



# Critical Review of International Social and Political Philosophy

ISSN: 1369-8230 (Print) 1743-8772 (Online) Journal homepage: <https://www.tandfonline.com/loi/fcri20>

## Why indigenous land rights have not been superseded – a critical application of Waldron's theory of supersession

Kerstin Reibold

To cite this article: Kerstin Reibold (2019): Why indigenous land rights have not been superseded – a critical application of Waldron's theory of supersession, *Critical Review of International Social and Political Philosophy*, DOI: [10.1080/13698230.2019.1697842](https://doi.org/10.1080/13698230.2019.1697842)

To link to this article: <https://doi.org/10.1080/13698230.2019.1697842>



© 2019 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group.



Published online: 09 Dec 2019.



Submit your article to this journal 



Article views: 366



View related articles 



View Crossmark data 

ARTICLE

OPEN ACCESS



# Why indigenous land rights have not been superseded – a critical application of Waldron's theory of supersession

Kerstin Reibold

Department of Philosophy, UiT - Arctic University of Norway, Tromsø, Norway

## ABSTRACT

Jeremy Waldron introduced the notion of rights supersession into the philosophical discussion about restitutive justice in cases of historic injustices. He refers to land claims by indigenous peoples as a real-world example and as an application of his theory of rights supersession. He implies that the changes that have taken place in settler states since the first years of colonialism are the kind of changes that lead to a supersession of land rights. The article proposes to unbundle property rights into rights of benefit, control, use, and access and to distinguish between different forms of attachment. This strategy allows for a third option of restitution and supersession, namely partial restitution. Partial restitution grants current land holders those rights that they need to satisfy their attachments and basic distributive justice claims. At the same time, rights that are not needed for either purpose will revert back to indigenous peoples as the original owners. The article argues that the notion of partial restitution allows for far more extensive land rights than a less nuanced application of the supersession thesis.

**KEYWORDS** Territorial rights; indigenous rights; historic injustice; supersession; land rights

Jeremy Waldron introduced the notion of rights supersession into the philosophical discussion about restitution as a remedy for historic injustices. He first presents the concept and his argument in his article 'Superseding historic injustice' (Waldron, 1992, pp. 4–28) and revisits it in 'Redressing historic injustice' (Waldron, 2002, pp. 135 – 160). In both articles, he refers to land claims by indigenous peoples as a real-world example and as an application of his theory of rights supersession. He argues that historical rights can be superseded if certain background circumstances change. Furthermore, he states that 'We cannot be sure that these changes [i.e. the changes since settlers first arrived] in circumstances supersede the injustice of their continued possession of aboriginal lands, but it would not be surprising if they did. The facts that have changed are exactly the sort of facts one would expect to make a difference to the justice of a set of entitlements.' (Waldron, 1992, p. 26; 2002, p. 156).

---

**CONTACT** Kerstin Reibold kerstin.reibold@uit.no

© 2019 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group.  
This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (<http://creativecommons.org/licenses/by-nc-nd/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way.

The paper will expand on Waldron's work in three ways: First, it will differentiate between kinds of attachment to land and discuss their relative weight and their persistence through time. Second, it will unbundle the rights comprised within the concept of property rights. This allows a decision on whether or not each right should be superseded. Consequently, rights to land can be discussed in a more nuanced way and different demands of justice can be reconciled better. Last, it will apply the modified supersession thesis to different types of land and will argue that there are only few cases in which a complete supersession has taken place. Hence, in most cases, the supersession thesis allows indigenous peoples to set or have a privileged position in setting the terms of land use in the future. The paper stays exclusively within Waldron's theory on supersession which treats entitlements to land primarily as property rights. As property rights fall into the domain of distributive justice, the paper will discuss neither other dimensions of justice nor other rights that are connected to land such as jurisdictional rights.

### Three ways for property rights to fade

According to Waldron, historic entitlements can sometimes stand in the way of realizing justice in the present and in the future. Therefore, the validity of historical rights must be critically assessed and it must be decided whether these rights still hold today. He gives three reasons why historic rights to stolen goods can fade: death of the owner, change of the social function of the former owner, and change of the distributive circumstances. As we will see, the last reason has the most potential to restrict indigenous claims to restitution of land. The first reason for rights claims to fade is that the owner dies. According to Waldron, however, in the case of land rights of indigenous peoples, this difficulty does not present itself. As it is not an individual but the tribe that owns the land, the injustice is not a historical but rather an ongoing one. (Waldron, 1992, pp. 14–15; 2002, p. 146) The second way in which rights can fade is when the entity that claims them has changed in such a way that it is not identical with the original one anymore (Waldron, 2002, p. 148, 157).

If a group changes the role it plays within a society and the functions it fulfils for their members, it might lose claims that are based on this function (Waldron, 2002, p. 148) Indigenous tribes were self-sufficient groups that provided their members with access to their culture and religion and secured their subsistence. Indigenous groups maintain their function of providing cultural belonging, community, spirituality, and social support for those identifying as members. Land can play two roles here: Either it can be important as a part of the culture and social system itself, e.g. Sami reindeer herding (Daes, 2011, pp. 463–484; ILO 169, 1989) or it can provide income that allows the group to finance its cultural and communal activities, as e.g. Urban Maori Authorities do. Therefore, even if indigenous peoples now can or do earn their living in other



ways, they might still need the land to uphold their culture and beliefs. In this sense, indigenous tribes have sufficiently retained their identity and social role to make claims to the land that they need to fulfil these functions.<sup>1</sup> Thus, the first two possibilities for rights to fade currently do not apply to the land claims of indigenous peoples. Consequently, Waldron's main argument for the possible supersession of indigenous land claims is the third one.

The third argument says that changes in background circumstances can change in such a way that the original property rights are no longer justifiable. In contrast to the other reasons for supersession, changes in background circumstances are not related to changes of the original owners but to something external to them. According to Waldron there are two broad categories for such changes: First, there can be a change in attachment to the resources in question. Waldron holds that if the stolen goods lose their centrality to the life of the robbed persons and instead become central to the thief's life, this might transfer the right to this good to the thief. Second, the onset of or an increase in scarcity, e.g. because of increased population or loss of land, can change what property holdings count as justifiable under a certain scheme of distributive justice. I will discuss each possibility in turn, starting with the argument from distributive justice.

## **Supersession due to redistribution**

According to Waldron, property rights must be continuously justified against those who are excluded from them (Waldron, 1992, p. 20; 1992, pp. 185–215, 2002, p. 154). What this justification looks like, depends on one's chosen theory of distributive justice. Waldron's theory of supersession clearly belongs to patterned end-result theories and not to historical entitlement theories (Nozick, 1974, p. 202). His supersession argument is precisely based on the idea that original property holdings can become unjust and should be redistributed if background circumstances change, that is, if the initially just pattern of distribution has changed in an unacceptable way. There are a variety of patterned end-result theories of distributive justice. In the following, I will first discuss a very minimalistic one, which corresponds with the examples that Waldron uses when talking about supersession. Afterwards, I will turn to resource egalitarian theories. Egalitarian theories are among the most demanding distributive justice theories. Thus, discussing a minimalist and a maximalist theory can explore the end points on a scale of possible distributions.

### ***Supersession due to redistribution: the basic-needs approach***

In the minimalist approach, property holdings are no longer justifiable if they deprive people of the basic necessities for living. Waldron's examples of supersession of property rights all concern such basic necessities as food,

water, and shelter. He talks about this approach when he discusses the example of suddenly dried up waterholes, which lead to people dying of thirst unless the remaining waterholes are shared (Waldron, 1992, pp. 24–25). Here he concludes that exclusive property rights over the remaining waterholes are no longer justifiable. The original owners lose these rights and they are redistributed to meet the needs of other poor and thirsty people.<sup>2</sup> Similarly, if restituting land to indigenous peoples would leave settler descendants deprived, the land rights of indigenous peoples would be unjustifiable and therefore superseded.

In 'Redressing Historic Injustice' Waldron suggests that

"Two hundred years ago, a small aboriginal group could have exclusive domination of 'a large and fruitful Territory' without much prejudice to the needs and interests of very many other human beings. Today, such exclusive rights would mean many people going hungry who might otherwise be fed, and many people living in poverty who might otherwise have an opportunity to make a decent life." (Waldron, 2002, pp. 156–7)

This passage implies that it is an empirical fact that land restitution would deprive settler descendants of their most basic needs, such as food and a place to live, and would plunge them into poverty. If that is true, it would follow that indigenous land rights are superseded. However, as Waldron himself admits and Irlbacher-Fox points out, we cannot be sure that restitution will actually have those consequences (Irlbacher-Fox, 2013, pp. 373–387). Instead, the question is how many of the land rights have been superseded under the minimalist approach and which land still belongs to indigenous peoples? In order to answer this question, we need to take a closer look at the structure of land rights as property rights.

Land rights as they are discussed here are property rights which themselves are a package of different rights (Waldron, 1985, pp 313–349; Honoré, 1960): the right to use; the right to control the land, including the right to rent, sell, or gift it, and the right to set terms for its use; the right to benefit from its use and capital value; and the right to access it. These rights can be limited and separated either by the owner themselves or by the jurisdictional authority over that territory (Waldron, 1985, p. 315). Thus, property rights can consist of a changing set of rights depending on the laws and the actions of the owner. This flexibility of property rights allows the supersession thesis to be discussed in a more nuanced way. In the case of indigenous land claims, we can now ask which of these rights are the most important ones when discussing supersession? More specifically, in the case of the minimum needs approach, we must ask: If restituting aspect x of property rights (e.g. the right to use, to benefit, to access...), would this deprive anyone from fulfilling their minimum needs? If the answer is no, no supersession has taken place and the property rights should be fully restituted.



If the answer is yes, we need to ask a further question: Can poverty only be avoided when the full property rights stay with the current owners or is it only a specific aspect of property rights that would lead to poverty? If the full property rights must stay with the current owners to avoid poverty, full supersession has taken place. No restitution is then justified. Yet, if it is just a specific aspect of property rights that would lead to poverty if restituted, only partial supersession has taken place. It means that the background constraints on these rights can be adjusted in such a way that land restitution is possible without depriving people of their minimum needs. Some aspects of the property rights are then fully restituted, while other rights must be regarded as superseded.<sup>3</sup> In the following, I will show how this can play out by discussing different types of land. Land that is undeveloped is a fairly clear-cut case. It is not crucial for securing decent living conditions for settler descendants and therefore should be returned to indigenous peoples.

In the case of populated land, we need to differentiate between the right to benefit, the right to use, and the right to control the use. Settler descendants have the right to occupancy as they would otherwise have nowhere else to live. It means the indigenous peoples' right to use this land in the way they desire has been superseded. If they were to convert cities into entertainment parks, it would deprive settler descendants of their minimum needs for living a decent life. Yet, the right to benefit in terms of receiving rent for the land in question has not necessarily been superseded. As long as indigenous people charge rent in accordance with what people can pay, restituting to them the right to benefit from their historical land does not necessarily conflict with the minimum needs approach. There might be homeowners who cannot pay any rent without dropping beneath the poverty line. Likewise, there might be some landlords who cannot earn enough money to cover their basic needs if they need to return all of their owned land. In these cases, indigenous people's rights to benefit has clearly been superseded. However, there will also be many cases where apartments are owned by rich landlords or for-profit organizations. Land restitution here would mean that the current owners would lose most of their wealth. However, they would not necessarily live in poverty after losing most of their property.

Under this assumption, the right to benefit from the land has not been superseded and indigenous peoples can rightfully claim it. Of course, there will be many cases in between and how much land can be restituted has to be decided on a case by case basis. Still, if we distinguish the right to occupy and use land from the right to benefit, few rights to populated land will have been completely superseded. Most cases will call for a partial restitution of land rights. It is only partial because the state will be justified to alter the background restraints on these property rights. They can and should, for example, restrict the use of the land so that settler descendants can continue to live there. In fact, restrictions of this kind already exist in many places and Canada

has already successfully used such partial restitution to deal with the claims of Musqueam Nation. In some cases, restrictions on the rent might also be justified if there is a well-founded concern that the new owners would ask for rents that the current inhabitants could not pay. These restraints limit the full bundle of property rights and in that sense lead to a partial or conditional restitution. However, it is still a restitution because indigenous peoples can claim the other aspects of property rights, for example the right to benefit.

In cases where indigenous peoples' own basic needs are not met and full land restitution would be an effective way to satisfy their basic needs, even full restitution would be possible. In such cases, denying land rights would leave indigenous peoples in a 'dispossession purgatory' that would violate the relevant principles of justice (Irlbacher-Fox, 2013, p. 382). The same reasoning applies to land that is economically used. Here again, most land rights would be partially restituted. Arguing that the restitution of agricultural land would lead to poverty and hunger for settler descendants assumes that indigenous peoples would stop using the land agriculturally and/or would not sell to settler descendants. In such cases, the restitution of land could be conditional on the signing of trade agreements that secure the food supply for the wider state, or conditional on leasing contracts that allow the current 'owners' to keep working on the land for a certain amount of years (which gives plenty of time for adjustments) but requires them to share their profit with the indigenous owners and grants indigenous groups some say in matters of land development. Another worry is that the restitution of economically used land would lead to major job losses, resulting in poverty. One solution would be to resort again to partial restitution. That is, the state could oblige the new indigenous owners to continue the employment of the current workers.

Yet, in many cases, even full restitution could be justified. Already, small companies are absorbed by bigger ones, companies merge or are taken over by rivals. Often these changes in ownership result in major restructuring and layoffs. Therefore, the possibility of something similar happening, were the land to change into indigenous hands, is not a good reason against restitution. Job losses through land restitution would only be unjustifiable if the state were not able to socially support the newly unemployed people and they were plunged into poverty. I have argued that if we assume the minimal needs approach, the change in background circumstances has led to a partial supersession of rights to land that is necessary as housing space for settler descendants and that they need to make a living. Rights to land that is uninhabited or that is used to further improve the already good quality of life of settler descendants or allows them to further expand their economy or population have not been superseded. The discussion has shown that differentiating between the different rights that make up property rights leads to more extensive land rights for indigenous peoples. The reason is that any partial restitution would count as full supersession under an undifferentiated

supersession scheme. Such extensive restitution of land rights would bring about a big shift in wealth and power. Under a distributive justice theory that only asks that people's minimal needs are satisfied, such a change would be acceptable. Yet, many of us would probably feel that a distributive justice theory should lead to a more equal distribution. Therefore, I will explore the implications of an egalitarian understanding of distributive justice next.

### ***Supersession due to redistribution: the resource egalitarian approach***

A more ambitious picture of distributive justice, that is of the goal which should underlie current decisions about property rights, could be an egalitarian one. Under a resource egalitarian approach, indigenous peoples would lose most of their historical lands so that both indigenous peoples and settler descendants might get a fair share of the existing land. The only function of historical rights in such a case is that they give rise to rights to particular shares of land. The fact that a tribe has historically owned some specific land gives reason to allocate the fair share from those lands from which lands, but it does not give it rights to more than its fair share in the overall distribution of land. Thus, under an egalitarian theory of justice most indigenous land rights would nowadays be superseded. However, I will argue that the egalitarian approach has limited relevance in current debates about indigenous land rights. The reasons for this are the two additional conditions for rights supersession that Waldron introduces, which I will discuss next.

#### ***The two application conditions***

Waldron qualifies his theory of supersession with two important conditions. Firstly, he says (1992, p. 27; 2002, p. 159), 'what I have said applies only if an honest attempt *is* being made to arrange things justly for the future. If no such attempt is being made, there is nothing to overwhelm or supersede the enterprise of reparation.' 'Second, my thesis is not that such resolve has priority over all rectificatory actions. I claim only that it has priority over reparation that might carry us in a direction contrary to that indicated by a prospective theory of justice.' (Waldron, 1992, p. 27; 2002, p. 159)

The first condition is the most important one here. The second condition is mostly a theoretical point about the possible coexistence of reparations and a theory of justice. It only says that reparations can be part of a theory of justice or at least that they do not need to be opposed to one. The first condition, in contrast, concerns the application of the proposed theory in the current circumstances. Here, Waldron is clear that the ultimate justification for superseding historical claims is that they hinder an overall effort to bring about justice. If no such effort is made, all other conditions for a supersession of rights might apply, but they do not have normative force. Thus, in order to decide whether the supersession of indigenous land rights should have any practical

effect we must ask two questions: First, what would a theory of (distributive) justice demand and which effects does this have on indigenous land rights? Second, are honest efforts being made to bring about such a just state?

I have discussed the first question with regards to a minimal and a very demanding, egalitarian theory of distributive justice. In order to answer the second question, we need to ask what such broader theories of distributive justice require from the rest of the society. We must clarify this in order to see whether efforts are made to transform the current society into a just one. I will not go into detail here but will only point out some obvious consequences of each approach. If one favors the basic-needs version of distributive justice, one can argue that most welfare states today satisfy the conditions for justice. Therefore, we can say that here, an overall effort is being made to bring about justice in accordance with the minimal needs approach. Consequently, any indigenous land rights that conflict with the minimal needs approach are superseded. As explained above, this would mean that most land rights should be at least partially restituted to indigenous peoples.

If one favours the egalitarian theory of distributive justice, however, it is clear that most societies in their current form do not meet its test for a just distribution. Not only is land distributed unequally, but so too, is wealth. In order to make a credible effort to create an egalitarian society, it is not enough to redistribute indigenous land in an egalitarian manner. Instead, everyone's property – be it land, money, or other goods – would have to be redistributed. This would mean heavily taxing the wealthy, expropriating owners of big corporations and also redistributing the land of non-indigenous landowners. None of these policies are currently in place and most states do not even have an egalitarian redistribution as a policy goal.<sup>4</sup> Therefore, the more egalitarian reading of Waldron's approach is almost irrelevant at the moment because there is no evidence that any large-scale redistributive efforts are being made to transfer property rights from the rich to the poor. As long as this is not the case, the redistributive argument about rights supersession does not apply to indigenous peoples either. It thus becomes almost meaningless in the current debate over indigenous land rights.

## **Supersession due to changing attachments**

Besides conflicts with demands of distributive justice, a change in attachments can also cause rights supersession. The way that ownership of resources, including land, comes about, is that people actively include them in their central life plans (Waldron, 1992, p. 18). We plan our life based on the assumption of continued access to and control of this resource. The essential wrong of theft is the restriction of autonomy and the interruption of life plans of the previous owner. Therefore, rights can change if attachments to resources change (Waldron, 2002, pp. 157–158). If a thief manages to hold



on long enough to the stolen goods, they might start to incorporate them into their life plans and the robbed person necessarily adjusts their plans to a life without this good. Thus, the stolen goods are then central to the life of the thief (or their descendants) while they have lost their importance for the robbed person. Waldron thus defends an autonomy-based argument for respecting attachments to goods. The more central a good is to a person's life plan and autonomy, the weightier is the attachment claim to it (Hendrix, 2008, pp. 46–47; Marmor, 2004, p. 328).

To decide whether attachments to land have changed in a way that would make the original rights fade, it is helpful to distinguish between different forms of attachments. The reason is that different attachments fade faster or slower over time and that their disruption affects our ability to pursue our life plans differently. With respect to land there are four main types of attachment: economic, cultural, activity-based, and social. Economic attachment is an attachment to the value that land produces and that can be used to further all kinds of life plans. It thereby values land only instrumentally and highlights the right to benefit. The relevant attachment is not to land itself but to a source of income. Thus, economic attachment to land can fade fast and without any disruption to life plans if someone loses land but gains another, equivalent source of income. We can think of two cases of economic attachments: The case of the landlord and the case of the big company. A landlord can draw his whole income from the houses he possesses. He relies on receiving rent to finance his further life plans. In that case, there seem to be two options: Either land is restituted and he is compensated with an alternative source of income or the right to benefit from the land is superseded.

Which option is more viable, depends on questions of responsibility for compensation that I cannot address here further. However, it is important to note that even if the indigenous peoples' right to benefit is superseded, this restricts but does not extinguish their other rights. For example, indigenous people might retain the right to use or to set the terms of use for this land, as long as the use generates the same income as the old use would have. The case of the big company is slightly different. Here it is harder to link the right to benefit to concrete life plans. Companies as such do not have life plans though the people working for a company could have. Yet, employment is always insecure and could be terminated by the company's loss of land as much as by a downturn in the economy, a company decision to merge and lay off people and much more. So, unless we consider that an employee has a right to keep a job, the employee's economic attachments do not count. This leaves the economic attachments of the company owners. They possess a right to benefit, if land restitution would interrupt their central life plans.

I want to draw attention to two ways in which company owners' life plans might not be influenced in such a way: First, the company can be owned by shareholders. Unless they invested all their money in one stock, losing some

shares will probably not completely disrupt their life plans. Thus, restitution would be possible. Second, if company owners do not need all the profit to pursue their life plans, limited restitution seems to be possible. There might be cases in which it is discussable whether a certain amount of profit is necessary for pursuing life plans or only for satisfying expensive tastes. However, it seems likely that there are enough cases where high profits are clearly not used to pursue individual life plans. In those cases, there might be an economic *interest* in land but surely no economic *attachment* as defined above. If there is no economic attachment, however, the indigenous land rights have not been superseded.<sup>5</sup> The company case is relevant for land that is owned by big stock companies or companies that operate internationally. These companies have the weakest claims to economic attachment. At the same time, they own increasing amounts of agricultural land and are leading in natural resource exploitation on traditional indigenous lands. In these cases, supersession has not taken place and thus land rights should be restituted fully to indigenous peoples. Indigenous peoples might be required to compensate the current owners for improvements that have added value to the restituted land (Marmor, 2004, p. 329). However, this duty to compensate presupposes that indigenous people intend to benefit from the added value and that value has been added. In the case of extractive industries, it might more often be the case that indigenous peoples are owed compensation for the value extracted.

Cultural attachment denotes the significance of land for cultural and spiritual practices and historical remembrance. According to Waldron, cultural attachments are very resilient to the passing of time in cases of wrongful dispossession (Waldron, 1992, p. 19). One of the reasons is that land is important for upholding the culture itself. Land-based practices and historical places are often tightly connected to a culture so that often the attachment exists as long as the culture does and vice versa (Marmor, 2004, p. 2004). This connection explains both why cultural attachment persists for a long time and why restitution is especially important in the case of indigenous peoples. As Kymlicka (1995) has argued, societal cultures provide a context of choice for life plans. As such, they enable their members to act autonomously and to pursue their life plans. If a culture is necessary for choosing and pursuing life plans, and if land and culture are strongly connected, then land rights become crucial for the exercise of this autonomy. There are two reasons why cultural attachments of indigenous people potentially outweigh attachments of settler descendants. First, land rights play an especially important role for indigenous cultures because they are often relational and grounded in land-based practices (Coulthard 2014; Sanderson, 2011, pp. 155–182; Alfred 2005). The preservation and revitalization of indigenous cultures depends on access to and control over their traditional lands. Without land rights, indigenous people often find themselves in a cultural limbo which undermines their individual and collective autonomy. While all other

attachments provide the means to pursue one's life plans, cultural attachments are a precondition for forming life plans in the first place. Their foundational role for autonomy gives them extra weight when they conflict with claims from other attachments.

The second reason why indigenous cultural attachments often outweigh settler descendants' attachments, lies in the minority status of indigenous peoples. Cultural attachments to land are often far weightier for vulnerable minority cultures like indigenous peoples than they are for majority cultures. If attachments to culturally significant land fade away, the same often happens to culture. Majority cultures, in contrast, are usually securely established in all aspects of public life. They also have important landmarks, but these are one of many cultural pillars. Therefore, the cultural attachments to land of minority cultures outweigh those of majority cultures in most cases. Exceptions are places that are central to a majority culture and only marginal to the competing minority culture. In rare cases, the land disputes involve land that has cultural significance for indigenous peoples as well as for settler descendants. A first step to resolve such conflicts is to identify what the cultural significance of the place is. Besides the centrality it has for the respective culture, one should ask whether the landmark serves to uphold ideologies and attachments that are now understood as celebrating racism, colonialism or similar morally objectionable concepts. If the latter is the case, claims to this landmark are not justified. If this is not the case, shared access and control over these lands might be the best solution.

Besides the encompassing meaning of culture, there is also a weaker meaning of culture. For example, we talk about farming cultures or surfer cultures. Culture here refers to a certain activity that structures an individual's life and sense of identity. It is not as comprehensive and intergenerational as the encompassing meaning of culture, but it can still be central to a subgroup's self-understanding and sense of purpose. If it is not possible to practice this identity-conferring activity, individuals may experience a loss of their sense of purpose and belonging, similar to when they are displaced from their homes. Therefore, these activity-based attachments also hold considerable weight. However, in contrast to cultural attachments, they are likely to fade over time. This process often occurs naturally within a single generation when the children choose different lifestyles and occupations for economic or other reasons. Examples are farming communities or families that have produced wine for several generations. Here, land is not just the basis of income but also the basis of a certain identity. Access to and use of land is bound up with a certain activity-based culture and contributes to the social structures that people feel at home with. Thus, there are activity-based and social attachments to consider. Both kinds of attachments are fairly strong and thus full restitution of the land is out of question.

Yet, partial restitution might still be an option. As with other populated land, the rights to use and access might be superseded, whereas the rights to benefit from the land might persist. The fact of partial supersession will become especially important if the activity-based attachment declines and people start to move away. The decline of small and medium scaled farms is a good example for this change (McGreal, 2019). If such change occurs, it means that the social and activity-based attachments to land will fade. The children of farmers might consider selling their land or developing it into real estate. At this point, however, a reversion to full restitution is possible (Hendrix, 2008).<sup>6</sup> Indigenous peoples already had the right to benefit from these lands. The other aspects of property rights were considered superseded because attachments had changed. Settler descendants had built strong attachments to the land in question, which gave them the right to occupy and use it. Yet, if attachments change again, that is, if the attachments of settler descendants fade or are replaced by pure economic attachments, their rights to use the land can equally be superseded. If this happens, indigenous peoples will again receive the full bundle of property rights to the land, thus full restitution follows.

Social attachment refers to attachment to land on which we have our homes and our social relationships. It covers the place we live in as well as the surrounding region with which we are familiar, where we feel safe, and where we have built our social connections. Moore argues that these kinds of attachments and the interests associated with them give rise to rights of residency (Moore, 2015), Nine similarly argues for a right to a home based on the private attachment one builds to the place that one lives in (Nine, 2015, pp. 37–52). Social attachments are less persistent than cultural attachments as people start to build their social and habitual life around the new place of living. However, being forced to move out of the area that is one's home is highly disruptive. The options a given place offers us with regard to our career, partner choice, family planning, friends, education, and hobby are crucial building blocks for our life plans. If we are forced to move away (in contrast to choosing to move away to pursue other options), the plans we have made based on the choices a particular place offers us, will be disrupted. Moreover, being forced to move away, typically, does not just frustrate our plans in a particular area of life but affects almost all parts of our social life.

What should be clear from the analysis above is that historical land rights usually cannot justify forced relocation of current settler descendants. In such cases, the indigenous peoples' right to use the land has been superseded – at least under the provision that the historical owners also have a permanent place to live which is comparable in quality with that of the settlers currently occupying their former lands (Hendrix, 2008, p. 328). Yet, indigenous peoples might still hold some cultural attachments to these lands that might result in rights to access or shared decision-making powers if culturally significant parts of the land are transformed. The right to benefit from the land in the

form of receiving some rent also persists. An exception is cases in which settler descendants cannot pay such rent and thus would indirectly be forced to move out if indigenous peoples were entitled to receive rent.

## Conclusion

Unbundling the rights that are comprised in the concept of property rights to land and distinguishing between different forms of attachment has shown that Waldron's supersession theory allows extensive claims to indigenous land restitution. It protects settler descendants' attachments and expands indigenous peoples' land rights by introducing the notion of partial and conditional restitutions. Under the undifferentiated supersession thesis, all cases of partial restitution would be cases of supersession. Furthermore, supersession would be complete and thus irreversible even if the attachment of settler descendants were to fade. Unbundling land rights allows more flexible and nuanced solutions to overlapping historical and attachment claims. Thus, the suggested approach justifies more indigenous land rights than the undifferentiated supersession thesis while still satisfying Waldron's demand that historic property rights and current demands of justice should be reconciled.

Moreover, the article has pointed out that the potentially restrictive function of distributive justice claims is very limited in today's world where strong economic inequalities are allowed and accepted. Under such circumstances, nothing speaks against indigenous peoples becoming much wealthier than settler descendants. As Hendrix argues, such a reversal in wealth relations might actually be the best we can do to further justice in the non-ideal circumstances in which we find ourselves (Hendrix, 2011, pp. 669–668). As states move towards a just and equal distribution, indigenous peoples might lose some of their land rights. However, the reason for this loss is that their land rights cannot be justified under the new distributive justice system anymore. The reason is not that their land rights have been superseded all this time.

## Notes

1. As many other conclusions of this paper, this statement relies on current empirical facts. If the facts on the ground change, the conclusions might change as well. Yet, as the goal of this paper is to explore the supersession thesis's application to current indigenous land claims, it also takes the current facts as its starting point.
2. As this example shows, time does not matter when supersession occurs due to redistributive justice. The change in circumstances that make redistribution necessary can occur in an instance, for example, when waterholes dry up because of an earthquake, or over a long time period, for example, when the population increases such that resources become scarce.

3. The concept of partial supersession is also employed by Meyer and Waligore (2018). Yet, they use it to describe a situation in which part of the original property is restored while the rights to the full property are superseded (2018, pp.227/8). In their example, partial supersession means that a stolen waterhole is not completely restored to the original owner but that the original owner gets part of the waterhole and that the thief keeps the other part of the waterhole. In contrast, my concept of partial supersession does not apply to a split of the property but to a split in the property *rights*. In the case of the waterhole, for example, this could mean that the right to exclude has been superseded – the original owner cannot prohibit the thief from using the waterhole. However, the right to benefit might still rest exclusively with the original owner, that is, they might charge for the use of the waterhole and any possible further financial benefits that come from it belong to them.
4. Even if we favor another, less egalitarian theory of justice like Rawls's, one can still argue that no honest attempt is being made to bring about a just situation. If the aim is to relieve poverty and to create more equality of opportunity, a redistribution of monetary wealth through taxation and investment into education and social services are arguably much more effective in bringing about these aims than a redistribution of land. Therefore, as long as there are no true efforts made to better the situation of the worst-off by taxing the wealthy ones, it is not justifiable to instead use the resources that a) are less effective in realizing a just state and b) belong to a group that by far does not belong to the wealthiest in the society.
5. Hendrix (2008, pp. 48/9) makes this argument with respect to individual land owners that possess land but have not integrated it into their central life plans. Thus, summer cottages and similar individually owned lands could also be subject to full restitution.
6. Hendrix refers to such a possible reversion of the rights supersession as secondary claims that remain. He only talks about cases in which land is abandoned. However, all that is needed for secondary claims to become relevant is a fading of place-based attachments.

## Acknowledgments

I am grateful to the participants at the conference 'Territorial Rights: New Directions and Challenges' at the Université du Québec à Montréal, as well as those at the GMR Annual Workshop 2017, and those at the Political Philosophy Reading Group at Queen's University for their helpful comments on earlier versions of this article. I owe special thanks to Kasper Lippert-Rasmussen, Lukas Meyer, Annamari Vitikainen, Timothy Waligore, and two anonymous journal reviewers for their insightful suggestions and comments on this article.

## Disclosure statement

No potential conflict of interest was reported by the author.

## Funding

Norwegian Research Council under the Globalizing Minority Rights project (NFR 259017).

## Notes on contributor

**Kerstin Reibold** is a PhD student at UiT - the Arctic University of Norway. She writes her thesis on indigenous land and self-determination rights and is also interested in other areas of political philosophy and ethics.

## References

- Alfred, T. (2005). *Wasase: Indigenous pathways of action and freedom*. Toronto, ON: University of Toronto Press.
- Coulthard, G. (2014). *Red skin, white masks: Rejecting the colonial politics of recognition*. Minneapolis, MN: University of Minnesota Press.
- Daes, I. (2011). Principal problems regarding indigenous land rights and recent endeavours to resolve them. In A. Eide, J. T. Moeller, & I. Ziemele (Eds.), *Making peoples heard. Essays on human rights in honour of Gudmundur Alfredsson* (pp. 463–484). Leiden, Boston: Nijhoff Publishers.
- Hendrix, B. (2008). *Ownership, authority, and self-determination*. State College, PA: Pennsylvania State University Press.
- Hendrix, B. (2011). Context, equality, and aboriginal compensation claims. *Dialogue*, 50, 669–688.
- Honoré, A. M. (1960). Social justice. In R. S. Summers (Ed.), *Essays in legal philosophy* (pp. 61 - 94). Oxford: Oxford University Press.
- International Labour Organization (ILO) (1989). *Indigenous and Tribal Peoples Convention.C169*.
- Irlbacher-Fox, S. (2013). Justifying the dispossession of indigenous peoples: Discursive uses of temporal characterizations of injustice. In S. Tomsons & L. Mayer (Eds.), *Philosophy and aboriginal rights. Critical dialogues* (pp. 373–387). Oxford: Oxford University Press.
- Kymlicka, W. (1995). *Multicultural citizenship: A liberal theory of minority rights*. Oxford: Oxford University Press.
- Marmor, A. (2004). Entitlement to land and the right of return: An embarrassing challenge for Liberal Zionism. In L. H. Meyer (Ed.), *Justice in time: Responding to historical injustice* (pp. 319–333). Baden-Baden: Nomos.
- McGreal, C. (2019, March 9). How America's food giants swallowed the family farms. *The Guardian*. Retrieved from <http://www.theguardian.com>
- Meyer, L., & Waligore, T. (2018). Die Aufhebungsthese. Der Vergangenheit begegnen. In F. Dietrich, J. Müller-Salo, & R. Schmücker (Eds.), *Zeit - eine normative Ressource* (pp. 215–230). Frankfurt a.M: Vittorio Klostermann.
- Moore, M. (2015). *A political theory of territory*. Oxford: Oxford University Press.
- Nine, C. (2015). Water crisis adaptation: Defending a strong right against displacement from the home. *Res Publica (Liverpool, England)*, 22, 37–52.
- Nozick, R. (1974). *Anarchy, state, and Utopia*. Oxford: Blackwell.
- Sanderson, D. (2011). Against supersession. *Canadian Journal of Law and Jurisprudence*, 24(1), 155–182.

- Waldron, J. (1985). What is private property? *Oxford Journal of Legal Studies*, 5(3), 313–349.
- Waldron, J. (1992). Superseding historic injustice. *Ethics*, 103(1), 4–28.
- Waldron, J. (1993). Property, justification and need. *The Canadian Journal of Law and Jurisprudence*, 6, 185–215.
- Waldron, J. (2002). Redressing historic injustice. *The University of Toronto Law Journal*, 52, 135–160.