

# The Morality of Indigenous Land Claims

*An investigation of the moral justification of  
indigenous peoples' claims to specific land and  
resources*

Inga Oskal Eidsvåg



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Supervised by Researcher Kim Angell, Department of Political  
Science

University of Oslo  
Department of Philosophy, Classics, History of Art and Ideas  
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Inga Oskal Eidsvåg

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# Abstract

Is it possible to provide an argument that justifies indigenous claims to specific land and resources? Should indigenous peoples be compensated for the historic injustice they have suffered or should there be moral statutes of limitations on injustice? Can culture ground land claims?

The main purpose of this thesis is to investigate the moral justification of indigenous claims to specific land and resources. The way in which this will be done is by looking at the claims in relation to two different approaches.

The first approach is concerned with rectificatory justice. What is at stake here is an acknowledgement of the historic injustice but a claim that the injustice has been superseded. The situation has changed since the time of the injustice and it may be possible to argue that indigenous peoples have lost their claims to compensation. I look at several pragmatic arguments in the literature that seek to defend this claim.

The second approach is based on an individual right to culture. I will argue that an assimilation of an indigenous group – successful or not – is morally problematic because an individual has a right to her specific culture. The thesis will show that there is strong connection between land and indigenous cultures. In order to get closer to an argument that may be able to justify indigenous land claims the idea of shared interest and their ability to ground group rights will be discussed in relation to indigenous cultures' dependency on specific land and resources.



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# 1 Introduction

In 1979, the Sámi people and environmental organizations in Norway came together in a demonstration to stop the planned damming of the Alta-Kautokeino watercourse. They demonstrated to protect the natural resources that were threatened to be destroyed by the planned damming. The damming would have grave consequences for the reindeer herders and it would affect the wildlife and the rich flora and fauna in the area. The demonstration gained international attention and the Norwegian government received strong criticism for their treatment of the Sámi protesters. Despite the commitment of the protesters the damming was completed. Still, the demonstration had a tremendous impact on the rights of the Sámi people – rights that had been significantly limited before the demonstration (Berg-Nordlie, Tvedt 2016: URL).

At the time of my writing, the right to natural resources has once again become a matter that indigenous groups all over the world are now coming together and demonstrating for in light of the planned Dakota Access pipeline (DAPL), an underground oil pipeline that will carry oil from North Dakota to Illinois. The pipeline will go under the Standing Rock Indian Reservation. The Sioux tribes that live on these lands fear that the pipeline will destroy their natural resources, most notably their water sources. The Norwegian Bank (DNB) has sold their shares in the project and the pressure is on the Swedish bank Nordea to do the same. Indigenous peoples all over the world are claiming rights to land and resources they have traditionally owned but in many cases have been dispossessed from. Do indigenous peoples, like the Sioux Indians, have moral grounds for their claims for specific land and resources? The aim of my project is to assess the moral legitimacy of indigenous peoples' claims to specific lands by looking at central arguments in the literature. My claim is that there is a general tendency to favour the non-indigenous population and that this overshadows the indigenous peoples' claims. A focus on *specific* land and resources will also be central to my thesis.

ILO 169 is the primary international law that aims to secure and strengthen the rights of indigenous peoples. The convention, in addition to the United Nations Declaration on the Rights of Indigenous Peoples that came after in 2007, acknowledges the fact that indigenous peoples all over the world have suffered historic injustice that some would argue still persists. Article 3 states that “Indigenous and tribal peoples shall enjoy the full measure of human

rights and fundamental freedoms without hindrance or discrimination” and Article 5 states that “the integrity of the values, practices and institutions of these peoples shall be respected”. Most would agree that this is the minimum of what an indigenous individual can expect. Problems arise when part II of the convention is addressed which is the part that covers rights to land and resources. Countries like Sweden, Finland, Russia and USA have not (yet) ratified the convention. In Sweden the politicians say that they still have not been able to get a sufficient overview of the possible consequences they would face in ratifying the convention. In ratifying the convention, the states would be obligated to acknowledge the rights of the indigenous peoples concerned to land they have traditionally owned or occupied.

The concern is that a ratification of the convention would harm those who occupy or have rights to these lands and resources today. They may not be responsible for the injustice the indigenous peoples have suffered and some would argue that limiting their rights would be unfair. Should the concern for the peoples who inhabit the lands outweigh the claims of indigenous peoples? There is a general lack of compensation for the injustices suffered by indigenous peoples all over the world. The defense of this lack of compensation is often based on the fact that those who were responsible for the injustice are not alive to compensate the indigenous peoples concerned. A different approach is an appeal to changes in circumstances. The situation has changed from the time that the injustice took place and some would argue that the situation has changed so much that a rectification of the injustice is morally illegitimate.

A different attempt at defending the moral legitimacy of indigenous claims to land and resources is based on an individual’s right to culture. This approach has its origin from the Canadian professor Will Kymlicka who claims that culture is necessary for every individual’s chance to formulate life projects and to be able to pursue them. States tend to prioritize the majority culture which leaves the indigenous culture disadvantaged. Indigenous peoples have strong links to lands and resources and it may be possible to argue that *specific* lands and resources are part of what constitutes the cultures of different indigenous groups. If this is the case, should indigenous peoples be compensated for their disadvantage by way of special rights to specific lands and resources?

## 1.1 Terminological clarifications and delimitations

The diversity of indigenous peoples is acknowledged by the UN in that they have not adopted a single official definition of “indigenous”. Rather, they have based their understanding of indigenous peoples on a set of characteristics that may or may not apply to a specific indigenous group. These include the “Self-identification as indigenous peoples at the individual level and accepted by the community as their member”, “historical continuity with pre-colonial and/or pre-settler societies” and “strong link to territories and surrounding natural resources”. The strong link between indigenous peoples and the territories they have traditionally owned and may still occupy will be central to my discussion. The UN also notes that some indigenous groups share “Distinct languages, cultures and beliefs” as well as “Distinct social, economic or political systems”. The last characteristic says that indigenous peoples “Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities”. The purpose of these characteristics is, according to the UN, to be able to identify indigenous peoples rather than trying to find a definition that is able to capture the diversity among them (UN: URL). For present purposes, my understanding of indigenous peoples will be based on these characteristics. The link to land and resources and the distinct cultures will be central to my thesis.

What is common to most indigenous groups is that they claim rights to specific lands and resources. The question I am raising concerns the moral justification of these claims. There are a series of different understandings of special rights, some of which base the claims on the agent’s ability to increase the value of a natural resource. I will come back to this definition when I discuss what I shall refer to as the Lockean provisos, namely the sufficiency argument and the efficiency argument. The sufficiency argument states that upon appropriating land one should leave “enough and as good for others” and the efficiency argument states that in upholding a property right to a piece of land, the use of the land has to be efficient. Indigenous claims to land are special in that they are rights that some agents possess over particular natural resources. More specifically, their life-plans are dependent on their continued access to particular natural resources. These particular resources cannot be replaced by the same amount of resources somewhere else (Armstrong 2014: 51). I will

Special rights are not necessarily *exclusive* rights. This point, made by Chris Armstrong, makes it clear that one cannot simply disregard the claims of others who may also have an attachment to the land (Armstrong 2014: 65). One of the characteristics I base my

thesis is on concerns the fact that most (maybe all) indigenous peoples have strong links to territories and resources. This does not rule out the possibility that other non-indigenous individuals have strong links to territories and resources as well.

An agent's rights over particular objects, e.g. based upon the agent's attachment, can be held by both individual and collective agents. One reason why such rights can be held by an individual can be illustrated by the following example: If I am the last living member of an indigenous group that has enjoyed rights to a specific piece of land for centuries this right need not disappear just because I am the only individual left who can claim this right. Rights over particular objects can also be collective. Some, most notably Joseph Raz, argue that if enough members of a group share an interest then the weight of these individuals' interests may serve as moral grounds for collective rights. The rights can also be grounded in interests of individuals outside of the group (Jones 2016: URL). For instance, there may be other than Sámi individuals who have an interest in keeping the traditions of reindeer herding because they see it as an important part of Norway's cultural heritage. On Raz' conception of collective rights, the number of individuals in a group makes a difference. It makes a difference in that the more individuals there are in a group the weightier their claim is if most of them share the same interest (Jones 2016: URL).

One challenge concerning rights that are held collectively is the fact that not all members of a group may share the same interests. It is very unlikely that all the members of the Sámi people would want to be reindeer herders even though they share a collective right that gives them special rights to land for the purpose of reindeer herding. They are not *forced* to be reindeer herders by virtue of being Sámi. They may have special land rights by virtue of being Sámi but they can choose, as individuals, whether or not they want to act on these rights. They may not want to be herders themselves, but they may still have an interest in preserving the tradition. A few members may even think that reindeer herding is a waste of land and resources but as long as there are enough members of the group and the majority of them want reindeer herding to persist, the few who are against it have no real impact. They can of course choose to leave but they cannot change the rights of the Sámi as a collective.

I will, in the following, assume welfare egalitarianism. The reason why I make this assumption is that I find this approach the most convincing and an extensive discussion of the debate between welfare- and resource egalitarianism is outside the scope of my thesis. My reasons for choosing welfare egalitarianism are based on the work of G. A. Cohen. On the question of what we should equalize, Cohen argues that welfare is the proper equalizer. The

aim of justice is an equal distribution of welfare. The objection raised by resource egalitarians is that welfare equality fails to hold individuals responsible for their actions. Some people have preferences that are costly to satisfy. These are called “expensive tastes”. Resource egalitarians like Ronald Dworkin argue that those who have developed expensive tastes could have chosen not to develop them and therefore they themselves should bear the cost of satisfying them (Cohen 1989: 913). Since welfare is the chosen equalizer for welfare egalitarians, resource egalitarians like Dworkin argue that they are obligated to compensate individuals for their expensive tastes which he argues is unfair for those who have inexpensive tastes. In response to this critique, Cohen argues that welfare egalitarians can disregard expensive tastes that individuals can be held responsible for. Unchosen expensive tastes, on the other hand, should be compensated (ibid: 914). Cohen says that the purpose of welfare equality is to “... eliminate *involuntary disadvantage*, by which I (stipulatively) mean disadvantage for which the sufferer cannot be held responsible, since it does not appropriately reflect choices that he has made or is making or would make” (ibid: 916). We may be born with an expensive taste and we may also be born into a culture where we develop an expensive taste at a very early age. I assume that these are involuntary expensive tastes and a compensation of these expensive tastes may be morally justifiable.

## 1.2 Outline

In the first chapter of the thesis, chapter 2, I will investigate the arguments related to rectificatory justice. In the first part of the chapter, 2.1, I address and critically discuss the three pragmatic arguments against the idea that indigenous peoples have claims to land and resources based on the historic injustice they have suffered. Following Rodney C. Roberts, I argue against the argument based on *Competing claims* (2.1.1) that the rectification of *some* of the injustice that has taken place in the past is better than rectifying none. Jeremy Waldron (1992) has argued against *Counterfactual reasoning* (2.1.2) as a way of justifying special land claims by saying that we cannot guess what the indigenous peoples would have done had their lands not been taken from them. Also, the people who are alive today may not have been alive had the injustice not taken place. I will employ Bernard R. Boxill’s counterfactual argument for black reparation in arguing that the indigenous people who are alive today suffer from the historic injustice suffered by their ancestors and that this raises claims to compensation.

Finally I counter the *legitimate expectations*-approach (2.1.3) with the Beneficiary Principle: Those who inhabit the lands today may not have been directly responsible for the unjust acts against indigenous peoples but they have enjoyed benefits of the injustice. It is morally problematic to hold on to the benefits of injustice. Therefore, I argue that those who have benefited from the historic injustice against indigenous peoples may be obligated to compensate indigenous peoples for the injustice by returning (at least some) of the land and resources.

I then move on to examine the principled arguments (2.2). These include Jeremy Waldron's argument based on *Changing circumstances* (2.2.1) as well as the Lockean *Sufficiency argument* (2.2.2) and *Efficiency argument* (2.2.3). My claim is that Waldron's underestimates the strong claims of indigenous peoples and that a failure to rectify indigenous peoples requires a *severe* change in circumstances. In response to the sufficiency argument, I will attempt to show that the "enough and as good"-proviso may actually advocate indigenous' claims for specific land and resources. I argue that the efficiency proviso does not take into account that some indigenous groups inhabit territories that resemble conditions of plenty. I will also show that indigenous peoples who are nomadic make use of all the land they claim rights to even if they may not use of all of it at all times.

In chapter 3 I move from a backward-looking approach to indigenous' claims to specific land and resources based on historic injustice to a forward-looking approach inspired by Will Kymlicka based on individual right to culture and autonomy. In the first part of the chapter I discuss *The normative implications of cultural structures for indigenous peoples* (3.1). Here, I first establish the connection between cultural structures and individual autonomy. Following Kymlicka I argue that indigenous groups may be entitled to compensation because states tend to favour the majority culture. I also argue that one is entitled to one's *own* culture, rejecting Kymlicka's claim that *any* culture will suffice. In the next section, *Cultural structures within a liberal framework* (3.1.1) I argue that cultural structures do not limit but may actually advocate individual liberty. In the second part, *Culture and specific land and resources* (3.2) I argue that there is a close connection between indigenous cultures and specific land and resources. I also argue that this is an interest shared by the majority of the individuals within an indigenous group. This separates indigenous cultures from the majority cultures. My claim is that this shared interest gives indigenous peoples' claims to specific lands and resources.

## 2 Rectificatory Justice

“Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent”

(United Nations 2008: 10)

As stated in Article 24 in *The United Nations Declaration on the Rights of Indigenous Peoples*, indigenous peoples have the right to claim rectification for the historic injustice they have suffered. Lands have been taken from indigenous peoples and it is possible to claim that the returning of lands to indigenous peoples is justified. There are, however, some who argue that the injustice suffered by indigenous peoples happened so long ago that they have lost their claims to rectification. I will look at some of these claims. In rectifying historic injustice, one aims to put the victim in the position she would have been in had the injustice not occurred (Sanderson 2012: 104). For example, if someone were to steal a book from my locker this would be considered an injustice. I suffered the loss of my book. If the theft was discovered a couple of weeks later and the thief returned the book to me then the justice would have been rectified (assuming that I was not in desperate need of my book during the two weeks it was missing and assuming that the book had not been damaged).

Difficulties arise as time passes. What if I discover the theft 30 years later when I no longer need the book? After all, I had bought a new copy when I realized I had small chances of ever getting it back. Some would claim that I no longer have claims to rectification because the injustice happened so long ago. In legal terms, this form of reasoning is covered by “statutes of limitations”. A statute of limitations sets a timeframe for how long one can press charges against someone after an injustice/crime has taken place. This means that after a certain time has passed (depending on the severity of the crime) one cannot be punished for a crime. Statutes of limitations exist in order to make sure that the evidences in the case are reliable and that one is able to get the full picture of the case. The more time that passes after an incident, the harder it is to collect enough evidence to make sure that the defendant faces a fair trial. Behind a statute of limitations there is also the idea that after a certain time has passed, the defendant has suffered *enough* to balance out the potential punishment for the crime. The defendant may have regretted what she did and deeply regretted it for many years

after the incident. This, one could argue, is punishment in itself. The problem with this justification for statutes of limitations is that it is impossible to know if she has regretted what she did, or not.

What then, of morally unjust actions? Do statutes of limitations apply in these cases? The historic injustices suffered by indigenous peoples have been discussed in connection to so-called “moral statutes of limitations”. Are there reasons good enough to claim that the historic injustice suffered by indigenous peoples is “a thing of the past” – so far in the past that the claims to rectification have faded? Does the fact that many of the states concerned have issued statements saying that they feel really bad for the harm that they have caused the indigenous people change the claims to rectification?

In “The Morality of a Moral Statute of Limitations on Injustice”, Rodney C. Roberts (2002) questions whether a Moral Statute of Limitations (MSOL) on injustice can be morally justified. According to Roberts, to argue in favour of a MSOL on injustice is, in practice, claiming that there is a window of time on the moral legitimacy of the right to rectification. After this window of time has passed, one can no longer raise claims of rectification (Roberts 2002: 116). The majority of the arguments in favour of this approach are *pragmatic*. They are pragmatic in that the arguments are based on either epistemic challenges or they are utilitarian – defined by Waldron as “non-procedural” pragmatic justifications. In addition to the pragmatic justifications for MSOL, he also discusses Jeremy Waldron’s approach to the debate. Waldron’s approach is formulated in his paper “Superseding Historic Injustice” and is a *principled* argument against a rectification of historic injustice. In the following, I will discuss three pragmatic arguments against a rectification of historic injustice and one principled justification presented by Waldron.

## 2.1 Pragmatic reasons

The first reasons I will discuss are *pragmatic* and I will look at three different reasons/arguments<sup>1</sup>. The first deals with the magnitude of injustices have happened in the past

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<sup>1</sup> Roberts deals with several additional premises. One is a premise he calls “the major disruption premise” and entails the idea that a rectification of historic injustice is morally unacceptable in cases where a rectification would lead to major disruption and that appealing to a MSOL would be pragmatic in trying to avoid this (Roberts 2002: 120). This premise has much in common with Waldron’s “changing circumstances”-argument



and the fact that it is impossible to identify all of them. This, according to some, has consequences for the claims to rectification. The second deals with counterfactual reasoning and the difficulties we face in trying to decide what would have happened if the historic injustice had not taken place. Would the Sámi in the north of Norway and Finland have continued to cooperate if the borders had not been drawn or would they have separated by choice? The two first pragmatic arguments are what Waldron defines as procedural pragmatic arguments:

“Statutes of Limitations are inspired as much by procedural difficulties about evidence and memory, as by any doctrine of rights. It is hard to establish what happened if we are enquiring into the events that occurred decades or generations ago” (Waldron 1992: 16)

The third deals with the expectations of the beneficiaries – those who have benefited, often involuntary, from the unjust actions against indigenous peoples. Waldron defines this type of argument as a nonprocedural pragmatic argument. In addressing these claims one has to consider whether pragmatic considerations can outweigh justice. Are the questions concerning indigenous land claims so complex that it is easier to reject them?

### **2.1.1 Competing claims**

The idea behind the first justification for a MSOL is that the history is clouded with unjust takings – the amount of time that has passed is so substantial that it is impossible to account for all of them. This could easily be solved by appealing to a MSOL: One could determine a period of time that is relevant in deciding who should be entitled to the land. Any unjust takings that happened before this should not be rectified. They are no longer morally relevant. This solution to the complicated matter of addressing past injustice is not one that Roberts seems to share. He, on the other hand, argues in favour of addressing *all* the unjust transactions that have taken place in the past. This may not be possible in practice, but that does not mean that we should refrain from trying (Roberts 2002: 119). Roberts clarifies:

“A multiplicity of claims being raised may even be a sign of a healthy democracy. When we take rectificatory justice seriously, we are forced to conclude that a society based on unrectified injustice is

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and I think Waldron’s argument carries more weight. The idea that one should avoid major disruption is one that everyone would agree with. This alone does not provide a justification for a MSOL.

itself unjust” (Roberts 2002: 119)

Even if we are able to identify all, or at least most, of the injustice that has happened in the past we will most likely never be able to rectify all of the injustice. Despite this, Roberts claims that there will be positive moral implications. Symbolic justice is better than no justice (Roberts 2002: 120). If we try to rectify as much injustice as possible, there may still be someone who feels that the injustice that they or their ancestors have suffered is not acknowledged. The fear that someone will feel left out is not a good enough reason to refrain from trying to rectify historic injustice. Those who feel left out will most likely agree with the fact that it is better to rectify *some* of the injustice rather than not trying at all.

Moreover, if we appeal to an MSOL one faces the danger of not being able to rectify a terrible incident that happened right before the time limit defined by the MSOL. For example, if I dug up a grave 49 years and 355 days ago to steal something valuable I would have rectified this injustice if the MSOL for this kind of immoral action is set to 50 years. If the Norwegian state dug up more than 100 graves of Sámi people 50 years and one day ago to use the bones for research against the families’ will the families would no longer have claims to rectification. The number of people harmed by the second example is significantly higher and it is reasonable to assume that these families will feel that they have been treated unjustly if the injustice is rectified in the first example and not in their case. The arbitrary and absolutist nature of an MSOL makes it insensitive to cases like this.

An MSOL is also insensitive to two different cases of morally unjust actions where there is an extensive amount of evidences in the one case and almost no evidences in the second case. It just so happens that the case where there is enough evidence to properly rectify the injustice happened so long ago that the MSOL deems it morally irrelevant. In the case where there is not sufficient evidence, however, there is still a claim to rectification that is justified because it happened within the temporal limit set by the MSOL.

A possible solution to this problem is to allow exceptions from an MSOL. In cases where there is enough evidence to make sure that one arrives at the proper rectification, MSOLs should not apply. After all, there are exceptions from legal statutes of limitations. Legal statutes of limitations do not apply to murder. In many countries and states in the US there are no statutes of limitations for rape or kidnapping. However, exceptions based on available evidence are tricky. How much evidence is *enough* to allow an exception? The challenge with cases of moral wrongdoing is that the evidences are often of a different kind

than for example in cases of sex offences with minors. If there is available DNA that directly links a defendant to the crime, statutes of limitations do not apply. The discrimination of the Sámi people cannot be determined by a DNA sample. Some of the injustice is documented in public records like the banning of the Sámi language and traditional clothing. More subtle incidents like granting money to cultural events that promote the majority culture and never to cultural events that promote the indigenous minority are harder to determine. If the exceptions from an MSOL are based on the availability of evidence, many cases of discrimination would fail the test.

### **2.1.2 Counterfactual reasoning**

What then, are the prospects of counterfactual reasoning as a justification for special rights for indigenous peoples? Are there so many problems linked to counterfactual reasoning that we should appeal to a MSOL to avoid these problems? The counterfactual approach to compensation concerns the challenges we face when we try to assert what would have happened if an event in the past had not taken place. The idea behind counterfactual reasoning concerning land rights, according to Waldron, is:

“... the view that a judgement about past injustice generates a demand for full and not merely symbolic reparation – a demand not just for remembrance but for substantial transfers of land, wealth, and resources in an effort actually to rectify past wrongs”

(Waldron 1992: 7)

The transfer of land and resources based on counterfactual reasoning is a way of changing the present in order to make the present look more like it would have looked had the injustice not taken place (Waldron 1992: 8). Waldron says that one has to raise the question of what the indigenous peoples would have done if their territories had not been taken from them. According to Waldron this is the same as asking how people would have exercised their freedom if they had a real choice. Would they have hung on to the land and passed it on to the next generation or would they have sold the land (Waldron 1992: 10)? Part of the difficulty in answering these questions is our uncertainty about what we are doing when we try to make guesses about how free will would have been exercised.

The Sámi people in what has become Norway and Finland moved over large areas

between the summer grazing areas and the winter grazing areas. The creation of borders created barriers for the herders. In 1852, the Russian Tsar closed the border so that herders were unable to move across the border. In 1958, a fence was built to make sure that no reindeer would cross the borders<sup>2</sup>. The grazing areas that had been established over the course of centuries were now divided by fences. One could argue that, in putting up fences to prevent the herders from moving across the borders, the Norwegian and the Finnish state failed to respect the reindeer herding traditions deeply embedded in the Sámi culture. If we assume a counterfactual approach to compensation the question of what would have happened if the strict border control never took place arises. Would the grazing areas have persisted or would they have moved their herds by choice?

Even if one decided that compensation is justified: How would one decide what compensation is appropriate? How would one decide what lives the victims of injustice would have lived today had the injustice not taken place? Critics have argued that had the injustice not taken place, present living people may not even exist. How do we compensate people who would not have been alive had the injustice not taken place? To avoid these difficulties one could appeal to a MSOL.

The way Roberts sees it, counterfactual reasoning stems from Robert Nozick. According to Nozick, a person is fully compensated if and only if she is no worse off than she would have been had the injustice not taken place (Roberts 2002: 134). Roberts sees several flaws with this definition. The first problem is that it may render consequences that run counter to justice. The following example illustrates how this could potentially play out:

My car is stolen while I am grocery shopping. The thief gets away. A week later I find my car at the scrapyard in pieces. It appears that the thief has turned it in for cash. At the scrapyard I run into a rich woman who feels sorry for me and offers to buy me a brand new car. I gladly accept and I go home that day with a much better car than the car I originally had before it was stolen.

In this example, I am the victim of injustice but somehow I manage to end up better off than I was before the injustice occurred. Does this legitimize the injustice? The thief, in stealing my car, is responsible for me becoming better off than I was before the theft. This may be true, but this conflicts with our conception of justice. In this case, justice requires that the thief returns my stolen car. Justice does not require, as Nozick's conception of compensation may

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<sup>2</sup> Reinbeitesaken. (2012, 3. februar). In Store norske leksikon. Visited November 27th 2016 at <https://snl.no/reinbeitesaken>.

suggest, that the thief keeps my stolen car so that I will run into a generous stranger who will give me a new and better car. Roberts' claim is that the counterfactual conception as presented by Nozick does not capture the essence of compensation: Compensation means compensating someone for their actual loss. Whether they are worse or better off misses the point, or, as Roberts puts it: "... the point is to compensate me for *what did in fact take place*" (Roberts 2002: 136).

The counterfactual conception of compensation in the lines of Nozick may not be adequate, but other attempts have been made to employ counterfactual reasoning as a justification for rectification of historic injustice. In "A Lockean Argument for Black Reparations", Boxill argues in favour of a counterfactual argument for black reparations. His argument is based on John Locke's ideas on reparation and inheritance as presented in *The Second Treatise of Government* (Boxill 2003: 63). According to Boxill, the counterfactual argument he employs calls for black reparation. Boxill explains reparation as a way to "make satisfaction" for the harm that a victim has suffered. Reparation differs from compensation in that reparation can only be received by the victim from the person who harmed her. Compensation, on the other hand, can be received by a victim from someone who had nothing to do with her being harmed. Boxill illustrates this by saying that the slaves were, without doubt, in a position where they could claim reparation from the slave holders for the harm they caused them. A more complicated question is whether present day African Americans can claim reparation based on the enslavement of their ancestors.

Following Locke, Boxill argues that it is possible for present day African Americans to seek reparation if the enslavement has harmed them. The amount of time that has passed does not seem to matter as long as they are harmed by the injustice. The present day African Americans may be entitled to reparation, but the question is from *whom* they should seek reparation (Boxill 2003: 65)? After all, the slaveholders are not alive and therefore not able to give the African Americans the reparation they deserve. Boxhill suggests that the U.S. state and federal governments can be held responsible because they helped support slavery. Since these institutions persist today, it may be possible for the African Americans to seek reparation from them (Boxill 2003: 65).

Boxill claims that a double injustice has been done to African Americans – first through slavery and then by allowing the injustice to persist. Boxill explains:

"This double injustice with its resultant harms, continued through succeeding generations, makes a powerful case for claiming that if the slave holders and their federal and state governments harmed the

slaves, the white generations after emancipation have caused these harms to persist, that is, have caused them to be passed from the slaves to the descendants. In short, if slavery put blacks on the canvas, later whites made sure they stayed there” (Boxill 2003: 86)

According to Boxill, the current white generation owes the current African Americans reparation because they prevented the slaves and their descendants from recovering from the harms that slavery caused them (Boxill 2003: 87). Some would claim that the current white generation has less of a responsibility to compensate the African Americans because they were not directly responsible for the harms caused by slavery. Boxill argues that this argument is mistaken. Why it is mistaken can be illustrated by the following example. Imagine that I inherit a bakery from a distant relative that passed away. I keep the workers who happen to be one woman and one man. When they worked for my relative, the woman was paid less than the man despite the fact that they did the exact same work. When this came to my knowledge I raised her salary the same level as the man. In doing that I did what was demanded of me as the owner of the bakery. Despite doing this, I failed to compensate the woman for the injustice she had experienced while working for my relative. Because she was paid less she had difficulties in paying her bills. Raising her salary to the same level as the man helped but it did not make up for the years of being paid less. I should have given her extra compensation in addition to raising her salary to put her in the position she would have been in had the injustice not taken place. I was not directly responsible for the harms she suffered but I am responsible for not fully compensating her for the injustice she suffered.

There are two common objections against counterfactual reasoning. Boxill addresses both objections. The first concerns the problem that arises when those who suffered and those who caused the injustice are not alive today. Does the next generation of African Americans *inherit* the claims to compensation and does the next generation of whites *inherit* the obligation to compensate the African Americans? The second objection is based on the idea that if slavery never happened, the current African Americans would not exist. Therefore, they have no claims to compensation (Boxill 2003: 85).

In response to the first objection, Boxill argues that the counterfactual argument he employs does not demand that the present black population receives compensation for the injustice that happened before they were born. Rather, Boxill says that the current black population should be compensated for the injustice they have experienced themselves. Boxill uses an example of a two slaves who were released from slavery. They were entitled to reparation from the government who allowed their enslavement but were never offered

reparation. This injustice continued after they had a daughter. The injustice was therefore passed on to their daughter who grew up in an environment where her parents were still suffering from the harms that slavery caused them. As a result, their daughter was also affected by the harms of slavery. The fact that the harms of slavery also harmed her gave her rightful claims to compensation from the government. Boxill argues that she has the right to compensation because the government is obligated to put her in the position she would have been in had the injustice not taken place (Boxill 2003: 88). Boxill puts emphasis on the fact that the daughter does not inherit her parents' claims to compensation even though she would not have claims to compensation had her parents been properly compensated for the harms of slavery. She has the right to compensation for the harms that she has suffered herself (Boxill 2003: 89).

The second objection concerns, as mentioned, the idea that if slavery had never taken place, the current generation of African Americans would not exist. Although this may be true, Boxill argues that it does not affect the claims to compensation. The current African Americans' claims to compensation do not depend on injustices that took place *before* they were born. Rather, they depend on what happened *after* they were born. Their lives have been affected by the lack of compensation offered to their parents – an injustice that has been passed down to them (Boxill 2003: 89). Furthermore, Boxill argues that the amount of compensation they can claim depends on how much the failure to compensate their ancestors has affected them (Boxill 2003: 90).

Boxill's counterfactual argument is also applicable in the case of indigenous peoples. Most people would agree that taking lands from indigenous groups harmed the individuals in the indigenous group. The question is whether this act of injustice harms the individuals in the indigenous group who were not alive when the injustice took place. Boxill claims that we cannot hold the people who are alive today responsible for what their ancestors did, but it is possible to hold them responsible for not helping the descendants of those who were harmed from recovering. Suppose that the people who put up the fences on the border between Norway and Finland are not alive today. Following Boxill, one cannot hold the descendants of those who put up the fences responsible for the act of putting up the fences. One can, however, hold them responsible for not trying to help the Sámi herders recover from the harms caused by the fences. For example, one could expect the descendants to facilitate new grazing areas or in other ways help to make the transition to new grazing areas easier. In doing nothing Boxill argues that one continues to harm the victim (Boxill 2003: 87). Every

government after the one that put up the fences has, following the counterfactual conception of compensation, a duty to put the Sámi herders who were harmed by the fences in the same position they were before the fences were put up.

Then there is the objection that the people who are alive today may not have been alive had the injustice not taken place. Some claim that the people who are alive today have *inherited* the right to compensation from their ancestors. Consider a scenario where the Sámi herders who were alive when the fences between Norway and Finland were put up are not alive today. Following the idea of inheritance, the descendants of these herders *inherit* the claims to compensation. Their ancestors had claims to compensation that they never received. Instead of disappearing, the claims are passed down to the descendants. One could argue that the inheritance based idea of compensation misses the point. A counterfactual argument cannot be based on inheritance because one cannot put those who were harmed in the position they would have been in had the injustice not taken place because they no longer exist. The descendants of the victims who are alive today still suffer from the injustice that persists if the descendants of those who harmed them fail to help them recover from the injustice. The Sámi herders who live on the lands today suffer because of the injustice their ancestors experienced but it is the fact that they still suffer from this injustice that raises claims to compensation. The idea that the herders who are alive today may not have been alive had the injustice not taken place does not make a difference because it is the fact that the herders are *still* suffering from the injustice today that gives them claims to compensation. They would have been better off had the injustice not taken place. Therefore, they deserve compensation.

### **2.1.3 Legitimate expectations**

The pragmatic argument based on expectations refers to the legitimate expectations that one has involving one's life, goals and hopes for the future. More specifically, it concerns the expectations shared by those who have unintentionally benefited from the injustice suffered by indigenous peoples. They have benefited from the injustice unintentionally because they were not directly responsible for the unjust actions against indigenous peoples. After a certain time has passed, people start to build up expectations that revolve around the land and resources that are available to them. Does the fact that those who inhabit the lands today were not directly responsible for the injustice suffered by indigenous peoples give them legitimate claims to keep the land in their possession? And if they have claims to the lands – do these



claims outweigh the claims of indigenous peoples?

Roberts says that having expectations met is part of what brings stability and dependability in one's life (Roberts 2002: 124). Understood this way, certain expectations can be said to have moral legitimacy in that they form the basis of a good life. Those who enjoy rights to lands that were traditionally indigenous lands may have formed projects and expectations that are directly linked to the lands they inhabit. Waldron also addresses the expectations of those who live on the lands that were taken from indigenous lands today:

“For better or for worse, people build up structures of expectation around the resources that are actually under their control. If a person controls a resource over a long enough period, then she and others may organize their lives and their economic activity around the premise that that resource is “hers” without much regard to the distant provenance of her entitlement. Upsetting these expectations in the name of restitutive justice is bound to be costly and disruptive” (Waldron 1992: 16)

Waldron argues that after a certain time has passed, those who inhabit the lands begin to see the land as their own without thinking about how it became “theirs”. It is possible to counter the argument based on legitimate expectations with “the Beneficiary Principle”. According to the Beneficiary Principle, agents can acquire rectificatory obligations through involuntarily benefiting from acts of injustice committed by others such as the agent's ancestors. They acquire these obligations involuntarily because the benefits in question are not voluntarily acquired or accepted: It is not received by the beneficiaries through an act of will (Butt 2007:130).

The Beneficiary Principle shares some similarities with Boxill's version of a counterfactual argument. Both depend on the idea that the current situation would have been different had the injustice not occurred. Some people are better off and some people are worse off as a result of the injustice. In order to compensate those who are worse off as a result of the injustice, one has to imagine a possible world where the injustice has not occurred (Butt 2007: 144). This may mean that those who are better off may have to give up some of their advantages. It differs in the following respect: Boxill's counterfactual argument is, on the one hand, based on the continued injustice suffered by indigenous peoples living today and the obligation of others to compensate them for that injustice. The obligation to compensate indigenous peoples is not necessarily related to the question of who the responsible agents are. Those who *can* have a responsibility to compensate the indigenous peoples who are alive today for the injustice they suffer. The Beneficiary Principle, on the other hand, is based on

the beneficiaries' (those who have involuntary benefited from injustice) acknowledgement of the historic injustice and at the same time the failure to acknowledge that their benefiting from the injustice is an injustice in itself (Butt 2007: 144). Daniel Butt says:

“The individual’s duty not to benefit from another’s suffering when that suffering is a result of injustice stems from one’s moral condemnation of the unjust act itself. In consequence, a duty to disgorge (in compensation) the benefits one gains as a result of injustice follows from one’s duty to not to so benefit. ... We make a conceptual error if we condemn a given action as unjust, but are not willing to reverse or mitigate its effect on the grounds that it has benefited us” (Butt 2007: 143)

Understood this way, the Beneficiary Principle requires that we, as moral agents, accept the fact that some of the advantages we have stem from unjust actions. Some of the “things we enjoy”, as Butt puts it, may be ours as a result of unjust acts. These actions may not be our own. They may be our ancestors’ unjust actions but in some ways we are the products of their unjust actions. According to Butt, we should do more than just regret that we have benefited from injustice. Since we are in control of the things we enjoy, namely lands and natural resources, we should compensate the indigenous peoples by transferring back the land that the indigenous peoples were dispossessed from (Butt 2007: 144). Whether or not this is possible is a different question – one that I will address in the next part of the chapter.

As a response to the Beneficiary Principle, it is possible to argue that the principle altogether disregards the expectations of those who have benefited from the historic injustice suffered by indigenous peoples. Does justice require that the beneficiaries give up everything that they have come to depend on? This question concerns the difficulty we have in deciding how much the beneficiaries have actually benefited from the injustice suffered by indigenous peoples. Imagine that certain pastures were taken from the Sámi in Norway in order to build power lines, roads and other infrastructure between two cities. It is possible to argue that the people living in these cities, even if they were not the ones responsible for building the infrastructure, have benefited from the act. They may agree the act of building the infrastructure, without consent from the Sámi, was an act of injustice. Still, they may argue that “there is not much we can do about it now”. The injustice was unfortunate, but there is no simple way to undo what was done. They may also argue that, despite being an unjust act at the time, it has made life a lot easier for them. Is it enough that they acknowledge the injustice or is this a way of denying responsibility? Are they morally obligated to return land to the Sámi because of the benefits they have enjoyed after the injustice took place or do they have

weighty claims to a status quo?

Cara Nine elaborates on this idea and says that the land is important for the current inhabitant's self-determination. The current inhabitants have developed certain rights of themselves over time as they have become dependent on the land. She uses Australia as an example and says that Australians cannot simply pick themselves up as a group, return to Europe, and continue to be Australians in the sense of being citizens of Australia because at this point Australia as a political state would cease to exist. As she puts it: "The Australians have 'nowhere else to go' without ceasing to be Australian" (Nine 2008:84). Therefore, one could argue that the descendants of colonists also have a justified claim to territorial sovereignty within the land that they now occupy. The outcome would then be for the descendants of colonists and the indigenous peoples to share territorial sovereignty if possible (Nine 2008:85).

This point by Cara Nine is a good one and it acknowledges the attachment of non-indigenous citizens to land and resources. Still, I hold that it does not apply to all indigenous peoples. In the Sámi case the Norwegian citizens would not have "pick themselves up" and leave like Nine suggests the Australians would have to in order to compensate the Aboriginals. Few people live in the north of Norway and although the exact same land used to be pastures cannot be returned they can be compensated with rights to land somewhere else – assuming that the land has enough available resource to serve its purpose as a pasture.

The beneficiary principle is demanding in that it holds agents responsible for historic injustice that they did not take direct part in. It requires that the agents not only acknowledge the injustice but that they also acknowledge the advantaged position they are in as a direct result of the injustice. Their advantaged position may require them to return land and resources to the relevant indigenous group or they may have to share them with the indigenous group. As mentioned, it may not always be *possible* to return land and resources to indigenous people, even if one is morally obligated to do so. I will address this in the following.

## 2.2 Principled reasons

As previously stated, Waldron argues against the idea that indigenous peoples should be granted special territorial rights – at least if the claim is based on rectificatory justice. In addition to discussing procedural and non-procedural pragmatic reasons he also provides principled reasons. The first he mentions has to do with changes in circumstances. According to Waldron, some changes in circumstances are morally relevant and may change the claims to rectification. An action that was clearly unjust at a time in history may be just now because of a change in circumstances. When this happens, Waldron argues that justice has been *superseded*. Has justice been superseded in the case of indigenous land claims? Have circumstances changed in a morally relevant way so that indigenous peoples have lost their claims to rectification?

Waldron also briefly discusses the John Locke's theory of property. The two Lockean provisos – the sufficiency proviso and the efficiency proviso are also principled reasons and I will address both of them. The sufficiency proviso contains the idea that, upon appropriating land, one leaves “enough and as good for others”. This argument can be used to reject indigenous land claims because they would need too much land to be able to leave enough and as good for others. On the other hand, one could argue that indigenous peoples would need *more* land to have enough and as good as others. Assuming a welfarist egalitarianism, this would support land claims for indigenous peoples.

The efficiency argument is based on the principle of efficient use of resources. One could argue that a dispossession is just if those who were dispossessed failed to use the resources *efficiently*. If those who take the land manage to use it efficiently then the taking of the land is, according to Locke, just. If one bases rights to land of efficiency one has to address several questions. First of all one has to determine what constitutes efficient use. Are indigenous groups who live a nomadic life naturally inefficient in that they leave much of the land they inhabit unused for long periods of time? Should efficient use be defined by the amount of money one can “get out of” the land?

### 2.2.1 Changing of circumstances

The first reason I will discuss has to do with changes in background information: There may

have been changes in both social and economic circumstances since the historic injustice took place and Waldron argues that justice is relative to these circumstances (Waldron 1992: 16). Waldron raises the question of whether justice is relative to circumstances or if we can completely ignore changes in background information (Waldron 1992: 20): Indigenous lands are indigenous lands no matter what happens in the world. Or?

The changes Waldron has in mind are "...changes in population, changes in resource availability, occurrence of famine or ecological disaster, and so on" (Waldron 1992: 20). Do our claims to territory depend on how they will affect the people we are excluding when we are making the claims? There is a morally relevant difference, according to Waldron, in claiming territories where there is a small population and plenty of space and in claiming territories where the population is large and the space is scarce. Put in other words, land claims are relative to scarcity (Waldron 1992: 21). A piece of land remains mine, given the fact that I appropriated the land in the right manner, for as long as circumstances remain unchanged. If, however, the circumstances change drastically, Waldron claims that I can no longer take the land for granted (Waldron 1992: 22). In theory, this line of reasoning seems plausible. I cannot hold on to a piece of land if, upon doing so, I leave other people in hunger and poverty. In the case of indigenous peoples it would be the same: An indigenous group cannot claim rights to territories if, upon doing so, they leave others in hunger and poverty.

But what does Waldron mean when he says that justice is relative to circumstances? He says the following:

"In the case of almost every putative entitlement, it is possible to imagine a pair of different circumstances,  $C_1$  and  $C_2$ , such that the entitlement can only barely be justified in  $C_1$  and cannot be justified at all in  $C_2$ . The shift from  $C_1$  to  $C_2$  represents a tipping point so far as the justification of the entitlement is concerned" (Waldron 1992: 20)

According to Waldron, the existence of the tipping point between  $C_1$  and  $C_2$  has an impact on the original appropriation of land. He illustrates this by saying that an appropriation that may *barely* be justified in conditions of plenty ( $C_1$ ) where there is a small population and plenty of land may be entirely inappropriate in conditions of scarcity ( $C_2$ ) where there is a large population and limited land (Waldron 1992: 21). To say that the appropriation of land in  $C_1$  is "barely" justified is an interesting choice of words. Imagine an indigenous group settling at a time when there is no one else around. The conditions are without doubt plentiful. To say that the indigenous group is "barely" justified in appropriating land in under these circumstances

sound odd. The indigenous group would not harm anyone by acquiring land under these conditions and one could argue that they are more than justified in appropriating the land.

Waldron then moves on to question whether, upon appropriating land, one should take into account the possible changes in circumstances that may happen in the future. He suggests that there could be a test for the appropriation that takes the changes in circumstances into account. If one fails the test, one would not be justified in appropriating the land. An appropriation of land has to be appropriate in both  $C_1$  and  $C_2$  (Waldron 1992: 22). This puts limits on appropriation even in conditions of plenty. Putting these limits on appropriation would explain why Waldron argues that an appropriation is “barely” justified in  $C_1$ . Very few appropriations will be justified if all future changes in circumstances have to be taken into account upon appropriation. Still, Waldron says that the idea that there should be strong limits on appropriation in conditions of plenty makes no sense. If there are conditions of plenty then people should act as if they are without taking every possible scenario in the future into account (Waldron 1992: 23).

The next move Waldron makes is to suggest a weaker limit to appropriation. Waldron suggests that the limits to appropriation should concern the way in which rights are exercised in  $C_1$  and  $C_2$ . If an indigenous group appropriates a piece of land in conditions of plenty they are basically entitled to do anything they want with the lands. However, if things change in a morally relevant way as suggested by Waldron they may be limited in what they can do with the lands. One possible way that circumstances may change is, according to Waldron, that water may become scarce (Waldron 1992: 23). Since this would affect the basic liberties of others the indigenous group would be obligated to share the water source with others even though they had exclusive rights to the source originally.

Based on this reasoning, Waldron argues that the act of holding on to initially stolen land may in some cases be justified. The act of stealing a piece of land from an indigenous group in conditions of plenty ( $C_1$ ) is an act of injustice. Can the act of holding on to initially stolen land be justified if the circumstances change? According to Waldron it can. If a person steals land from an indigenous group in conditions of plenty ( $C_1$ ) and conditions change to conditions of scarcity ( $C_2$ ) the act of holding on to the land is justified (Waldron 1992: 23). It is justified because holding on to the land is necessary for the survival of this person. The idea is that, under conditions of scarcity a person may take whatever she need for survival and is justified in doing so. If holding on to land is necessary for the survival of those who possess it, the act of holding on to the land is justified. As Waldron puts it:

“... it seems possible that an act which counted as an injustice when it was committed in circumstances  $C_1$  may be transformed, so far as its ongoing effect is concerned, into a just situation if circumstances change in the meantime from  $C_1$  to  $C_2$ ” (Waldron 1992: 24)

When the circumstances change from  $C_1$  to  $C_2$ , Waldron claims that injustice has been “superseded” (Waldron 1992: 24). This means that if lands were taken from indigenous peoples in conditions of plenty ( $C_1$ ) and the circumstances change to conditions of scarcity ( $C_2$ ) then the injustice has been superseded. Despite the fact that Waldron says that the supersession of historic injustice is a possibility he says that it does not always happen. It does not always happen but Waldron argues that the changes in circumstances in Australia and North America are of the sort that would allow a supersession of the injustice that took place when the indigenous peoples were dispossessed (Waldron 1992: 25-26). This is a strong claim.

One could reformulate Waldron’s argument to the following: Indigenous lands are indigenous lands and should be returned to indigenous peoples unless the circumstances have changed *drastically*. The circumstances have to have changed so much that the returning of lands to indigenous peoples would have consequences so severe that the people who inhabit the lands today would lose their basic liberties. Indigenous peoples have strong claims to land and the changes in circumstances have to outweigh these strong claims. Imagine a case where an indigenous group claims the right to lands that they have traditionally owned but have been dispossessed from. The situation since the time of their dispossession has changed. Many families now inhabit the lands and depend on these lands in their everyday lives. If these lands were returned to indigenous peoples some of these families would have to move. This would undoubtedly be challenging for the families concerned. Still, having to move is not a violation of their basic liberties. Waldron says the following of the use or possession of certain resources:

“If an individual makes a claim to the exclusive use or possession of some resources in our territory, then the difficulty of sustaining that claim will clearly have some relation to the level of our concern about the plight of other persons who will have to be excluded from the resources if the claim is recognized” (Waldron 1992: 20)

Here, Waldron says that the sustaining of one person’s claim to a piece of land or resources is

related to the level of concern we have for those who are excluded as a result of that person's claim. If an indigenous group has acquired a piece of land then the sustaining of their claim to the land depends on the concern we have for those who are excluded from the land. What then of the concern we have for the indigenous people who have been dispossessed of their land?

If there is a case where the returning of lands to indigenous peoples would leave others in extreme poverty then at least one acknowledges that the indigenous peoples do have claims to the lands but these claims cannot be met due to drastic changes in circumstances. Assuming the alternative formulation of Waldron's argument the returning of lands and resources to indigenous peoples would be justified in many cases. In the north of Norway where the Sámi live, scarcity is not a challenge. There is more than enough land for the Sámi to have rights to the land and resources they depend on at the same time as the basic liberties of others are maintained. On other continents where the conditions are not as plentiful there may still be a solution that takes the historic injustice suffered by indigenous peoples into account.

Waldron briefly mentions the idea that the way in which one exercises the rights to land may change if the situation changes from  $C_1$  to  $C_2$ . If an indigenous group has exclusive right to a water source and water becomes scarce then the indigenous group is obligated to share it with others. This is not as strong as saying that justice is superseded. Population growth has put more pressure on the natural resources and it may not be possible to give the indigenous groups exclusive rights to the resources they traditionally owned. This does not, however, mean that they cannot be given *any* rights. And equally important – it does not mean that justice has been superseded. Justice, on the alternative formulation of the argument, is relative to *drastic* changes in circumstances and these are not as common as they appear to Waldron.

### **2.2.2 The sufficiency argument**

Locke's sufficiency proviso sets boundaries for our appropriation of property rights. When we take a piece of land we have to make sure that "enough and as good" land is left for others. Since the land and resources of the earth were given to mankind in common there is no individual who has exclusive rights to certain parts of the earth. However, all individuals have a right to appropriate parts of the earth (Simmons 1992: 279). The sufficiency limits the amount of land one can appropriate. Simmons describes the sufficiency argument as a "no-harm" principle (ibid: 281). Not harming others means not limiting others' right to also



appropriate land. Simmons says that “This limit would seem to define one’s ‘share’ as ‘a portion of the earth’s resources as large and as good as the best share which simultaneously be privately held by everyone with a right to appropriate” (ibid: 282). This would mean that the amount of land that I take has to allow for my neighbour to later be able to take as much and as good for herself. A “fair” share is one that allows others to appropriate an equally large and good share. I will look at several aspects of the sufficiency argument. Writers like Waldron and James Tully disagree on the nature of the “enough and as good”-clause. According to Waldron it is only a descriptive statement and not a normative one, whereas Tully argues that it is central to Locke’s theory of property and necessary for it to make sense. If it is a normative one, what does it mean for indigenous land claims?

According to Locke, we need to put limitations on the appropriation of property rights because “... all persons possess equal rights to make property and not be excluded by others from doing so, additional limits on property rights are set by the conditions necessary for all to exercise these rights” (Simmons 1992: 279). The idea that all persons have an equal right to acquire property is strengthened by Locke’s conception of natural “shares” of the commons. The idea, further developed by Simmons, is that each person has the right to appropriate a fair share of the commons (Simmons 1992: 279). One’s share is according to Simmons the fair amount of land that one is able to use. At the same time, enough has to be left for others so that they have a fair share of the land that they can use simultaneously (Simmons 1992: 283).

Locke’s claim is that labour gives rights to property only insofar as one leaves enough and as good for others. In conditions of plenty where one would not be able to appropriate enough land to limit the fair shares of others one could question whether the sufficiency argument puts any limitations on appropriation of land. Locke does to some extent answer the question in saying that during the original appropriation limitations concerning fair shares were not an issue because there was more than enough land for everyone (Simmons 1992: 283). By “not an issue” one could argue that Locke suggests that the argument still holds in conditions of plenty, but it makes no difference to the practice of appropriation.

Simmons argues that the first proviso limits one’s property rights in conditions of scarcity as well in conditions of plenty. A family who lives under conditions of scarcity can only be granted a small share of the commons – even if they wanted more. Simmons points to the fact that under conditions of scarcity the appropriation of shares of the commons may be entirely illegitimate. If – in taking a fair (divided with all those with claims) share of the

commons – the land is impossible to make use of productively then the land must stay common (Simmons 1992: 290). Here, the sufficiency argument seeks to prevent a situation where a few take all the commons to save themselves or they give up all claims in order to save others. Simmons instead suggests that on Locke’s view it would be better if all agree on a division of the commons that will best benefit all. In conditions of plenty it is less likely that people fight over appropriation of land and this is highlighted by Locke. At the time of appropriation in conditions of plenty there would be no reason to quarrel among those with claims because there would be enough land for everyone. At a later time – under conditions of scarcity – the situation is entirely different. As Simmons puts it: “The clear implication is that in later ages, when scarcity *is* a problem, there is room for doubt about titles, rights and largeness of possession” (Simmons 1992: 291). A share of the commons that was fair at the time of appropriation may not be fair at a later time under conditions of scarcity.

The idea that a share of the commons is fair at one point in time and not a later time when conditions have changed has much in common with Waldron’s “changing of circumstances”-argument. Waldron’s claim is that the unjust act of taking land from indigenous peoples may be superseded: Those who inhabit the land today may be justified in holding on to the land if circumstances have changed in a way that is morally relevant. An indigenous group who left no one worse off at the time of appropriation may leave someone worse off at a later time when circumstances have changed and there is scarcity for certain natural resources. This would affect the indigenous groups who inhabit lands today and it would also affect the indigenous groups that are claiming that the lands that were taken from them are returned. The claim that indigenous peoples should lose their claims to land because what constitutes a “fair share” of the commons has changed needs further explanation. What does it mean to leave someone “worse off”? Is it enough to claim that one feels worse off? How do we measure whether someone is made worse off or not?

Simmons formulates two ways in which one person’s appropriation may leave another person worse off:

- 1) The other loses the opportunity to improve her situation as a result of someone else’s appropriation.
  - 2) The other can no longer use the land (that used to be common land) freely.
- (Simmons 1992: 292)

This is an important clarification because Locke – according to Simmons – does not wish to deny *any* appropriation that harms another in *any* way. Simmons points to the fact that any

appropriation will make some other worse off in some way or another (Simmons 1992: 292). If I take a piece of land – even if I leave more than enough and as good for others – another person could potentially feel worse off for no other reason than her wanting that particular piece of land. Despite the fact that the land next to mine was just as good or even better it is possible that someone else had their eyes set on my piece of land and therefore would feel worse off upon me claiming that land. As long as I make sure that other claimants' opportunities for self-preservation are secured when I claim a piece of land I am not – according to Locke – acting unjust upon claiming that land (Simmons 1992: 292).

The idea that a certain piece of land may have more value to a person than others may be more important than Locke seems to think. An indigenous group, for example the Sami people, have special preferences for specific lands. The reindeer have specific summer and winter pastures that have been carefully chosen because of the available resources that are necessary both for the reindeer and the herders. These are factors that may not be important to others who would like to own land whose main motivation is to grow vegetables and build cabins.

One could possibly solve this by saying that specific lands should be used for specific purposes. Imagine a situation where two individuals, Bob and Patti, are looking for land. They want about the same amount. Bob wants to grow vegetables and Patti wants to build a cabin. There are two shares of land available at about the same size. They look very similar but one of the two shares is much more suitable for growing vegetables. If Patti, who wanted to build a cabin, insists on the share that is more suitable for growing vegetables, Bob would be left worse off. He would be left worse off because he would be left with a share that is less suitable for his purposes. Patti could reply something like “but that share somehow *feels* better than the other share”. The fact that it feels right to her is not enough to outweigh the fact that the share is more suitable for Bob because his purpose is to grow vegetables. This isolated case sounds fair enough. The shares should be divided based on what their purposes for the shares are and in this case it is easy to decide which share is best suited for whom. It can get much more complicated. What if Bob and Patti both wanted to grow vegetables? This could be solved by them dividing both the shares in two so that they both had half of the share that was well-suited for growing vegetables. None of them would then be worse off.

Patti may suddenly decide that, in addition to the cabin she wants to build, she also wants a swimming pool. In order to build a swimming pool she needs a bigger share. She argues that in order to have enough and as good she needs a little bit of Bob's share as well.

Here, the question is whether what Patti *wants* is the same as what Patti *needs*? Patti may argue that she needs a swimming pool in order to have enough and as good as Bob. This, one could argue, is an example of Patti having an “expensive taste”: She needs more resources than others to be on the same level of well-being as others who have non-expensive or ordinary tastes (Kaplou 2006: 417). It is an expensive taste that she herself has developed and something she should be held responsible for. Bob, who one could argue has non-expensive tastes, should not have to give up land in order to compensate Patti for her expensive taste. What then, of expensive tastes that one is born with or one develops, involuntarily, by influence of one’s family or culture? Should they be relevant to one’s claims to land?

On the welfare egalitarian view, one should be compensated for involuntary expensive tastes. Elizabeth S. Anderson says the following about involuntary expensive tastes:

“Although some preferences are voluntary cultivated by individuals, many others are shaped genetic and environmental influences beyond their control and are highly resistant to deliberate change. Moreover, an individual may not be responsible for the fact that satisfying them is so expensive” (Anderson 1999: 295)

It is possible to claim that indigenous peoples have an expensive taste for land. The Sámi have an expensive taste for land because they need large areas to herd reindeer. The expensive taste for land is one that is deeply rooted in the Sámi culture. The individuals within the Sámi culture develop this expensive taste involuntarily by growing up in a culture that relies on reindeer herding. Therefore, a Sámi herder would have stronger claims to a larger share than Patti would have. Patti’s expensive taste does not qualify for compensation, whereas the Sámi herder’s expensive taste does. Both feel they need more land to have enough and as good as others, but only the Sámi herder’s needs are seen as morally relevant since her needs are based on an involuntary expensive taste. Understood this way, the sufficiency argument can support granting more land to indigenous peoples than to others.

The idea that indigenous peoples have special attachments to specific lands is compatible with Chris Armstrong’s attachment-based claims. Basing land claims on attachment means taking seriously the idea that agents form close attachments to resources and that these attachments carry moral weight. Armstrong (2014) explains the relationship between the agent and the resource as something that allows the agent to develop life-plans upon having secure access to that resource (Armstrong 2014: 49). The idea that agents develop attachments to resources is commonsensical if we look at everyday life. I use my bike for transportation all year round. I take good care of it and keep it indoors in the winter. I am

attached to my bike and I depend on it to get to the University, to get to work and to do my grocery shopping. My bike is an essential part of my everyday life and helps me in pursuing my life-plan. If someone were to steal my bike from me my daily routines that I have come to appreciate would be altered. Armstrong points to the fact that we all, in some way, are dependent on some natural resources in order to pursue our life-plans. We need drinking water, food and clean air regardless of what our individual life-plans are (Armstrong 2014: 56). Access to these resources is general.

Claims can be special, according to Armstrong, in that they are rights that some agents possess over particular natural resources. More specifically, their life-plans are dependent on their continued access to particular natural resources. These particular resources cannot be replaced by the same amount of resources somewhere else (Armstrong 2014: 51). For example, a Saami reindeer herder in the north of Norway has developed an attachment to her *Siida*. A *Siida* is a Saami community within a particular area that either consists of one family or a cooperation of more families. In *Siidas* that consist of more than one family, the families help each other with the herds. The families may still have individual rights to certain resources but they come together for activities like moving the herds from the summer pastures to the winter pastures and the branding of the reindeer<sup>3</sup>. The land and resources within a reindeer herder's *Siida* cannot be replaced by the same amount of land and resources somewhere else because she and her reindeer are dependent on that particular area. This is different from the attachment I have to my bike. If my bike was replaced by a different bike that had the exact same qualities I would still be able to pursue my life-plan. I depend on *a* bike, not a *particular* one. The same cannot be said for the reindeer herder.

A hunter may not be as attached as a reindeer herder to specific lands. This does not, however, mean that we should disregard the hunter. The hunter identifies herself as a hunter and hunting is important for her way of life – for her to be able to pursue her life-plans. For the hunter, what is at stake is that she is allowed to go hunting. In the case of the Saami reindeer herder, her access to the natural resources within her grazing area what is at stake. As long as no one destroys or occupies the land in ways that would interfere with her reindeer herd, the pursuing of her life-plan is secured. This would allow the hunter to go hunting on

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<sup>3</sup> The cooperative nature of the *Siida* is one of the reasons why a “tragedy of the commons” approach against Saami land claims falls short. The claim, raised by both the Norwegian and the Swedish governments, is that each individual herder will seek to increase her number of reindeer to be prepared for the dangers of for example predators when the reindeer are owned by the individual herder and the pastures are owned by the commons. This claim does not take into account the fact that the pastures are not a “commons” – the pastures are regulated among the herders within the *Siida* structure.

the lands where the reindeer herder has her *Siida* as long as, in doing so, she does not harm the herd. I will come back to the idea of attachment-based claim in chapter 3 where I discuss the relation between culture and attachment-based claims.

### **2.2.3 The efficiency argument**

States and courts have appealed to Locke's second proviso, also known as Lockes's efficiency argument upon arguing that current indigenous groups fail to use the land in a way that gives them right to that land (Kolers 2000: 392). To understand how they can do that, we need a clear conception of the arguments provided in Locke's second proviso, often referred to as the spoilage proviso in that waste or spoilage is central to the argument. The efficiency argument embodies the idea that efficient use of land is morally relevant when one determines the rightful owner of a piece of land. Locke says that the efficiency proviso limits one's property rights in that property can only be appropriated and enjoyed:

“...as much as anyone can make use of to any advantage of life before it spoils; so much he may by his labour fix a property in. Whatever is beyond this is more than his share and belongs to others. Nothing was made by God for a man to spoil or destroy” (Simmons 1992: 282)

Simmons sees the efficiency proviso as determining one's fair share of land as the amount of land one is able to use. If I take a piece of land I cannot take more than I can make use of. What I can “use” consist of whatever I need to secure my basic liberties in addition to the things that make life “convenient” in Lockean terms. This separates the efficiency argument from the sufficiency argument. Whereas the sufficiency argument determines my fair share based on what others can take when I am done, the efficiency argument is determined by my ability to use that land that I have taken (Simmons 1992: 282). This could suggest that the efficiency proviso does not take the claims of others into account. It could also lead to a situation where I take large amounts of land that in no way is necessary to secure my basic liberties but that I argue is convenient. For example, I could argue that I want a gigantic inflatable castle outside my apartment that would require large amounts of land just in case I may want to use it one day. I may never use it, but I could argue that having the possibility to use it is convenient. Some would argue that this is unfair. It is also possible to argue that, in

insisting on an inflatable castle that I may never use, I am “wasting” or “spoiling” the land. In using a large piece of land to have an inflatable castle one may object that I am in fact not “using” the land at all. I am at least not using it *efficiently*.

In “A Lockean Theory of Territory”, Cara Nine describes the efficiency argument as a limiting principle: The current landowners are wasting their land and in doing so they are limiting the rights of others to access that land and to use it in a more efficient way. Consequently, the current landowners end up having their rights limited and may be rightfully forced to give others rights to the land (Nine 2008: 162). This can be illustrated by looking at the Sámi people of Norway who have rights to large areas in the North of Norway for the purpose of reindeer herding. The Sámi people are nomadic in that they move from summer pastures to winter pastures. This means that large areas are not being used during a certain time of year. Still, other citizens cannot do whatever they want on these lands. They may be allowed to hunt and fish on the lands but they cannot do anything that disturbs the herders or the reindeer. Some may argue that the Sámi herders are wasting land in leaving so much land unused for long periods of time. They are at the same time limiting others from using the land.

Our property rights are, as mentioned, limited to the amount of land that we are able to use. Simmons explains this by saying that someone who takes more land than they can use fail to respect the natural equality of all people. In taking more land than one needs one fails to acknowledge the projects of others and one deprives others of the opportunity to use the land that one would not use anyway (Simmons 1992: 280). If one has more land than one can use, one *wastes* or *spoils* the land. Following Simmons, it does not seem like the Sámi herders are wasting their land because they use all the land that they have rights to – they just do not use all of it all the time. The nature of reindeer herding makes it impossible to use all the land at once. At the same time, they need all the land because the summer pastures and the winter pastures serve different purposes. Even if one cannot use the land while the herders and the reindeer are occupying the land – would it be possible to use it when they are not there? For example, would it be possible to have a summer camp in the same area as the winter pasture when the herders and the reindeer are at the summer pasture? It would most likely not be possible because a large amount of people making fires and stepping on the pastures could possibly destroy the resources that the reindeer depend on to survive through the winter. Even though they are not using the lands at all times, they depend on the resources that are there. The resources that are available at the winter pastures when they are away are not resources

they would “not use anyway” but they are resources they will use when they return.

Uncultivated land is waste in Locke’s opinion. According to Locke, one maximizes the output of the land by improving the land through cultivation. And by cultivating the land “he who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind” (II, 32). Human needs should be the main goal and what all labour should be aimed at and it should be aimed at something useful (Simmons 1992: 271-272). “Useful” is a relative term but it seems that as long as the labour gives something positive back to humans, the land is not wasted. Although indigenous peoples do not necessarily cultivate every piece of land that they inhabit, one could argue that their labour still gives something positive back to humans. Not allowing cultivation of water sources and forests may result in better conditions for fishing and hunting which undoubtedly is useful to those who hunt and fish. In deciding what constitutes waste, one also has to define *who* the labour is supposed to be useful for. Locke says that it is supposed to be useful for all of mankind. All cultivation does not increase the common stock of mankind. If one person enjoys the fruits of the labour of large areas of land it hardly seems like this advances all of humanity. It would be better for humanity as a whole to leave the land uncultivated so that people could freely go fishing and hunting. At least more than one person would be able to enjoy the resources available on the lands.

It is questionable whether the efficiency argument holds in conditions of plenty. Simmons claims that it holds independent of whether there is more than enough land for everyone or just enough. One could object to the efficiency argument that in conditions of plenty one should not be concerned with waste. If I have enough and as good as my neighbour, I should not be concerned with whether she wastes her share or not. Simmons argues that by wasting something that others could make use of – even if they have enough and as good – I have robbed them of the opportunity to make what I have wasted useful (Simmons 1992: 286). Here, one could object that no one is robbed of this opportunity. In conditions of plenty there is no one that could otherwise use what I have wasted. It is possible to argue that the North of Norway at least comes close to conditions of plenty. There is more than enough land for all the people who live there. The Sámi herders use large areas for reindeer herding purposes and there are rarely conflicts between the herders and the other citizens. It may be that the herders sometimes use more land they need because it is convenient. This is not a problem because no one else would want to use these lands anyway.



There is so much land available that the herders rarely have to limit themselves. This does not mean that they are wasting the lands.

# 3 The morality of cultures

Can the right to culture serve as justification for rights to specific land and resources? Will Kymlicka claims that it is within a culture we make our choices. We should be able to live the lives we want to live and in order to do that we need the proper framework. The proper framework is found, according to Kymlicka, within a culture. Morality should be concerned with cultures because a culture protects an individual's right to maintain a way of life without interference. In order to make free and uninterrupted choices we depend on what Kymlicka defines as cultural structures. In the case of indigenous peoples, are these cultural structures tied to specific land and resources? And if they are – does that give indigenous peoples a justification to claim these lands and resources?

## 3.1 The normative implications of cultural structures for indigenous peoples

Kymlicka argues in favour of special rights for indigenous peoples based on each individual's right to culture – a right Kymlicka sees as a basic liberty or a primary good. It is a primary good, according to Kymlicka, because it is closely linked to individual autonomy. Basing his argument on Rawls' theory of justice, Kymlicka argues that behind a "veil of ignorance", where no one knows their social standing, level of intelligence, abilities, income or fortune, everyone would want to have a culture. What does Kymlicka mean by "culture"? According to Kymlicka a culture provides "cultural structures" for an individual in which she can make her choices and pursue her life goals. Cultural structures provide safety in that they give the individual a sense of belonging and identity (Song Forthcoming: URL). The culture of a group is defined by that groups' way of life.

If we look at the Sámi culture the culture defines the activities which among other things include fishing, hunting and *Duodji* (traditional Sámi crafts). It also defines the occupations which in the Sámi case are reindeer herding, selling meat and traditional crafts. It also affects the everyday things that people do and how they do it. One's culture may in many cases define one's language, customs, ceremonies and way of cooking. Understood this way, it is clear that the culture influences the choices that are available (Margalit, Habertal 2004:

535). How then, are cultural structures related to autonomy?

The autonomy of the individual is “bound up with the options available within their culture” in Kymlicka’s terms (Kymlicka, Marín 1999: 138). Kymlicka claims that it is through cultural structures that we become aware of the options available to us. Kymlicka identifies “cultural structures” as the existence of a context of choice where individuals are presented with meaningful options and the help to judge the value of these options. In “Culture and Courts: Revisited”, Caroline Dick explains the role of cultural structures in saying that:

“In the first place, the range of options from which we choose in formulating our life plans is culturally given. Though we are free to choose among any number of options in deciding how to live our lives, we do not choose the options themselves. Second, our cultural heritage is critical to our ability to judge the value of those options. Our capacity to assess the alternatives before us and to ‘intelligently examine their value’ only can take place within a cultural context that helps us assign value and significance to particular activities and life plans” (Dick 2009: 264-265)

We may, then, choose whatever options we have available. The choices we make will still be affected by our culture and our culture will help us in making the choices – choices that would not have been available outside the cultural structures. What then, if the individuals within an indigenous group see the options available within the culture as limiting? Kymlicka does not see this as a problem. He claims that the individuals within a group are free to question the traditional ways of life and, over time, it may also be possible to revise or even reject the traditional way of life that an indigenous group represents (Kymlicka, Marín 1999: 138-139). If some of the members choose a different way of life than the traditional lifestyle of the indigenous group this does not mean they have to give up their heritage entirely. They are free to modify the culture to meet their preferred way of living. Kymlicka’s understanding of culture is individualistic in that individual interests have priority over group interests. Kymlicka does not seem to be concerned with *what* cultural structures one is surrounded with. As long as I am part of *a* culture, my individual autonomy is protected. He sees assimilation as altogether positive and argues that it provides diversity. A culture’s richness, according to Kymlicka, comes from the interaction with other cultures<sup>4</sup> (Kymlicka, Marín 1999: 142). The

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<sup>4</sup> Kymlicka’s discussion of the positive side effects of interactions with other cultures is a response to Waldron’s objections raised in “Minority Cultures and the Cosmopolitan Alternative” where Waldron advocates his cosmopolitan alternative to Kymlicka’s multicultural approach. Waldron’s claim is that the multicultural approach limits the options of the individual because more options are available outside a distinct culture.

idea that the mixing of cultures is entirely positive could potentially be problematic. Would this understanding of culture allow for a forced assimilation of indigenous peoples?

Avishai Margalit and Moshe Halbertal (2004) raise the question of whether there is such a thing as a “right to culture”. They see the right to culture as a right to protect one’s “personality identity”. Where Kymlicka argues that one has the right to *a* culture, Margalit and Halbertal argue that an individual has a right to *his* or *her* specific culture (Margalit, Halbertal 2004: 540). A member of an indigenous group has – according to Kymlicka – the right to some sort of cultural affiliation. The right to cultural affiliation is strongly tied to the liberal concept of individual freedom. It is within a culture that options become available for an individual. Without cultural context these options are not available for evaluation and therefore the freedom of the individual is restricted. What could potentially be problematic about this approach for an indigenous group is that *any* culture who is able to provide these options for the individual will suffice. The majority culture may be just as good as an indigenous group in securing cultural affiliation. The individual within the indigenous group does not have the right to his or her traditional indigenous culture specifically, but to *a* culture (Margalit, Halbertal 2004: 541). Furthermore, Margalit and Halbertal claim that Kymlicka’s framework would allow the (successful) assimilation of an indigenous group into the majority culture (Margalit, Halbertal 2004: 542). I will come back to the problem of forced assimilation in the next part of the chapter when I discuss cultural structures inside a liberal framework.

Members of an indigenous group are, according to Kymlicka, disadvantaged in that states tend to prioritize the majority culture. He says that this tendency is based on an idea shared by most liberals which is the idea that individuals are more likely to find their freedom within the majority culture and that “...minority cultures would and should disappear; and hence that modern states would, over time become ‘nation-states’, with a common language and national identity” (Kymlicka, Marín 1999: 135). Therefore, special rights for indigenous people are necessary in order to protect the basic liberties of the individuals in the indigenous group. An individual in an indigenous group is vulnerable to the decisions made by the majority they are surrounded by. These decisions may threaten the survival of the indigenous group and in that way also threaten the autonomy of the individuals in the group. Special rights for indigenous peoples that seek to limit the rights of the majority to claim property and to exploit natural resources may be necessary for the individuals in the indigenous group to enable them to practice their language and culture in the same way that individuals in the

majority culture are able to practice theirs (Oskal 1998: 149). Such rights are not only in line with liberal principles – they may actually be *required*. It may be required based on a principle of equality: equal treatment of the indigenous group and the majority culture is only possible if the indigenous group is compensated for their disadvantages (Oskal 1998: 150).

In both Sweden and Norway, the State has tried to assimilate the Sámi into the majority culture with the goal of creating a nation-state. The Norwegian State tried to turn the Sámi into Norwegians by forcing them to speak Norwegian and by not allowing them to exercise their Sámi culture through music and other rituals. Another method used to assimilate the Sámi both in Sweden and in Norway was to force Christianity on them. The public policies led by the Norwegian and the Swedish state are very much in line with what Kymlicka says about a state's tendency to put priority on a particular national culture. He says that this becomes obvious when one looks at the decisions made regarding the language used in schools, courts and government services. Although granting equal citizenship rights without regard to race or ethnicity sounds just in theory it may lead to more inequalities than actually giving weight to these factors. Because of the tendency a State has to put priority on certain cultures it seems that one would need to grant indigenous peoples the rights (that do not necessarily coincide with the rights of the other citizens in the state) that are necessary to protect their distinct culture (Spoulding 1997: 42).

### **3.1.1 Cultural structures within a liberal framework**

Kymlicka claims that special rights for indigenous peoples are justifiable within a liberal egalitarian framework. However, such collective rights can only be justified by reference to the individuals in the group and their individual autonomy (Oskal 1995: 151). Not only does Kymlicka argue that indigenous rights are consistent with liberal democratic principles. He also claims that such rights can promote individual freedom. This is because individual autonomy is bound up with the options that are available within that individual's culture. According to Kymlicka, recent history shows that people are strongly tied to their own cultures and view their freedom in connection to the options made available to them within that culture (Kymlicka, Marín 1999: 138). In other words, one's culture is what makes it possible to pursue the good.

The way Kymlicka sees it special rights for indigenous peoples can promote individual

freedom rather than limit it. More often than not, granting special rights to one group is seen as a threat against individual freedom because it has the potential of limiting the rights of others who are not members of that group. As Tomasi (1995: 583) puts it: “A liberalism that allowed groups to claim rights that conflict with basic individual rights would appear to treat “respect for groups” as more important than “respect for individuals””. According to Kymlicka, this idea rests on a misunderstanding. The protection of individual rights is twofold: First, there is the respect for an individual as a member of a political community and second, there is the respect for an individual as a member of a particular cultural community (Tomasi 1995: 583). Furthermore, Kymlicka recognizes cultural membership as a primary good. This is because – as mentioned – Kymlicka sees individual autonomy as dependent on the options that are available to that individual within his or her particular culture.

Kymlicka argues against the communitarian objection that liberalism does not take into account the fact that individuals are shaped by cultural communities. The background for this objection is that many liberals assume that individuals find their freedom within the *majority* culture, not within *minority* cultures. As a result, minority cultures will disappear – they should disappear – and modern states will become nation-states with a common language and national identity (Kymlicka, Marín 1999: 135). A different argument provided for the nation-state without cultural minorities is the idea that cultural minorities are hindrances to becoming so-called “citizens of the world”. For a society to make progress in this respect one has to assimilate minorities looking backward to a majority leaning forward. According to Kymlicka this argument does not hold and there are several examples of minorities that can prove why it does not hold. The Quebecois form a modern society and the Czechs have proved that they can participate in the modern world without assimilation into the German nation (Kymlicka Marín 1999: 135-36).

One can therefore claim that minority rights should be protected insofar as such rights do not restrict the basic liberties of their members. An example of how the basic rights of individuals within the group could be restricted as a result of granting the group special rights is the following:

The Sámi people of Norway are granted rights to specific land and resources in virtue of their cultural traditions involving reindeer herding. This requires a vast amount of land and the Norwegian State decides to grant them special rights to territories in the north of Norway. As a result, some of the members of the Sámi people feel they *have to* practice reindeer herding in order to be part of the group. Their basic liberties are therefore restricted because they feel obligated to live a certain traditional l

lifestyle that they do not identify with.

As mentioned, it is important that the rights of the individuals in the group are not restricted. Kymlicka argues that the individual members should remain free to choose whether or not they want to maintain the traditional lifestyle that their indigenous group represents. The traditions embedded in the indigenous group should not be privileged over individual choices (Kymlicka, Marín 1999: 138-139). What the content of the indigenous culture should be is decided by the individuals in that group and is not determined by the culture's historic content (Tomasi 1995: 585):

“The cultural community continues to exist even when its members are free to modify the character of the culture, should they find its traditional way of life no longer worth while.”  
(Kymlicka: 167)

Here, Kymlicka – intentionally or not – justifies the assimilation of indigenous groups as long as it is done in a way that does not threaten the rights of the individuals in the indigenous group. As long as they are successfully integrated into the majority culture and they identify with the cultural community there seems to be nothing problematic about the assimilation. There seems to be nothing inherently valuable about an indigenous culture. The culture's value is based on its ability to secure the members' right to choose between a set of options, or, in other words – choose a life plan. If the individuals within the indigenous group begin to make different choices than they traditionally have done, this does not mean that the cultural community is threatened in any way. It simply means that the cultural community has changed. The culture may change but the cultural structure remains (Tomasi 1995: 585).

What then of an indigenous person who finds herself growing up in the midst of a transition where the indigenous group is being assimilated into the majority culture? It is difficult to imagine a cultural structure in which she is able to make her choices given such circumstances. Moreover, if *any* culture will suffice, how can Kymlicka argue that some individuals – especially those who are part of indigenous groups – can claim rights to specific land and resources? It appears that having a cultural structure that one sees as one's own is the primary good that Kymlicka claims all should be entitled to. Since it is a primary good it is presupposed that everyone has access to this good. How is it then possible to claim special rights by appealing to the right to a cultural structure? Kymlicka could here reply that a cultural structure in itself is not enough – the cultural structure has to be stable. Tomasi

discusses Kymlicka's notion of stability and says the following:

“A cultural community as a context has two aspects: it sets out options of life choices, and it assigns values to those options relative to one another. Let's say that such a context is *unstable* in periods when new options suddenly and unpredictably appear among the life-choice possibilities while important old options disappear.”

(Tomasi 1995: 589)

Imagine a girl about to go to college. She early on decided which college and what program she wanted to apply to. In her last year of high school the college system changes completely and the program she originally wanted to apply to has changed its name and some of its content. She then has to learn how the new system works and she has to choose a different program. Her options are not necessarily limited but they have without doubt changed. For a period of time her context of choice is unstable in that she no longer can follow the life plan she had decided upon earlier in her life. Many new options presented themselves for the girl, but an old option that was important to her has changed. Kymlicka's discussion of cultural structures would suggest that the girl's situation is unstable during the period of time where she has to become acquainted with the new system and where she is undecided about what to do next. As soon as she has become used to the new system and has decided upon an option that feels right for her the structure is stable again.

In the case of the college girl the situation of instability is brief and the stability in her cultural structure is quickly regained. In defending his argument, Kymlicka could therefore argue that this is not the case for indigenous groups and that this is why stability is central to his argument. Maintaining stability in the cultural structure within an indigenous community takes much more effort because of the constant challenges the indigenous group faces in maintaining its traditional lifestyle as a minority. To give the individuals within the indigenous group an equal chance of a stable cultural structure compared to the individuals within the majority culture they should be granted special rights.

What then about the changes in the cultural structure's character? One could argue that a change in the character of a culture in itself limits the choice available to the individuals in the group. Tomasi claims that Kymlicka fails to formulate a distinction between changes in a cultural community's character and changes in that culture's structure as context of choice. In the case of the girl who has to change her college program one could argue that it was the culture's structure as a context of choice that changed and not the character of the cultural



community. The structure was unstable for a while but after some time and adaptation the structure became stable again. The same cannot be said for an indigenous group that has been assimilated into the majority culture. It can very well be that the cultural structure is stable after a successful assimilation but what is certain is that the character of the cultural community has changed. Kymlicka acknowledges the fact that one cannot speak of a stable cultural structure if a person from an indigenous group grows up in the middle of a transition process where the indigenous group is being assimilated into the majority culture. However, I do not find it plausible that nothing of value that is worth protecting disappears after the assimilation is complete. As mentioned, indigenous groups are vulnerable to assimilation because they are a minority. Tomasi furthermore notes that indigenous people may be “outside liberalism”.

A dilemma arises when a group is dependent on their shared identity as a group in order to reach certain political goals. In ““Culture and the Courts" Revisited: Group-Rights Scholarship and the Evolution of s. 35(1)” Caroline Dick discusses the identity problem one faces when a group claims rights on the grounds of that group’s culture. It seems that in order to claim rights on behalf of one’s culture then that culture would have to be relatively fixed and stable. According to Dick, even if one’s intentions are good in trying to define a groups’ identity, it will oppress the members of the very group one seeks to describe by ignoring the differences that exist among group members. At the same time one excludes those members of the group that do not fit the identity one has defined (Dick 2009:959-960). An answer to this problem posed by advocates of so called identity politics is that a group identity does not have to be fixed or stable. Rather, it can be understood as something fluid and subject to change. Identity in this view would come about as a result of social location and the sense of belonging to a particular identity category. Furthermore, the group identity on the fluid interpretation is a result of group members being situated in the same political, social and economic structures (Dick 2009:960).

The identity of the Sami people as a group has in some ways remained the same through centuries, but it has also been subject to changes. In the beginning, the Sami hunted wild reindeer which later developed into organized reindeer herding. What has remained the same is that the reindeer herder follows the path of the reindeer, not the other way around. During the 16<sup>th</sup> century the Sami reindeer herding developed into the reindeer herding that the Sami practice today. The Sami started to attend to the reindeer on a daily basis and the herders moved with the reindeer throughout the year. Even though the tradition of reindeer herding is

maintained, the Sami are no longer nomadic in the sense that they are now settled and have in some ways assimilated to the majority cultures in the countries they live in. The herders only live away from home during the most intensive periods, for example during moving from the summer pasture to the winter pasture. One cannot characterize reindeer herding as a job – it is rather a way of life (Borchert 2001: 23). The *Siida* is also central to the Sámi sense of identity. All aspects of the Sámi way of life revolve around the *Siida* which is their main unit of organization. All decisions were traditionally made on the *Siida* level. It is a flexible form of organization. Families can join and divide within a *Siida* depending on the season (Forrest 1996: 24). Furthermore, the different families can help each other when there are differences between the *Siidas* during the winter. For instance, one family could struggle with very thick and hard snow which is a problem for the reindeer because they will have difficulties with accessing food in the ground. Then they would be able to move their reindeer into a neighbouring *Siida* with better snow conditions.

The Sámi identity has been threatened in many ways. In Norway and Sweden, as mentioned, the nation states used religion as a mean to assimilate the Sami people into the majority culture – they tried to convert the Sámi populations to Christianity. The *Noaidi* – the spiritual leaders of the Sami – were persecuted much in the same way as the witchcraft trials were held. Their sacred drums were taken away by Christian missionaries and most of these are lost today (Bochert 2001: 32). The state believed that controlling the Sámi from a central government would best serve the common good. One could argue that the common good did not involve the interests of the Sámi herders (Forrest 1996: 74).

Despite going through changes one can still find the *Siida* structures in modern Sámi reindeer herding territories. The difference is that these territories are fixed today because the state created strict herding districts (Forrest 1996: 26). As a result, the different herders do not have the same flexibility they once had. It has become more difficult to move reindeer between *Siidas*. One problem with imposing strict herding districts on the Sámi herders is that one puts herders up against each other. Traditionally, the herders solved disputes among themselves within their *Siida* and their pastures would partly overlap from time to time. The state argued that the introduction of fixed territories for reindeer pastures would prevent herds from getting mixed up and would make it easier to keep track of the number of reindeer present in each herd.

## 3.2 Culture, specific land and resources

I now move on to the question of whether the right to culture can, in extension, justify indigenous claims to specific land and resources. This would require a special interest in land shared by the individuals within the indigenous group – a special interest that is not shared by the individuals in the majority culture. If the land claims of indigenous peoples are to be justified by their attachment one has to provide an argument that establishes the connection between land and culture. Can land and resources qualify as part of an indigenous group's culture?

### 3.2.1 Is land culture?

The first question I will address concerns the connection between land and culture. Is land culture? As I have already discussed, Kymlicka sees culture as “societal” in that it provides a shared language and access to participation in meaningful ways of life including “social, educational, religious, recreational, and economic life” (Kymlicka, Marín 1999: 138). In the case of the Sámi, these activities included reindeer herding, hunting, fishing and traditional crafts. All these activities – activities that constitute the Sámi culture – are strongly linked to specific land and natural resources. It seems that the well-being of Sámi individuals depends on access to these lands. The fact that there appears to be a strong link between the Sámi culture and specific land and resources suggest that there is a strong attachment to land and resources embedded in the Sámi culture.

Attachment to land can, according to Chris Armstrong, justify rights to specific land and resources. His theory of attachment-based claims is in line with Kymlicka's cultural structures in that Armstrong also bases his argument on individual life-plans. He argues that it is important that individuals are able to direct their own lives. Various material and natural resources are necessary to secure one's basic liberties. The right to the resources that secures one's basic liberty is a right that all possess and it is *general* (Armstrong 2014: 51).

As previously discussed, *special* rights are rights that some individuals enjoy over *specific* natural resources. According to Armstrong “An attachment-based justification for special claims over natural resources will emphasise the way in which particular people sometimes form life-plans which depend on their continued access to *specific* resources”

(ibid: 51). The resources are specific in that they cannot be replaced by the same amount of resources somewhere else. There are, according to Armstrong, many instances where individuals have formed life-plans that depend on the continued access of a specific natural resource. In these cases, Armstrong argues, it is possible to justify the right to (at least) continued access to the natural resource. Not only can the natural resources be replaced by the same amount of somewhere else. The resources also have to be specifically valuable. This means the resources cannot be easily replaceable (ibid: 53). Further, a replacement of the natural resource has to complicate the situation of the individual. This can be illustrated with the following example: A Sámi reindeer herder in the north of Norway has developed an attachment to her *Siida*. A *Siida* is a Sámi community within a particular area that either consists of one family or a cooperation of more families. In *Siidas* that consist of more than one family, the families help each other with the herds. The families may still have individual rights to certain resources but they come together for activities like moving the herds from the summer pastures to the winter pastures and the branding of the reindeer<sup>5</sup>. The land and resources within a reindeer herder's *Siida* cannot be replaced by the same amount of land and resources somewhere else because she and her reindeer are dependent on that particular area. The particular area has been chosen for the availability of resources necessary for the herders and the reindeer. The availability of lichen for the reindeer to eat is essential in both the summer and the winter grazing areas. This special dependency on lands makes a move very challenging for the Sámi herders and reindeer.

This example illustrates how the natural resources the Sámi have access to, if replaced by other seemingly similar resources somewhere else, may not serve the same purpose as the natural resources they had to begin with. Armstrong also discusses the Sámi case and he sees the *Siidas* as providing the Sámi herders with a shared life-plan that consists of a specific way of life that is deeply rooted in the specific land and natural resources that surround them. The identity of the individual Sámi herder is tied to the herder's continued access to these specific lands (Armstrong 2014: 56).

Armstrong makes an important point when he says that we all depend on *some* natural resources in one way or another. He suggests that clean air and drinking-water are two

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<sup>5</sup> The cooperative nature of the *Siida* is one of the reasons why a "tragedy of the commons" approach against Saami land claims falls short. The claim, raised by both the Norwegian and the Swedish governments, is that each individual herder will seek to increase her number of reindeer to be prepared for the dangers of for example predators when the reindeer are owned by the individual herder and the pastures are owned by the commons. This claim does not take into account the fact that the pastures are not a "commons" – the pastures are regulated among the herders within the *Siida* structure.

examples that are shared by all individuals. They are both general resources in that everyone needs access to them. Having secure access to clean air and drinking-water is a basic liberty and is part of the life plan of all individuals, but there are some life-plans that depend on secure access to specific resources. The current demonstration at the Standing Rock reservation in North Dakota captures this idea. The Standing Rock Sioux Indians are demonstration against the planned Dakota Access Pipeline (DAPL) that will cross under the Missouri river which is the only water supply for the Standing Rock Reservation. What is at stake is the fear that the pipeline will break and oil will leak into the river. If this happens, the drinking-water will be contaminated and the wildlife may be threatened. The DAPL is also planned to go under sacred areas where Sioux Indians perform sacred rituals. If this happens, one could argue that the Sioux Indians would no longer be able to identify as Sioux Indians because their natural resources would be destroyed (Armstrong 2014: 56). The resources are central to the shared life-plan of the Sioux Indians and if the resources are destroyed it is possible to argue that an important part of their identity is, at the same time, destroyed.

### **3.2.2 Shared interests and indigenous claims to specific land and resources**

Now that I have established that some individuals may have strong attachments to specific land I move on to examine whether this is something that separates indigenous cultures from the majority cultures. If indigenous cultures differ from majority cultures based on their attachments and shared interest: Is this difference is of a morally relevant kind? If it is it may give indigenous peoples claims to at least the continued access to specific land and resources. The individuals within the majority culture also depend on certain natural resources. If there is a morally relevant difference between the indigenous cultures and the majority cultures this does not, however, imply that indigenous peoples can be granted unlimited access to natural resources. What, then, would the limits be if it turns out that indigenous peoples may have claims to specific land and resources? Should the rights be exclusive or would the indigenous peoples have to share the rights with others?

Joseph Raz' conception of collective rights states that:

“X has a right when an aspect of X's interest is sufficient reason for holding some other person or persons to be under a duty, by adding that for a collective interest to exist (a) the interest in question must be the interest of

individuals as members of a group in a public good, and (b) the interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty” (Miller 2002: 184)

A sufficient reason, therefore, requires that more than one individual holds an interest. The right is held by a collective of individuals who share the same interest(s). Collective rights like these exist in cases where the interests are not weighty enough for one individual to be the right-holder but if the interest is shared by many individuals in a group, the group can hold the right as a collective (Miller 2002: 184).

I have argued that indigenous cultures like the Sámi and the Standing Rock Sioux Indians contain a strong attachment to specific land and resources. The life-plans of the individuals within these groups are dependent on their continued access to certain resources. The Norwegians and the non-indigenous Americans represent the majority cultures in these countries. Neither Norwegians nor the non-indigenous Americans share the same strong attachment to specific land and resources that the Sámi and the Standing Rock Sioux Indians do. The activities of the Sámi and the Standing Rock Sioux Indians revolve around the specific natural resources that they are surrounded with. The Norwegians and the non-indigenous Americans also depend on *some* natural resources. I have already mentioned drinking-water and clean air but this is not the same as the attachment to lands that the indigenous groups share. Imagine an ordinary Norwegian woman. She depends on drinking-water, clean air and food to be able to pursue her life-plan. These natural resources are necessary for her survival and represent basic liberties. Her particular way of life also involves an attachment to other objects that she surrounds herself with. She may have bought her grandmother’s house which is filled with memories and is essential for her to feel at home and she has a strong interest in the continued access to this house. The safe surroundings the house provides is important for her to be able to make meaningful choices.

What separates this Norwegian woman’s attachment from the attachments of the Sámi individuals in Norway is the *shared* nature of the Sámi individuals’ interests. Most Norwegians do not have strong attachments to their grandmother’s house. It is at least possible to argue that the amount of people who are strongly attached to their grandmother’s house is so limited that it does not bear enough weight. The shared interest of Sámi individuals for specific land and resources is weighty because of the amount of individuals who share this interest. The same dependency on specific land and resources cannot be found within the majority culture. It is now possible to formulate a claim in the following steps:

- 1) Culture is a basic liberty in that it provides cultural structures that are necessary for individuals to form and pursue their life plans which is necessary for their individual autonomy
- 2) Land is culture in that the activities within some cultures are related to specific lands
- 3) (Most) individuals within an indigenous group have strong attachments to specific land and resources in that the activities they take part in depend on these lands and resources
- 4) This attachment to specific land and resources is not one that is shared by (a substantial number of) the individuals in the majority culture
- 5) This difference between the indigenous culture and the majority culture is morally relevant

If these premises hold, and I think they may, indigenous peoples may be justified in claiming rights to specific land and resources. The next necessary move is to determine the content of these claims. Arguing that indigenous peoples have *some* claims to land is not the same as saying that they have *unlimited* or *exclusive* rights to land. According to Armstrong, there are hardly any instances where an indigenous group can claim full ownership of a resource. The claim to specific land and resources based on an individual's right to culture and attachment demands that a continued access to land and resources is secured. It says nothing about full ownership or exclusive use. I, for example, enjoy the bike lanes than run from my home to the University. I like to use my bike for transportation and I see it as an important part of my life-plan because it gets me where I need to go and I enjoy the journey. This does not, however, mean that I have to own the bike line or that I want exclusive use of the bike lane. In fact, sharing the bike line would in my case be beneficial because it would be safer to ride. With more bikes in the bike lane the bikes would be more visible and the drivers would pay more attention to the bikes.

It is possible to argue that the same would hold in the case of indigenous peoples. Hunting and fishing is allowed on Sámi pastures as long as those who hunt and fish do not interfere with the reindeer herding. It has happened on more than one occasion that hunters have discovered wounded reindeer and reindeer that have been trapped in fences or ropes. The herders cannot keep track of all the reindeer at all times which makes the help of others like hunters valuable. What seems to be important is the autonomy of the individual: To be able to live the life one wants to live without interruption. The Sámi herders want to live their life as herders without being interrupted. I want to live my life happily biking to the University without being denied access to the bike lane and without being run over by a car.

The Sámi in Norway are entitled to keep the income they earn from selling reindeer meat and skin as long as they pay taxes to the state. Is this problematic from the point of view

of justice? It could potentially be problematic because they have special rights to the land and resources they need for reindeer herding purposes. These are rights that Norwegians do not enjoy because they do not have the same shared interest for land that the Sámi individuals do. This means that they do not have the option of owning and herding reindeer which would also mean that they do not have the option of selling the meat and skin of reindeer. This could be perceived as unfair. Norwegians are excluded from the possibility of earning money from the act of selling the meat and skin of reindeer. Against this objection, Armstrong argues that the income that is made off of selling meat and skin provides what Armstrong sees as “a rather basic standard of living”. Therefore, he argues that the income earned from the activity would not be problematic from a point of view of justice (Armstrong 2014: 59).

The Sámi herders may not make much of an income at the moment but what if they do in the future? What if the meat of reindeer becomes so popular that there is an international demand for it and people are willing to pay as much for a small piece of reindeer meat as they do for the most expensive caviar in the world? If it comes to this, one could argue that the Norwegians would be disadvantaged because they do not have the special rights that allow them to engage in the activity of reindeer herding and the benefits attached to activity. To this objection, a reindeer herder could reply that the Norwegians who feel that they are treated unfairly can make money of other kinds of meat like beef, lamb or chickens instead of reindeer. Unfortunately for the reindeer herder, this objection does not take the actual problem into account. *Anyone* in Norway can, if they want to, keep cows, lamb and chicken and make an income from selling the meat. Even Sámi individuals can keep cows, lamb and chicken if they want to. It is only the Sámi who have the special right that is required to herd reindeer and sell the meat. The difference between the two cases lies in the fact that there is exclusion in the one case and not in the other.

The situation that I now portrayed is not one that is likely to happen in the foreseeable future. Reindeer herders face the challenges of predation, climate change and loss of pastures. The cost of these challenges is so high that the price for reindeer meat would have to match that of the most expensive caviar in the world for the herders to become rich. For now, the income of reindeer herders does not seem to be problematic from a point of view of justice.

The indigenous claim to land based on culture, attachment and shared interests also face the potential limits that Waldron presents in his “changing of circumstances”-argument. Although his argument applies to cases where indigenous peoples claim compensation for historic injustice, the argument may also apply to present day cases. In conditions where there



is a scarcity for natural resources the indigenous claim to specific land and resources may be illegitimate. It may be illegitimate because it would threaten the basic liberties of others. I still hold that there are very few cases where the claim is illegitimate. Kymlicka sees culture as a basic liberty. The right to culture may not be *as* strong as the right to drinking-water and clean air but is a strong claim nonetheless.

# Conclusion

Through the course of this thesis, I have attempted to answer the question of whether indigenous peoples are justified in claiming rights to specific land and resources. I have also been concerned with the potential limits on these claims. I have approached the question from two different perspectives.

Looking at the question from a perspective of rectificatory justice made it clear how difficult it is to imagine what would have happened if an injustice had not occurred. This difficulty has resulted in several pragmatic arguments against a compensation of historic injustice. A moral statute of limitations on injustice has been suggested as a way of solving these difficulties: After a certain time has passed one can no longer be held responsible for an act of injustice. Despite these difficulties I have argued that none of the pragmatic arguments are good enough to reject a compensation of the injustice suffered by indigenous peoples.

Through the discussion of the principled reasons for why the historic injustice in Waldron's words has been superseded I agreed that, if circumstances have changed since the injustice to a situation where natural resources are scarce, indigenous peoples may not be justified in claiming rights to specific land of resources. However, my argument is that the claims of indigenous peoples are so strong that the circumstances have to have changed so much that in rectifying the historic injustice, those who inhabit the land today would lose their basic liberties. Waldron is not surprised if the changing of circumstances concerning indigenous peoples proves to be of the sort that renders injustice superseded. I, on the other hand, will be surprised if there is *any* changing of circumstances so severe that one should not return land and resources to indigenous peoples. I remain open to the idea that this may change in the future but as of now I prefer to hold my ground.

The other perspective I have based my discussion on is an argument in favour of indigenous peoples' claims to specific land and resources. The approach is based on the individual's right to culture. I have argued that, for indigenous groups, specific land and resources are necessary for the individuals within the group to engage in the groups' activities – activities such as hunting, fishing and herding. I have made an attempt at developing Kymlicka's approach by appealing to Raz' conception of collective rights. I argued that there is a morally relevant difference between the shared interests of the individuals in the indigenous culture and the shared interests of the individuals in the majority culture. The

individuals in the indigenous group have a shared interest in specific land and resources that is not shared by the individuals in the majority culture. I argue that this difference between the indigenous culture and the majority culture may justify indigenous claims to specific land and resources.

I hope it has become clear from my discussion that the arguments against the claims of indigenous peoples do not carry enough weight to fully reject the claims of indigenous peoples. The argument in favour of such claims is more promising but it needs work. The claims of the individuals within the majority culture should not be rejected. It is an indisputable fact that non-indigenous peoples also depend on resources in forming their life-plans and any approach to indigenous land claims should take this into account. I, however, have a feeling that the indigenous cultures' dependency on specific land and resources makes a morally relevant difference.

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