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PRIVATIZING HOODIA

Patent ownership, benefit-sharing, and indigenous knowledge in Southern Africa

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Introduction

In March of 2003, San peoples sat beside South African scientists and government officials to sign a contractual benefit-sharing agreement. At the centre of the agreement was *Hoodia gordonii*, a Kalahari Desert succulent plant known by San as *!Xhoba*, used for generations to suppress hunger, increase energy, quench thirst, treat wounds, and ease breast feeding. Through the use of biochemical assays and clinical animal trials, scientists with the South African Council for Scientific Research (CSIR) identified Hoodia-based extract processes and chemical compositions for suppressing appetite. They provisionally patented their invention in 1997 and entered into a partnership with Pfizer, and eventually Unilever, to develop *Hoodia gordonii* into a blockbuster anti-obesity product for humans. Hoodia patents, however, sparked controversy. Indigenous San peoples, with a coalition of lawyers and environmental activists, accused CSIR of stealing San traditional knowledge without prior informed consent and began demanding compensation.² After two years of opposition and negotiation, the parties gathered to sign the San–CSIR Hoodia benefit-sharing contract, which granted San peoples monetary and non-monetary rewards from potential Hoodia sales and positioned San as “stakeholders” in the privatization and commercialization of Hoodia.

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² I generally use the terms San and Indigenous San peoples to refer to a collective group of peoples across Southern Africa who self-identify as indigenous peoples and who have historical connections to the land prior to invasion and colonial settler expansion. San historically refer to the plant as *!Xhoba*, but in their political organizing also use its botanical name *Hoodia gordonii* so I refer to the plant as Hoodia as well. I use these terms cautiously, though, with recognition of the limits of language itself in discussing relations of power and inequality.

In 2008, however, expectations regarding San–CSIR benefit-sharing began to change. Unilever dropped plans to develop Hoodia products in late 2008 and hopes for a financial windfall to San peoples plummeted. Unilever’s termination of the programme raised anxieties among San that the benefit-sharing agreement had officially failed. At the same time, South Africa had just passed legislation governing bio-prospecting and benefit-sharing under the Regulations on Bio-prospecting, Access, and Benefit-sharing (“2008 BABS Regulations”). Aimed at regulating the privatization of knowledge in ways that protected indigenous peoples and resources, the new law now required entities engaged in bio-prospecting to enter into contractual relations with indigenous peoples before patenting and commercializing indigenous biological resources.

The privatization of Hoodia knowledge provides insights into how these new forms of governance are similar yet different from colonial histories as they regulate through modes of both inclusion and exclusion. Colonial practices of bio-prospecting operated under what Foucault (2003 [1994]) refers to as “states of dominations” (pp. 291–292). Power was located in fixed sites of control to exploit subjects and exclude them from power (Foucault, 2003 [1994]). As colonial voyages sailed to new lands in the Americas and Africa, colonialists settled in these lands, encountering and exploiting indigenous peoples, bringing them under colonial rule (Schiebinger, 2004). They sought to dominate indigenous peoples through the taking of land and acts of violence in order to secure colonial power. More contemporary forms of governing, however, as Elizabeth Povinelli (2002) notes, bolster nation-state interest not through domination, but by enrolling indigenous peoples within the very processes of power. For instance, Jennifer Reardon (2012) examines how new techniques of genomic research secure hierarchies of power by both including and excluding indigenous peoples.

Extending Foucault’s notions of governmentality, Nickolas Rose similarly argues that, rather than powers of domination, the relationship of science and society are now conditioned through “powers of freedom” (1999, p. 1). Rose argues that new styles of governing have emerged since the late twentieth century whereby the state no longer governs social problems, but rather grants individuals new freedoms enabling them to address problems on their own. Autonomous liberal subjects are now conditioned to be responsible subjects in control and accountable for their wellbeing. In other words, the state has increasingly become what Martha Fineman refers to as a “restrained state” that is less responsive to social problems and inequalities (2008, p. 239). Central to this shift are increased processes of privatization whereby the state funnels social obligations to private entities with the promise that certain goods will be returned to the public. Legal conditions are designed to give individuals freedom, choice, and autonomy to ensure their own welfare. Structures of governing have thus ceded to private ordering and market logics that serve the interests of the private, rather than public sphere.

A factor within these shifts has been an increased emphasis on the privatization of knowledge and resources through patent ownership. Government policies increasingly emphasize the importance of intellectual property rights. It is assumed

that patent ownership is a key driver of innovation toward developing medicines and improving healthcare. For instance, South Africa passed the Intellectual Property Rationalisation Act (1996) extending intellectual property rights throughout the country. That same year, South Africa's Department of Arts, Culture and Technology stressed that aligning patent ownership with international norms was crucial "to best promote innovation" (South African Department of Arts, Culture, Science and Technology, 1996, p. § 6). De Beer, Armstrong, Oguamanam, and Schonwetter (2014) note how privatization of knowledge and resources, as mediated by patent ownership, has increasingly become tied to the development goals of South Africa.

In this chapter, I discuss the privatization of knowledge and resources in South Africa as related to indigenous San peoples' struggles over the patenting of Hoodia and subsequent benefit-sharing. I also consider how South Africa has begun regulating such forms of privatization in ways that offer limited protections to indigenous peoples. Elsewhere I have addressed Hoodia struggles through notions of biopolitics (Foster, 2012) and a methodological emphasis on "critical cultural translation" (Foster, 2014), while arguing for attention to the materialities of patent law (Foster, 2016) and calling for a feminist decolonial approach to patent ownership (Foster, forthcoming). Expanding upon this work, this chapter interrogates patent law through notions of privatization and vulnerability by addressing how patent ownership and contractual benefit-sharing become sites for understanding how new forms of governing secure interests of nation and capital not through the domination of vulnerable subjects, but rather through their simultaneous inclusion and exclusion. For instance, in order to secure rights, San peoples make strategic decisions over narrow legal registers of contractual benefit-sharing that empower San as modern political subjects, but also disempower them as fixed, nonmodern peoples. Through similar mechanisms, nation-state governing of contractual benefit-sharing aims to ensure the protection and recognition of indigenous peoples, but continues to primarily serve nation-state and capital interests in maintaining access to indigenous peoples' knowledge and resources. Examining the privatizing of Hoodia through patent ownership rights, contractual benefit-sharing, and new government regulations generates arguments for a more responsive state divorced from the logics of privatization in order to more fully meet the needs of vulnerable subjects.

South African and San histories

The privatization of Hoodia-based chemical compositions through patent ownership is embedded within colonial histories of the taking of San lands, resources, and cultures. Similarly entangled within such histories, San struggles over benefit-sharing seek to challenge the taking of Hoodia knowledge as a symbolic extension of past colonial and apartheid violence against San peoples. Heterogeneous groups of indigenous peoples were present in South Africa prior to its colonization by Dutch and British settlers in the seventeenth and eighteenth centuries. Archeological evidence suggests San peoples have been living in the region for

over 20,000 years (le Roux and White, 2004). They lived in more arid conditions of Southern Africa in small mobile groups employing a wide range of expert skills through their hunter-gatherer lifestyle. They hunted game, gathered edible plants, and developed expert knowledge of local plants and animals as they adapted to locally abundant or scarce conditions. Artistic expression was also highly valued, as San engaged in complex forms of rock art, music, and dance (Parkington, Morris, and Rusch, 2008). San groups shared similar ways of life and a set of click sounds within their different languages, but were also quite heterogeneous. Adapting to distinct local conditions, San populations such as Ju|'hoansi, Khwe, G|wi, Naro, !Xun, or ||Gana differed from each other (le Roux and White, 2004).

San practices, cultures, and knowledge also shifted over time through relations with other indigenous Khoi pastoralists and eventually Black Bantu-speaking peoples. Khoi shared similar physical features to San, but were less mobile and more engaged in agrarian practices and the herding of sheep and cattle. They distinguished themselves from San, referring to them as "Sonqua" or "Soaqua", meaning "those who forage" (le Roux and White, 2004, p. 4). Khoi shared similar forms of language and custom amongst themselves, but differences were also found across various Khoi groups of Nama, Griqua, Koranna, and Cape Khoi (Le Fleur and Jansen, 2013). Relations between the two groups were complex and changing as mutual relations of trade and exchange gave way to violent clashes between them. The emergence of Black Bantu-speaking groups between fourth century A.D. and the late eighteenth century also changed Khoi and San relations (Thompson, 2014). As their diverse cultures and farming economies began to dominate southeastern Africa, Black Bantu-speaking groups began threatening San and Khoi ways of life. In response, San struggled for survival by killing and taking livestock, but violent clashes with Black Bantu-speaking peoples resulted in the deaths of many San and Khoi.

With the emergence of the Dutch Cape Colony in 1652 relations and tensions between these groups again shifted. The Dutch East India Company brought in slave labourers from southeast Asia to help build infrastructure for the growing colony (Beinart, 2001). Dutch settlers also increasingly took possession of land and began growing crops and herding cattle. Tensions between Dutch settlers, San, and Khoi subsequently rose. Settlers referred to San in a derogatory manner as "Bushmen" or "Bosjesmen", meaning low-status "people from the bush" who engaged in hunting and gathering (le Roux and White, 2004, p. 4). They distinguished San Bushmen from Khoi, who they referred to as "Hottentots". Violence eventually ensued between the groups as Dutch colonists took Khoi cattle, exploited divisions among indigenous groups, and used sophisticated weaponry against them. Given this violence against indigenous societies, Thompson (2014) notes that by the early 1700s many San and Khoi communities were decimated and pulled apart, and many were forced to work for Dutch landowners under harsh conditions alongside slaves.

Pastoral farming and the white, Dutch settler population grew throughout the eighteenth century until a new wave of white colonization came about. British

colonial settlers arrived in the Cape Colony in 1795 and took over by 1806. They established an even stronger presence in 1820 with the arrival of 4,000 additional settlers (Thompson, 2014, pp. 52–55). British settlers occupied lands previously inhabited by Black Bantu-speaking peoples and asserted firm distinctions between themselves and earlier Dutch settlers who they derogatorily called “Boers”, meaning farmers. Dutch speakers, however, referred to themselves as “Afrikaner” and engaged in not only farming, but hunting and pastoralism as well (Beinart, 2001). Despite British proclamations in 1828 granting San, Khoi, and former slaves equality before the law, Thompson (2014) notes that conditions of poverty and landlessness forced many to remain working on white farms. Emancipation and legal recognition, however, established the foundations for a new class of peoples as colonial officials began referring to Khoi, San, and former slaves as “Cape Coloured People” to distinguish them from white ruling classes and Black Bantu-speaking Africans. Such characterizations would serve as foundations for racial classifications under South African apartheid rule in the latter half of the twentieth century.

Privatization and control of land and resources was enacted through very different registers of power during the colonial era through the domination of indigenous San peoples. Dutch and English settlers secured colonial, white rule through the taking of lands and resources. They also excluded San peoples from social institutions and committed violence against them, contributing to San peoples’ loss of land, livelihood, and ways of life. Privatization in the colonial era involved more discrete practices of domination as colonial settlers took ownership control over lands and resources that were historically communally shared. Such histories become important for understanding struggles over the privatization of Hoodia plant properties that seek to include San peoples as “stakeholders” within Hoodia commercialization. Contemporary processes of privatization may differ from histories of colonial domination, but they remain embedded within such histories and cannot be understood as divorced from them.

Privatization of Hoodia through patent ownership

For South Africa and its CSIR, Hoodia was thought to be the next big blockbuster drug and funnel millions in revenue to the economy. Hoodia had the potential to treat obesity and to secure South African interests within the profitable ethnopharmaceutical weight-loss industry. South African scientists, rather than multinational corporations in the global north, were the ones who held patents on Hoodia, so they maintained initial control over Hoodia commercialization. The patenting of Hoodia properties thus differed from accounts of bio-piracy whereby companies in the global north were privatizing the resources of countries in the global south. In this case, it was South African scientists patenting plant properties previously known by indigenous peoples. The patenting Hoodia properties empowered South African scientists as producers of science in promising and limited ways that both included and excluded San peoples.

An understanding of patent law is central to developing insights into these practices of privatization. Patent law is a set of legal standards regulated by administrative government offices such as the United States Patent and Trademark Office and the South African Companies and Intellectual Property Commission. In exchange for public disclosure of an invention, the government agrees to grant the inventor temporary monopoly control over the materials and processes related to the invention (South African Patent Act 57, 1978; United States Patent Act, 2011). Rights are granted so long as the inventor can meet certain required elements of patentability. For instance, under South African and US law, applicants must show that their invention is patentable subject matter and also novel, nonobvious, and useful or inventive. Subject matter considered patentable only applies to man-made cultural inventions and not things found in nature.³ In the case of Hoodia, patent ownership applies not to the plant itself. Rather, it attaches to the chemical composition isolated and purified by scientists, which could suppress appetite.

The Hoodia patent specification document outlines how Hoodia becomes patented invention (van Heerden et al., 1998). Collected plant material is treated with a solvent, its valuable properties extracted, and then further purified through interactions with water and chemical solvents. Scientific technologies of Waring blenders, rotary evaporators, column chromatography, and bioassays procedures help to transform *Hoodia gordonii* into patentable subject matter. Nature becomes invention when homogenized, separated, and mixed with chemical solvents to reveal its precise chemical properties. Scientific practices are then structured through the legal language of patent law to delineate Hoodia found in nature from Hoodia in the lab because it is the latter that matters most as potential global capital.

Privatization of Hoodia properties positioned South African scientists as producers of science. Colonial histories of science historically constructed South Africa as a “living laboratory” or source of raw material, rather than site of knowledge making (Tilley, 2011). But CSIR scientists held Hoodia patents, which redirected the flows of scientific knowledge production from global south to global north, thus challenging these colonial pasts. Patenting Hoodia became a symbol of a changing postapartheid South Africa and the opening up of scientific fields to those formerly excluded as knowledge producers. For instance, Vinesh Maharaj, one of the lead scientists who is credited with much of what is known about Hoodia, identifies as coloured. Under apartheid, those classified as coloured received more educational benefits than those designated as black, but they experienced discrimination nonetheless and had fewer educational opportunities than whites (Osseo-Asare, 2014). In patenting Hoodia plant properties, Maharaj challenged these apartheid pasts in becoming a producer of Hoodia science.

As producers of Hoodia science and owners of Hoodia patents, CSIR maintained initial control over Hoodia commercialization. Patents facilitated South

3 Under US law, to obtain patent rights, an invention must be “markedly different” from its natural state (*Association for Molecular Pathology, et. al. v Myriad Genetics, Inc., et. al.* 569 S.Ct. 12–398 (2013)). South African law implies a similar doctrine, although with less specificity due to less guidance from case law.

African desires for what postcolonial science studies scholar Ruha Benjamin (2009) refers to as a “lab of their own” (p. 341). They obtained patent rights then quickly sublicensed their invention to UK-based biotechnology firm Phytopharm for assistance in developing Hoodia-based products. Phytopharm’s chief executive officer, Richard Dixey, had a strong background in traditional medicines, which informed his leadership of the company whose motto was “inspired by nature”. To commercialize Hoodia products on a global scale, however, CSIR and Phytopharm would need to find an even larger commercial partner with more resources, which was initially found with Pfizer. The multi-national pharmaceutical corporation headquartered in New York quickly came on board in 1998 hoping to develop Hoodia into an ethno-pharmaceutical drug – a pill to cure obesity.

By July of 2003, however, Pfizer merged with Pharmacia, resulting in the closure of its Natureceuticals unit and the decision to end Hoodia development as an anti-obesity drug (Wynberg, Schroeder, and Chennells, 2009, p. 96). The withdrawal of Pfizer was four months after CSIR agreed to share benefits with San peoples. It would take CSIR and Phytopharm a year to find another development partner, this time with Unilever, a multi-national consumer good company with headquarters in both England and the Netherlands. Unilever sought to develop Hoodia properties into a functional food product to treat obesity, much like their already popular Slim-Fast® line of products.

Privatization of Hoodia through patent ownership and contractual sublicensing governed relationships between CSIR and its development partners. These practices of privatization acted as legal adhesive, bringing scientists from the global south into relationships with researchers in the global north. Nation-states such as South Africa in the global south are historically vulnerable to the patenting and exploitation of their resources from entities in the global north. When South African researchers patented their own nation-state resources they challenged hierarchies of global north/south and colonial histories of exploitation. At the same time, they also re-inscribed colonial and apartheid powers by patenting Hoodia plant properties historically known and used by indigenous peoples.

Compelled to operate within normative mechanisms of drug discovery, CSIR scientists positioned themselves as producers of science through the privatization of Hoodia knowledge, which San peoples and their representatives vigorously contested. CSIR scientists learned about the Hoodia plant from colonial botanical guides detailing its uses by San peoples, but CSIR scientists initially failed to credit San peoples for contributing to their “scientific” knowledge. CSIR scientists did not obtain prior informed consent for the use of indigenous San knowledge nor did they enter into benefit-sharing prior to patenting Hoodia properties. Hoodia patents did not legally prevent San from using the plant because the patent applies to the chemical compositions within Hoodia and the scientific processes of extraction to separate the compounds from the plant, not the plant itself. Yet, patent ownership also has a socio-cultural force that can deter the use and circulation of patented resources. The scope of Hoodia patents created uncertainty for San

peoples who expressed desires to grow and sell Hoodia as a sustainable fair trade product to reduce appetite.

Patent ownership can commit violence against indigenous peoples however in different ways, especially at an epistemological level by valuing certain ways of knowing over others, for instance, by designating knowledge produced by CSIR scientists over that of San peoples. Patent ownership is contingent upon maintaining binaries of nature and culture, thus items discovered in nature are not patentable, only man-made cultural inventions. The Hoodia plant is found in nature, but becomes cultural invention when scientists isolate its chemical compositions and their market potential. CSIR and Phytopharm scientists cast Hoodia as a “natural product” that would treat weight loss, but when it came to securing patents, they stressed their triumph in making Hoodia properties distinctly different from nature by isolating particular chemical compositions. Patent law thus rests on a cornerstone of nature/culture binaries in order to distinguish CSIR Hoodia knowledge from San peoples’ ways of knowing. In doing so, legal recognition of CSIR patent rights values and positions CSIR ways of knowing as more modern, while devaluing San peoples’ knowledge as less modern, traditional, and mere raw material.

In reinforcing hierarchies of knowledge production, patent ownership maintains a set of nature/culture binaries that are historically gendered and racialized. The subordination of women, Sherry Ortner (1998) argues, is partially understood by socio-cultural associations of women with nature versus men with culture (p. 583). Women have and continue to be characterized as closer to nature due to their reproductive capacities and association with caretaking. This is in contrast to men, whose intellectual work is aligned with conquering nature and with producing creative, cultural works. Being considered closer to nature, women are subordinated to a lower status in the private, domestic sphere, while men are constructed as natural participants in the public sphere of private, economic enterprise. Such binaries, however, are also racialized, meaning not all women or men are treated alike. Historical constructions of men and women of colour as closer to nature have been used to deny them full humanity. For instance, Carl Linné (1735), an eighteenth century Swedish botanist and zoologist, classified San and Khoi as less than human and closer to animals. Patent ownership thus relies upon a set of binary assumptions of nature/culture that are not ahistorical or value neutral. Privatization of Hoodia may engender CSIR scientists as producers of science, but it also secures hierarchies of power by valuing CSIR ways of knowledge over that of San peoples and by reinforcing gendered and racialized binaries of nature/culture.

Benefit-sharing and San as modern/nonmodern subjects

Contractual benefit-sharing becomes a site where privatization of knowledge begets more privatization. San peoples make a strategic decision in demanding benefit-sharing as a way to contest the patenting of Hoodia properties through recognition of San ways of knowing. In doing so, San are enrolled as stakeholders

within the commercialization and privatization of Hoodia, so the more Hoodia fulfills its promise as weight-loss product the more San peoples stand to benefit. In other words, CSIR Hoodia patents and plans for commercialization remain intact. Attention to these processes requires an understanding of how contractual benefit-sharing both empowers and disempowers San peoples through privatization.

San resistance against the patenting of Hoodia was enacted through a collective group of San peoples, lawyers, and environmental activists. A mobilizing network was already in place, emanating from earlier struggles to reclaim land taken from San through systems of colonialism and apartheid. Daniel Huizenga (2014) and Steven Robins (2001) have each written about San political mobilization around land claims, noting the tensions and heterogeneity in which San peoples navigate. Political action against the patenting of Hoodia took on similar, yet different forms. A critical moment in launching San political organizing against Hoodia patents emerged when Biowatch and Action Aid brought the story to the attention of a newspaper reporter for *The Observer* in London named Antony Barnett (2001) who reported that the Hoodia cactus had kept San “bushmen” alive, but the “Western drug industry” had stolen their secret to “make us thin”. While Phytopharm and Pfizer officials were busy seducing the media and their shareholders about the wonders of Hoodia as a “dieter’s dream”, they had failed to obtain prior informed consent from San to use their knowledge. In fact, Phytopharm chief executive, Richard Dixey, was quoted two months earlier, saying giving back was difficult “especially as the people who discovered the plant have disappeared” (Firn, 2001, p. 2).

San peoples were not extinct; on the contrary, they were actively mobilizing to demand contractual benefit-sharing from CSIR patent owners. Members of the South African San Council, along with their lawyer, Roger Chennells, began pressuring CSIR to enter into benefit-sharing negotiations. The government research institution had historically been in the service of the former apartheid-era government, engaging in research projects supportive of the government’s interests in racial segregation. The controversy over Hoodia forced CSIR to confront its own racist past and to determine how best to meet the demands of a new South African polity transitioning from apartheid. Marthinus Horak, another scientist with the Bio/Chemtek Unit, suggested that their Unit wanted to consider benefit-sharing with San peoples, but only after the drug had finally been tested and approved (Barnett, 2001). But with mounting pressure from San and global attention on the issue, CSIR’s Bio/Chemtek Unit entered into negotiations for a contractual agreement with San peoples.

In June of 2001, negotiations between the two groups began with the Working Group of Indigenous Minorities in Southern Africa (WIMSA), a regional San-led governing organization, authorizing the South African San Council to negotiate on behalf of San peoples. Members of the South African San Council articulate different degrees and challenges of San participation within the negotiations. According to Wynberg et al. (2009), some San recall a strong sense of San autonomy during meetings and talks with CSIR officials, whereas others note a reliance on

their lawyer, Roger Chennells, to assist with negotiations. After two years of talks between the two parties, they signed a memorandum of understanding in March of 2002 and a final agreement was signed in March of 2003.

San–CSIR contractual relations empowered San peoples across Southern Africa, promising them much needed benefits. CSIR agreed to give San 6% of CSIR royalties and 8% of milestone payments (South African San Council and CSIR, 2003). CSIR also promised to assist San with obtaining educational scholarships and the two parties agreed to partner on future bio-prospecting collaborations committed to conserving biodiversity. The agreement was also symbolically important in recognizing indigenous San knowledge and heritage. The agreement valued San Hoodia knowledge not only for contributing to CSIR ways of knowing, but recognized it as an important form of Hoodia knowledge. Contractual benefit-sharing also challenged the patenting of Hoodia by simultaneously recognizing both San and CSIR forms of knowledge production. Although Hoodia patent ownership valued CSIR over San ways of knowing, contractual benefit-sharing sought to re-order this epistemological privileging by contesting these hierarchies of knowledge production.

Not only did San–CSIR contractual benefit-sharing promise tangible and intangible benefits, it also positioned San peoples as modern subjects. San political mobilization and negotiations signaled San as modern, political agents engaged in complex decision-making and practices of self-determination. San peoples made it clear they were ready and able to make demands for benefit-sharing against CSIR and any others, thus benefit-sharing became a pathway for enabling future San political action. The South African San Council, for instance, recently signed an additional benefit-sharing agreement involving *Scelletium tortuosum* (Chennells, 2013).

Even though contractual benefit-sharing empowered San peoples as modern subjects, it also positioned them as fixed and nonmodern (Comaroff and Comaroff, 2009). Styles of governing in South Africa have shifted from colonial and apartheid domination of San peoples to a transformation politics emphasizing accountability for these violent pasts. Contractual benefit-sharing has been cast as a means towards recognition and protection for indigenous peoples as well as redress for past domination. Elizabeth Povinelli (2002) notes how indigenous peoples are gaining new forms of legal rights, but she argues that such protections remain within the narrow registers of the law, forcing indigenous peoples to assert themselves as simultaneously modern and traditional (pp. 48–57). In the case of Hoodia, San make strategic decisions to position themselves through logics of difference as rooted in the past to bolster demands for benefit-sharing within a new South African politic that emphasizes multi-cultural diversity. For instance, Petrus Vaalbooi, Chairman of the South African San Council, wore traditional “Bushman” dress at the signing ceremony and San articulate their ways of knowing as tied to ancestral pasts and linked to a former hunter-gatherer lifestyle. Although San reinforce themselves as traditional through these political moves, they simultaneously demonstrate San as modern, political subjects engaged in complex political

and legal strategies for benefits. Such complex and contradictory positioning, as Povinelli (2002) suggests, provides a site of empowerment for indigenous peoples; however, it can also limit meaningful recognition of contemporary San lives and potential pathways for further political actions (pp. 56–57).

Additionally, the benefit-sharing agreement limits San through the terms of the contract itself and its safeguarding of CSIR patent rights. The agreement recognized San peoples, but it also ensured that CSIR patent ownership remained intact, along with its binary assumptions of nature/culture. CSIR agreed to give benefits, but in return San acquiesced not to claim any co-ownership of the Hoodia patents and not to contest the validity of the patents themselves. The agreement therefore sustained logics of property by ensuring CSIR patents would go unchallenged in court. By securing CSIR's patent rights, the contract strengthened CSIR's scientific authority and knowledge of the plant in comparison to San ways of knowing. Furthermore, it hinged San benefits to the uncertainty of the market. The problem though is that when protection of vulnerable subjects is contingent upon the commercial success of the product at issue, then contractual benefit-sharing for social welfare purposes can easily fail to deliver, given the unpredictability of the market. In the case of Hoodia, Unilever terminated the project in late 2008 citing safety reasons, leaving San with little recourse. According to Wynberg et al. (2009), San-CSIR generated some 569,000R (\$70,000) to San peoples through milestone payments, but now there was little hope that San would see more monies. Contractual benefit-sharing empowered indigenous San peoples as new liberal subjects with a stake in Hoodia commercialization, but denied them control over Hoodia production. San became recognized as indigenous peoples with claims to Hoodia knowledge, yet discourses of sharing become a new way to secure the privatization of knowledge and resources.

Promises and limitations of regulating benefit-sharing

The South African government now regulates and requires entities involved in the commercial phase of bio-prospecting to obtain contractual benefit-sharing agreements from indigenous peoples in order to mitigate the exploitative implications of privatization and commercialization. San-CSIR benefit-sharing was negotiated as a private agreement in 2003 and at the time the South African government had little oversight over bio-prospecting and benefit-sharing. CSIR was able to begin commercialization of Hoodia and apply for patent rights without prior informed consent of indigenous San peoples or a benefit-sharing agreement in place. South Africa has since passed the Biodiversity Act (2004) mandating the protection of "indigenous biological resources", which refers to "any living or dead animal, plant, or other organism of an indigenous species", excluding human genetic material (National Environmental Management: Biodiversity Act, 2004, § 1(1), § 80(82)(b)). The Act requires entities engaged in research for "commercial or industrial exploitation" to obtain bio-prospecting permits with proof of benefit-sharing with relevant indigenous peoples (§ 1(1)).

The 2004 Biodiversity Act set forth the initial mandate requiring access and benefit-sharing, but the passing of the 2008 BABS Regulations provided further guidance. The latter required permits from entities engaged in both the discovery and commercialization phase of bio-prospecting research involving indigenous biological resources (Regulations on Bio-prospecting, Access and Benefit-sharing, 2008, p. § 4(1)). Commercialization was defined as involving the filing of a patent application, conducting of clinical trials, engaging in market research, or synthesizing material to produce a commercial product; it was therefore distinguished from the discovery phase where opportunities for commercialization of indigenous biological resources are less certain (§ 1(1)).

The 2008 Regulations however have since been repealed and replaced with the Amendments to the Regulations on Bio-prospecting, Access, and Benefit-Sharing (2015) ("2015 BABS Regulations"). The 2015 BABS Regulations still require permits for entities engaged in both discovery and commercialization, but recognizing that these two phases often overlap the law no longer explicitly distinguishes these two phases. Entities engaged in either form of research must still apply for a bio-prospecting permit when their research involves indigenous biological resources. Both the 2008 and 2015 BABS Regulations however were similar in that they only govern biological resources that are "indigenous" to South Africa, meaning a species that has historically occurred "naturally" in the borders of the country and has not been introduced by human activity (National Environmental Management: Biodiversity Act, 2004, p. § 1(1)). The law therefore only protects indigenous species, not those considered non-native.

The 2015 BABS Regulations are significant in their attempt to protect and include indigenous peoples within the early stages of bio-prospecting research by requiring prior informed consent and benefit-sharing. South Africa, unlike the United States, is at the forefront with countries such as India and Brazil in terms of requiring researchers to share benefits with indigenous peoples (Gross, 2014; Research and Information System of Developing Countries, 2014). If research involves any indigenous peoples' knowledge or use of indigenous biological resources, then researchers applying for a permit must show they have entered into a contractual benefit-sharing agreement with the relevant indigenous community. Under the 2008 BABS Regulations an indigenous community was defined as "a community of people living or having rights or interests in a distinct geographical area within the Republic of South Africa with a leadership structure" (Regulations on Bio-prospecting, Access and Benefit-sharing, 2008, p. § 1(1)). In contrast, the 2015 BABS Regulations provide no such definition, which leaves the contours and difficulty of defining indigeneity to the communities and peoples themselves. Furthermore, under both the 2008 and 2015 BABS Regulations, indigenous communities must adopt a resolution consenting to the benefit-sharing agreement and authorizing their representatives to sign on their behalf. Entities engaged in bio-prospecting are then required to attach the resolution to their bio-prospecting permit applications.

Private benefit-sharing therefore becomes publicly managed through a set of governmental regulations. The 2008 and 2015 BABS Regulations bring agreements

into line, prescribing the appropriate standards and forms in which benefit-sharing contracts must align. A list of possible monetary and non-monetary benefits is specified in the 2015 BABS Regulations to include, but not be limited to, sharing research data, grants for development and environmental education projects, facilitating ongoing communication of bio-prospecting objectives, training of local people, co-authoring publications, providing equipment and infrastructure support, co-ownership of intellectual property rights, allocating royalty payments, and apportioning milestone payments (Regulations on Bio-prospecting, Access and Benefit-sharing, 2015, p. Annexure 12). Sharing of monetary benefits is also systematized. Under both the 2008 and 2015 BABS Regulations, monetary benefits must now be paid into a centralized Bio-prospecting Trust Fund to be managed by government officials. Indigenous communities continue to receive the full amount of benefits awarded, but this added layer of bureaucracy generates additional burdens that reinforce paternalism over indigenous peoples.

These new regulations provide a site for understanding how private contractual relations have become publicly regulated and how privatization of knowledge is being simultaneously disrupted and secured. Prior to the 2008 BABS Regulations, the law did not require contractual benefit-sharing and indigenous peoples had to politically mobilize against entities involved in bio-prospecting to pressure them into contractual negotiations. Public pressure likely bolstered the bargaining power of indigenous peoples entering into negotiations, but now indigenous peoples have the force of law to support their efforts. Entities are compelled to seek prior informed consent and benefit-sharing prior to applying for patent ownership. This creates space for indigenous peoples to challenge the privatization of knowledge by insisting on being named inventors or being co-owners of patents. It also generates new relationships between parties. Obtaining consent and negotiating contractual terms is a responsive process conducted over time and it requires building trust and developing relationships between researchers and indigenous peoples. The law thus challenges the privatization of knowledge by requiring scientists and scientific processes to inform indigenous peoples at the beginning of the commercialization process.

Although South Africa is a leader in such governing processes, these regulations are still being implemented as government officials struggle with exclusions enacted by the law. One such exclusion is that indigenous peoples are forced to adopt styles of governance that may not be aligned with their own customary practices. The 2008 and 2015 BABS Regulations compel indigenous communities to organize and to generate formal resolutions in support of benefit-sharing. Indigenous peoples must therefore make strategic decisions on how to organize themselves to become intelligible to the law and to negotiate contractual benefit-sharing. In other words, in order to position themselves as modern, political subjects within the narrow parameters of the law, Shane Greene (2004) argues that indigenous peoples are forced to market themselves as "Indigenous Peoples Incorporated" (p. 223). In doing so, they create formally recognized leadership structures and treat their indigenous knowledge as intellectual property, but in a

way that contests the Western logic of privatization (p. 223). Regulating benefit-sharing through government management compels indigenous peoples to make these strategic decisions and to realign their governing structures accordingly.

The 2008 and 2015 BABS Regulations are also limited in the ways in which they reinforce indigenous peoples as in need of training, rather than perhaps the scientists themselves. For instance, the 2008 and 2015 BABS Regulations list many alternative possibilities for what could be negotiated in terms of monetary and non-monetary benefits. However, only indigenous peoples are assumed to be in need of benefits. This assumption recognizes asymmetries between the two groups; however, it denies the possibility for benefits to flow from indigenous peoples to scientists, a movement that would contest normative flows of scientific knowledge production often characterized as moving from "top to bottom". San peoples for instance could be given the chance to provide training to CSIR researchers, educating them on San histories, languages, and heritage. Recent guidance by the South African Department of Environmental Affairs (DEA) seems to address this point by listing "training of scientists, technicians, and researchers" as a possible non-monetary benefit, but more attention is needed (Department of Environmental Affairs, 2012).

Implementation of these regulations is still in the making. According to a government-sponsored report published in April of 2014, the DEA has received 77 permit applications concerning the commercialization phase of bio-prospecting (Sustento, 2014). Seventeen permits have been granted, the majority of which involve local South African companies and only one of which involves a foreign entity (p. 17). Of the approved permits, nine involve biotradors and two are pharmaceutical companies. Sixty permit applications were still under review, comprised of 30 pharmaceutical companies and 14 biotradors. The report also cites several key challenges of implementation that indicate lack of protections for indigenous peoples. Entities are now required by law to seek prior informed consent and enter into benefit-sharing agreements, but identification of holders of traditional knowledge can sometimes be unclear. The South African Traditional Medicines Research Unit at the University of Cape Town hosts an online Traditional Medicines Database, but there is no national system for verification. CSIR aims to create a national database to record, preserve, and protect indigenous knowledge in South Africa through a new National Recordal System, but it is still being developed and will likely not be free from conflict. Establishment of traditional knowledge databases in countries such as India, for example, has raised concerns in relation to indigenous and traditional knowledge (Fish, 2006). Additionally, a lack of human resource capacity within the DEA also means delays in processing permit applications, which still tend to be submitted with poor and incomplete documentation, despite DEA guidelines for applicants being made publicly available.

The 2008 and 2015 BABS Regulations also serve to reinforce and secure processes of privatization. Indigenous peoples' social movements globally have launched powerful campaigns against the patenting and commercialization of indigenous

knowledge. Such movements challenge ongoing bio-prospecting projects that require access to indigenous peoples' knowledge and biological resources. The 2008 and 2015 BABS Regulations challenge bio-prospecting in a different way by enrolling indigenous peoples as stakeholders within the commercialization process. The problem though is that even though the law requires prior informed consent and contractual benefit-sharing, it helps to ensure that access to indigenous knowledge and resources remain open to scientists, which keeps systems of power intact. Recognition and protection of indigenous peoples through government regulation of benefit-sharing can too easily become more about supporting private capital and nation-state innovation, rather than primarily indigenous peoples. Contractual negotiations are often conducted through unequal bargaining positions, with indigenous peoples holding less power than private commercial entities. Monetary benefits for indigenous peoples are also hinged to the commercial success of the developed product, thus indigenous peoples' livelihoods are tied to the uncertainty of the market. If the product generates too little revenue, it means a smaller percentage of royalties for indigenous peoples, which makes negotiation for non-monetary benefits even more important.

Government regulation of contractual benefit-sharing forces us to consider how even when a state becomes responsive to protecting indigenous peoples, such efforts may continue to protect private and nation-state interests. The 2008 and 2015 BABS Regulations may encourage more sustained engagement between scientists and indigenous peoples. In doing so, indigenous peoples may gain recognition as modern, political agents making demands for contracts that may produce monetary and non-monetary benefits. Yet, how do such changes foreclose a broader discussion of the fairness of benefit-sharing agreements? How do they obscure debate over how to address indigenous peoples' notions of social justice into this new regulatory domain? The 2008 and 2015 BABS Regulations are embedded within values of biodiversity conservation, rather than indigenous peoples' self-determination, and they are governed by the mandate of the Biodiversity Act (2004) from which they flow. The central goal of the Act is the conservation of indigenous plant material, not the self-determination of indigenous peoples. Implementation of the 2015 BABS Regulations is still in the early stages, but how might norms of conservation inform the regulations going forward? As benefit-sharing agreements become regulated and standardized critical attention must focus on how norms of conservation may come to supplant indigenous peoples' rights of social justice and self-determination.

Conclusion

Contemporary forms of privatization function through different modes of governing, informed by discourses of freedom and autonomy, rather than colonial domination. Nation-state power was enacted more through acts of physical violence and the explicit taking of lands and resources. Nation-state interests are now increasingly secured through less explicit practices, but nonetheless they can

produce violence against indigenous peoples and enact the taking of their knowledge, land, and resources – thus still dominating, just by different means. Privatization of knowledge enables South African scientists to become producers of science, but patent ownership can prevent indigenous peoples' access to resources and commit epistemological violence through the devaluing of their knowledge. Contractual benefit-sharing attempts to disrupt such modes of privatization, but can work to both empower and disempower indigenous peoples. In the case of San–CSIR benefit-sharing, San are recognized as modern, political agents through mobilization against the patenting of Hoodia properties, but such recognition depends upon San peoples positioning themselves as nonmodern. Understanding issues of privatization and vulnerability requires attention to how indigenous peoples make strategic decisions in their mobilization for legal rights, while navigating this contradictory terrain. Attending to the particularities of the nation-state also becomes important. South Africa aims to protect indigenous peoples through regulation of bio-prospecting and benefit-sharing, but such protections are limited as government officials balance ensuring benefits to indigenous communities, with meeting corporate interests in accessing resources. Attention to these contradictions and tensions becomes important for addressing questions of privatization, vulnerability, and social responsibility in specific ways.

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