their traditional resource area (*koros*), usually as a result of the changing of seasons (/Useb, 2000). It became necessary to appoint strong leaders when other people invaded the land of the Hai//om people. All the married people of the community came together and chose the man with the best skills to defend the land. It was important that the newly appointed leader knew well the quality, boundaries and natural resources of the *koros*. Whether leadership was based on inheritance or appointment, nothing much changed in the decisions making process; it

¹³¹ Traditional Authorities and traditional communities are ultimately subject to constitutional and statutory law. The two most important Acts detailing the role and functions of Traditional Authorities, and by extension the status of traditional communities, are the Traditional Authorities Act (2000), which superseded the previous Traditional Authorities Act (1995) in its entirety, and the Council of Traditional Leaders Act (1997). Whereas the former outlines the principles for the formation and recognition of a traditional authority – and hence a traditional community – the latter sets out the role of traditional authorities in state governance (Suzman, 2002)

continued to be done by consensus and information was passed on in a very informal way, while leaders continued to be treated in the same way as any other person in the community.

Although Lee and /Useb reach a different conclusion, Lee describes a similar leadership structure for the !Kung community as /Useb has done for the Hai//om. Initially the !Kung called their leader *headman*. Lee has enquired to what extent the concept of headman was part of the political structure of the !Kung and came to the conclusion that the concept of headman only entered the view of the !Kung when they made contact with non-!Kung groups. Lee concludes: *'The changing pattern of leadership reveals the existence of two contradictory systems of politics among the San. The old system based on genealogy and n!ore ownership¹³² favoured a leader who was modest in demeanour, generous to a fault, and egalitarian, and whose legitimacy arose from long-standing n!ore ownership. The new system required a man who had to deny most of the old virtues. The political arena of district councils, land boards, and nationalist politics required someone who was male, aggressive, articulate, and wise in the ways of the wider world'* (cited in (Hinz, 2003: 76).

Although it is not entirely clear for each of the different San communities in Namibia to what extent the leadership structure has changed from being hereditary to one of appointment and to what extent this has changed under pressure of non-San peoples, one thing is clear: throughout the years the role of San leaders has become increasingly formal and has gained in significance and political importance. As a result, a leader who was previously seen as equal amongst the others in the social organisation of the community is now expected to represent his or her people in dealings with the central government. The whole issue of leadership has become

¹³² *N!oresi* (plural for *n!ore*) are named territories without fixed boundaries. Usually important resources can be found on *N!oresi*, such as permanent and semi-permanent waterholes or highly valued food or medicines. Individual rights to residence within a *n!ore*, and to use its resources, are inherited directly from both parents and ownership of a *n!ore* is only recognised if kinship can be demonstrated. As such, ownership of a *n!ore* is exclusive to a group related through kinship who manage the resources communally. Ownership cannot be transferred to non-kin or outsiders, although outsiders are allowed to reside within a *n!ore* for a prolonged period of time with permission of the recognised owners (for example, this happens in periods of drought). An individual chooses in adulthood which of their parents' *n!ore* they wish to claim as their own. When that person gets married to someone from outside the *n!ore*, that person gains rights of access and resource use to a second *n!ore*. In this sense, kinship networks underpin an individual's rights to land and resources (source: Sullivan and Homewood, 2004).

increasingly politicised¹³³ for two reasons. First, the San who are poorly represented in the formal bodies of government see in the recognition of the traditional leaders a possibility to gain basic participatory rights in important decisions such as securing land rights (Suzman, 2002). Second, in recent years the power of the chiefs has not only gained in importance, but has also extended to new areas such as land and natural resource management (Van Rouveroy van Nieuwaal and Van Dijk, 1999). Especially, NGOs have turned chieftainship into a new almost entrepreneurial domain. Previously, chieftaincy was associated with nostalgic claims to authentic ritual power. Under the influence of the NGOs' agenda of promoting sustainability, resource management and environmental awareness, chieftaincy is now much more defined in terms of real political power and brokerage.

3.3 Discussion

In short, there are many reasons why the demands for land rights of the San are not fulfilled. Although after independence the Namibian state promised civil and equal rights to all Namibian citizens, the San are still struggling to gain recognition as equal Namibian citizens. Both local and state led prejudices continue to label the San as a people who are not making appropriate use of the land, a vision that is similar to early colonialist thinking. There is widespread bias against the San modes of subsistence; the only acceptable way of exploiting land is through pastoralism or agriculture and alternative forms of social organisation and land holding are not recognised. The new Namibia's land policy bears some resemblance to the legacy of colonial (ethnic-based) land distribution, i.e. linking access to land to power relations. These power relations existed, and continue to exist, on different levels, viz. between the colonised and colonisers, between common law and customary law, and between local chiefs amongst themselves. Any successful land reform policy has to unravel these relationships.

It remains to be seen whether in the longer run customary law will pose a real threat or provide a tool to support rural democratisation (Ribot and Oyono, 2005) and

¹³³ Local Informants argue that in all likelihood chief Sofia will be recognised because she supports SWAPO, while chief Langman's recognition will be very problematic because he is a supporter of Democratic Turnhalle Alliance (DTA). At the moment, only the San chiefs that are member of SWAPO, the ruling party, have been officially recognised by the government as chief (for more details see Harring and Odendaal, 2006).

emancipation of subjugated peoples like the San. As discussed in chapter 8, this will mainly depend on, first, rediscovering customary law in the daily social practice of indigenous peoples and, second, integrating customary law or informal law in common law or formal law.

Whether customary law can be used for law reform processes such as land reform or as a means to protect indigenous culture, is another open question. As explained in chapter 8, one step in the right direction is to define both Western and customary law as ‘fluid’, ‘relational’ and ‘negotiable’ systems that are linked to ever changing social and political relations. It would be wrong to perceive customary law as a form of law that is fixed in time and location. Instead, just like Western law, customary law shapes and has been shaped by economic, political and social processes. Therefore law can be used as a mirror for looking into society’s power relations. As Oomen (2005) argues, law can give us Foucauldian insights: *‘power emanates in many places, and it is in discourse that power and knowledge are joined together to create – in this case – legal – subjects, categories, divisions. As such, law not only mirrors and creates power relations but also makes for meanings and understandings of identity’* (Oomen, 2005: 22).

The theoretical insight that law is an institution that gives meaning to identity has been discussed in detail in chapter 8 (section 3.2), but this issue will be further examined from a practical angle when the next questions of this chapter will be further explored, viz. what can indigenous peoples do to regain their rights over land? on what basis can indigenous peoples claim entitlements to land, resources and knowledge? should they use a strategy that is based on native title claims, moral or rights claims?

4 *Validating Land Claims*

4.1 Native Title Claims

Native title is a *sui generis* proprietary interest in land recognised in common law jurisdictions such as Australia¹³⁴, Canada¹³⁵, the United States and New Zealand. The

¹³⁴ For Australian Aboriginal and Torres Strait Islanders an important step towards rights over land was taken with the Australian High Court’s decision in the *Mabo case* of 1992, which overturned the *terra*

*Richtersveld Community and Others v. Alexkor and Another*¹³⁶ was the first case to consider whether aboriginal title is part of South African law (Ülgen, 2002). In *Richtersveld* native title claim was dismissed on the basis that the Court lacked jurisdiction to award restitution of a right to land not recognized under the Restitution Act.¹³⁷ The doctrine of native title is appealing to indigenous people in Southern Africa because it would legitimise their rights over land they occupied prior to colonisation. However, the arguments that have been used in Australia and Canada for claiming back ancestral land cannot easily be made in Southern Africa. Native title claims are based on a historical membership in a particular tribe or kingdom. In a country still recovering from apartheid and where tribal groups have been uprooted many times, it is argued that native title claims will unnecessarily awaken or worsen

nullius principle. Although in the decision it was declared that the Crown's acquisition of sovereignty could not be challenged in a court, the decision established that native title could be claimed over unappropriated Crown lands. As a result of the *Mabo* judgment – which, some have argued, was far more conservative than both the debate over its implications and subsequent development have suggested – native title exists only where there is an Aboriginal group that has maintained its connection with traditional lands. The group has to be able to prove that it is looking after its land, discharging obligations under traditional law, and enjoying as far as is practicable the traditional rights of use and occupation (Brennan, 1995 in Keal, 2003: 124). In spite of being limited in this way, the recognition of native title in the *Mabo* judgment was, for Australian indigenous peoples, a milestone in the recovery of identity and rights. Following *Mabo* the Federal Government enacted the Native Title Act in 1993, which was intended to be the judicial framework for claims to native title. For Aborigines and Torres Strait Islanders it was a bitter disappointment. It legitimised past dispossession without compensation and placed tight restrictions on what could be claimed (Keal, 2003). In 1996 a new conservative Coalition government came to power. A few months later, in the *Wik* case, the High Court ruled that pastoral leases do not necessarily extinguish native title. The Native Title Amendment Act that followed further weakened native title (*ibid.*). For more information on *Mabo*, *Wik* and native title see for example Butt *et al.* (2001); Mantziaris and Martin (2000) and Glaskin (2003).

¹³⁵ In Canada the case comparative to *Mabo* was the *Calder case* (1973) concerning the claim of the Nisga'a First Nation to traditional lands in the Nass Valley in North-western British Columbia. The Supreme Court recognised native title, but it was not until April 2000 that an agreement between the Nisga'a and the governments of Canada and British Columbia finally came into force. The outcome of this agreement was that though the Nisga'a agreed to give up native title to ninety percent of their traditional lands, the Court recognised the supreme power of the Nisga'a legislature to make laws concerning the constitution, citizenship, culture, language and the management of the lands of the Nisga'a's First Nations (Keal, 2003). Further important Canadian cases were *Sparrow vs. the Queen* (1990) and *Delgamuukw vs. British Columbia* (1997). The latter case is of particular importance because it gave, as no other court has done previously, the meaning of native title, i.e. full proprietary rights including ownership of sub-surface minerals and the right of native owners to develop traditional lands in non-traditional ways (*ibid.*)

¹³⁶ In *Richtersveld* the Richtersveld people, comprising the inhabitants of four villages in the Northern Cape Province, claimed aboriginal title to land that is the site of diamond mining operations by Alexkor Limited, a public company that owns the land and holds surface and sub-surface mineral rights. The Richtersveld people alleged dispossession of a portion of the land after 19 June 1913 by a series of racially discriminatory legislative and executive acts. They sought restitution of three alternative rights in land based on the doctrine of native title: ownership, exclusive beneficial occupation and use for specified purposes, and beneficial occupation of the land for a longer period than 10 years prior to dispossession (Ülgen, 2002).

¹³⁷ Ülgen (2002), on the other hand, argues that the conceptual framework of the Restitution Act does recognize the principle of native title.

destructive ethnic and racial politics– an argument eagerly put forward by Southern Africa’s governments.¹³⁸

However, international law does recognize native title. The 1994 UN Declaration on the Rights of Indigenous Peoples states that there is *opinio iuris* (conviction that the practice is obligatory) to recognize aboriginal title. Considering the fact that South Africa and Namibia accept in their Constitutions the application of international law, it can be argued that they should recognise native title claims, a vision shared by legal commentators in both nations (Tjombe, 2001). Bennett and Powell (1999) have argued that in the context of Southern Africa it might be better for indigenous peoples to invoke native title in international law rather than in national common law because the latter was responsible for their land dispossession. In order for the doctrine of native title to be applicable, according to international law, the concept of native title claims has to be recognised in at least one of the three accepted sources of international law which are treaty, custom and the general principles of law as recognised by ‘civilised’ nations (Bennett and Powell, 1999)¹³⁹.

In terms of treaty, in addition to the UN Declaration on the Rights of Indigenous Peoples (1994) (see above), the ILO Indigenous and Tribal Populations Conventions 107¹⁴⁰ (1957) and 169¹⁴¹ (1989) recognise the principle of native title¹⁴². Even though Namibia is not a signatory party of the conventions, they highlight an emerging consensus on the doctrine as an indication of state practice and *opinio iuris* (conviction that the practice is obligatory).

With regards to custom, international legal theory splits the requirement of custom into two elements, viz. a state practice and *opinio iuris*. Legislation, court decisions

¹³⁸ For example, large parts of South Africa could be subject to overlapping and competing claims where pieces of land have been occupied in succession by San, Khoi, Xhosa, Mfengu, Trekkers, and British people (Ülgen, 2002).

¹³⁹ In order to avoid repetitive referencing, the description of what entails treaty, custom and the general principles of law recognised by civilised nations is based on the writings of (Bennett and Powell, 1999).

¹⁴⁰ ILO Convention 107 has been ratified, as per January 2006, by 18 member states.

¹⁴¹ ILO Convention 169 has been ratified, as per January 2006, by 17 member states.

¹⁴² For example, ILO Convention 169 states in Article 14.2: Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupied, and to guarantee effective protection of their rights of ownership and possession and in Article 14.3: Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

and the writings of the most highly qualified legal publicists provide evidence for state practice and *opinio iuris*. The state practice of executive or legislative recognition of aboriginal title can be explicit (for example, the Constitution can protect the land rights of indigenous peoples – which is the case in Canada, Brazil, Panama, Guatemala, Peru and the Philippines) or the rights might be guaranteed by a treaty (for example, in the United States and Norway) or by local legislation (for example, Ecuador, New Zealand and Venezuela). Further evidence of state practice can also be found in the decisions of municipal courts (for example, *Mabo v Queensland*). On their own, the above activities are not sufficient to constitute international custom. However, when taken in combination with *opinio iuris* and the ILO Conventions on Indigenous and Tribal Peoples, altogether they demonstrate a consensus that native title is a rule of customary international law.

With regards to the last category, the general principles of law recognised by civilised nations, native title has been perceived as a principle recognised by the world's main legal systems (which are the legal systems of the former colonial states with surviving indigenous peoples), and therefore forms part of international law. Especially, the writings of legal theorists can shed more light on this. Contemporary legal scholars trace native title back to the writings of 16th Century legal scholars and in particular the *terra nullius* principle which dates from ancient Roman law.

To recapitulate, *terra nullius* allowed occupation of new territory only when it was uninhabited. The crucial question was whether territory occupied by tribal peoples was uninhabited. According to Victoria, and later Grotius, whenever people had a social organisation their territory could not be considered *terra nullius*. Whether indigenous peoples' society fulfilled this criterion remained an open question until the *Western Sahara* case¹⁴³, some three hundred years later. In the second half of the 18th

¹⁴³ The sovereignty of the Western Sahara remains the subject of a dispute between the Government of Morocco and the Polisario Front, an organisation seeking independence for the region. The Moroccan Government sent troops and settlers into the northern two-thirds of the Western Sahara after Spain withdrew from the area in 1975, and extended its administration over the southern province of Oued Ed-Dahab after Mauritania renounced its claim in 1979. The Moroccan Government has undertaken a sizable economic development program in the Western Sahara as part of its long-term efforts to strengthen Moroccan claims to the territory. Since 1973 the Polisario Front has challenged the claims of Spain, Mauritania, and Morocco to the territory. Moroccan and Polisario forces fought intermittently from 1975 until the 1991 ceasefire and deployment to the area of a U.N. peacekeeping contingent, known by its French initials, MINURSO. In 1975 the International Court of Justice issued an advisory

Century the legal scholar, Wolff, was more precise about the requirements of social organisation and argued that single families and nomadic tribes had rights in the land they inhabited. These rights could not be seized, not even by a just war. Vattel, on the other hand, argued that, nature obliged all humans to cultivate the soil; therefore seizing the land from peoples who lived by hunting or gathering was perfectly acceptable. Today the relevance of this earlier writings about *terra nullius* is embedded in the *Western Sahara case* which supports the earlier interpretations of the concept of *terra nullius*, and more specifically those of Victoria, Grotius and Wolff, i.e. whenever territory is inhabited by a people it cannot be *terra nullius*. Furthermore, the *Western Sahara case* acknowledged that indigenous peoples were bearers of certain rights, including property rights.

4.1.1 Native Title and the San: From *Civilized* to *Socially Organised*

At first sight it would appear that the San fulfil at least some of the requirements for native title claims. Although, as mentioned, the validity of indigenous land rights remains an open question in Namibian law, Judge Mahomed indicated in the *Rehoboth Baster*¹⁴⁴ appeal that the principles set out in *Mabo* might hold in Namibia on the basis that the decision did not focus on Australian law, but instead discussed indigenous rights under the pretext of common law principles. Since common law recognizes native title (common law is operant in Namibia [see section 4.2 of chapter 8] as the result of the British occupation in 1915) and indigenous land title is inextinguishable by colonial powers (*Western Sahara case*), it is likely that the San can dispute South Africa's original title which was transferred to the Namibian government (Harring, 2002). However, presenting a case of native title will require extensive anthropological and historical evidence to prove that neither Germany nor South Africa ever held title to the communal land.

opinion on the status of the Western Sahara. The Court held that while some of the region's tribes had historical ties to Morocco, the ties were insufficient to establish "any tie of territorial sovereignty" between the Western Sahara and the Kingdom of Morocco. The Court added that it had not found 'legal ties' that might affect the applicable U.N. General Assembly resolution regarding the decolonisation of the territory, and, in particular, the principle of self-determination for its people.

¹⁴⁴ The members of the Rehoboth Baster community are descendants of indigenous Khoi and Afrikaans settlers who originally lived in the Cape, but moved to their recent territory in 1872. In the Rehoboth Baster Case the Court recognised the Rehoboth Basters as a people in their own right, but the High Court rejected the Community's claim to communal property. The Supreme Court rejected the *Rehoboth Basters'* appeal.

The requirements for native title which indigenous peoples have to meet have evolved from a civilization to a social organisation requirement (Chan, 1997). Until the 20th Century, indigenous peoples had to give evidence of having a civilized legal system in place so courts could establish that the claimants were capable of holding title. Indigenous peoples who failed the civilization test simply did not exist before the law. For example, in *Re Southern Rhodesia*, the Privy Council dismissed land claims of the Ndebele as irreconcilable with the legal ideas of a civilized society. In recent common law jurisprudence (the *Mabo* and *Western Sahara* cases), the legally recognized identity of an indigenous group is no longer linked with the civilization requirement. A proof of social organisation is now put forward as the decisive factor for native title claims.

As illustrated by Chan (1997), today, the first step in a native title claim is to show that the indigenous group has its own socio-political structure. In practice this means that it meets the following criteria: community identity, permanence, exclusivity, and a pronounced relationship to the land. Some legal scholars have argued that the new requirement, although an improvement, still uses a Western legal yardstick of social structure. However, there has been a shift. For example, it is no longer acceptable that only Western scholars or judges decide whether or not indigenous peoples conform to the ideas of social organisation. Instead, that decision is now left to indigenous peoples themselves: the group itself must believe that they have a social structure and a relationship with the land, that they adhere to it, and most importantly, that others recognise the group's coherence.

Based on the above, it can be argued that in order to secure a native land claim, the San have to provide evidence of their relationship to a particular piece of land and their position as an autonomous group with their own identity vis-à-vis other groups. Bishop (1998) has already done this exercise for the San in Botswana and came to the conclusion that the San can provide sufficient evidence of their continued use and occupation of the Kalahari in order to comply with the requirements of native title. However, she suggests that the common law terminology of 'land tenure' might unnecessarily cause further complications for the claim because it cannot be assumed that San use conforms to the common law concept of tenure. Instead, she suggests using evidence of the San's territoriality; it captures the holistic system of land use

and occupancy by the San. The term is not frozen, i.e. it does not refer to a specific era of occupation; instead it is inclusive of adaptations to modern circumstances. Furthermore, territoriality captures the identification of various San *n!oresi* and includes the rules associated with their use and tenancy.

Territoriality opens a new domain of research questions. On what basis can indigenous peoples claim entitlements to land: moral claims or historical connections and customary practices? A case study of the Khwe San in the West Caprivi will be used to answer this question (for more details on the Khwe see Appendix 1).

4.1.2 Khwe San Land Claims

The Khwe San of the West Caprivi use a multi-layered strategy in their quest for economic and political autonomy. Rights over land in the West Caprivi are linked to settlement history, colonial influences, neighbourly relationships, ethnic identity, recognition of traditional leaders, and economic survival. The main tool the Khwe are using in order to secure access to land is identity. They represent themselves as a cohesive and distinct ethnic group in anticipation that this will give them a legitimate identity in national, regional, and global venues.

Besides claiming a special relationship to the land, the Khwe use their language, hunting with bow and arrow, and food gathering as evidence of an authentic tradition. Orth noted that for the Khwe *“the importance of tradition was not to be found in their content, but rather in the difference between the Khwe [way] of doing things and those of other peoples, especially the Mbukushu”* (2003: 145). She has interpreted this expression of difference by the Khwe as a sign of the need to express their own identity in order to survive the threat of subordination posed by the Mbukushu, who perceive them as a sub-group of their tribe. The government does not recognise the Khwe’s authority structure and as a result the Khwe fall under the leadership of the Mbukushu king who denies the Khwe access to their ancestral land.

An example of re-traditionalisation as a cultural survival strategy is exemplified in the Khwe revival of hunting. Even though hunting is forbidden because of the game park status of the West Caprivi, the Khwe emphasise hunting with bow and arrow as a main feature of their heritage. As one Khwe (based in the Omega camp) testified: *“the*

wild animals are our cattle, the cattle of Mbukushu are destroying the natural resources, they are killing the wild animals, these Bantus create problems for us Khwe” (31 August 2005). Orth concludes that the Khwe are using a strategy that promotes their identity as Khwe at the local level, as San at the regional level, and as indigenous at the global level.

Khwe land claims focus on a connection to their use of land. However, this discourse is often based on an unrealistic expectation of indigeneity. Native title claim is a process that remains embedded in a colonial frame of reference. For example, non-indigenous peoples often define tradition in a narrow and restricted way (for more details see chapter 2). Indigenous culture, according to them, is expressed through the use of traditional language, stories, places, ritual practices, and kinship ties. Thus, native title claims are driven to represent the past as frozen, while ignoring that they are part of a complex process of transformation and continuity. As a result, indigenous peoples are required to internalise the non-indigenous (i.e. colonialist) understanding of tradition and authenticity in their strategy to gain land rights.

There are problems with defining indigeneity in this narrow sense, as exemplified by Chennells' reflection on the success of the †Khomani San land claim that he represented in 1999: *“The San are now landowners. They'll have to train people to do the tracking and all those things to fill that space. But probably the most major challenge is trying to make the myth that we've actually created in order to win the land claim now become a reality. It is the myth that there is a community of †Khomani San. At the moment there is no such thing (emphasis by author). We have to try and find a way of helping the †Khomani understand what it means to be †Khomani”* (cited in Robins, 2001: 840; 2003: 277-78).

In order to win this land claim, the San in South Africa conformed to the expectations of donors and governments and engaged with a strategic narrative of community solidarity, social cohesion, and cultural continuity. However, after winning the land claim, the community fell into social fragmentation and intra-community conflict¹⁴⁵.

¹⁴⁵ Some of the †Khomani community members complained to the South African Human Rights Commission when one of the community members was murdered (it was claimed by the community that this person was murdered by the police, the Human Rights Commission has not denied this claim

4.1.3 Idealisation of Indigeneity

The criteria for indigenous status in native title claims enforce an engagement with ‘primordialist’ and ‘essentialist’ concepts of culture. Indigeneity is fixed in time and place and is not socio-economically and historically contextualised. This strategy can lead to the exclusion of indigenous peoples who have lost connections with their ancestral lands. For example, Canadian and US courts “*have rendered land claims invalid when plaintiffs do not appear Native enough*” (Thorpe, 2005: 7). Sylvain (2002) gives the example of the Omaheke San¹⁴⁶ who have been a landless underclass of farm workers for generations and as a result have been incorporated into an ethnically hierarchical class system. For the non-San in Namibia there are no authentic San in the Omaheke anymore; they no longer hunt and gather and therefore have lost their cultural identity. The Omaheke San, on the other hand, do not consider themselves to be non-authentic. To them, being San means being able to cope with continuing experiences of exploitation. The Omaheke San express a class-shaped conception of territorial identity. However, global discourse expects indigenous peoples to represent themselves as being internally undivided and untouched by history. While indigenous peoples are expected to represent land struggles in terms of this idealised traditional cultural identity, in reality, as Sylvain argues, land rights are tools to obtain contemporary social and economic justice: “*the Omaheke San are also seeking land rights, but they are not trying to restore a hunting and gathering lifestyle or regain an evolutionary heritage; rather, they are struggling for access to development, resources for better work conditions, and for political representation*” (2002: 1080).

in its fact finding report). The Human Rights Commission started an inquiry in 2004 and addressed a complex and intertwined set of challenges around relationships, cooperative governance, just administrative action, capacity-building and sustainable development. One of the key issues that emerged during the inquiry was that 1) there is a serious division within the community, particularly between the original claimants and those that joined the land claim; 2) the community is very close to splitting up and 3) that the problems in the community are exacerbated by the involvement of other players (for more details see South African Human Rights Commission report on the Inquiry into Human Rights Violations in the †Khomani San Community, 2004).

¹⁴⁶ Beginning in 1914, large tracts of the Omaheke region were set aside as reserve lands for the Hereros and Tswanas. The reserves became apartheid homelands in the 1970s, and after Namibian independence they became communal areas. These areas comprise about 35 per cent of land area in the Omaheke. The remaining 65 per cent is a ‘commercial farming block’ dominated by Afrikaner and German cattle ranchers who occupy 900 farms averaging about 7,000 hectares. No land in the Omaheke was set aside for the San (Sylvain, 2002).

Although the San have a strong case to claim native title over their ancestral land, Suzman has argued that the fate of the Hai//om with regard to their claims over Etosha “ultimately rests on the government’s appreciation of their particular predicament of landless underclass and willingness to prioritise them and other San in the land reform process” (2004: 222). Questions can be raised about the continued use of the native title claim as an ‘enforced’ strategy. Instead, approaches that are infused with current socio-economic realities might better reflect the needs of present indigenous peoples. For example, a land rights strategy based on compensation for past injustices and discrimination could be a valid alternative. However, while native title claims are clearly embedded in a legal framework, gaining land rights as compensation for past injustices and discrimination is still only theoretical. However, van Meijl argues in his case study on the redistribution of property rights to the Maori that the main issue at stake in any debate about redistributing property rights to indigenous peoples is the point of departure for the negotiations: is it “*historical justice based in the restitution of property rights that were dispossessed in the nineteenth century or [is it] social justice on the basis of contemporary concerns about [...] poverty*” (2006: 171)?

Normative arguments such as the concept of *terra nullius* that justified colonial acquisition of territory, are biased against the political and social organisation of indigenous peoples. These biases, according to Tully (1994), influence the current debate about native title claims and form the basis against which native title claims are judged. Contemporary property theory does not recognize the sovereignty of indigenous peoples; neither does it approve of indigenous tenure systems (see chapter 4). Both Dodds (1998) and Tully (1994) argue that it will be difficult to respond appropriately to compensatory demands for justice with regard to indigenous land claims as long as Western-based property theory is used to judge them. Tully suggests that it is important to assess land claims on the basis of historical practices of injustice, and whether or not these practices continue to exist. As such, an alternative framework for claiming property rights needs to be explored. In the next part, it will be examined whether a broader rights-based approach could offer a better alternative to the strategy of native title claims.

4.2 Human Rights Framework

While native title claims are clearly linked to an 'essentialised' indigenous identity, not only anthropologists (see for example Sylvain, 2002; Robins, 2001; 2003) but the San themselves (see Appendix 2) have repeatedly argued that they want to become equal citizens. Under the post-apartheid Constitution, all Namibians should be equal. However, native title claims that require the projection of an essentialist and primordial identity and relationship to land might prevent the aspiration of the San to become equal citizens in Namibia. Therefore a more generalist rights discourse might be a better tool for the San to advance their land claims on the political agenda. A broader rights discourse that includes social and economic rights would lead to new and different claims relating to land (Hellum and Derman, 2004). For one thing the claims would be more contextualised and embedded in the daily socio-economic reality of the San.

A widened vision of rights (i.e. more widely defined as going back to a traditional way of life) would open up the debate and could easily include demands of rights to livelihood, equal protection of tenure and access to resettlement land for the San. Hellum and Derman (2004) show in their paper that property rights are part of a general right to a decent standard of living, life and dignity. As such, human rights are more defined as a holistic concept, wherein property rights are linked to the realisation of broader social and economic rights.

According to Hellum and Derman (2004), any land reform programme should be both equitable and economically sustainable. In practice this means that any land reform programme should include the three pillars of human rights, namely, civil and political rights (for example, the right to participate, the right to protect bodily integrity and property and the right to equality and non-discrimination); social, cultural and economic rights (for example, right to health, food, water and livelihood) and solidarity rights (for example, right to development and to live in a healthy environment). Some of these requirements are already embedded in the most important human rights instruments (see Appendix 4).

At first sight, it seems that the San could potentially use a whole area of international and regional African human rights instruments in their battle for land rights. According to Hellum and Derman (2004), these human rights instruments are particularly appropriate because they are designed to protect social justice and go beyond the sole protection of individual property. These instruments acknowledge that property rights are far broader than exclusive private ownership; they include a bundle of rights to use land and its resources in a way that can support the livelihood strategies of indigenous peoples. However, as already mentioned in the introduction, these instruments need to be implemented by the state and, as the case study of the San indicates, this has not yet happened in Namibia.

In their campaigns for recognition, indigenous peoples are increasingly making use of an international political platform, such as a human rights framework, to influence national decision-makers. Keck and Sikkink (1998) call this the 'boomerang strategy'. It can be helpful in states where the input of indigenous peoples in the political and judiciary process is very limited and where governments are dependent on international support to advance development projects. In this scenario, indigenous groups make appeals to other nations and to NGOs which then put pressure on their recalcitrant national governments. However, this strategy underscores a dilemma that many indigenous peoples face; in order to gain access to an effective platform to voice their concerns, they have to engage in a discourse that is not embedded in their daily reality. In addition to appeals to the international platform and use of the boomerang strategy, there is a third way for indigenous peoples to achieve recognition for their land claims, viz. social movement action in the form of local grass-root mobilisation; an issue that will be discussed in the next part of this chapter.

4.3 Local Grass-Root Mobilisation

In recent years, social movement action in the form of an international grass-roots mobilisation has been a popular strategy for indigenous peoples. Scholars like Brysk (1996; 2000) have argued that the fate of social movements in general, and indigenous peoples in particular, now depends on the establishment of a transnational civil society that is capable of encouraging international solidarity. However, as illustrated in this chapter, against this background of globalism, internationalism and

cosmopolitanism, the nation-state continues to be a critical player in the process of modifying the economic, political and socio-cultural position of subordinated groups. This is not to argue that indigenous peoples should be discouraged from pursuing an international strategy, but as Otero (2004a; 2004b) argues, subordinated groups (like indigenous peoples) will only be able to influence domestic state politics and interventions in their favour when these groups organise themselves politically at the local level. Castree (2004) calls this approach 'situational pragmatism' and he argues that contemporary efforts to defend territories, resources, knowledges and cultural artefacts can be perfectly embedded in the local without sliding into a 'xenophobic particularism'; the latter is often used as an argument by some for rejecting a local approach.

Based on observations of indigenous peoples' struggles in Latin America, Otero and Jugenitz (2003) and Otero (2004a; 2004b) argue that a political theory of class formation with a bottom-up linkage approach, offers a better strategy for indigenous peoples than a globalist strategy. Indigenous peoples must be able to mobilise themselves from below, hence the need for a theoretical and practical bottom-up approach. In terms of indigenous mobilisation in Latin America, Otero (2004a) has observed two approaches. The first is based on the attempt to reassert class as a political determinant; the other, in contrast, is part of a new social movement and uses identity, rather than class, as the prime factor for mobilisation. However, Otero (2004a) argues that there are problems with both concepts. While the first approach is (too much of) a continuation of traditional Marxism, the second approach does not sufficiently target local politics. Otero (2004a) claims that a theory of political-class formation would provide a better understanding of how subordinated groups should organise themselves because, first, both class and identity would serve as constitutive parts and, second, inspired by Gramsci's (1971) insights about civil society, political-class formation would create the optimal framework for understanding the dynamics between civil society and the state.

In this respect, political-class formation becomes a particular attractive option for indigenous peoples in their struggle for recognition. Especially, the link with Gramsci's theory that civil society is the arena between the state and the market wherein ideological hegemony can be contested, offers some scope for better targeted

campaigns by indigenous peoples. Although Gramsci's ideas about civil society have long been used to organise resistance to colonialism and post-colonialism, as Lewis (2002) illustrates, some scholars still question the relevance of the transfer of civil society – which historically was mainly a Western concept – to other (non-Western) political and cultural settings. As a counter argument, some have suggested that the concept of civil society can – when transferred to other cultural settings – take on local and different meanings, while others have implied that the idea of civil society has for a long time been implicated in Africa's colonial histories of domination and resistance.

Comaroff and Comaroff (1999 in Lewis, 2002) offer a useful insight when they argue that while a Eurocentric approach to civil society is rather narrowly defined in the institutional arena, recognising a local counterpart of civil society opens up a new terrain of action that highlights the potential of kin-based and ethnic organisations in helping to form public opinions and political pressure groups. Widening the concept of civil society to include kinship, will be problematic for those scholars (see e.g. Gellner, 1995 in Lewis, 2002) who still define civil society according to Hegel's conception in which the domestic sphere of family and household is explicitly excluded from civil society. However, within the context of this chapter, it is argued that a culturally varied type of civil society that organises social activities and mobilisation at a micro-level will be more useful for some indigenous peoples, like the San, than the current strategy of focusing on high levels of international rhetoric, abstraction and a-historical generalisation. For one thing, social mobilisation organised at the micro level is a natural continuation of their kinship-based social organisation.

Hearn (2001) argues that concentrating on the lowest possible level of social mobilisation (which could be kinship) allows the possibility of operating outside the formal realms of law. As demonstrated in this chapter, this strategy might be particularly useful given the fact that the current legal regime in Namibia (a) does not recognise the San as equal citizens with the same rights and duties as other Namibians even though they are equal before the law and (b) does very little to alleviate the poverty of the San which was, in the first place, created by outsiders. In this sense, the concept of civil society at the micro level becomes not only a theoretical concept, but

above all a pragmatic act that indigenous peoples like the San can use to create a more supportive and socio-economically sound environment at the local and national level.

While the debate about how to protect indigenous peoples' resources, land and knowledge has so far been heavily influenced by concepts of 'belonging' and 'identity', it is argued in this chapter that this approach has led to essentialised policy prescriptions. Therefore, it is suggested that the central focus of this debate should shift to issues of 'scale' which links targeted micro-level actions with more national and international approaches. When von Benda-Beckman's *et al.* (2006) make a distinction between *categorical* ('formal') and *concretised* ('informal'/daily reality) property relations (see chapter 5) this is mainly a distinction of scale. The prime example in this chapter is that of the state's (formal and top-down) approach to communal and individual land ownership, which has been demonstrated to be clearly at odds with the daily needs and enacted livelihood strategies of the San family groups and communities.

Highlighting the importance of the local scale is also consistent with the starting point of this chapter, that territoriality may in fact be a more useful concept to guide the debate about traditional knowledge and how to protect it than intellectual property rights. To quote Greene, territoriality encourages "*a stronger sense of political integrity and consistency for indigenous peoples, challenging them to (self-) determine what should and should not be considered a resource and what should or should not become accessible to market concepts of property and commercialisation, hence also a method for preserving the values associated with local cultures*" (2002: 245).

5 Conclusion

This chapter has explored continuities between the enclosure of the land of indigenous peoples under colonial and post-colonial regimes. Taking the Namibian San as an example, it can be argued that current indigenous concepts of land tenure represent centuries of assimilation, subordination, and cultural loss, rather than pristine cultural and socio-economic practices of pre-colonial eras. Just like other indigenous peoples, the San have started to wield their indigeneity as a basis for claiming restitution of

alienated property. Emphasising a special relationship to land has become their main weapon.

The argument that indigenous peoples should claim property rights over land on the basis of their culture is based on the erroneous assumption that traditional communities are homogenous (see e.g. Appendix 5) and can be represented with one voice. Where society once enforced assimilation on indigenous peoples, it now enforces re-traditionalisation. With regard to native title claims, it is a continuation of a trend that requires indigenous peoples to link their relationship with land to concepts of identity, culture, and personhood. However, underlying power relations continue to derail land reform processes.

The tradition of cultural exchanges of indigenous peoples with neighbouring groups was severely distorted by the particular power asymmetry that developed under colonialism, an imbalance that continued in the post-colonial period and has been intensified by the forces of globalisation at work today. In order for land reform to succeed, land reform and reconfiguration of the received legal model of individualised property rights need to come to terms with the historic subordination and domination of indigenous peoples.

The colonial enclosures continue to bear on the living conditions of indigenous peoples today. Even after decolonialisation, some new national governments ratified the colonial appropriations of land and in some cases extended them. The maintenance of indigenous land-tenure systems is a fundamental component of indigenous peoples' livelihood strategy and cultural survival. Nevertheless, despite the growing international recognition of indigenous rights, national states and other ethnic groups continue to enclose indigenous peoples' land.

So far, to put it bluntly, law has been used to create an underclass, i.e. legal subjects subordinated by more powerful groups. The fate of the San, and other indigenous peoples for that matter, provides an example of this process. Law is an institution that has legalised to a certain degree the persistence of inequality between indigenous peoples and non-indigenous peoples. For indigenous peoples to use law to their own advantage will require a change of strategy. A first step in the right direction is to

reframe the debate over traditional knowledge to a language that is less embedded in an international rhetoric that is rather abstract and often meaningless at the local level. In order to survive, indigenous peoples have to secure access to land and while it may be useful and feasible for some indigenous peoples to influence their local and national government through the international arena of the UN, within the remit of this research doubts are raised whether this is going to be the most appropriate strategy. Although indigenous peoples are familiar with the concepts of globalism and cosmopolitanism, it is argued in this chapter that in order to grasp the real fate of the tragedy of traditional knowledge, academics, policymakers and NGOs should shift their attention from the global to the local. This is not to argue that the local should be firmly placed as the opposite of the global; throughout this thesis it has been argued that bifurcated views will only reinforce so-called differences. By drawing attention back to the local, the debate becomes more contextualised. The local and the global are not two opposing worldviews, they are related conflicts at different scales. A better understanding of socio-cultural, economic and political settings at the local level will help to inform the relevance of the debate at the international level; as has been demonstrated repeatedly in this thesis, the opposite approach has often resulted in essentialising indigeneity.

Chapter 10 - Conclusion

This thesis has sought to unpack and contextualise some of the assumptions that have been made in the literature about traditional knowledge, commodification, property and indigeneity. This has resulted in the emergence of several themes that constitute key challenges that must be dealt with in order to further the debate about traditional knowledge and the policies designed to use and protect it.

1 Dichotomies

There is a continuing belief in the validity of depicting different knowledge systems, commodities and property systems as complete opposites. The persistent portrayal of traditional knowledge as the mirror image of other knowledge systems is the result of the impulse to divide the world into two meta categories. The origins of this belief must be sought in the Enlightenment philosophy that universalised European society and its socio-economic and political infrastructure. By separating European society from non-European societies, an opposing classification of 'us' versus 'them' has been created. The strong emphasis on differences continues to guide the debate about traditional knowledge and how to use it and protect it.

It is argued, for example, that indigenous peoples' economic systems differ from the Western economic system. This dichotomised portrayal has led to a one-sided portrayal of commodification processes and has provoked strong opinions about the commodification of traditional knowledge that does not always represent the views of indigenous peoples themselves. Property relations in indigenous societies have been oversimplified and reduced to being community-based, as opposed to Western individualised property rights. Another example of a bifurcated view is the portrayal of indigenous legal systems as different from Western legal systems. Such polarisation may lead to policy prescriptions of little value once they are applied in a particular case.

The strong emphasis on differences, which has been artificially created as a result of this philosophical perspective, inhibits the recognition of substantial similarities in knowledge, economic, property and legal systems. The false polarities promote

hierarchies and there is a danger that continuously emphasising the dichotomy between the so-called opposing knowledge, property, economic and legal systems leads to misinterpreting the foundation of these. This approach has introduced the problem of how to identify **authentic** traditional knowledge and objects, indigenous property rights and indigenous (customary) law and leads to essentialising these aspects. The effect of portraying these aspects as bounded and discrete entities and opposing them to other bounded entities is that these concepts are going to be judged: which one is better or worse; more or less valuable; dominating or victim of domination.

It is important to move away from this homogenised and polarised thinking. In order to protect traditional knowledge from further exploitation by other parties, it is necessary that concepts of indigenous peoples' rights over knowledge, resources and culture can bridge the gap between Western and non-Western cultures. Recovering, protecting and commercialising traditional knowledge in a more equitable way means looking for similarities between the two, at first sight opposing, systems. A 'true' *sui generis* approach should be based on recognising the difference of indigenous peoples without essentialising their identity, knowledge, property and legal systems, while simultaneously promoting cooperation and unity between indigenous and non-indigenous peoples. Building bridges between the two diverging systems depends on paying more attention to the cultural aspects and contexts of knowledge systems, commodification, property rights and law.

2 *Social Relationships*

Emphasising simplified dichotomies in this debate about traditional knowledge is a defining characteristic of a positivist approach. In contrast to indigenous peoples' systems, Western concepts of knowledge, commodities, property and law are portrayed as being devoid of any real social embeddedness. However, Western knowledge creation, commodities, property rights and legal systems are just like their indigenous counterparts reflecting political and social practices and expressing relationships between people and environments. Although the format and output may be different between different knowledge, property, economic and legal systems, the concept that these units emerge and develop as political constructs and represent

particular social and institutional relations is just as relevant for Western as it is for indigenous systems.

For example, acceptance of the idea that all knowledge is socially produced dissolves the theoretical dichotomy between indigenous and scientific knowledge and reveals particular social and historical relations and practices which might better explain the contestation between different knowledge systems than highly simplified dichotomised epistemologies of knowledges. A similar approach is also relevant for the concepts of property relations, commodification and legal systems. It is important to consider property relations and regimes as being embedded in larger social, economic, political and legal constructs rather than to focus narrowly on the proprietary terms of individual versus communal property rights, which is in any case largely a Euro-American construct that was exported to non-Western cultural settings during the colonialist era.

Furthermore, this approach also highlights the responsiveness of these frameworks to context-specific challenges. Especially, the concept of traditional knowledge and indigenous peoples' identity as bounded in time and space must be criticised. Knowledge systems are syncretic, in a constant process of change and continuously influenced by outside ideas. Any sort of knowledge system, commodity, property relation or legal system embodies a history of social practices and is an answer to the local cultural context.

Studying knowledge, commodity, property and legal systems in a more contextualised manner requires mapping and analysing the power structures between different networks, the influence of formal and informal law and procedures, the role of formal and informal organisational structures with regard to property and different positions of power on the ground between institutions and different groups of people. In other words, the difference between 'us' and 'them' does not lie in opposing systems; the difference lies in power relations.

3 *Power*

In order to further the debate about the commodification of knowledge, it is important to acknowledge that indigenous peoples are not just helpless victims who submit to globalisation and commodification, but are capable and often participating actors who can make commodification work to their advantage. The focus on commodification as a tool to achieve social and economic equality is a very contested approach. Commodification can only become an act of emancipation and liberation when poor and subordinated people are sufficiently involved in setting out the rules and meaning of the exchange or commodification. This means that in order for commodification to work in the best interest of indigenous peoples, it is important that local settings are questioned. There is a need to have a critical understanding of historical trajectories and to identify underlying power structures that dominate local settings. In practice this means that the focus of attention should shift from the yes-no question on commodification towards the empowerment of those who want to use their traditional knowledge and sources in order to improve their livelihood. Indigenous peoples' acceptance of commodification in principle does not equate to the acceptance of a commodification practice that is shaped by and driven by more powerful external actors. On the contrary, it is important to empower indigenous peoples who want to use their rights to prevent the commodification of their knowledge. Regardless of whether the issue is the protection of traditional knowledge as an economic resource or the protection of traditional knowledge as an expression of cultural identity or heritage, both forms of protection require the possession of power.

Many indigenous peoples are turning to intellectual property rights in the hope that these can help them with redressing a historical situation of social, economic and political oppression and subordination. However, it is difficult to see how intellectual property rights can be an appropriate tool to help indigenous peoples to achieve equality. This is certainly going to be problematic as long as indigenous peoples are not sufficiently empowered to seek the commodification of their knowledge on their own terms. In their struggle for empowerment and control over their knowledge, resources, culture and land, indigenous peoples are increasingly enforced to rely on

claims of ethnic and cultural authenticity, even when and where these images bear little resemblance to the current identity of indigenous peoples on the ground.

4 *Politics of Identity*

By turning knowledge and culture into property, their uses and meaning are defined and directed by law, a process that is steered by more powerful actors and which often excludes indigenous peoples from participation. The result may be that the 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.

The criteria for indigenous status also guide native title claims and enforce an engagement with 'primordialist' and 'essentialist' concepts of culture. Indigeneity is fixed in time and place and lacks socio-economic and historical contextualisation. This strategy can lead to the exclusion of indigenous peoples who have lost connections with their ancestral lands.

Allocating property rights over culture on the basis of ethnicity needs to be questioned for all but the most isolated indigenous groups. The Sentinelese are probably the only remaining group for whom this approach might be valid. 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. 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. In short, (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.

5 *Issues of Scale and Locality*

The translation of local life and daily practices into formal (legal) categories has led to policies that dichotomise, simplify and homogenise the complexities of social life as lived by indigenous peoples. A *sui generis* approach to protecting traditional knowledge must focus on discovering the localised practices of law that are, so far, barely explored in the formal system of law making. In order to find a 'solution' to the problem of protecting traditional knowledge that works in the local context, it is important that scholars, development workers, NGOs and institutions like the UN 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 (i.e. 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 importance of the local scale.

While the debate about how to protect indigenous peoples' resources, land and knowledge has so far been heavily influenced by concepts of 'space' and 'identity', this approach has led to essentialised policy prescriptions. Therefore, in this debate more emphasis should be placed on issues of 'scale' which link targeted micro-level actions with more national and international approaches.

Formal-institutionalised law has created an underclass, i.e. legal subjects subordinated by more powerful groups. Law is an institution that has legalised to a certain degree the persistence of inequality between indigenous peoples and non-indigenous peoples. For indigenous peoples to use law to their own advantage will require a change of strategy. A first step in the right direction is reframing the debate over traditional knowledge to a language that is less embedded in an international rhetoric that is abstract and therefore often of little relevance at the local level. Therefore indigenous peoples' strategy to gain more rights over their knowledge, resources and land should shift from the global to the local. This is not to argue that the local should be firmly placed as the opposite of the global; such a polarised view will only reinforce so-called differences. The purpose of drawing attention back to the local is to contextualise the debate. The local and the global are not two opposing worldviews, they are related conflicts at different scales. The fieldwork in this research and the stories interspersed as intermezzi in this dissertation have emphasised the importance of understanding local concerns and illustrated the relationships between global and local conflicts. A better understanding of socio-cultural, economic and political settings at the local level will help to inform the debate at the international level and end the practice of essentialising indigeneity.

Furthermore, focusing on the local will also facilitate the (re)discovery of law and its rules in daily life. The sources of law that regulate intellectual property rights are not only to be found in the WIPO, CBD, UNESCO or WTO, they can also be found through observing local practices and listening to local stories. Incorporating these local practices into the global is going to be the challenge. However, as argued throughout this thesis, by unpacking some of the assumptions that have been made

about commodities, properties, knowledge systems and legal systems, it appears that the gap between the global and the local or 'us' and 'them' does not have to be unbridgeable. The 'noble savage' has always been a myth; creating a system of goodwill and equality is perhaps the most important prerequisite to demystify and decolonise this myth, and it opens the way for a property system that is less exclusive and more balanced in the way in which it allocates both rights and obligations over knowledge.

Appendix 1 – Fieldwork Methodology and San Communities Visited

Given the fact that the fieldwork observations and data have not been used in a very prominent manner in this thesis, it is decided that, following the same logic, the description of the methodology that was used during the fieldwork should not be part of the main body of the thesis. This appendix describes the social science research methods used during the fieldwork (section 1-3) and the San communities visited during the fieldwork in Namibia and South Africa (section 4).

The main research methods that have been used for the fieldwork (see further down) have their roots in ethnographic research. Although this research is not a priori an anthropological study of the San, it is not unusual to use ethnographic research outside its classical domain of anthropology (Flick, 2002). It is not uncommon that researchers from a variety of disciplines (e.g. human geographers, sociologists) conduct on-site participant observations, although typically shorter periods of time are spent in the field in comparison to fieldwork by anthropologists, mostly because of resource and time constraints (Sherman Heyl, 2002). For this study, fieldwork was carried out from August - November 2004 and July – September 2005.

Linking different qualitative data gathering methods (triangulation) has become an essential part in empirical studies (Flick, 2002). The main purpose of triangulation is to enhance confidence in the research findings by combining different methods in order to seek validity of the results by cross-checking one method with another method (*ibid.*). In other words “*once a proposition has been confirmed by two or more independent measurement processes, the uncertainty of its interpretation is greatly reduced. The most persuasive evidence comes through a triangulation of measurement processes*” (Webb *et al*, 1966: 3). Furthermore, ethnography is not a single method; many methodologies can be used such as direct observation, interviewing, discourse analysis, diary techniques and even questionnaire surveys (Uzzell, 2000). With regard to this study, the San’s point of view towards intellectual property rights in general and in particular the Hoodia benefit sharing agreement has been collected by making use of mainly three techniques: participant observation,

informal and semi-structured interviews and scenario survey testing (for more details on the scenario survey testing see Appendix 2).

Following Denzin's (1970) categorisation, the following two triangulation methods have been used in this research. First, through data triangulation data is gathered by making use of different sampling strategies, for example by focusing on different communities in different countries, across gender, age categories and different social positions within the community (for more details on the communities that have been visited see section 4 of this Appendix). In addition to the collection of data by engaging directly with the San, interviews with non-San people (e.g. people from the government and NGOs) were added to the data collection to verify and cross-check the data collected by interviewing and observing the San. Second, between-method triangulation has been used to contrast the findings generated through different qualitative research methods like participant observation, informal, semi-structured and elite interviews, scenario survey testing, transect walks, recording of life stories and other narratives. The main research methods that were used during the fieldwork are described below.

1 Participant Observation

Participant observation has been one of the main research tools to gather data in the field. The main aim of participant observation is to get close contact with the people that are being researched by making them feel comfortable enough with the presence of the researcher so that the study group can be observed and information recorded about their lives without interrupting the daily practice or life of the community members that are being studied (Bernard, 1988). The purpose of participant observation is twofold: first, to engage with the activities identified as appropriate for the field of study and second, to observe the activities of the people under study and the physical aspects of their situation (Spradley, 1980). The style of participant observation that has been used for this fieldwork – i.e. the degree of involvement both with the people and in the activities that were observed (Spradley, 1980) – varied between passive participation (i.e. being present at the scene of action but not participating or interacting with other people to any great extent), moderate participation (i.e. maintain a balance between being an insider and an outsider,

between participation and observation) and a few cases of active participation (i.e. do what other people are doing to fully learn the cultural rites for behaviour, e.g. transect walks to gather food and medicines).

The crucial part of this research technique is the impression the researcher makes when he/she enters the field (Bernard, 1988; Jorgenson, 1989). For this study, the Working Group of Indigenous Minorities in Southern Africa (WIMSA) has facilitated the entry in the field. Establishing contact and building up a relationship with WIMSA was in any case a prerequisite since every researcher has to sign a research and media contract with the San, through WIMSA, which aims to protect the intellectual property rights of the San and guard that correct information of the San reaches the public. In the past, numerous researchers and journalists have exploited the San by depicting them wrongly and not sharing the benefits accrued from the research, such as the revenues generated through the sale of books or documentary films about the San (Useb, 2003). When the San communities were visited, the signed research contract had to be shown to the elders and chiefs of the respective communities. The research and media contract is also seen as a tool to combat knowledge ownership disputes that can arise as a result of using San images by artists, advertisers researchers and media without the consent of the San.

In all the communities visited during the fieldtrip, but especially during the first three weeks in the field, participant observation has been the main source of data gathering for the following reason. Although prior to the fieldtrip, numerous anthropological works have been analysed in order to become familiar with the San's culture, realities of the field demanded that before any attempt could be undertaken to conduct interviews and exercise the scenario surveys, more information needed to be gathered to adapt both the interview topic guide and the scenario surveys to the realities as experienced in the field. Especially, attending meetings organised by the elders and elected representatives of the community proved to be extremely useful for understanding the context of the San's social, political and economic situation, but above all their marginalised situation in mainstream society. It also gave invaluable insights in how the San perceive the relationship between themselves and other parties; like government, NGOs (mainly WIMSA), researchers and funding bodies.

This initial approach of mixing and mingling with everyone possible is an example of what Fetterman (1998) calls the big-net approach. It allows for a wide-angle view before zooming into the microscopic analysis of the population. As the study progresses, the focus of the observation narrows to specific groups of people. It is common practice to use the first stage of the fieldwork as a tool to help refine the focus of the research and to aid the fieldworker in understanding the finer details that he or she will capture in notes for further analysis. To assist in this achievement it is believed that using this more informal strategy at the onset of the fieldwork can be most beneficial (Fetterman, 1998).

It was obvious from the way the members of the community acted that they saw this research as some sort of facilitating body through which they could 'air' their grievances. The San made great attempts to make sure that meetings were translated even though there was no direct link between the agenda of the meeting and the focus of this research. However the privilege given by the San to attend their meetings allowed for a better understanding of the power relationships at play amongst the San themselves and between the San and the so-called outside world. This information has been quite useful in reshaping the research strategy and reviewing interview topic guide and shaping the approach to the scenario surveys. Facilitating these San meetings (mainly in the sense of providing transport logistics) helped to establish a good rapport with the community. Also the decision to pitch a tent amongst the San during the fieldwork was helpful in establishing a good and trustworthy relationships with the San. It provided more time and opportunities for conversations and observations, which could take place on a more equitable basis as community members could and did pay visits to the researcher's campsite when they felt like it.

The data that has been collected through participant observation has been recorded in fieldnotes. Writing fieldnotes provides the basis and is even the foundation of ethnographic representation of the findings of participant observation (Emerson *et al*, 2002; Spradley, 1980). As explained by Emerson *et al* (2002), "*the primary purpose of writing fieldnotes is to describe situations and events, as well as people's understandings of and subjective reactions to these matters, fieldnotes also provide a critical, first opportunity to write down and hence to develop initial interpretations and analyses. In writing the day's events, [the researcher] tends to assimilate and to*

understand [...] observations and experiences, seeing previously unappreciated meanings in particular happenings, making new linkages with or contrast to previously observed and written-about experiences” (Emerson *et al.*, 2002: 361). Geertz (1973) has called this practice ‘writing down the social discourse’.

Following Van Maanen’s (1988) and Jorgensen’s (1989) recommendations about keeping and writing fieldwork diaries during the fieldwork, whenever the opportunity occurred, field observations were recorded in the fieldbook with the greatest possible detail in order to represent and recount just-observed events, persons and places to written accounts. Fieldnotes describe events, people, things heard and overheard, conversations among people, conversations with people, etc. (Emerson *et al.*, 2002). Three types of fieldnotes were taken during the fieldwork. First, in the descriptive fieldnotes (Bernard, 1988) everything that was observed was captured in the fieldbook with a particular focus on the behaviour of people and the environment. Second, analytical fieldnotes (*ibid.*) described the evolution of ideas about how the research was developing, including analyses of how the communities that were examined responded to the research, how they were organised, what sort of problems the communities were facing, etc. Third, personal and emotional reactions (Emerson *et al.*, 2002; Bernard, 1988) were also recorded in a diary.

Fieldnote extracts have been included in the intermezzi and are presented as ‘impressionist tales’ (Van Maanen, 1988; Emerson *et al.*, 2002) in the sense that the stories are striking but are not intended to tell readers what to think of an experience. Impressionist tales draw the reader into the story and let the reader work out the problems and puzzles of the story (Emerson *et al.*, 2002).

A similar approach has also been used for the incorporation of narratives and life stories in the intermezzi. Narratives are, just like participant observation, used to represent experiences of particular persons or groups so that others may know life as they know it through ‘expressions of voice’ (Emerson *et al.*, 2002). Emerson *et al.* (2002) argue that this concept of voice can be linked to the need for certain groups to be heard. The life stories and narratives that have been collected during the fieldwork have been presented in the intermezzi through the voice of those whose life story has

been collected without any undue interference from the researcher; a technique recommended by Van Maanen (1988).

In the context of this particular research special interest was shown in collecting life stories to have a better understanding of the political, social and economic situation of the San in recent history. Collecting life stories has become a crucial part of this research to map the San's human rights and socio economic position in which they find themselves within the national context throughout different stages of their life. By listening and incorporating the life stories of the San into the research, a better understanding can be gained of their struggles embedded in a specific context shaped by specific conventions of time and place. The life stories of the San do not appear out of nowhere; they are embedded in their traditions and culture.

Life stories are also an important pillar for understanding identities – of who one is and who one is not: *“[Life stories] make links across life phases and cohort generations revealing historical shifts in a culture. They help establish collective memories and imagined communities; and they tell of the concerns of their time and place. They bridge cultural history with personal biography. And they become moral constructions, tales of virtue and non-virtue, which may act to guide us in our ethical lives. Indeed, the stories we construct of our lives may well become the stories we live by. What matters to people keeps getting told in their stories of their life. Listening carefully to these stories may well be one of the cornerstones of ethnographic enquiry. To describe and analyse the ways of life which is a culture must mean describing and analysing the stories of its lived lives”*. (Plummer, 2002: 395).

2 Interviews

During the fieldwork mainly two different interviewing techniques have been used. First, unstructured interviewing has been used to interview people informally during the course of an ordinary day of participant observation (Bernard, 1988), e.g. during long rides through the Kalahari, when sharing meals, etc.. These informal conversations were included in the fieldnotes on the basis of ‘remembering’ the conversations. Any conversation between an ethnographer and a member of the culture being studied can be considered as an interview (Werner and Schoepfle,

1987). For example, any verbal confirmation or disconfirmation of an observation, or any formal, informal, or casual answer to a question, constitutes an interview (*ibid.*). Second, semi-structured interviews were used whereby an interview guide was used to gain insights in the San's perception of their socio-economic and political position; the importance of the preservation of their cultural identity; what it meant to be San and their stance towards protecting their traditional knowledge of plants. The interview guide was set up after close observations in the field. Where permission was given, the interviews were recorded on tape. However, Kvale's (1996: 3-5 in Sherman Heyl, 2002: 371) reference to the metaphor of 'the researcher as traveller' means that even semi-structured interviews can lead to unexpected twists and turns as interviewers sometimes have to adjust their paths according to how interviewees 'met along the way' choose to share their stories.

Elite interviews were organised with government officials in Namibia, representatives of NGOs (e.g. WIMSA, WWF, Omaheke San Trust) and people who have been involved in the negotiations of the Hoodia benefit sharing agreement (e.g. the human rights lawyer Roger Chennells, members of the Hoodia working group in Namibia; Martinus Horak from the South African Council for Scientific and Industrial Research [CSIR] – the patent holder).

Group discussions were included in the research. Some of these discussions were casual (e.g. the problems the community faced), while other group discussions were more focused and deliberately structured on a variety of topics directly related to the research (e.g. rights over knowledge and land).

In some communities discussions and semi-structured interviews were also organised with elite informants such as schoolteachers, health workers, farmers, non-San community members, shop owners, etc.

The process of sampling was mainly led by relying on personal judgment and recommendations of the translators and guides in order to select the most appropriate members of the subculture. This very common technique is called judgmental sampling. Where ever possible, a good spread of gender and age of interviewees was attempted. The majority of the interviews in Namibia were conducted in Khoisan

(general term for the family of San language) through an interpreter, whilst the interviews in South Africa where in Afrikaans were the interpreter functioned mainly as a guide to the community. The informal interviews and conversations were conducted in Afrikaans or English.

3 Scenario Surveys

The scenarios used by Soleri and Cleveland (1994) for their study on intellectual property rights and protection of folk crop varieties of the Zunis (a Native American community) were adapted to fit the local context of the San. Two scenarios 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 agreements the San would prefer and why (for more details on the scenarios see Appendix 2). Although the scenarios presented were fictitious, they described a situation that could easily happen to the San and some of the proposed scenarios were very similar to what happened with the Hoodia.

The sampling for the scenario surveys was based on judgmental sampling. All the people that were interviewed have participated in the scenario surveys. Sometimes people who were not interviewed participated in the scenario survey because they came to listen to the interview. Consequently, the sample does not pretend to reflect the opinion of the San across different communities and countries. At best, the sample is a reflection of the ideas that live in that particular community.

4 Communities¹⁴⁷

4.1 Omatako Community (Namibia)

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

¹⁴⁷ Description of the communities is based on the author's own observation, complemented by Suzman's (2001) and Haring and Odendaal's (2002; 2006) description of the communities.

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 jewellery. 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 to be allowed to settle in the area in the time of South Africa's occupation¹⁴⁸. 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

¹⁴⁸ Other members of the Omatako community provided this information.

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 (Namibia)

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)¹⁴⁹. This

¹⁴⁹ The Devil's Claw is traditionally used by the San as a digestive tonic, for headaches, fever and 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).

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 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 limited 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 †Khomani 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 colonisation) in an act that was relatively free of controversy in a time of elections. The government has bought up and handed over to the †Khomani San a number of farms around Andriesvale and gave the †Khomani certain user rights within the South African part of the Kgalagadi Transfrontier Park. The government did demand that all †Khomani

San descendants should share the rights to this land and this initiated a search for †Khomani 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 N|u (the original language of the †Khomani – see also Appendix 5), 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 †Khomani 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 medicine¹⁵⁰. 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.

The successful land claim had 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 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 gains 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.

4.4 Other San Communities in Namibia

While between two to three weeks each were spent in Omatako, Blouberg, Vergenoeg and Andriesvale. Shorter periods of time (between one week and 10 days) were spent in the following communities.

¹⁵⁰ For a detailed chronology of the commercial development of the San, see Stephenson (2003); Wynberg (2004b) and chapter 7, section 4, Table 5.

4.4.1 Communities in West Caprivi

The Caprivi region is home to approximately 4 000 San, most of whom speak Kxoadam and are better known as the Khwe, Barakwena or Barakwengo. At the time of Namibia's independence West Caprivi was also home to the Vasekele !Kung population but half of them have now moved to other places (including Omatako). The Kwe, most of whom live between the Kavango and Kwando rivers in West Caprivi, have had possibly the most tumultuous and complex recent history of all Namibian San. Their traditional authority has not yet been recognised and their tenure status remains insecure. After independence, 600 Khwe fled to Botswana fearing intimidation and harassment from the Namibian Defence Force and Special Field Force. The South African Defence Force employed the Khwe as trackers during the independence struggle.

While the lands of the Khwe are ancestral, the land is now communal but the legal status of the land remains uncertain and contested on two fronts. First, the Mbukushu (a Kavango people) have migrated into Khwe lands in large numbers and are now claiming ownership over the land. Second, the Namibian government has gazetted most of these lands as part of the Bwabwata National Park, thereby claiming ownership of Khwe communal land. Furthermore, in Divundu the government has also opened a resettlement project and prison.

The communities that were visited in West Caprivi were Divundu, Mutciko and Omega.

4.4.2 Mangetti West (Farm 6) Community

Mangetti West is one of the large blocks of government farms run by the recently defunct Namibian Development Corporation (NDC). These NDC farms were originally quarantine farms set up and run by the South African Government for the purpose of moving cattle from north of the Red Line (which is a communal farming area) into the white economy (commercial farms). Approximately 130 Hai//om live in an informal settlement in Farm 6 at Mangetti West. The majority of them are displaced farm workers with nowhere else to go.

Mangetti West's location at the edge of the communal areas permits some access to hunting and gathering activities but only a few Hai//om can still engage with these activities. There is little work in the area other than some casual work for the NDC. The area in Mangetti West was formerly the traditional land of the Hai//om. While the 130 Hai//om could be given the land back since the land has become vacant as a result of the closure of the NDC, in all likelihood other ethnic groups will be resettled on that land by the government and the Hai//om will once more be expelled from their land (there are rumours that it will go to Ovambo individuals who are well connected to the ruling party, SWAPO).

4.4.3 Nyae Nyae Conservancy

The Ju/'hoansi have lived in the East Bushmanland for hundreds of years, carrying on traditional hunting and gathering activities in this remote region of the Kalahari desert. At the time of the Odendaal Commission, this area was set aside as the communal lands of the Bushmen.

The original inhabitants of Nyae Nyae are among the most traditional of the San peoples, but anthropologists report that by 1960s most of their traditional hunting and gathering activities has ceased. Small-scale subsistence activities persist, but most people of the Ju/'hoansi have settled in the new administrative centre in Tsumkwe although some Ju/'hoansi have recently moved back to the more remote parts in the area. Because the land was remote and these communal lands were set aside for the San, the Ju/'hoansi are the only San in Namibia living uncontested on their own lands. In 1998 the Ju/'hoansi communal land was turned into the Nyae Nyae Conservancy, the first conservancy in Namibia, hence the conservancy has become a major economic and social force for the Ju/'hoansi.

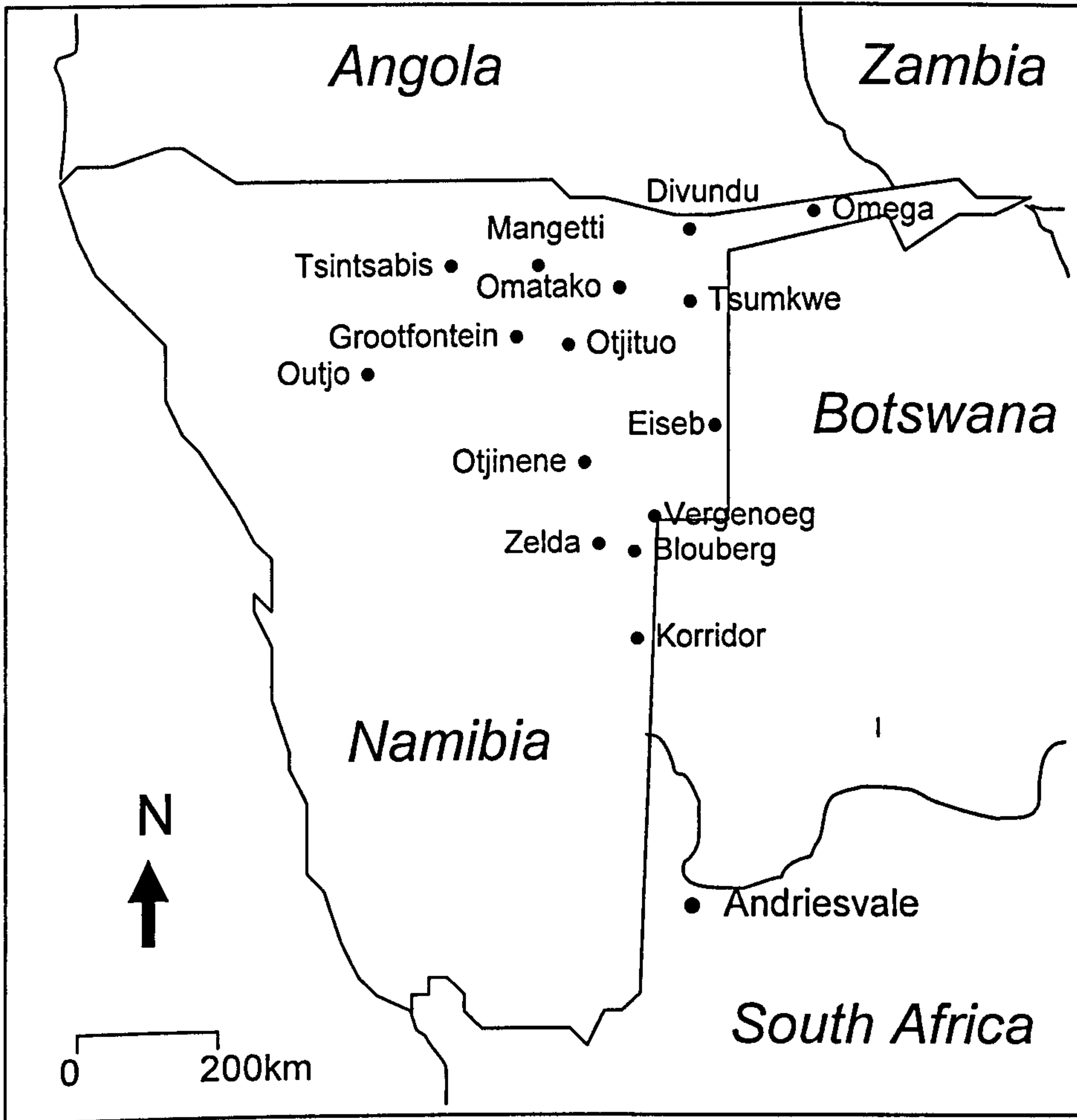
4.4.4 Former Hereroland (Omaheke and Aminuis)

In the Omaheke region the San are living both on commercial farms and communal areas. Commercial farming in the Omaheke region began early in the 20th Century and settlement continued until the 1930s, by which time the commercial farming block had taken on more or less the shape that it has today. Like most Namibian farms, the Omaheke farms are very large (averaging around 6000 ha.) and their creation resulted in the majority of the Omaheke San being transformed into a farm labour force. The

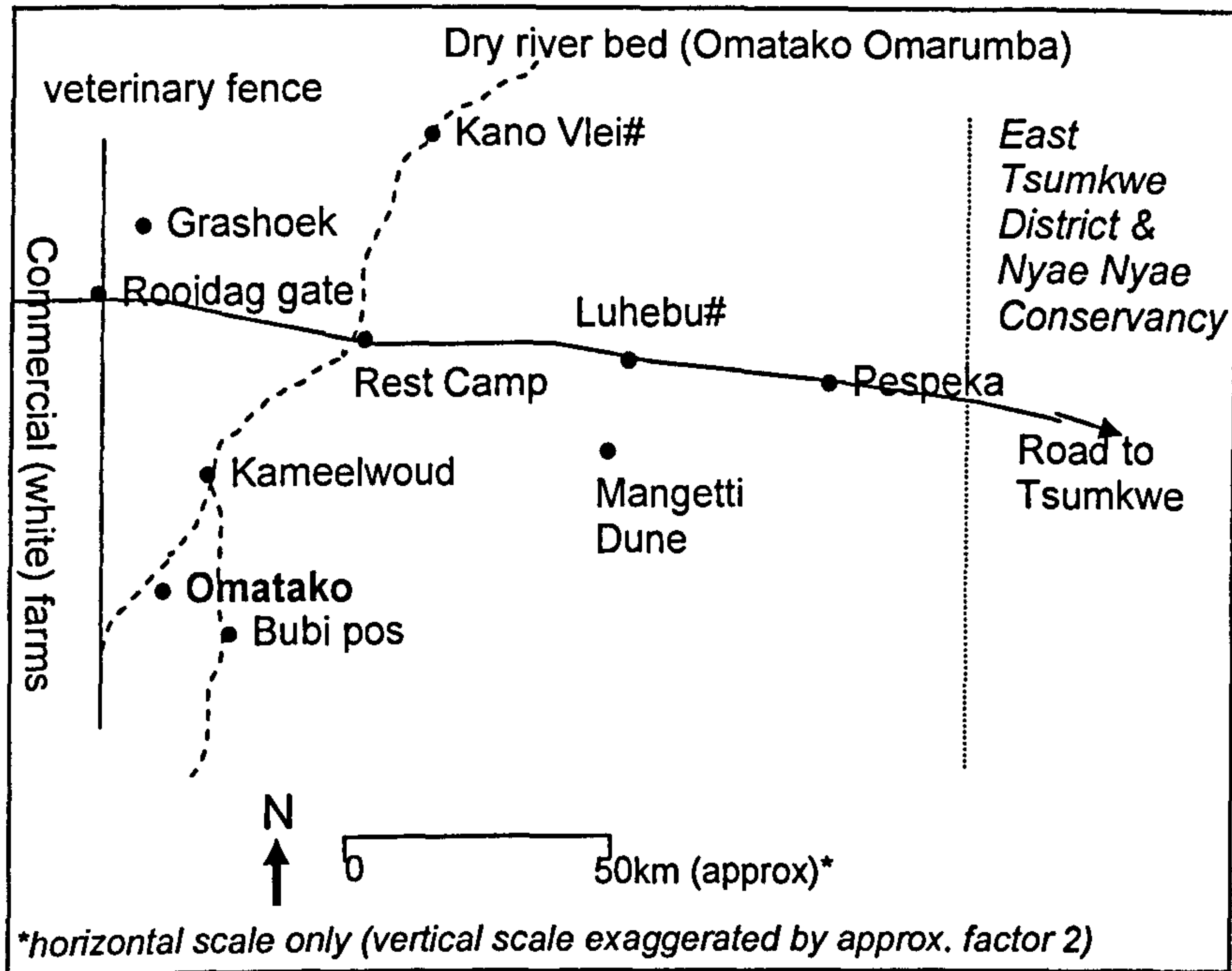
minority of the San that did not become farm workers in the Omaheke commercial farm region moved into Hereroland or Botswana. Within the commercial farming block, one farm was visited, Zelda, where the majority of the workforce were San.

The communal area in former Hereroland is now divided in Omaheke (Hereroland East, mainly Ju/'hoansi, Nharo and !Kung speakers), Otjozondjupa (Hereroland West, mainly !Kung speakers) and Aminuis and adjacent Korridor (Hereroland East Area 2, mainly !Xo and Nharo speakers). The San constitute more than 5 % of the population in these communal areas and usually live in the vicinity of larger towns and villages or on the peripheries of larger settlements. The living conditions of the San in the communal areas are often squalid. In the larger settlements alcohol abuse is widespread and food security is a real concern. The levels of tuberculosis and other poverty-related diseases are high among the San in these areas.

The communities that were visited in the communal areas in former Hereroland were: Skoonheid, Eiseb, Tsjaka and a few small communities/settlements in the Korridor.



Map 1: Distribution of the San communities visited (see Map 2 for details of West Tsumkwe District –i.e. the area around Omatako)



Map 2: Settlements in West Tsumkwe District (western part of former 'Bushmanland'). All settlements were visited during the fieldwork except those indicated with #.



Map 3: San and other ethnic groups in Namibia: A very rough indication of historic distribution before the arrival of Europeans (*non-san groups in italics*).

Appendix 2 – Trade in Tradition? Exploring Views on the Commodification of Traditional Medicinal Knowledge Within and Between Four San Communities

Fieldwork in four San Communities

The San are former hunter-gatherers and the oldest surviving ethnic group of Southern Africa. Despite severe pressure –including persecution- from more recent arrivals (pastoralists and agriculturalists of the Bantu-language group arrived in the last 2500-500 years, white settlers arrived mainly in the 1800s), it is estimated that about 100.000 San survive today in the Kalahari basin. While local and regional variation exists, the vast majority of the San have lost the title to their land and with that, the opportunity and skills to hunt. They are almost invariably poor by local standards and few can survive on subsistence farming, as this requires access to land, a suitable soil and climate and some capital in the form of livestock or fences to protect their crops. Many depend for their livelihoods on seasonal farm work (often paid in kind) and the collection of bush food. In countries like Namibia and Botswana food aid from the government is also important.

The case study 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. Below is a brief description of the communities (for more details, see Vermeulen, 2005 or Appendix 1).

Omatako, West Tsumkwe District. This community is located in former Bushman land, inhabited by only 5% of the Namibian San and the only ones that have *de jure* rights to the land. The San community is rather diverse, with some ‘local’ !Kung San and many relative newcomers from other areas of Namibia and Angola. The San are the majority group in the area, which is a community-based conservancy with significant natural resources for hunting and the collection of bush food. Many san families also grow some millet or maize, but even in years with good rainfall this is insufficient to feed them for the whole year.

Blouberg and Vergenoeg. These formerly white-owned farms are also resettled by other black groups who have been more successful in farming. The San here do not have *de jure* land rights and are much poorer than in Omatako. They do not own any livestock and the opportunities for the collection of bush food and for growing crops are much more limited, both because of land ownership issues and because of the physical environment (drier than Omatako). Some of the San in Vergenoeg are harvesting the Devils Claw in a scheme run by the Centre for Research Information Action in Africa and Southern African Development and Consulting (CRIAA SA-DC, 2003). While the Devils Claw is harvested across rural Namibia, this scheme is characterised by price guarantees for contract harvesters and the promotion of sustainable harvesting methods. CRIAA is not active in Blouberg.

Andriesvale, South Africa. The San were labelled as 'coloured' under Apartheid and widely scattered. They were thought to be culturally extinct in the early 1990s when a search across the Northern Cape Province found a handful of elderly individuals who could still speak the language. A community of their descendants has been more or less 'reconstructed' to claim back their land rights in and around the South African part of the Kgalagadi Transfrontier Park. On the back of this successful case, their lawyers also managed to persuade CSIR to sign a benefit sharing agreement for the commercialisation of the Hoodia.

Methods

The following ethnographic research methods were used; focus group discussions with a facilitator from within the local community, participant observation, informal conversations (e.g. see Binns et al., 1997) and a scenario survey (e.g. see Soleri and Cleveland, 1994). A guide and other community members who were keen to communicate in English or Afrikaans acted as translators for others.

The scenario survey was conducted to assess and clarify community attitudes toward proper use of traditional knowledge in view of demands from the outside world. It consisted of a hypothetical story about a businessman coming to a community because he had heard about a medicinal plant, which he would like to sell in the outside world. He meets three fictitious San individuals who respond in different ways:

1. Refusal to share knowledge over the plants.
2. Agreement to share knowledge in exchange for a share of the benefits (profits) 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. (similar situation to the Hoodia benefit sharing agreement).
3. Willingness to share knowledge, provided the san will get legal protection over their knowledge so that they can control it's use by others (similar to the concept of intellectual property rights).

The participants were asked to choose the response they liked best and comment on it or give their own response. The survey was developed on the basis of the findings in the first community (Omatako) and was subsequently replicated in Vergenoeg, Blouberg and Andriesvale. Vergenoeg and Blouberg communities were so small that the sample included the majority of adults present in these communities at the time of the research. Most people were keen to participate; upon approaching an adult member of a household, relatives and neighbours would join in a circle. The scenario story provoked an animated discussion as people gave their (frequently differing) views one by one. Only a few elderly individuals were reticent. According to other community members this was due to traumatic experiences of cruelty and beatings at the hands of white farmers (Blouberg) or teachings of the church against traditional practices (Omatako).

Results

In all the communities that were visited, people spoke about their knowledge of medicinal plants and their uses. In addition to widely shared knowledge, people referred to medicine men who have specialist knowledge of medicinal plants. The specialist knowledge of these individuals goes beyond plant knowledge; it also involves diagnosis, knowledge over healing rituals and spiritual aspects. This knowledge is guarded much more preciously by the traditional healer who decides himself to whom this knowledge should be passed on.

In addition to medicinal plants, most people in the community also referred to the tradition of collecting of food plants. They indicated that in the absence of the need

for these plants to support their livelihoods, they would still be keen to collect and eat them as it was part of their culture. Although most people that were interviewed confirmed that their knowledge was eroding and that their parents and grandparents knew much more, they also confirmed their intention to pass on the knowledge they still possess to the next generation.

Are the San willing to share traditional medicinal knowledge?

When people were asked whether they considered themselves as owners of the medicinal plants, they automatically made a distinction between the plants (tangible property) and the knowledge over this plant (what it treats and how to prepare it - intangible property). People linked ownership of the plant to territorial rights; the plant belongs to those who own the land. 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 (as opposed to current restrictions imposed by government) could be helpful in their struggle to alleviate their poverty. Especially, the San in the Na Jaqna Conservancy (Omatako) 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. The San were however also concerned about the depletion of natural resources. Residents of Omatako voiced concern over unexplained bush fires and the damage of livestock (overwhelmingly belonging to recently arrived, wealthy non-San settlers) to the natural environment which also resulted in a depletion of bush food. Around the settlements the ground was bare from livestock grazing, but a trip beyond the range of the cattle posts around Omatako, showed a very different landscape; tall grasses were abundant and there was much evidence of digging by wildlife for tubers. The community at Omatako had decided to stop the exploitation of Devils Claw out of concern for over-exploitation. However this decision may also have been influenced by the bad experience they have had with middlemen from outside the community who paid less than promised or nothing at all after collecting bags of dried Devils Claw roots. Some Omatako community members described the 'right' technique for harvesting of Devils Claw which involved removing just the regenerative side-shoots, leaving

the main root in tact and covering the hole again¹⁵¹. This method of sustainable harvesting has also been promoted in Vergenoeg by CRIAA SA-DC.

With regards to the ownership of the knowledge over medicinal plants, especially the San in Omatako were more protective. They were aware that they were the original inhabitants of these areas and although the neighbouring Herero (pastoralists of the Bantu-language group) and even other Khoisan speakers (Nama or Damara) might now have the same knowledge, they felt that ultimately the knowledge belongs to the San. The San might have shared their knowledge with other people, but the knowledge originated from the San and in the case of commercialisation, they felt they had the primary right to share in the benefits. This suggests that in Omatako at least, the San have an a priori understanding of intellectual property rights.

It also became clear that the San have some 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. Most San did expect something in return. In the past it could be anything, a piece of cloth, beads, food, iron, etc. For some people the principle of reciprocity is still more important than the question what is given back in exchange, but others mentioned that they now live in a money economy and expect money in return. Especially, women made 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 was seen as 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. 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

¹⁵¹ Phuthago and Chanda (2004) report the same harvesting technique amongst a San community in Botswana.

best interest. In both cases the money would disappear and the San would have lost control of their knowledge without gaining any benefits. They argued it would be better to offer treatment but keep the knowledge to themselves so people would have to come back and a continuous benefit stream was guaranteed.

Sharing knowledge with companies was seen as more problematic than sharing knowledge with individual people. As long as individuals fulfilled 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 the scale of reciprocal social relations. Most San expected that if the person who acquires the knowledge from the San has paid for it, he or she will also charge the person he or she is going to help. But if that person would have obtained the medicine for free or as a gift and is then trying to sell the medicine to more people and tries to make a profit, the San do not agree. Passing on the plants and the knowledge to use them was seen by most as a social contract which creates obligations for reciprocity. Most San were not categorically opposed to the idea of (re)sale and profit, but these options had to be discussed and agreed upfront with the community; trust in the business partner, fairness regarding the benefit distribution between the san and the business partner and retaining community ownership of the knowledge (including the right to stop the contract) were seen as key criteria for such a venture. Some people also expressed concerns that the knowledge could be misused and something might go wrong with the preparation of the medicine because of lack of appropriate information and knowledge.

Taking plants without permission was also considered as a very bad practice. Some are less worried about this practice, because they believe in the powers of the medicine and 'robbing' medicines would undermine their healing powers.

Especially with regards to the devil's claw, many San thought that they were being exploited. People repeatedly suggested that legislation should be in place to prevent the theft or that 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 for trading, 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.

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 commercial (i.e. wealthy) farmers to make money with the San's knowledge was perceived as unfair.

Preferred options for knowledge sharing

Table 6: Number of individuals who expressed preferences for particular knowledge sharing options; a breakdown by gender, income and community.

| Breakdown by | | Option 1 | Option 2 | Option 3 | No idea | Sum |
|--------------|----------------------------------|----------|----------|----------|---------|-----|
| Gender | Men | 8 | 5 | 25 | 1 | 39 |
| | Women | 14 | 20 | 10 | 6 | 50 |
| Income | Pension | 7 | 3 | 4 | N/A | 14 |
| | Devils claw (only in Vergenoeg) | 0 | 0 | 4 | N/A | 4 |
| | Nothing | 2 | 6 | 2 | N/A | 10 |
| | Child care (only in Andriesvale) | 3 | 0 | 5 | N/A | 8 |
| | Occasional | 1 | 2 | 10 | N/A | 13 |
| Community | Vergenoeg (Nam) | 0 | 3 | 15 | 6 | 24 |
| | Blouberg (Nam) | 9 | 19 | 1 | 0 | 29 |
| | Andriesvale (SA) | 13 | 3 | 19 | 1 | 36 |
| Country | Namibia | 9 | 22 | 16 | 6 | 53 |
| | SA | 13 | 3 | 19 | 1 | 36 |

Table 6 summarises the results of the scenario survey, dividing the participants into categories that are distinct in their responses. Clear differences were found in the preferences expressed by men and women. Men had a very strong preference for option 3, which was three times more popular than option 1 and five times more popular than option 2. The opinions of women were more spread out, with option 2 being twice as popular as option 3, with option 1 lying somewhere in between. Women are also much more likely to say they don't know.

Option 2, which is the equivalent of the Hoodia benefit sharing agreement, was the most popular option for the women interviewed in this survey. When asked why they opted for benefit sharing, their view was very utilitarian. Generating money was important to feed the children, pay for 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; this would help them to shake off 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 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 treat them with more respect. 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 but for community-based development projects.

The difference between the preferences of men and women may relate to gender inequality. Exposure to other cultures has undermined the traditional gender equality of the San. San women have lost influence and autonomy as a result of sedentarisation, shift to pastoralism and wage-labour 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 men over women. This has pushed the San women further into the margins of the cash economy. Exclusion from the cash economy may explain 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. Interestingly, subsistence gathering for family sustenance remains predominantly a woman activity, but the harvesting of natural resources for cash income has become a male activity. 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 why women gave

the lowest preference for intellectual property rights (option 3) – it is likely to be negotiated by men, excluding the women from decision making.

Men on the other hand seemed very keen to have legal rights and protection (intellectual property rights / option 3). 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. Some also argued that gaining rights over knowledge, natural resources and land was crucial for restoring their human dignity. 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 poisonous¹⁵². Furthermore, there was lack of trust in the benefit sharing option and a disbelief that legal rights would be granted considering their experience of marginalisation. Keeping the knowledge for themselves seemed then the safest option. 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. 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 choose, 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

¹⁵² Women also used this as an argument for wanting to keep the knowledge to themselves.

half the respondents chose option 3, just over a third chose option 1 and one in twelve preferred option 2. This may be related to the diversity within this reconstructed community.

The outspoken preference for option 3 in Vergenoeg is likely to be 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 management. Harvesters became 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, 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\$1.00¹⁵³ 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 had limited awareness over ecological and sustainability issues and, very importantly, had no voice in the industry or the opportunity to take up such issues with other stakeholders. According to CRIAA SA-DC (2003), this situation changed radically with the SHDC project. 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. The SHDC project has made the San in Vergenoeg aware that their natural resources are valued in the marketplace and that control over both harvesting and selling is required in order to demand 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.

¹⁵³ The exchange rate of one Namibian Dollar (N\$) is about £0.10 (2005). The Namibian Dollar is pegged to the South African Rand at the rate of 1:1.

The SHDC may also explain why respondents in Vergenoeg have not opted for the first option, viz. they have a positive experience in sharing their knowledge.

The situation in Blouberg, the poorest community, illustrated that extreme poverty and exclusion from the market or cash economy can translate into a more pragmatic and utilitarian response, viz. selecting the benefit sharing agreement. People in Blouberg complained that they were without food for days and had to live on handouts. Unlike Vergenoeg, the people in Blouberg did not participate in the CHDC or any other project. Sharing knowledge in return for money was considered as a means to end poverty. When the results are compared against income similar results emerge, i.e. respondents with an income were more likely to choose option 3 and to a lesser extent option 1. However, the interviewees without a source of income opted for the benefit sharing agreement in the hope that this could generate an income. Also the respondents who received a pension (they are 65+ of age) seemed more protective than the younger generation; they were 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 seemed in general to be more protective than men when it comes to sharing medicinal knowledge.

All the respondents in Andriesvale knew about the Hoodia benefit sharing agreements. Only a handful of 'elite' San in Namibia knew about this agreement; community members who have been elected as representatives in national and international organisations. Yet the respondents in Andriesvale rejected the benefit sharing option as their preferred solution; interviewees complained that they had not been involved in the procedures and expressed feelings of exclusion and being neglected (see Vermeulen, forthcoming).

Probably as result of the Hoodia and CRIAA experiences, the interviewees in Andriesvale and Vergenoeg were more aware of the value of their knowledge and natural resources and were keen to gain more control in the dissemination and commodification of that knowledge. 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. But then the people in Andriesvale were visibly better off, the pension money was twice as much as in Namibia and young mothers received money for childcare. Most of the people interviewed also confirmed that winning the land claim has improved their social situation and made them feel proud to be San.

Conclusions

This research illustrates that, amongst many individuals in these four San communities, there is an understanding of the concept of intellectual property rights and sense of ownership over both tangible and intangible aspects of traditional medicine. There was a widespread interest in the commodification of traditional medicinal knowledge, but under certain conditions related to trust, reciprocity and control through contracts with the community. However it would be wrong to assume that there is a generic form of collective or community-based intellectual property rights system, as opinions varied between individuals and communities. Factors such as the level of poverty and marginalisation, the extent of existing resource rights, and previous experiences (good and bad) in dealing with outsiders helped to explain much but not all of this diversity. This shows that although 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.

Appendix 3 – Shortcomings of the Human Rights Framework

Mutua (2002) argues that whole body of human rights should be more responsive towards the needs of Africa. The inspiration could come from the Banjul Charter (African Charter on Human Rights and Peoples' Rights) in which close attention is given to both rights and duties. Especially the focus on the latter could reintroduce values such as: commitment, solidarity, respect and responsibility; see also Murray and Wheatley (2003) who argue that a human rights regime developed under the Charter might be more compatible with the expression of rights of minority groups, including indigenous peoples.

An-Na'im and Hammond (2002) argue that transplanting the fully developed, conclusive and rigid concept of human rights from one society to another will not work. Human rights as a concept needs to be presented in local terms by local people if it is to give actual meaning and value to people's lives.

Chanock (2002) concludes that the scholarly discussion of rights (and culture for that matter) is too much framed in a meta-narrative of rights declarations and international law and how these narratives can fit in meta-cultures, or in other words a variation on the universal versus cultural relativism debate. Chanock calls this the 'sacralised discourse' of human rights, but argues that precisely this sort of discourse can be held accountable for ignoring the realities in which oppressions take place. The focus of attention, according to Chanock, should shift towards addressing the detailed needs of those affected by the wrongs.

According to Wright (2001), the origins of human rights can be found in natural law theories which, she argues, carry a significant limitation for non-Europeans because there is a strong relationship between the development of international law and the expansion of European colonialism. The commentators of natural law (like Grotius, de Vattel) ignored the claims of indigenous peoples while preaching about principles of war and international law that furthered the colonial project. Wright argues that many scholars have avoided analysing the historical context in which human rights

have developed. According to Wright, the discourse about human rights is too often bounded within a Eurocentric framework which makes the rights of the vast majority of human beings seem marginal, alternative or irrelevant. Embedding the human rights discourse more in a historical context can empower all human beings and can bring the marginalised into the centre of the discussion over the division of resources and power in this world.

In the edited volume, *Truth Claims: Representation and Human Rights*, Bradley and Petro (2002) explore the possibilities of an 'expansive humanistic interpretive' human rights framework. They argue that in the past the scholarly literature on human rights has been too much focused on the realisation of a Kantian endpoint characterised by achieving global rights, justice and welfare. They argue that it is important to question more critically the foundations of these normative claims that are firmly embedded in the moral principles of natural rights as formulated by Hugo Grotius and John Locke. They question whether we should take these normative ontologies for granted. Furthermore, the authors that have contributed to this volume argue that it is time to move beyond the oppositional debates (individual versus collective, West versus East, masculine versus feminine, and so forth). Instead, they argue to focus more on the 'dialogical encounter' between the local and the global.

According to Massa Arzabe (2001) the human rights paradigm is difficult to implement since pre-eminence is given to civil and political rights over social, economic and cultural rights. The emphasis on civil and political rights has its roots in liberal culture. She further argues that the dissociation between the two groups of rights contributes to inequality and the continuation of social exclusion and extreme poverty. Massa Arzabe laments the fact that the international legal system is based on the liberal principles of autonomy, free will, universality and abstraction. Such a focus prevents special treatment of the poor. Human rights should be more related to human dignity. This would allow concentrating on the empowerment and participation of concrete persons rather than abstract enforcement of human rights. The strong emphasis on human dignity is also shared by Van Genugten and Perez-Bustillo (2001).

Steiner and Alston (2000) question, *inter alia*, why the current human rights framework is founded and embedded in the rhetoric and concept of rights; whether the 'rights' language is essential to the values and goals of the human rights movement; and whether this language is accepted because of its strong roots in liberal political theories. They question whether other cultures necessarily have to accept the value of the rights discourse; would it be possible and acceptable to have a Universal Declaration of Human Duties?

Chandler argues that there is a danger that a strong emphasis on the normative ethical framework of human rights will not empower the underclasses such as: "*women, the racially discriminated, the poor and the hungry*" (2001: 87). He defines the normative human rights theory as theory-making that is concerned with 'what ought to be' or in other words the current focus is on the moral precepts of universal human rights, while Chandler argues that the focus should shift to the "what is".

Appendix 4 – Property Rights as Part of Human Rights

Property rights are recognised in the Universal Declaration of Human Rights¹⁵⁴ (see e.g. Article 17¹⁵⁵). The International Covenant on Civil and Political Rights¹⁵⁶ (ICCPR) protects the more specific indigenous rights (see e.g. Article 1(1) and (2)¹⁵⁷; Article 26¹⁵⁸; Article 27¹⁵⁹). The ICCPR also protects the rights and interests of indigenous peoples under the rights to family and privacy in Article 17, rights to freedom of thought, conscience and religion in Article 18 and the right to protection of the family in Article 23¹⁶⁰. As with regards to the binding status of these articles, Article 1(1) of the ICCPR has the status of customary law and is a binding norm of international law. The rights guaranteed by Articles 1(2) and 27, along with other provisions of the ICCPR dealing with privacy and family, are at least evolving norms and are arguably binding customary law. Proof of the international rule remains, however, the most vexed problem for domestic courts in applying international law (Triggs, 2003).

¹⁵⁴ Namibia became a member of the United Nations on 23 April 1990 and it is generally understood that by becoming member of the United Nations, member states also endorse the Universal Declaration of Human Rights.

¹⁵⁵ Article 17: Everyone has a right to own property alone as well as in association with others; and no one shall be arbitrarily deprived of his property.

¹⁵⁶ Namibia signed the Covenant on 28 November 1994 and the Covenant became effective in Namibia on 28 February 1995.

¹⁵⁷ Article 1 (1): All peoples have the rights of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 1(2): All peoples may, for their own ends, freely dispose of their natural wealth and resources [...] In no case may a people be deprived of its own means of subsistence.

¹⁵⁸ Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law [...] the law shall prohibit any discrimination [...] on any ground such as race [...]. The principle of non-discrimination is also embedded in the African Charter of Human and Peoples' Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Women's Convention and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

¹⁵⁹ Article 27: In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

¹⁶⁰ In *Hopu v France*, the Human Rights Committee considered a claim that the construction of a hotel in Tahiti located on ancestral grounds, of which the traditional owners had been dispossessed in 1961, would destroy their traditional burial grounds and have a strong impact on their fishing activities. Adopting a wide view of family and taking into account past cultural traditions, the Committee concluded that the construction would interfere with the rights to family and privacy, in violation of Articles 17(1) and 23(1) of the ICCPR. The majority accepted that visits to ancestral lands can play an important role in a person's identity (Triggs, 2003).

Article 27 of the ICCPR, which was originally not intended to apply to indigenous peoples because it is an individual not a group right, has nevertheless proved to be the most fruitful provision of the ICPPR in generating jurisprudence on indigenous peoples' rights. For example, the Human Rights Committee has considered complaints under Article 27 which are very relevant for indigenous peoples because the Commission has shown a willingness to intervene in situations where the rights of indigenous peoples in general are jeopardised¹⁶¹ (Triggs, 2003).

Furthermore the Human Rights Committee has also explicitly linked the right of indigenous peoples to enjoy their culture with indigenous land as illustrated in the case *Lovelace v Canada*. The Committee found that a member of a Canadian indigenous group, the Maliseet Indians, had been denied her rights of access to native culture and language when one member of the group was prevented from residing on a tribal reserve. In 1995, the Human Rights Committee concluded that: '*Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples [...] The enjoyment of those rights may require positive legal measures of protection and measures that ensure the effective participation of members of minority communities in decisions which affect them*' (Triggs, 2003: 395). The functioning of the Human Rights Committee under the ICCPR could potentially be very important for indigenous peoples. The Commission has actively recognised that economic and resource activities play an important role in the maintenance of the cultural rights protected by Article 27 and in the possibility of protecting indigenous interests in indigenous land through rights such as privacy and family life. It is likely, for example, that Article 27 will evolve to protect indigenous rights to harvest natural resources where it can be shown that the activity is an integral part of the indigenous culture (Triggs, 2003).

¹⁶¹ In *Ivan Kitok v. Sweden*, the Human Rights Committee considered a complaint by an indigenous person from Sweden relating to the right to carry out reindeer husbandry. The Committee found that, while the regulation of an economic activity is normally a matter for the state, there will be a violation of Article 27 if the activity in issue is an essential element in the culture of an ethnic community. Similarly, in *Ominayak v. Canada*, the Human Rights Committee found a Canadian Government lease over Indian land violated Article 27, where the lease was to be used for commercial timber activities, on the grounds that this could destroy the traditional life of the Lubicon Lake group (Triggs, 2003).

Other provisions that protect indigenous rights are: Article 11 of the International Covenant on Economic, Social and Cultural Rights¹⁶² (ICESCR) which provides for the rights to livelihood and obliges states to *'[...] recognise the rights of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, housing, and to continuous improvement of living condition'*. Article 11(a) of the ICESCR suggests measures such as improvement of production methods and land reform.

That land reform falls within the scope of basic human rights standards becomes even more clear from Article 14 of the African Charter of Human and Peoples' Rights which states that *'The right to property shall be guaranteed. It may only be encroached upon in the interests of public need or in the general interest of the community and in accordance of the provisions of appropriate laws'*.

¹⁶² Namibia signed the Covenant on 28 November 1994 and the Covenant became effective in Namibia on 28 February 1995.

Appendix 5 – San Settlements and the ‘Illusion’ of Community

While some of the generational farm workers can be said to live roughly in the same area as their ancestors prior to the arrival of white or black farmers, many other San individuals and families have moved over long distances to escape persecution, to seek better living conditions or because they have been moved there by the authorities. Some of the Hai//om San inhabitants of Etosha Pan national park were deliberately distributed over white farms far away from the park so they would be less likely to escape and go back into the park from which they were evicted. Other San groups, such as many of the Vasekele from Angola, were resettled by the South African army for both ideological and practical purposes as many San men were recruited to work for the South African army during their fight against SWAPO. During a period of unrest in the Caprivi strip in the late 1990s, part of the Khwe community (where many had served in the South African Army) fled to Botswana in fear of violent reprisals from the Namibian army. They ended up near Francis Town, some 700 km away. Although the situation had been quiet in the Caprivi since about 2001, some of the Khwe still had not returned by 2005.

There are many examples of San settlements, i.e. settlements where the San are a majority, which consist of people from a varied cultural and geographical background. These differences can be very important for people whose traditional identity was primarily centred on kinship. Some Vasekele can be found amongst the Kwe in Divundu (West Caprivi). Following the independence of Namibia, some Kwe and Vasekele soldiers in the South African army were settled with their families in Smidsdrift, South Africa, some 1500 km from their ancestral land. The current †Khomani in South Africa consist of descendants of a local group speaking the N|u language and two Khoekhoegowap speaking groups (the language which is also spoken by the Nama, Damara and Hai//om) who came from deep within Namibia, fleeing the brutality of the German colonial army: the |Namani or tall bushmen and the †Hanasen. The latter is the group around David Kruiper who appear to be the most traditional (dressing up in traditional clothes and making a living by selling crafts to tourists) and who initiated the land claim. Vergenoeg community in the Omaheke

region consists of Nharo and !Xo. Smaller settlements within West Tsumkwe district (former Bushman land) include Pespeka which is inhabited by Ju/'hoansi people evicted from the Khaudom Game Reserve and Luhebo, which is inhabited by Angolan Vasekele. However perhaps nowhere is the population more mixed than in Omatako, the largest settlement in West Tsumkwe district. The diversity of the people residing there and the wide geographical distribution of their kinship relations can be exemplified and illustrated (see map overleaf for the location of places) by the background of seven non-related residents of Omatako:

Male, late 20s. Nharo, from the Omaheke region where his parents still live. His job is that of the secretary of the !Kung traditional authority.

Male, 50-60. !Kung. From Otjituo where he grew up on a Herero farm. He came to Omatako in 2001 with his family and some cattle after discussions with the chief and being offered a position as one of the councillors of the traditional authority.

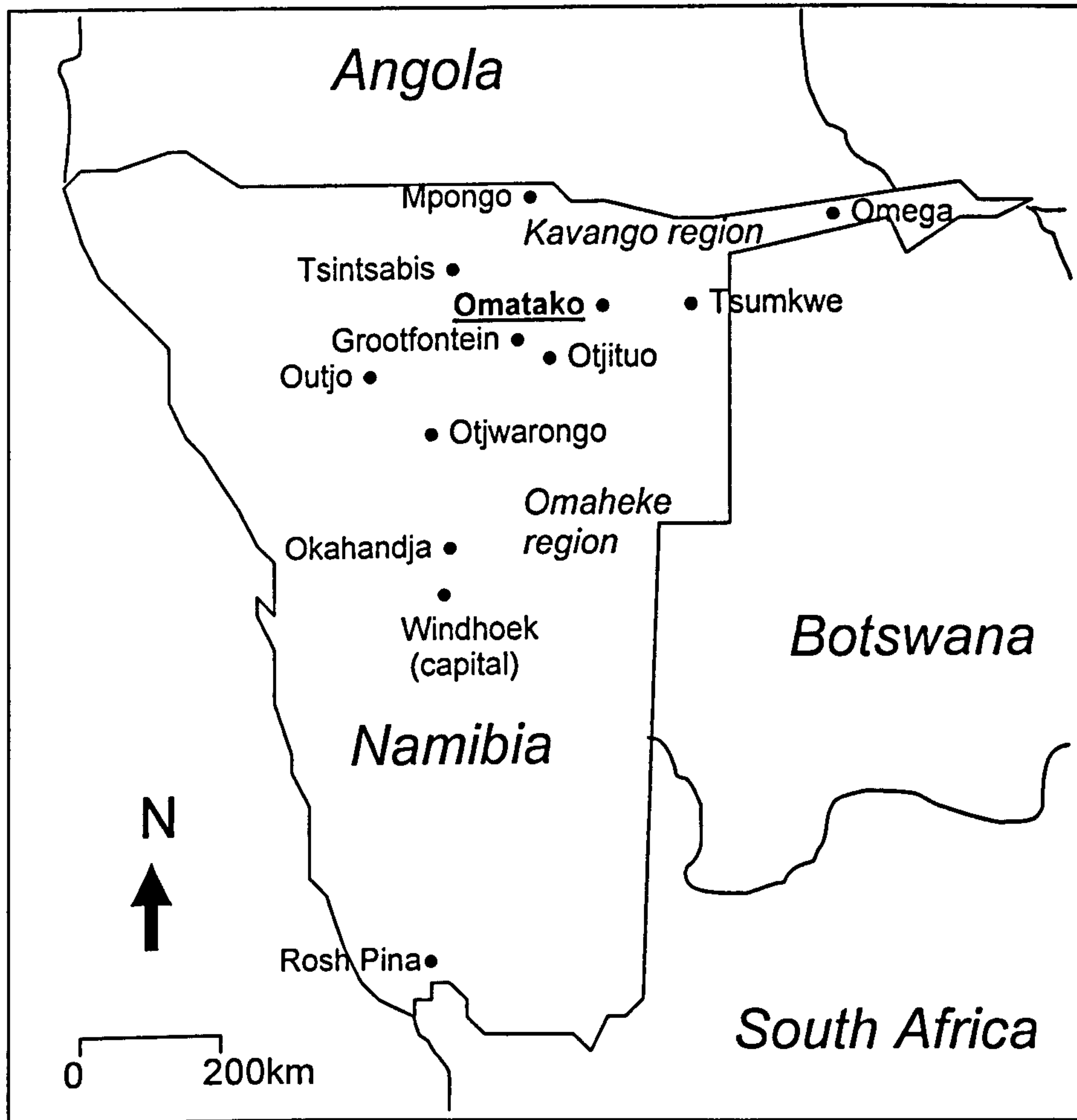
Male, 20, Ju/'hoansi. Comes from Tsumkwe. Moved to Omatako in 2003 when he was asked to work as a translator at the rest camp. Wife is !Kung from Omatako.

Male 30-40. Hai//om from Tsintsabis. Came to Bushmanland to work for South African army. Wife is !Kung.

Female, 31. Hai//om (as is her father; her mother is Damara). Born in West Bushman land. Moved to Tsumkwe, then to Omatako because of her husband's job (he is teacher). Eldest son is in secondary school in Okahandja (where he can stay with family). Her brother works in Rosh Pina (a mining town).

Male, about 45. Vasekele. His parents are from Angola. He was born in Omega where his father worked for the South African army.

Female, 60+ !Kung from Mpongo. Came to Omatako on behest of her sons who were working for the S. A. army and were based in Bushmanland.



Map 4: A wide geographical dispersion of kinship relations: Each place name represents the location of birth or the residence of parents, children or siblings of seven (non-related) San residents of Omatako.

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