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Indigenous rights, supersession, and moral status equality

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Foreword

It is said that it takes a village to raise a child and during my time as a PhD student I have learned that the same is true about writing a thesis. Many people have contributed in just as many different ways to this thesis being finally ready for submission. I want to thank everyone who has accompanied me on this journey, who has offered support, an open ear, critical questions, interesting thoughts, chances to present and investigate my work, and much more. I am in the lucky position to have received support from so many people, that it is impossible to list them all by name and still comply with the expected brevity of forewords. Therefore, I hope that even those not explicitly named here know my gratitude. Those I want to thank personally are:

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1. Introduction

The adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is widely acknowledged as a landmark decision for indigenous rights. The United Nations Department of Economic and Social Affairs, Indigenous Peoples calls UNDRIP 'the most comprehensive international instrument on the rights of indigenous peoples.'(UN 2020) According to Sheryl Lightfoot, global indigenous politics of which UNDRIP is an official expression 'challenges states and the international system to complete the post-colonial project, reclaim moral legitimacy, and restructure themselves along lines that promote justice, fairness, and human dignity for all' (Lightfoot 2016, 211). The challenge for states and the international system mostly stems from UNDRIP's recognition of indigenous peoples as peoples. In international law, 'all peoples have the right to self-determination' (UN General Assembly 1966a; 1966b), presumably on their own territory. Yet, today, other peoples or states often occupy and use traditional lands of indigenous peoples. If indigenous peoples regain their traditional lands and sovereignty over them, the current occupants stand to lose their current legal rights. Thus, the challenge that indigenous rights pose is how to reconcile these conflicting rights or, if reconciliation is not possible, how to decide whose rights should prevail. This question is the topic of this thesis. It will focus on the rights of indigenous peoples in settler states, namely Canada, Australia, New Zealand, and the USA.

'Settler societies are founded by migrant groups who assume a superordinate position vis-à-vis native inhabitants and build self-sustaining states that are *de jure* or *de facto* independent from the mother country and organized around the settlers' political domination over the indigenous population.' (Weitzer 1990, 24) The domination of settler descendants over indigenous peoples originated in the denial of indigenous peoples' equal moral status which allowed settlers to regard the newly discovered lands as *terra nullius* and justified the political subordination of indigenous peoples (cf. Havemann 2005; Boisen 2013; Assembly of First Nations 2018). Even though the colonial era officially has ended, indigenous peoples in settler states have not regained their precolonial political independence and lands. Instead, they are still incorporated into the settler state that was founded on their subordination and in which they still are a numerical minority and a politically and socially non-dominant group. The thesis argues that this history and situation of indigenous peoples in settler states gives them a special interest in land and self-determination rights. The thesis holds that land and self-determination rights express equal moral status in contexts such as colonialism in which the denial of these rights has been

justified with an inferior moral status of a group and its members. While indigenous peoples in settler states are not the only groups to which this argument applies, it is especially relevant in the settler colonial context.

The reason is that indigenous land and self-determination rights are highly contested and intractable in settler states. Therefore, it is crucial to be aware of all the interests that arise in connection with land and self-determination rights when analyzing these conflicts. The conflict between indigenous rights and settler states' rights is complicated by different factors. To begin, in the case of settler states one of the groups that now competes for land and self-determination rights has committed an injustice against the other group which has caused current conflicts. It is by now widely acknowledged that the forceful taking of land and the imposition of colonial rule has wronged indigenous peoples and denied them their land and self-determination rights. The rights conflict between settler states and indigenous peoples thereby differs from conflicts between different indigenous groups that compete for the same land without being at fault for this competition.[1] Therefore, in settler states it seems clear that indigenous rights are stronger than settler descendants' rights claims because they are not founded on an injustice.[2] However, the fact that the initial injustice lies several generations in the past complicates this simple solution. Settler states are well-established and internationally recognized. As such, under international law they possess the same rights to self-determination and territorial integrity as indigenous peoples.[3]

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[1] For example, in many African countries different indigenous groups fight over the same land. Desertification leads pastoralists to encroach on the traditional lands of nomadic groups. In other cases, indigenous groups were relocated by colonial powers. Now conflicts arise when one group wants to return to their traditional lands but the current occupants do not want to or cannot leave because their own traditional land is also occupied by a third group. In these cases, the same *pro tanto* rights conflict. Yet, in contrast to settler states, the conflict has not been created by an injustice that either of these groups has done. Rather, external actors are mostly to blame for the conflict between these indigenous groups. In the case of desertification, the injustice is committed by those states that have contributed the most to climate change. In the other cases, land conflicts are a colonial legacy of colonial powers that have left. In settler states, however, it is clear who did wrong.

[2] This 'simple' solution often applies in cases where indigenous peoples have so far lived mostly autonomously and where the state now encroaches on their lands and self-determination. Examples are indigenous peoples in Brazilian rainforests that are threatened by state-supported land-grabs by pastoralists and international companies. While there might still be questions of distributive justice when it comes to resource rights, it is very clear that the majority state violates the rights of indigenous peoples.

[3] Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that 'All peoples have the right of self-determination'.

Even most normative theories assume that settler descendants and their states have at least some legitimate land rights and often also legitimate self-determination rights (cf. Simmons 1995; M. Moore 2013; Nine 2008; Meisels 2009). They assume that what Jeremy Waldron (1992) calls supersession has taken place. A right is superseded when circumstances change so that a formerly justified right now is overridden by another right. Two changes that are relevant in the context of settler states are an increase in population and the fact that settler descendants have structured their lives around their current land and state. Moreover, most of that currently occupied land has been acquired unjustly.

If traditional indigenous homelands comprised a small or little used part of the current state, complete restitution would be possible without threatening the settler state's existence. However, in the current situation, it is not clear whether the settler states could survive complete restitution of all indigenous lands. Besides, complete restitution would considerably disrupt settler descendants' lives and would possibly create stark distributive injustices between settler descendants and indigenous peoples. The stakes in settler states are high for both sides and it is unlikely that either complete supersession or complete restitution of indigenous rights is the right solution. Instead, complicated questions arise as to how much supersession has taken place and which rights have been superseded. This rights conflict is further strengthened by the fact that indigenous peoples and settler descendants have been preserved as two distinct groups (cf. Mills 2017, 41). If more intermarriage and/ or assimilation had happened, indigenous peoples might have either ceased to exist as a distinct group or the two groups would have formed a third, new group.[4] In each case, the original rightholders and wrongdoers would not exist anymore so that there would not be the same conflict over land and self-determination today.[5]

Instead, the situation in settler states is that there are two distinct groups that have *pro tanto* rights to the same lands and both need these lands for their self-determination. Thus, the primary question is not whether the interests of indigenous peoples and settler descendants justify the same general *pro tanto* rights to self-determination and homelands. The primary question is how to adjudicate between the justified but competing rights claims to the same homelands.

[4] Indeed, Canada's White Paper made the attempt to solve the 'Indian problem' by completing the assimilation of indigenous peoples into Canadian society and thereby terminating their status and rights as indigenous peoples (cf. Turner 2006).

[5] Of course, the original individual rightholders and wrongdoers do not exist anymore, yet in so far as groups wronged or were wronged, the wrongdoers in the form of the settler state and the wronged in the form of tribes continue to exist. On the question of collective responsibility for past wrongs see Miller (2007, chap. 6).

This question of indigenous rights in settler states is the topic of this thesis. The core of the thesis consists of three articles, each of which addresses one aspect of this question. Together, they cover the main argument of the thesis which claims:

1. To determine what rights indigenous peoples in settler states have, land and self-determination rights should be understood as rights that protect three basic interests of humans: the interest in individual self-determination, the interest in having one's minimal needs met, and the interest in recognition of one's equal moral status.

2. In settler states, indigenous rights must be understood as status-conferring rights that recognize the equal moral status of indigenous peoples with their former colonizers. They thereby protect the basic interest in the recognition of moral status equality. So far, territorial rights theories have overlooked this status-conferring function of indigenous rights. Instead, they have only focused on how territorial rights can contribute to individual self-determination and the satisfaction of minimal needs. The oversight of this additional interest has led to an incorrect weighing of competing indigenous and settler state claims.

3. When rights claims of indigenous peoples and settler states clash, land and self-determination rights should be unbundled. Unbundling rights clarifies which right protects which basic interest. This increases the chance that land and self-determination rights can be shared in such a way that the main interests of each party are protected. Together with the recognition of the status-conferring function of indigenous rights, this unbundling allows more nuanced and accurate decisions about who has which rights.

The article 'Why Indigenous Land Rights Have Not Been Superseded' starts with the last part of the argument. It analyzes how land rights can be shared between indigenous peoples and settler descendants in such a way that the core interests of each group are protected. While there is rich literature on shared self-determination arrangements (e.g. Marc Weller 2008; Metzger and Weller 2008; Hannum 1996; Suksi 2011; 1998), there has been a lack of in depth debates about how land rights understood as property rights can be shared. The article first analyses how land structures people's lives by discussing different types of attachment. Distinguishing types of attachment helps to specify which interests people have in land and which rights are needed to protect them. The article then introduces the notion of conditional and partial supersession/ restitution. Partial supersession refers to the idea that some rights in the land rights bundle can be superseded while others persist. For example, the right to control access to a certain land can be superseded while the right to benefit from the income it creates might get restituted. Conditional supersession or restitution means that rights are superseded or restituted

but with certain limits attached. For example, the right to use land might be subject to conditions that rule out or make mandatory certain kinds of use. The article shows how attention to the way in which land structures our lives and expectations can open up the possibility for compromises when it comes to distributing land rights. It then discusses how such compromises could be reached if partial and conditional supersession/ restitution is an option.

The first article discusses supersession in the context of two changes of circumstances; a change in attachments and a change is distributive background situation. The second article, 'Global welfare egalitarianism, resource rights, and decolonization', argues that there is a third change in circumstances which is relevant for supersession. It discusses how land and self-determination rights were a marker of full personhood during colonial times. Through this historic injustice, land and self-determination rights have acquired what I will call a status-conferring function for indigenous peoples in settler states. A status-conferring right expresses a certain status of the rightholder. In the case of indigenous land and self-determination rights, they express the re-cognition of the full personhood of indigenous people and thus their moral status equality with the former colonizers. Thereby, land and self-determination rights protect the basic interest to be recognized as a moral equal. They thereby also help to overcome the enduring effects of the colonial past by restituting moral equality between settler descendants and indigenous peoples. Colonialism thus has changed the meaning of indigenous land and self-determination rights so that they possess more weight now than without the prior injustice. As such, the status-conferring function acts as a counterweight to the other changed circumstances in settler states that trigger supersession.

The article analyzes how the status-conferring function of indigenous land and self-determination rights can counteract supersession due to a change in distributive background circumstances. For this, it focuses on Chris Armstrong's welfare egalitarian theory of resource justice. This focus has two advantages. First, Armstrong's theory explicitly considers attachments as a part of his broader distributive justice theory. It thus connects with the earlier discussion of the supersession thesis in which distributive justice and attachment also are the two main elements that justify rights. Second, as a global welfare egalitarian, Armstrong favors a distributive justice theory that can be expected to lead to expansive supersession of indigenous land rights. Thus, his theory is a good test case to show how the status-conferring function of indigenous rights can counterbalance supersession if taken into account as contributing to welfare. After this article has discussed the effect of status-conferring function of indigenous rights in the

context of land rights, the next article makes a similar argument for indigenous self-determination rights.

'Can naturalistic theories of human rights accommodate the indigenous right to self-determination?' argues that indigenous self-determination rights are derived human rights in the context of settler colonialism. Derived rights protect more basic rights and interests in a particular historical context. The article holds that self-determination rights protect the basic interests of indigenous people in having their moral equality recognized and in having control over their lives on an individual and collective level. In settler states, indigenous people have been treated as inferior and have been made powerless for a long time. Self-determination rights reaffirm their equality by granting them the same rights as their colonizers. At the same time, they shield indigenous peoples from oppression through the settler state. The article concludes that the indigenous right to self-determination protects basic interests and therefore can be regarded as derived human rights in the context of settler states.

While the first two articles have concentrated on land rights, the third article complements the discussion with an argument about self-determination rights. This addition is important because self-determination rights set the juridical framework for the collective life of a group. Thus, while land rights create a material basis for autonomous lives, self-determination rights ensure that the legal framework allows indigenous peoples to live their life the way they want to. Moreover, even if land rights are shared, the question is who has jurisdictional rights over these lands. The jurisdictional authority ultimately enforces the sharing of rights and decides possible conflicts between the joint rightholders. Thus, each group will have an interest in asserting jurisdictional authority over the land in question. The third article gives a reason why the indigenous claim to jurisdiction should have some extra weight when competing with settler states' claims.

The following chapters serve to give some background considerations and an introduction to these three core articles. Chapter 2 will define key concepts. It will distinguish between land rights, territorial rights, self-determination rights, and sovereignty and will clarify what is meant by supersession. It will identify the question of rights supersession as central to indigenous rights within settler states and will show that at the heart of the supersession thesis lies the idea that interests that justify rights can be weighed against each other. Chapter 3 will set out the theoretical framework of the thesis. It will situate the discussion of indigenous rights supersession within an interest theory of rights and will introduce the concept of basic and derived rights. It will argue that in the context of territorial rights there are three basic interests - the

interest in individual self-determination, the interest in having one's basic needs met, and the interest in recognition of one's equal moral status - which give rise to derived rights. Moreover, it will explain why the chosen framework is a broadly liberal one and how it can nevertheless make room for indigenous frameworks and ontologies. Chapter 4 analyzes which core interests are associated with land and self-determination rights in current territorial rights theories. It will demonstrate that the interests that justify territorial rights fall into the category of interests in having basic needs met and in individual self-determination. The interest in having one's moral status equality recognized does not play a justificatory role. The chapter will argue that territorial rights theories therefore are able to reject settler colonialism in its early stages, but cannot adequately deal with its enduring effects. Chapter 5 summarizes the main argument of the thesis as it is presented in the three core articles and concludes.

All in all, the thesis suggests that conflicts between indigenous peoples and settler states should be adjudicated in the following way. First, we need to determine which basic interests land and self-determination rights protect for indigenous peoples and for settler descendants. Here it is useful to recognize land and self-determination rights as derived rights which protect universal interests in a specific historical context that is shaped by a system of territorial states and a history of colonialism. Second, when understanding these rights as derived rights it is important to take the enduring effects of colonialism into account. Colonialism has caused indigenous rights in settler states to become status-conferring rights. For, indigenous peoples, land and self-determination rights thereby protect the basic interest in the recognition of their equal moral status. Thus, indigenous rights have an additional weight compared to the rights of settler descendants whose moral status has not been questioned historically (or at least not in the same way). It does not mean that indigenous rights always override the rights of settler descendants but it might tip the scale in several cases. Most importantly, the inclusion of the status-conferring function of indigenous rights completes the account of which interests are at stake when weighing competing land and self-determination rights in settler states.

At that point, we can begin to actually weigh competing interests to determine which *pro tanto* right is stronger and which one gets overridden. At this point, we should unbundle land and self-determination rights and decide for each single right whose interests are weightier. I have argued that in many cases, such an unbundling of rights will open the door to sharing land and self-determination rights in a way that protects the weightiest interests of each party. Again, it does not mean that there will not be cases in which rights sharing is not possible and only full supersession or restitution is an option. What it does mean is that there will be fewer cases in

which important interests of one party will be completely overridden. Moreover, if incompatible rights claims make a compromise impossible, then at least the decision about supersession is based on an accurate weighing of *all* relevant interests and does not overlook the status-conferring function of indigenous rights.

2. Indigenous rights and supersession

The aim of this chapter is to clarify some of the key concepts used in the thesis and to distinguish them from closely related concepts. The starting point will be UNDRIP which currently is the most influential and most widely accepted document outlining indigenous rights. The right to self-determination plays an important role in UNDRIP and many indigenous rights claims. Yet, the right is referred to by different names. Self-determination, internal self-determination, self-governance, as well as sovereignty are used to describe the rights claims of indigenous peoples. The chapter will distinguish sovereignty, self-determination, and territorial rights to prevent any confusion about these terms going forward (4.1.). This distinction will also help to clarify which rights UNDRIP grants indigenous peoples, which rights indigenous people themselves demand and why a discussion of territorial rights is relevant to indigenous rights (4.2.). Lastly, the chapter will explain how supersession is understood in the thesis (4.3.). Out of the discussion, supersession will emerge as the most pressing problem to be solved in the context of territorial rights. UNDRIP assigns indigenous peoples the same general right as any other peoples, that is, the right to self-determination on their traditional territory. Yet, it leaves open how such a general right fares if two different peoples claim the particular territory on which self-determination is to be exercised. The conflict is even sharper in the case of indigenous peoples and settler states as the fact that both people claim the same territory arises from a historic injustice.

2.1. Self-determination, Sovereignty and Territorial Rights

Sovereignty often is divided into internal and external sovereignty (Goodwin 1974; Dan Philpott 2020; Miller 2012). Traditionally, internal sovereignty is understood as a liberty right that refers to a state's legitimate control over internal affairs whereas external sovereignty denotes the claim right to non-interference into these internal affairs. The thesis will slightly depart from this understanding. It will understand the two aspects of sovereignty in the following way. External sovereignty gives a state standing in the international order. It can be seen as a mostly legal status which allows a state to enter into treaties and alliances, declare war and peace, and to become a member of international institutions like the UNO, WHO or WTO. External sovereignty is important because it allows states to conduct their own foreign policy by entering into alliances with other states that secure reciprocal support in the event of attacks from the

outside. It also means that states can decide if, when, and by whom their right to non-interference and jurisdiction can be limited.[6] By joining treaties and internationals institutions, they allow these institutions to regulate inter-state behaviour and in some cases even aspects of internal affairs. For example, membership in the WTO limits states' freedom to impose tariffs and end contracts with foreign investors. At the same time, it gives states the opportunity to bring any trade conflicts with other states before the WTO for resolution.

External sovereignty integrates states into an international order that protects its members' internal sovereignty and creates peaceful relations between states. As such, it lets states demand support from other states and institutions in inter-state conflicts and helps to prevent such conflicts in the first place. In the thesis, internal sovereignty is understood as a claim right which gives a state or a group rights to determine their internal affairs and imposes a duty on other actors to not interfere into these internal affairs. The reason that internal sovereignty is understood as a claim right is that it allows to speak of forms of political autonomy or associated statehood which give a group exclusive control over its internal affairs but do not amount to secession of full sovereignty. In the context of indigenous rights, this option is important. Indigenous peoples rarely aim for full sovereignty in the form of secession from the settler state, partly because of feasibility constraints[7]. They usually do not strive to have an own foreign policy or army and they do not aim for individual representation in international organizations.[8] Thus, they do not demand external sovereignty as I have defined it. However, they often reject the idea that the state holds ultimate authority over them and thus can interfere into their internal affairs. Thus, they claim the right to non-interference which in the traditional division of sovereignty means that they claim external sovereignty.

The case of Thomas v. Norris can illustrate what is at stake here. The case was brought before a court by a Coast Salish man who charged his Coast Salish home community with battery, assault, and unlawful imprisonment. He had been forced to undergo a spirit dancing ceremony

[6] Thus, in a sense international treaties and membership in international institutions limit the sovereignty of states. Yet, as states remain free to enter (and in certain circumstances end) treaties and memberships so that ultimate sovereignty continues to lie with them.

[7] The rarity of such demands can be seen in the attention that the claims to full sovereignty of the Mohawks of Kanesatake have received. For an analysis see Audra Simpson (2014).

[8] Indigenous peoples have successfully established some international representation, for example first through the Working Group on Indigenous Populations and now through the UN Permanent Forum on Indigenous Issues. Yet, these international bodies represent indigenous groups worldwide and do not represent individual indigenous peoples.

as a reaction to his misbehaviour within the Coast Salish community. This ceremony involved other men grabbing him and detaining him for some time in a Salish long house. The Coast Salish community argued that it was their right to exercise this ceremony as it was their traditional way of bringing about community healing. Yet, the Canadian court decided in favor of the plaintiff, saying that this treatment violated Canadian common law. The court thereby established that while indigenous peoples in Canada have cultural rights, their exercise is subject to Canadian common law. Furthermore, the judge ruled that with the institution of Canadian common law, it gained supremacy over aboriginal law. Thus, aboriginal law can be practiced as a cultural right but the Canadian courts will always have the right to interfere with its exercise, e.g. by overruling it or limiting its application.

In such a constellation, indigenous peoples cannot be fully internally self-determining because there is a higher authority that can interfere into their internal affairs even without the prior consent of the group in question. Even if no direct intervention happens, the possibility of such an intervention restricts indigenous peoples' control over their internal affairs because they will organize their own affairs in compliance with settler state law to avoid any future interference. The core question is whether the state is justified in interfering into the group's internal matters without their consent or whether indigenous peoples can make such interference conditional on their consent – even if they do not secede. To avoid confusion about which rights are meant in the following discussion, I have decided to talk in the following about internal sovereignty or territorial rights when internal self-determination plus the right to non-interference is meant and to talk about external or full sovereignty when there are claims to secession and independent statehood. Internal sovereignty then refers to a group's right to jurisdiction over its members and territory, its resource rights, and its right to non-interference from either individuals or other states and institutions. Internal sovereignty thus contains the rights that political theorists discuss under the heading of territorial rights. The individual aspects of territorial rights or internal sovereignty are the following:

1. Jurisdiction over land, goods, and resources on the state's territory. This includes second-order resource rights which are rights to determine property rules, including rules about who can be an owner, what can be sold and to whom, limits and/ or conditions to the use of property, and the regulation of benefits. For example, a state can legislate that certain lands cannot be used for industrial development, thereby setting rules of use, it can tax income derived from the sale or use of goods and resources, it can outlaw drugs and thereby prohibit ownership of certain

goods on their territory, and it can specify who can buy guns and thus determine who can own this specific good and regulate whom this good can be sold to.

2. Jurisdiction over people. Jurisdiction over people separates into jurisdiction over members and jurisdiction over aliens on state territory. A state only has jurisdiction over aliens as long as they are on its territory. Members, in contrast, can be subject to certain laws of their home state even if they are not on its territory. Often self-governance rights are primarily such jurisdictional rights over members.

3. Right to non-interference. The right to non-interference means that no outside state actor, be it an individual, other state, or group actor may overrule the state's laws or enforce non-state laws without the consent of the state itself. It turns the jurisdictional rights of 1. and 2. into claim rights and not mere liberties by imposing the duty to non-interference on external actors.

Resource rights and the right to control borders are sometimes treated as additional, separate rights. Yet within the tripartite division here, they are subsections of the three other rights. Resource rights are ownership rights of the state over natural resources in its territory. As the state regulates property rights within its territory, it also regulates its own property rights and thus can determine whether and/ or which natural resources are state-owned. The right to control borders is the right to control which goods and peoples can come onto the state's territory. As such it can be seen as a subsection of the right to jurisdiction over aliens and goods combined with the right to non-interference. If a state rules about who and what can be on its territory and under which conditions and outside actors are bound to respect these rules, the state can effectively control its borders. Sovereignty usually is attributed to states in the sense that states have institutional structures that make it possible to exercise jurisdiction and to enforce it effectively. However, it does not mean that states necessarily are the primary holders of territorial rights. Different normative accounts locate territorial rights with nations (Miller 2012; Meisels 2003), peoples (Nine 2012; M. Moore 2017a), states (Stilz 2009; 2019) or even individuals (Simmons 2001).

It is important to note that internal sovereignty or territorial rights need not always be accompanied by external sovereignty. For example, autonomous regions might possess full internal sovereignty, that is the parent state has no interference right into internal matters, without any corresponding external sovereignty, that is no legal international status. A concept that is closely connected to territorial rights and sovereignty is self-determination. In international law, self-determination is understood as being synonymous with sovereignty. Self-determination claims then are always claims to independent statehood and secession (Anaya 2000, 80; Marc

Weller 2008). Yet, it is important to keep the concepts of sovereignty, territorial rights or internal sovereignty, and self-determination separate. The equation of self-determination rights with rights to full sovereignty have kept many groups, including indigenous peoples, from achieving any form of self-determination or internal sovereignty as existing states and the international order are fearful of secessionist movements. Weller (2009, 114) claims that 'the all-or-nothing game of self-determination has helped to sustain conflicts, rather than resolve them.' Likewise, Corntassel and Primeau (J. J. Corntassel and Primeau 1995, 345) state 'that calls for self-determination, to self-identification, and for sovereignty only exacerbate tensions between indigenous groups and states.' Thus, the equation of self-determination with full sovereignty is not helpful in resolving conflicts between groups who both claim self-determination as is the case with indigenous peoples and settler states.

Instead, Anaya proposes to focus on what he calls the substance of self-determination and to determine on this basis which rights are needed to ensure that a given group can exercise self-determination. According to Anaya (2000, 82),

> 'ongoing self-determination requires a governing order under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis. In the words of the self-determination provision common to the international human rights covenants and other instruments, peoples are to "freely pursue their economic, social and cultural development."'

Collective self-determination is the right to control what is necessary for a group to determine its character and to shape its future. Self-determination differs from territorial rights and internal sovereignty because it does not have a fixed set of rights associated. Depending on the group and the context, different rights are necessary to ensure a group's self-determination. Which rights a group needs to be self-determining depends on how compatible the state institutions are with their way of life and values. In some cases, cultural autonomy is enough to ensure a group's self-determination within a bigger state. Cultural autonomy is especially helpful for culturally distinct but territorially dispersed groups. In other cases, federal government forms are best suited to achieving self-determination. In federal arrangements, the federal unit has jurisdictional control over aspects important to its self-determination while other jurisdictional rights remain with the parent state. For instance, Quebec has its own language and immigration policies that ensures that it remains French-speaking.

In still other instances, only full territorial rights or internal sovereignty will ensure a group's self-determination. Self-determination as internal sovereignty usually is necessary when a

group's way of life and values differ considerably from that of the state so that they cannot pursue self-determination within the states institutions or if the state has violated the rights of this group's members in the present or past. In the latter case, internal or sometimes even full sovereignty is a remedial measure for the past or present violation of a group's self-determination rights by the state. Sovereignty then is a remedial right either for ongoing rights violations or as a protection against expected future repetitions of rights violations. Anaya (2000, 80) argues that self-determination as sovereignty was meaningful in the context of decolonization because the colonized were not able to exercise self-determination within a colonial context. Yet, he (Anaya 2000, 80/1) holds that 'Indigenous peoples characteristically are within the more narrow category of self-determination beneficiaries, which includes groups entitled to remedial measures; but the remedial regime developing in the context of indigenous peoples is not one that favors the formation of new states.' The next section will discuss which rights indigenous groups claim and which are granted according to UNDRIP.

2.2. Indigenous rights

UNDRIP was adopted in 2007. It sets out indigenous rights and covers four main components: individual human rights of indigenous people, collective rights of indigenous peoples, relations between the majority state and indigenous people, and rights to redress for past injustices. It affirms that indigenous people have equal human rights and that indigenous peoples possess the same rights as other peoples, most importantly the right to self-determination and rights to their traditional lands. As such, UNDRIP does not lay out any special rights for indigenous people but only affirms that they have the same rights as everyone else (A/RES/61/295 2007, art.1+2). This affirmation can be seen as necessary given that indigenous people were seen as less than fully human and thus as lacking both individual and collective rights during colonial times (cf. Mills 2017, 62; Keene 2002). Accordingly, many of the articles emphasize those rights that historically have been violated such as the right to culture or parental rights (cf. A/RES/61/295 2007, art.7+8). According to UNDRIP, indigenous people possess the same rights as any other citizen of the majority state in which they were, often forcefully, incorporated as well as collective rights as members of a people distinct from the majority society. As such, indigenous peoples have the right to build and sustain their own institutions whether these be cultural, educational, or political ones.

These 'double' rights as citizens of the majority state and as members of a people stem from the often violent and involuntary incorporation of indigenous people in the current state. UNDRIP recognizes that, as a matter of fact, indigenous people are now citizens of this bigger

state and ensures them the same rights as other citizens possess. At the same time, UNDRIP acknowledges that indigenous people continue to exist as distinct peoples with a right to self-determination that has been oppressed in the past. Therefore, it also stresses that this right still exists today despite efforts to suppress and deny it in the past. UNDRIP thereby affirms indigenous people's status equality on the individual and collective level. The articles that regulate the relation between the majority state and indigenous people reflect the same split between acknowledging the effects of historic injustices, namely the incorporation of indigenous peoples as members of another state, and the will to not let historic injustices win out by erasing the rights that indigenous peoples possessed as collectives.

Thus, indigenous people do not have a state-to-state relation with the majority state as they are citizens of it and as a people do not possess external sovereignty. Still, they also do not have a simple state-to-citizen relation with the majority state as they maintain their collective right to self-determination. Seen this way, it makes sense that UNDRIP emphasizes that indigenous people have equal rights as citizens of the majority state as well as rights as members of an indigenous people. For example, article 13 of UNDRIP states that indigenous people have the right to build and sustain their own educational institutions but also possess equal rights to access and participate in the mainstream educational institutions. Lastly, some articles lay out what kind of redress indigenous peoples deserve for past injustices. Art. 28 states that indigenous people must be returned their traditional territories, or if that is not possible, land and resources that are as close as possible in kind and value to the land lost, or, if that is not possible, financial redress must be paid. Article 8 also lists the loss of culture, displacement, forced assimilation, past discrimination, and any actions that aimed at destroying indigenous people as a people or ethnicity as causes for further redress.

When the UN General Assembly voted on UNDRIP's adoption, 144 states voted in favor while four voted against. All votes against UNDRIP came from settler states in which indigenous peoples today are a numerical minority:[9]Australia, Canada, New Zealand and the United States. In the following years, the four countries have reversed their position. What kept them from supporting UNDRIP from the start? The official statement of New Zealand on behalf of New Zealand, Australia, and the USA states that UNDRIP fails to be 'clear, transparent and capable of implementation.' The following sections will take up specific criticisms that settler states

[9] Many South American countries also have a big settler population from times of colonialism, yet in many countries the indigenous population is much more numerous than in those four settler states.

presented in an official statement as reasons to reject UNDRIP. They highlight some of the main disputes around indigenous rights in settler states and thus give a first introduction into the main topic of the thesis.

2.2.1. Self-determination

> 'Self-Determination. For example, Mr Chairman, the provisions for articulating self-determination for indigenous peoples in this text inappropriately reproduce common Article 1 of the Covenants. Self-determination in the Chair's text therefore could be misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity, territorial integrity and the stability of existing UN Member States.' (Banks 2006)

Article 3 of UNDRIP indeed reads the same as the relevant articles on self-determination in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It states that 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' Yet, article 4 already limits the right to self-determination to internal and local matters. Furthermore, article 46.1. holds that 'Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.' Thus, in contrast to the claim cited, it is clear that self-determination is not understood as a right to full sovereignty and thus does not include a right to secession.

Nevertheless, indigenous self-determination rights can be understood as a right to full internal sovereignty, that is, to full territorial rights (cf. UNDRIP, art.4). Some indigenous scholars defend the position that indigenous peoples cannot be truly self-determining unless they have independent institutions from the existing majority state. They cite incompatible ways of understanding rights and obligations, incompatible values that underlie each society, and the continued colonial structures of the majority state as reasons (cf. G. S. Coulthard 2014; Alfred and Corntassel 2005; J. Corntassel 2012; L. B. Simpson 2016).[10] Other scholars hold that land and resource rights are indispensable for indigenous self-determination because they are necessary to ensure indigenous people's human rights to subsistence and culture in the long-term (cf. Daes

[10] For a criticism of such claims see Lightfoot (2020).

2004; J. Corntassel and Bryce 2012; Whyte 2018). Thus, even without understanding the right to self-determination as a right to secession, it may impose far-reaching limits to state power. The core question thus is which rights the right to self-determination contains in the case of indigenous peoples. Do they need full internal sovereignty rights and thus full territorial rights or do they only need a more limited set of rights to ensure collective self-determination?

2.2.2. Land and resources

> 'Lands & Resources. Mr Chairman, the provisions on lands and resources in the text before us are also equally unworkable and unacceptable. They ignore the contemporary realities in many countries with indigenous populations, by appearing to require the recognition of indigenous rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous. Such provisions would be both arbitrary and impossible to implement.' (Banks 2006)

UNDRIP indeed affirms that indigenous people have rights to their traditionally used, owned, and occupied lands and resources which include the right to own, use, develop, and control these lands and resources (A/RES/61/295 2007, art.26 + 32). Furthermore, article 8 states that indigenous people deserve redress for lost lands and forced relocation and article 28 specifies that such redress should take the form of restitution or, if that is not possible, 'compensation shall take the form of lands, territories and resources equal in quality, size and legal status.' The demand to honor the historic rights of indigenous peoples is construed as conflicting both with demands of distributive justice (by allowing indigenous people to control a disproportional share of land and resources) and with expectations and attachments that are based on the current law (by demanding that current property rights should be overridden). New Zealand highlights that now there are legally recognized titles to indigenous lands which would have to be overridden if land restitution took place. UNDRIP leaves open the option of compensating indigenous people with similar lands and resources if the original lands cannot be restituted, e.g. because they are now occupied by other people. Yet, the settler states seem to equally object to this option. One obvious reason is that such compensation would remove vast amounts of land and resources from the reach of the state and make it unavailable for use, development, and exploitation by the majority. Thus, these UNDRIP articles together with the statement by the opposing states bring the question of rights supersession clearly into focus.

2.2.3. Definition of indigenous people

> 'There is no definition of "indigenous peoples" in the text. The lack of definition or scope of application within the Chair's text means that separatist or minority groups, with traditional connections to the territory where they live – in all regions of the globe - could seek to exploit this declaration to claim the right to self-determination, including exclusive control of their territorial resources. And this text would allow them wrongly to claim international endorsement for exercising such rights.'

It is true that UNDRIP does not contain any definition of indigenous peoples. The New Zealand statement argues that if there is no definition of who the rightholder is, then the right in question can be claimed by anyone. It therefore demands a definition of 'indigenous peoples.' This demand seems reasonable. So why is there no clear definition of 'indigenous peoples'? One reason for the lack of a definition is that indigenous people are very diverse so that any definition risks to be under- or overinclusive in its scope.[11] This diversity of indigenous peoples thus seems to preclude a clear definition of who can hold the rights set out in UNDRIP. Yet, the question is whether a definition of indigenous peoples really is necessary for identifying a rightholder. As explained above, a major part of UNDRIP is simply an affirmation that 'Indigenous peoples and individuals are free and equal to all other peoples and individuals' and possess the rights that all humans and all peoples have (A/RES/61/295 2007, art.2). What justifies the human rights of indigenous people is not their indigeneity but them being human beings. Similarly, what justifies indigenous peoples' territorial rights is not primarily their indigeneity but them being peoples. Consequently, it is misguided to ask for a definition of 'indigenous peoples'. What is needed is a definition of 'peoples' or other clear criteria that allow picking out the relevant rightholders. As Dowie (2011, xii) says, 'there is no legal definition of indigenous peoples, partly because there is no legal definition of the word peoples.

UNDRIP as well as other official documents that assign self-determination rights to peoples are silent on an exact definition of 'peoples.' Thus, it is necessary to look somewhere else for such a definition. Territorial rights theories are a natural starting point as they not only justify territorial rights but also pick out the relevant rightholders. The turn to territorial rights theories has the additional advantage that they also specify the normative basis for territorial rights. Chapter 4 will take up this question. It will connect individual interests with collective interests

[11] On the general problem of defining membership rules see Vitikainen (2015, ch.5) and on problems with the UN's working definition of indigenous peoples see Corntassel and Primeau (1995, 346/7).

in land and self-determination rights and thus determine the relevant rightholders by identifying groups that realize these individual interests. Clarity over the normative basis of territorial rights helps to decide rights conflicts between indigenous peoples and majority states.

As we have seen, UNDRIP simply accords indigenous peoples rights over their traditional lands and to self-determination in accordance with international law. Yet, today, other peoples or states often occupy and use traditional lands of indigenous peoples – and international law similarly recognizes land and self-determination rights of these non-indigenous states and peoples. What UNDRIP seems to affirm then, are that indigenous peoples have *pro tanto*, and not necessarily all things considered, rights to their traditional lands and to self-determination.[12] When these *pro tanto* rights clash with current rights of settler states and their non-indigenous citizens, it is not clear whose rights should be overridden and whose granted. In order to decide which *pro tanto* right is stronger, one needs to have a clear idea about what the normative basis of these rights are. Territorial rights theories deliver such a normative basis while the supersession thesis of Jeremy Waldron provides a framework for assessing when one right can be overridden by another one.

2.3. Supersession

Jeremy Waldron introduced the concept of supersession in a series of articles (Waldron 1992; 2002). Supersession means that circumstances change in such a way that formerly justified rights are now not justified anymore. Supersession thus takes place if either the reason that gave someone a right ceases to exist or if the initial reason for that right is now being overridden by another one. An example for the first case is when the rightholder dies and the right cannot be inherited. An example for the second case is a change in background circumstances which creates competing interests that outweigh the interests in the right of the current rightholder. In the context of indigenous rights, Waldron discusses two such changes. The first one is a change in the distributive justice context, the second one I will term a change in attachments.

[12] I here follow Judith Jarvis Thomson's explanation of when a right can permissibly be infringed (Thomson 2013, 149). A right can be infringed if it conflicts with another, weightier moral right. Thus, if a *pro tanto* right is infringed, it is overridden by the competing right. Yet, even if a *pro tanto* right is overridden, it leaves a moral remainder. In the context of territorial rights, such a moral remainder can be addressed, for example, by granting special accommodations or compensations to the group whose land and/ or self-determination right was outweighed.

2.3.1. Change in distributive context

The context of distributive justice can change in two ways: resources can diminish or the number of resource users can increase. In each case, scarcity increases which might lead to constraints on property rights that before were not necessary. Waldron (2002, 151) illustrates how this leads to supersession with the example of two waterholes owned by two different persons. As long as each waterhole bears water, exclusive property rights of each owner are justified. If, however, waterhole 1 dries up, the owner of waterhole 1 now is in danger of dying from thirst unless they have access to waterhole 2. Therefore, the exclusive property right of waterhole 2 owner is superseded. In the changed circumstances, an exclusive ownership right cannot be justified anymore because it denies waterhole 1 owner their basic needs. When a right is overridden will depend partially on the distributive justice theory employed as well as on the justification for the right in question.

In minimal sufficientarian theories of distributive justice, basic needs are the only kind of interest that can outweigh the interests that justify existing property rights. The waterhole example draws on such a case of basic needs limiting existing property rights. In other theories of distributive justice, property rights can be superseded much more easily. Simmons' concept of fair shares of land is an example for supersession in a more demanding theory of distributive justice (Simmons 1995). Supersession due to a change in distributive background circumstances is not necessarily linked to historic injustices. Populations can increase and resources decrease even if there is no historic injustice involved. Such a change in distributive context affects rights no matter whether their holders can currently exercise them or whether they have been wrongfully kept from exercising them. In the case of indigenous peoples in settler states, however, the increased scarcity is usually caused by the influx of settlers and the following growth of their population. Thus, settler colonialism can trigger a supersession at least of indigenous land rights by increasing the total population living on the territory.

2.3.2. Change in attachments

The second way in which changed circumstances can lead to supersession is more closely connected to historic injustice. I term it a change in attachment. Attachment describes the special role that a good plays in the plans and life of a person.[13] It can do so in a variety of ways. It can

[13] Waldron himself does not speak of attachments. Yet, he acknowledges that rights to a good can be based on the role that the good plays in our plans but also on the role that the good plays for personal or cultural identity (Waldron 1992, 19). In the latter case, it seems clearer to speak of an attachment than to say that we have

be important because it helps that person to realize their life plan (think of a painter's studio), because the person relies on the use of the good to structure their everyday life (think of a house to live in) or because the good has become integrated into the personal or cultural identity of that person (think of a family heirloom). In all these cases, persons have strong expectations about their continued access to and control of that good and they have structured parts of their life around these expectations. Waldron (1992, 18/9) holds that supersession can take place if a good becomes integrated into the central plans of someone who is not the original owner and that person has strong expectations to have continued access to and control over the good in the future. Thus, supersession can take place if someone who currently is not the owner of a good becomes strongly attached to it and these new attachments outweigh the attachments of the original owner.

How can someone who is not the original owner form such strong attachments? One way, that is most relevant to indigenous rights, is through theft. If someone takes a good to which they have no right and keeps it for long enough, they will inevitably start to integrate it into their life. In the first generation of such theft, new attachments might not have any force because they express illegitimate expectations, that is, an expectation that is based on the continuance of injustice. However, as time passes, later generations might form strong attachments which carry some weight. Attachments of later generations can be meaningful for various reasons. These generations might form attachments before they become aware of the tainted history of the good in question or the good in question might not be easily substitutable. Both reasons apply in the case of land rights. When settlers took the land, they started to build a new life around the possession and use of this land. Their children and grandchildren grew up on this land and were taught that it was 'theirs.'

Narratives of indigenous peoples as uncivilized people that did not use the land, the official doctrine of settler land as *terra nullius*, and in many cases the settler state bestowing land on settlers could lead to expectations to keep that land that *de facto* were illegitimate but seemed legitimate to these settler descendants. It is hard to say whether these generations were innocently or willfully ignorant of the true history behind their current possessions. In any case,

incorporated the good into our plans. One reason why it seems awkward to say that we have incorporated a culturally important good into our plans, is that we usually think that plans can be changed more easily than one's culture. Cultures are not plans that we have but rather building blocks for our identity and the background against which we choose plans. 'Attachment' can be used as an umbrella term that denotes different ways in which a good can be important for someone's life. Later chapters will spell out the different kinds of attachments there are.

they started to build lives and indeed whole new states around these possessions. To Waldron, the fact that they have done so, is the decisive factor. He (1992, 18/9) argues that if rights to goods are partially justified through the attachment that people have built to them, then new attachments can lead to new rights regardless of how these attachments were created. He proposes that the best way to understand historic entitlements is to see them as needed for the personal autonomy of a person. Someone creates property rights in a thing by actively incorporating it into their life plan. Property rights then secure permanent access to and control over that good so that the owner can pursue their plans. Accordingly, theft is wrong because it upsets the owner's plans by removing the good from them. Yet, if property rights are based on the role that a good plays in the plans of someone and it is a wrong to remove a good that has been actively incorporated into plans, then restitution of a stolen good can be unjust in itself.

Restitution of a stolen good would be unjust if 1) the new 'owner' has integrated that good into their life, 2) restitution of that good would disrupt the life of the current 'owner', and 3) the original owner has rearranged their life in such a way that the good is no longer necessary in pursuing their life plans. Such a change in attachments can trigger supersession, too. In an ideal case, the original owners have no attachment anymore while the current owners have integrated the good into their most central life plans. This would be a clear case for supersession. Most cases, however, are messier. Old attachments often persist, especially if the good in question is not just needed for a life plan but is central to the cultural or personal identity of someone. Moreover, the original and the new owners might have incorporated the good in different ways into their life. Hence, not only attachments of original and current owners might compete, but there is also the question how different kinds of attachment should be weighed. The following chapters will further illustrate how this can lead to difficulties when restitution of land and territorial rights is at issue before offering a solution to it.

2.3.3. Superseding historic injustice

Two more clarifications are needed on the topic of supersession. First, does supersession mean that a right is overridden or that it is extinguished? Second, in what way does supersession turn an injustice into a just state? According to Simmons (2016, 157), supersession extinguishes the rights of the original owner from the moment of supersession on. In his interpretation, supersession creates a new set of rights that persist until they also become no longer justifiable and are thus superseded. Yet, this interpretation of supersession is counter-intuitive. Applied to Waldron's waterhole example, it would mean that even if waterhole 1 suddenly began to carry water again, the owner of waterhole 1 would continue to also have rights to waterhole 2. After

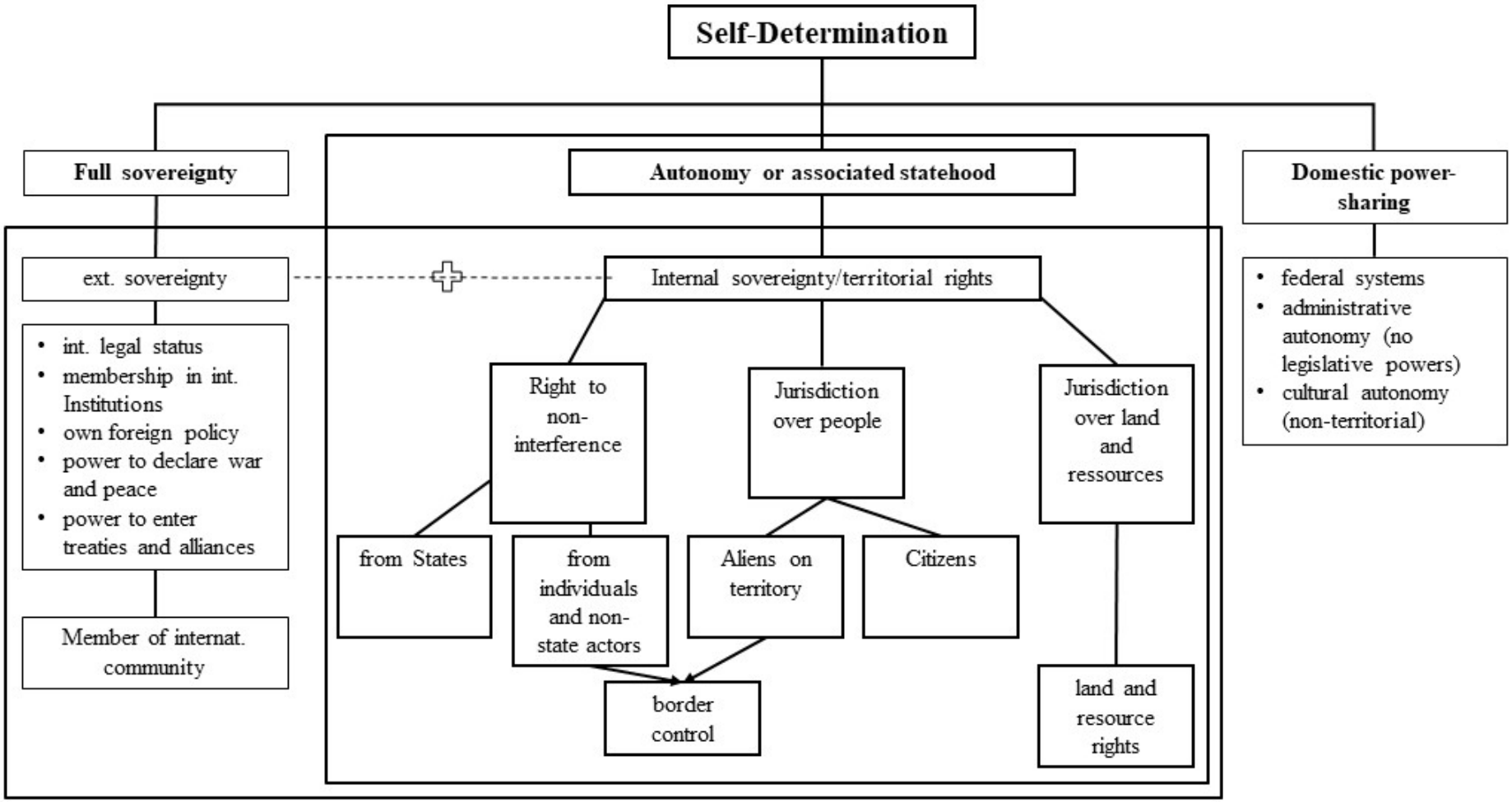
all, the right to exclusive ownership of the waterhole 2 owner have been extinguished. There are, however, alternative interpretations, which seem to better fit our intuitions about what would be just in such a circumstance. For example, one alternative would see the exclusive property rights of waterhole 2 owner restored as soon as the other waterhole fills up again. Exclusive property rights are justified once more because they do not keep waterhole 1 owner from fulfilling their basic needs. In that sense, a renewed change in background circumstances has led to a supersession of supersession. If rights can be restored once the trigger for supersession has disappeared, then these rights were not extinguished. Rather, the interest that justified them was outweighed by other, more important interests but the overridden rights persisted as *pro tanto* right claims.

Regarding the second question about the supersession of historic injustice, it is important to keep in mind that supersession primarily concerns the existence of *de facto* rights. Supersession means that a right is overridden by other rights claims and thus cannot be claimed anymore. If a rightholder currently holds a right, supersession means that they cannot exercise it anymore in the future. Waterhole 2 owner possessed the right to exclusive ownership and supersession meant that they lost this right and instead had to share the waterhole. If a rightholder has been wrongfully kept from exercising their right, supersession means that it is not wrongful anymore to be kept from exercising that right. Claims to restitution which rest on the continued existence of the right thus are superseded. If waterhole 1 owner had violated waterhole 2 owner's rights by taking water from his waterhole, the waterhole 2 owner had the right to be restored full property rights up until the point at which waterhole 1 dried out. Afterwards, any such restitution claims were superseded because the right on which they were founded was outweighed. Supersession thus does not mean that the initial injustice suddenly is not unjust anymore (cf. Meisels 2009, 60). Waterhole 1 owner stealing water from waterhole 2 is still a wrong. Supersession only means that a past injustice does not continue into the present anymore. After waterhole 1 has dried out, its owner does not steal anymore when taking water from waterhole 2 but rightfully takes the water.

2.4. Conclusion

In the context of indigenous rights, the main problem is competing claims between indigenous peoples and settler states. The clashes between indigenous rights and rights of settler states and settler descendants goes back to colonialism. The unjust taking of land and the settlement of indigenous territories have led to an increased population and new attachments which now compete with the historic rights of indigenous peoples. The supersession thesis proposes to

decide such rights conflicts by weighing the interests of each party in the right in question. If the strength of new attachments outweigh those of old attachments, supersession takes place. Similarly, if there are now new rights claimants with strong interests in receiving their just share of land, then some of the original land rights might be superseded to grant everyone a just share of land. Thus, the supersession theory implicitly relies on an interest theory of rights in which rights are determined by weighing how strong interests in a right are and how burdensome the corresponding duty would be. The next chapter gives a short overview over this theoretical framework.


Self-Determination
Full sovereignty
Autonomy or associated statehood
Domestic power-sharing
ext. sovereignty
Internal sovereignty/territorial rights
• int. legal status
• membership in int. Institutions
• own foreign policy
• power to declare war and peace
• power to enter treaties and alliances
Member of internat. community
Right to non-interference
Jurisdiction over people
Jurisdiction over land and ressources
from States
from individuals and non-state actors
Aliens on territory
Citizens
border control
land and resource rights
• federal systems
• administrative autonomy (no legislative powers)
• cultural autonomy (non-territorial)

3. Theoretical framework

The goal of this section is to give an overview of the theoretical framework within which the thesis is situated and to explain the centrality of moral status equality on which the thesis builds. The section explains why this framework was chosen but will not engage in further discussion of the general merits or criticism of the specific theories. The topic of the thesis is indigenous rights to land and self-determination as well as the question of how to decide competing rights claims by indigenous people and settler descendants. Thus, the thesis needs a theoretical framework that is able to give clear criteria for when a certain right exists as well as guidelines for deciding between clashing rights claims.[14] In order to satisfy both desiderata, the thesis uses a framework that builds on three main components: A broadly welfarist theory of value, normative individualism, and an interest theory of rights. The three elements work together in the following way. First, the interest theory of rights provides general criteria for when there is a claim right (when the interest in having the right outweighs the burden the right imposes) and for settling competing rights claims (by weighing the interests these rights protect according to how vital they are to individuals' well-being). Second, normative individualism specifies who can hold rights (individuals individually or jointly). Third, the welfarist theory of value specifies what determines the weight of different interests (their centrality to individual well-being).

3.1. Normative individualism and an interest theory of rights

An interest theory of rights defines when a right exists and how to settle competing rights claims. Raz's version of an interest theory of rights holds that 'X has a right if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty' (Raz 1986, 166). In order to determine whether a certain right exists, one must thus determine 1) whether the claimant can hold rights and 2) whether the interest in question is sufficiently weighty to impose duties on others. Normative individualism together with a welfarist conception of value identifies who can hold rights. Normative individualism determines individuals as the ultimate units of moral concern and moral status. Welfarist value theory identifies welfare or well-being as the primary moral value which rights should protect.[15] If normative individualism and a welfarist conception come together in a rights theory, right holders can be identified as individuals whose well-being has

[14] Thus, the focus lies on rights, not on the more general question of when a specific act is morally right or wrong.

[15] I will use 'welfare' and 'well-being' interchangeably for the purposes of this thesis.

an intrinsic value. The thesis focuses on humans as rightholders. Yet, this focus does not preclude the possibility that the well-being of non-human individuals such as animals also has intrinsic value.[16]

Indeed, many indigenous people recognize duties to and rights of the land and the animals, plants, and other beings that live on it. The Syilx for example have 'a philosophy of egalitarianism toward all life forms' (J. Armstrong 2018, 97). The reason that the thesis focuses on humans as rightholders is twofold. First, the core question of the thesis is how to resolve competing right claims between indigenous people and settler descendants. Therefore, it focuses on a conflict between humans. Second, the thesis' main argument is that certain rights and resources can be interpreted as status-conferring in specific historical and cultural contexts. The argument therefore mostly applies to humans because they care about the recognition of their moral status and have the ability for complex interpretations that lie at the heart of seeing indigenous rights as status-conferring rights.

In addition to individuals, groups can also hold rights if they do so in the name of their individual members. Collective group rights thus are possible within a framework of normative individualism. Corporate conceptions of group rights, however, are ruled out.[17] 'The principal difference between these conceptions is that, while the collective conception ascribes moral standing only to the individuals who jointly hold the group right, the corporate conception ascribes moral standing to the group as such.' (P. Jones 1999, 86) Thus, collective group rights are derived from the interests of the individual group members who have moral status. The corporate conception, in contrast, assumes that a group has moral standing, and thus moral rights, that is independent from its individual members. Such an assumption conflicts with normative individualism. The thesis will understand any group right discussed, such as the right to self-determination, as a collective right. Accordingly, all moral rights must ultimately be based on the interests of individuals. Furthermore, the weight of its right is determined by the weight of

[16] While traditional views of normative individualism understand 'individuals' strictly as humans (e.g. von der Pfordten 2012, 452), this equation is not necessary. If the well-being of non-human beings is acknowledged as having intrinsic value, this gives them moral status as well. For example, some indigenous peoples argue that their land rights are necessary to fulfill duties towards their traditional land and its beings which are seen as having intrinsic value that gives rise to rights and duties (cf. J. Corntassel and Bryce 2012; Whitt, Roberts, and Grieves 2001). This argument will be discussed in more depth in chapter 4.

[17] There might be legal rights that follow a corporate conception, I am here mainly referring to moral rights which can be expressed as legal rights but do not exhaust the scope of all legal rights that exist.

the individual interests that the group right protects. Thus, collective group rights differ from individual rights because they are, and sometimes only can be, held jointly by group members while individual rights are held by single individuals. They do not differ from individual rights by treating the groups as having a moral status that is independent and non-reducible to the moral status of its members.

Once it is clear who is a rightholder, the next step is to decide whether a specific interest is strong enough to be protected by a claim right.[18] There are two considerations to be taken into account. First, is the interest itself worth being protected by a right? If it is, does the interest justify burdening someone else with the corresponding duty? I will start with the second question and will return to the first question afterwards. In order to determine whether there is a certain right X, one needs to identify both the general interest that the potential right would protect as well as the general interests that the potential duty would frustrate. Depending on which interests are stronger, we can decide whether there is a *prima facie* claim right. There are two ways of further specifying when an interest in a right outweighs the burden the corresponding duty would impose. First, one can compare a (potential) rightholder's interest vs the (potential) dutyholder's interest on the individual level without aggregating rights or duties. That means, that what counts is how the right or duty would impact a single person. In that version, numbers do not count. If many people have the same interest, it does not give the interest more weight, nor does the fact that many people would be under a duty count against a right. Second, one can allow an aggregation of interests so that numbers would count. A rather weak interest on the individual level might still lead to a right if enough other people share it.

Both approaches have their advantages and drawbacks. If only comparing interests on the individual level, this will lead to some counter-intuitive consequences. This problem mostly arises when some interests are considered to be so strong that they trump virtually all other interests and lead to absolute rights. For example, if the interest in staying alive and the interest in going to museums or receiving an education is compared, the interest in being alive clearly is weightier than the other interests. Yet, in some cases, we still think that protecting the life of a few does not justify denying all others rights that are considered less weighty on the individual level. Consider a scenario in which 0.005% of a population suffer from a deadly disease that can be cured with a very expensive medication. Yet, buying this medication would strain the state

[18] I am following Hohfeld's (2001) systematic of rights in which a claim right is a right that imposes a duty on others and thus goes beyond mere liberties that only specify a certain freedom to act for the rightholder.

budget so much that there are no funds left for education or the arts. In this case, we usually think that the state acts wrongly if it defunds schools and the arts in order to save the lives of the deadly ill. Thus, at one point, we start to aggregate interests and allow the weighty interests of the few to be overridden by the interests of the many. If, however, interest aggregation is used exclusively, this leads down a utilitarian path in which almost anything can become a right if only enough people have an interest in it and in which minority or individual interests can be sacrificed for weak majority interests. Therefore, a combination of both approaches is the most plausible way of comparing the weight of different interests. How exactly these two approaches can and should be combined, is a question that goes beyond the scope of the current thesis.[19] However, it is possible to identify certain general ethical constraints on how interests should be weighed and considered.

First, interests in denying others basic rights or resources necessary to satisfy basic interests[20] should not count. For example, the interest to deny a certain group of people, historically women and black people, property rights would not be considered as property rights in modern society are important to individual welfare. Second, aggregations of interests that are not closely connected to basic interests but which lead to the non-satisfaction of interests that are directly connected to a basic interest are ruled out. For example, if many people want hotels on tribal land that is important for the cultural survival of a small indigenous group, then the aggregated interests of all hotel supporters should not be allowed to outweigh the interests of the small group in their tribal land. Third, if interests that are equally connected to basic interests clash, then the stronger rights interest wins out. The interest in a right is stronger if, for example, for one right claimant the good in question is not substitutable while it is substitutable for the other right claimant[21] or if for one right claimant more than one basic interest is connected to that

[19] For an overview of possible ways to approach this question, see List (2013) and for a proposal on how to constrain aggregation if interests see Voorhoeve (2014) and Rüger (2020).

[20] The next section will define what counts as a basic interest.

[21] I here follow Armstrong's analysis of substitutable resources. Resources, including land, can be non-substitutable in two ways (C. Armstrong 2017, 5, 16). First, they can be non-substitutable for certain persons because they play a central and non-substitutable role in their specific life plans (C. Armstrong 2017, 113–16). For example, someone's plan to maintain their family home and pass it on to their children makes that home a non-substitutable good. Armstrong speaks here of claims based on attachment. A resource or good can also be non-substitutable if it is necessary to meet a basic human need and nothing else can meet that need (C. Armstrong 2017, 124/5). However, this second non-substitutability differs from the first in that the first one expresses the non-substitutability of a certain resource *token*, someone is attached to that particular resource (e.g. the family home).

right. For example, there might be two claims to fertile land. Both claimants need the land for subsistence. However, group A is also culturally attached to the land. They use the land to satisfy their subsistence needs and to maintain their culture. Thus, they have two basic interests, subsistence and cultural survival, attached to the land and the land is not substitutable for them. If group B has no attachment to the land, then it is substitutable for them as a source of welfare. They could also satisfy their subsistence need with a different piece of land or possibly even without land if they were to change their occupation. Given that group B could satisfy their subsistence needs even without access to that particular piece of land while the attachment interests of group A could not be satisfied without this particular land, group A's claim is stronger.

The thesis mainly uses the non-aggregated way of comparing interests because none of the interests discussed have an absolute trumping power. Thus, the potential counter-intuitive consequences of using a non-aggregative interest comparison are not a problem here. In contrast, the problem of an aggregative account is especially pertinent to the question of indigenous rights. As Asch (2018) for example argues, many historic injustices done to indigenous people can be attributed to politicians prioritizing the interests of settlers because they were the voting majority. An aggregation of interests holds the same risk of justifying the perpetuation of oppressing or exploiting the indigenous minority, simply because their aggregated interests might be outweighed by the majority's aggregated interests. In any case, the main argument of my thesis focuses on introducing the interest in the recognition of one's moral status equality as an interest that should be taken into account when weighing competing land and self-determination claims. This argument applies no matter which way of weighing interest one uses. Choosing to weigh aggregated interests might lead to different outcomes to those described in the thesis's articles, yet the main argument that the interest in status equality should be considered as an important interest when weighing different rights still stands.

3.2. Conceptions of welfare

The last sections have sketched what it means that an interest in a right justifies burdening someone else with the corresponding duty. It is still open, however, which interests are worth being considered for a right in the first place and how the weight of interests is to be determined. The thesis relies on a broadly welfarist theory in so far as it considers interests that are important

The second one expresses the non-substitutability of a certain resource *type*. For example, humans need access to clean water and the resource 'clean water' cannot be substituted by another resource such as 'food'. Yet, where that water comes from in particular is irrelevant as long as it is clean water.

for the well-being of a person to be the proper object of rights. Welfare or well-being can be understood in three broad ways (A. Moore and Crisp 1996): welfare as satisfaction of desires, welfare as preference satisfaction, and welfare as an objectively good life. Desire satisfaction theories count anything that brings pleasure to one's life as welfare. Preference satisfaction theories understand welfare to consist in getting what one wants. Anything that an agent values, whether it brings enjoyment or not, contributes to their welfare. Preferences that are strongly valued and central to one's life are weightier than preferences that are only weak or do not play a central role in one's idea of having a good life. Derek Parfit's (1992, 496–98) distinction between local and global preferences is helpful in differentiating these two theories.

According to Parfit (1992, 497), a 'preference is global if it is about some part of one's life considered as a whole, or is about one's whole life.' Local preferences, in contrast, refer to a person's preferences, independent of how the role these preferences play in one's whole life or how they relate to the preferences that one has about how one's life should go. Preference satisfaction accounts of welfare[22] refer to global preferences whereas desire satisfaction theories relate more to local interests. Pure desire satisfaction of welfare can easily lead to counterintuitive and problematic conclusions and therefore will be left aside in the thesis. The advantage of preference satisfaction theories is that they are neutral towards different conceptions of the good. The disadvantage is that there is no common metric with which to compare different people's welfare. Furthermore, a general rights theory cannot take into account all individual, actual preferences as a) they are impossible to know and b) they are ever changing whereas general rights should be rather stable to guide expectations. Lastly, objective welfare theories declare certain things to be objectively essential to welfare. Nussbaum's list of capabilities falls into this category as it details what is necessary for any human life to go well (cf. Nussbaum 1995). The advantage of such objective welfare theories is that they provide a universal metric for weighing interests. The disadvantage is that such theories potentially are less accommodating of different conceptions of the good, favoring one over the other.

With regards to the thesis topic, the disadvantages of both the objective and the preference satisfaction account of welfare are important to consider. On the one hand, the central rights conflicts that the thesis looks at occur between indigenous people and the majority population or state. If these rights conflicts are to be settled by weighing how much the respective rights

[22] Parfit (1992, 494) further distinguishes between preference hedonism and a success theory of preference satisfaction. As the thesis does not centrally rely on a preference satisfaction theory of welfare, I will not further discuss these variants.

and interests contribute to welfare, then one needs a metric for comparison under conditions of value pluralism. Dworkin (1981) has tried to solve the problem with a market mechanism. The idea is that the strength of preferences can be measured by how much people are willing to pay for a certain good. There are, however, two problems with using a market mechanism to make preferences comparable. First, it presupposes that initially everyone has the same amount of resources with which they can make bids in the market. The second and more serious problem is that markets are man-made and thus always also express culturally relative values. This problem becomes especially clear when market mechanisms are applied to land and resources.

Different cultures have different views on what is a resource that can be sold in the first place. According to Kolers (2009, 56), 'the subjection of all persons and all ways of life to the same egalitarian order forces onto everyone a single relationship to every kind of thing, and a single sort of role in the political economy – namely, universal commodification and market consumption, respectively.' Such universal modification conflicts with how many indigenous peoples see land and everything on it. To Maori, for example, 'land was not something that could be owned or traded. [They] did not seek to own or possess anything, but to belong. One belonged to a family that belonged to a hapu that belonged to a tribe. One did not own land. One belonged to the land.' (Durie 1987, 78) If land is reduced to its market value, 'land becomes devoid of its agency and meaning-making potential and instead becomes objectified as a quantifiable good we live on rather than a living entity we live with and generate knowledge through.' (Stark 2018, 182) Moreover, as market demand sets prices, resource-rich lands will become especially expensive. Considering that indigenous homelands are among the most biodiverse and resource-rich places, indigenous peoples would have to pay high prices to 'save' their lands from being sold for resource extraction and industrialization. Kolers (2009, 53/4) describes the ensuing dilemma as follows:

> 'The misfortune of wanting land for cultural reasons, when others want it for economic reasons (which the Bedouins do not, by hypothesis, share), would require the Bedouins to overspend just for a place to live that supports their livelihood. Having done so, the Bedouins would be required to change their lifestyle, drilling the oil in order to make up for necessities they could not afford because their habitat was extraordinarily expensive. But it was precisely to avoid changing their lifestyle that they bid on that land in the first place. Just as Dworkin put persons

> off-limits to avoid the slavery of the talented, this global auction must put land off-limits, to avoid what we might call the slavery of the resource-rich.'[23]

Yet, if land is put off-limits, how then should we resolve land conflicts in which each party has legitimate and weighty interests in the land? Value pluralism thus poses a serious obstacle to comparing and weighing different subjective preferences across cultures. On the other hand, objective welfare conceptions run in similar problems. Indigenous people and the majority population often have very different ways of life, value systems, and conceptions of the good. Historically, such differences, coupled with an assumedly objective welfare account, have often provided a justification for colonialism. European powers adopted a welfare theory in which the European way of life was seen as the universal pinnacle of welfare. This view justified any 'civilizing missions' that forcefully assimilated indigenous people as serving the welfare of indigenous peoples themselves. International lawyer James Lorimer, expressing a common opinion during colonial times, thus argued that

> 'the moment that the power to help a retrograde race forward towards the goal of human life consciously exists in a civilised nation, that civilised nation is bound to exert its power; and in the exercise of its power, it is entitled to assume an attitude of guardianship, and to put wholly aside the proximate will of the retrograde race. Its own civilization having resulted from the exercise of a will which it regards as rational, real, and ultimate, at least when contrasted with the irrational, phenomenal, and proximate will of the inferior race, it is entitled to assume that it vindicates the ultimate will of the inferior race – the will, that is to say, at which the inferior race must arrive when it reaches the stage of civilization to which the higher race has attained.' (cited in Keene 2002, 114)

With this historical background, any objective account of welfare must be especially cautious to be sufficiently neutral towards different conceptions of the good and ways of life. One way

[23] As the recent dispute around the Coastal GasLink pipeline on traditional Wet'suwet'en shows, Kolers' Bedouin example is a very real conflict in today's world. Moreover, it engenders not just conflicts between indigenous peoples and settler states but also within indigenous peoples. In the Wet'suwet'en protests (Cousins 2020), elected band councils chose to allow the construction of a pipeline on their traditional territory in exchange for benefit agreements supposed to help their communities. Hereditary chiefs, in contrast, opposed the pipeline as its construction destroyed traditional cultural sites that they deemed important for the cultural survival of their communities. Thus, the tribe was pressured into deciding whether they would allow the destruction of their cultural heritage or the continued impoverishment of their people.

of doing this, is to aim to identify certain interests that are important to a wide range of preferences. Nussbaum's list of capabilities is one proposal to find such an objective list of rights that are central to diverse subjective welfare preferences (Nussbaum 1995). Welfare comparisons are easy if the list is concrete and orders the different goods lexically. Concreteness here means that it specifies how certain goods are obtained. For example, the right to education can be made more concrete by specifying when, for how long, and in which form someone should receive education, e.g. from the age of six for at least seven years in a public school that teaches the basics of reading, writing, maths, and sciences. Lexical priority expresses which goods take absolute priority over others. For example, the right to education could be considered less important than the right to physical integrity and more important than the right to paid holidays. Thus, everyone's right to physical integrity should be ensured first, afterwards everyone's right to education, and at last everyone's right to paid holidays. Moreover, the list would specify what exactly each right entails and thus when it is fulfilled.

Two problems arise with such lists, however. First, a list that is very concrete either must be very long to account for all possible contextual variabilities or it will necessarily privilege certain interpretations over others. The specification of the right to education given above, for example, will necessarily exclude other forms of education. Learning in hunter-gatherer societies often is largely self-directed, non-institutionalized, non-hierarchical, and imparts skills needed to participate as an equal in a hunter-gatherer, and not a modern, industrialized society. The goal of education in both societies is the same, yet the methods and contents learned differ in accordance with the kind of society in which the education takes place. Understanding the good of education in one specific, concrete manner thus eclipses other, valuable understandings of it. For example, to understand the human right to primary education along the lines of Western primary education has led to indigenous children being taken away from their remote or nomadic communities to attend boarding schools. Even if these boarding schools were not rife with discrimination and abuse, they still sever children from their primary social community and, while giving them an education largely useless in their home community, deny them the education which would enable them to lead a successful life within their own cultural community.

The second problem with concrete and lexically organized lists of welfare components lies in the determination of what has lexical priority. Generally, the more central an interest is to well-being, the weightier that interest is. Many rights might be *pro tanto* rights which can be limited, suspended or overridden if they conflict with other rights that protect more important interests.

For example, property rights in general are justified because they protect a weighty human interest in being able to pursue their plans by having control over certain stable things, their property. Yet, it is usually also acknowledged that property rights can get limited to ensure that basic survival needs can be satisfied (cf. Mancilla 2016; Simmons 2016). While there might be broad consensus on some lexical arrangements, there might be significant disagreement about the lexical ordering of others. For example, there might be a disagreement about whether environmental preservation or economic development takes priority or whether collective cultural attachments or individual life plan attachments are weightier. Here again, any lexical ordering will necessarily privilege one value framework while ignoring all others.

Therefore, the thesis embraces a thin, non-lexical list of welfare components. While it identifies three basic interests that are central to human welfare, it does not assume that they have a strict lexical ordering. Instead, it allows that individual preferences and varying contexts might shift the relative weight of the different basic interests. For example, two of the basic interests that the next section identifies are the interest in individual self-determination, understood as the interest in being able to pursue one's life plans and in living in accordance with one's values, and the interest in having one's minimal needs satisfied. While it is clear that in most cases, having one's basic needs met is a precondition for pursuing one's life plans – it is hard to e.g. pursue an education when one is on the brink of starvation – there are also cases in which pursuing one's life plans might mean to give up on the satisfaction of (at least some of) one's basic needs. For example, indigenous peoples are sometimes confronted with the choice of remaining in poverty but protecting their ancestral lands or allowing resource extraction on their land which destroys their cultural sites but brings money to meet their members' basic needs. While many indigenous people choose resource extraction in such a scenario, some also resist it - even if it means that no money will come to their community. They choose continued poverty in order to be able to live in accordance with their traditional values and to preserve their culture for the next generations.

While some might think that this choice is irrational, the thesis does not make this judgement but rather allows individuals and groups to determine for themselves how they weigh these basic interests. The thesis also does not take a definite stand on whether these welfare components should be distributed in an egalitarian fashion or whether it is enough that everyone has a certain minimally adequate access to each of these components.[24]

[24] If the goal is an egalitarian distribution of welfare, the problem of welfare comparison in the context of value

3.3. Three basic interests: Basic needs, self-determination, and status equality

In the thesis, I will assume that the following interests are shared by people with diverse conceptions of the good: an interest in having one's basic needs met (basic needs satisfaction), an interest in being able to pursue one's life plan (individual self-determination), and an interest in being recognized as having equal moral status (moral status equality). Having one's basic needs met is key to survival and a precondition for any kind of well-being. Schuppert (2013, 6) defines basic needs 'as needs which possess absolute necessity for the existence of the needing being, as the needing being cannot be and do without the basic need being met.' As humans share a common biology, there is a certain universality to what a basic need is (cf. Wiggins 1998, 15/6). For the purposes of this thesis, basic needs will be seen as being related to minimal physical and psychological well-being.[25] Henry Shue's argument for a basic right to subsistence and physical security is illuminating in that respect. It can be read as an argument for rights that protect minimal needs against what he calls 'standard threats' (Shue 2020). With regard to the question of what basic needs are, his concept of basic rights as rights that are necessary to enjoy other rights. Basic needs can analogously be thought of as needs that must be satisfied in order to successfully pursue further interests and preferences.

The interest in individual self-determination refers to the interest in being able to pursue one's chosen life plans. It gives rise to the right to be free from interference with one's actions as long as these do not impose unjustifiable burdens or harms on others. Often, political participation rights as well as collective self-determination rights of the encompassing group with which one identifies are also instrumental.[26] These rights allow shaping institutions in such a way that they enable, or at least do not obstruct, certain life plans. The interest in individual self-determination

pluralism rises its head again. This problem has led some to conclude that egalitarian approaches to distributive justice are not workable in reality, at least not until the problem of welfare comparability has been solved (cf. M. Moore 2019b, 33; Miller 1995, 106; 1999).

[25] In so far as minimal needs include basic psychological well-being, they also include interests in preserving the *ability* for self-determination. This interest includes protection from anything that would permanently damage one's ability to reason, make plans, and act on one's plans and reasons. Yet, this interest is different from the basic interest in individual self-determination which includes the material and political preconditions to actually exercise this ability. One can preserve the ability for self-determination without ever being able to exercise it.

[26] On the concept of encompassing groups, see Margalit and Raz (1990). Chapter 4 will also discuss what relevant groups are.

also justifies rights to be provided with access to certain goods that enable one to form life plans in the first place. Access to the social bases of self-respect and to one's own culture are core goods in that regard. According to Rawls (1971, 440), self-respect motivates us to pursue our life plans. Self-respect makes us value our chosen life plan and lets us believe in our ability to successfully pursue it. Access to one's own culture is important in two ways. First, Kymlicka (1996) argues that having access to one's own culture is a precondition for individual self-determination. According to him, cultures provide the necessary background for making options valuable to the chooser. Thus, secure access to a societal culture is necessary for forming and pursuing life plans. Second, cultural groups are one kind of group in which individuals can find esteem by their peers. This esteem is one of the social bases of self-respect and confirms to individuals that their life plan is valuable (Rawls 1971, 440/1).

The interest in having one's equal moral status recognized and affirmed is another interest that can be considered to be held by all human beings. Moral status is what includes one into the circle of rightholders in the first place. It signifies that one's wellbeing has intrinsic value and thus that one's interests must be taken into account when deliberating whether something should be a right or not. If one lacks moral status, one's interests are not considered. One is thus excluded from the circle of rightholders. Mills identifies such exclusion as a core feature of liberal racism (cf. Mills 2017). According to him, a racist liberalism that embraces the idea of equal rights was and is possible if some groups of people are not considered persons at all. As personhood traditionally is the signifier for having moral status, the denial of personhood goes hand in hand with a denial of rights as one stands outside of the circle of rightsholders. Consequently, persons have an instrumental interest in being recognized as having moral status because it gives them access to the rights that they need to pursue a good life.

Historically, such exclusion from the circle of rights holders has often been justified with certain groups being irrational or close to animals and thus as being unable to hold rights (Keal 2003). Yet, moral status alone is not enough. Many forms of institutionalized racism, oppression, and exploitation have been based on the assumption that certain groups have moral status but that theirs is lower than that of others (Keal 2003). The assumption of lower moral status then justified giving their interest less consideration. In all these cases, there is an unjustified hierarchy which assigns more rights to the dominant individuals than to the dominated ones. Hierarchies are unjustified if the preferential treatment is not based on one party having weightier interest but on the assumption that a normatively irrelevant feature such as race gives more weight to the otherwise equal interests of one group. Hence, in an interest theory of rights the

recognition of *equal* moral status of humans is important to ensure that everyone's interests are considered equally when rights and duties are weighed against each other.

Once equal moral status is recognized, it explains why interests should be considered on an equal basis. While many might have an interest in their interests being considered preferentially, this interest cannot be justified in an interest theory of rights as it would impose unjustifiable burdens on others, i.e. the duty to have one's interests considered to a lesser extent or not all, on others. All that can be justified is having one's interests considered on an equal basis with others. However, it is important to keep in mind that equal moral status must be acknowledged in the first place. Consequently, the interest in having one's equal moral status recognized and affirmed is a precondition for having all others interests considered. As individual's interests are the basis for collective group rights, the recognition of individuals' equal moral status also is necessary to have equal collective rights. Again, colonial history shows how the denial of individuals' equal moral status directly led to the denial of collective rights, most importantly the right to self-determination and territorial rights. Just as the colonized individuals were denied personhood, the colonized peoples were denied statehood. Thus, the interest in having one's equal moral status recognized and affirmed is a central interest within an interest theory of rights that is based on normative individualism. Within such a framework, it ensure that individuals can hold rights either individually or collectively.

So far, I have proposed that there are three basic interests that are universal both across historical and cultural contexts. First, the interest in having one's equal moral status recognized, second the interest in individual self-determination, and third the interest in having one's basic needs met. What is now remain is to explains how more specific, contextual interests and thus rights can be derived from these universal basic interests. In order to do so, the distinction between basic and derived rights is of use (Liao and Etinson 2012, 15; Griffin 2008, 50). Basic rights are those rights that relate directly to the interest that is thought to be the very core of a right. These rights are often rather abstract and are thought of as timeless and independent from institutions. In contrast, derived rights are neither timeless nor institution-independent. They are specifications of basic rights and state more precisely what needs to be done at a certain time and under certain circumstances to fulfill a basic right. As interests give rise to rights, there is a similar distinction between basic interests and derived interests as there is between basic and derived rights. For example, the basic interest in individual self-determination grounds an abstract, basic right to self-determination. In modern democracies, the basic interest in self-

determination will give rise to the concrete but derived interest in having a vote. In turn, this derived interest in voting will give rise to a derived right to vote.

The following chapter will discuss which basic and derived rights and interests are central in different territorial rights theories and what this means for the question of rights supersession in settler states. First, however, a few more remarks on the reason for choosing the specific framework presented here are in order.

3.4. Why this framework?

The adoption of the presented framework has several advantages for the task of this thesis. In the case of indigenous rights there are many overlapping rights claims of indigenous peoples, settler states, and settler descendants due to historic injustices. These competing rights claims are one of the central questions that a theory addressing indigenous rights has to answer. The chosen framework offers a way to adjudicate competing rights claims by comparing how closely connected these claims are to three basic interests identified above. Another problem that arises in the context of indigenous rights is the question of the comparative weight of group and individual rights. Often indigenous people claim land and self-determination rights as a group while the claims of settler descendants are phrased as individual rights to land and property. Adopting a collective conception of group rights based on normative individualism makes it easier to adjudicate such clashes between individual and group rights. To compare the strength of a conflicting group and individual right, one can compare the strength of the individuals' interests that each right protects. As the comparison of interests takes place on the level of individuals, it is not necessary to make a further decision on whether a group or an individual has a higher moral standing.

For example, if a tribe is seen as an entity with moral standing that is independent from that of its members, it is difficult to compare the tribe's interest in land rights with the interest of an individual claimant. Yet, if in both cases the interests can be reduced to those of individuals, these interests are more directly and more easily comparable. Moreover, adopting a collective view of group rights allows to give certain group rights the status of human rights if they are central to the protection of basic human interests (cf. P. Jones 1999). The possibility of expressing indigenous rights as human rights is in accordance with UNDRIP's first article. It states that "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law." While

there is still an argument to be made why indigenous rights are human rights, the collective conception of group rights at least opens up the possibility that they can be.

Cara Nine (2012, 19/20) points out that an interest theory of rights coupled with a collective account of group rights can better account for a group's right to self-determination. She stresses that some groups are unable to act as a corporate agent, e.g. because their political organization and activity is oppressed. In a corporate conception, the absence of group agency would mean that there is no group that can possess the right to self-determination. In contrast, in the collective account of group rights, the interests of individuals explain why a group of individuals can hold a joint, that is collective, right to self-determination even if they are currently not able to exercise it. This point is especially relevant in the context of indigenous rights as many indigenous peoples' capacity to be self-determining has been undermined by colonial policies and oppression. An individualistic interest theory of rights can show why these peoples still have a *pro tanto* right to self-determination. Moreover, if they have this *pro tanto* right and cannot exercise it because of a historic injustice, it also gives reasons to oblige the former oppressors to help indigenous peoples build the capacities to become self-determining.

A third issue with respect to indigenous rights is that many indigenous people have life plans, conceptions of the good, and ethical frameworks that vary between indigenous people but also often are very different from 'Western' worldviews. Thus, in order to weigh interests it is essential to adopt a framework that is not culturally discriminatory or biased. The chosen framework tries to achieve this by combining an objective list of what minimal conditions for a good life are and otherwise leaving room for more subjective ideas of what constitutes a good life. Therefore, individual self-determination is tied to the ability of making and pursuing a variety of plans and conceptions of the good and not to a thicker conception of autonomy or an objective account of what valuable life plans are.

Lastly, the framework explains why the recognition of status equality is at the heart of both individual and collective rights and thus shows why the public affirmation and recognition of equal moral status is 1) a weighty interest and 2) must play a central role in addressing historic wrongs that were justified through a denial of such equal moral status/ that were an outgrowth of the denial of such equal moral status. As the denial of status equality justified the taking of indigenous lands and the denial of indigenous self-determination, the restitution of land and self-determination is not just a matter of rectifying material losses but also an expression of recognizing the equal moral status of indigenous peoples.

There are several ways in which one might still think that the proposed framework is unable to accommodate indigenous views. First, it relies on an individualistic rights framework whereas many indigenous peoples think about land not in terms of rights but in terms of relational duties. The reason for adopting a rights framework is that the conflicts about indigenous rights take place between indigenous people and a majority which thinks in terms of rights. The thesis is meant to settle disputes between these two groups. Therefore, in order to do justice to both sides, a way must be found to translate the different worldviews into that of the other (Turner 2006). I hope that the adopted theoretical framework enables this translation to happen. Similarities between the ultimate grounding of indigenous ethical frameworks and the framework adopted here give reason to think that the proposed rights-centric framework does not preclude indigenous understandings. The notion of respect is central to many indigenous relational ethics (Whitt, Roberts, and Grieves 2001, 274; Trosper 1995, 67). Respect is understood as the recognition that every being has intrinsic worth and should be honored for that (Whitt, Roberts, and Grieves 2001, 732). The way that this honoring is expressed is through ceremonies but most importantly through giving the weight to the well-being and flourishing of any being (Wall Kimmerer 2018, 31). Indigenous ethical systems also value agency highly and ground duties of respect and reciprocity in it (Borrows 2018; Stark 2018, 193).

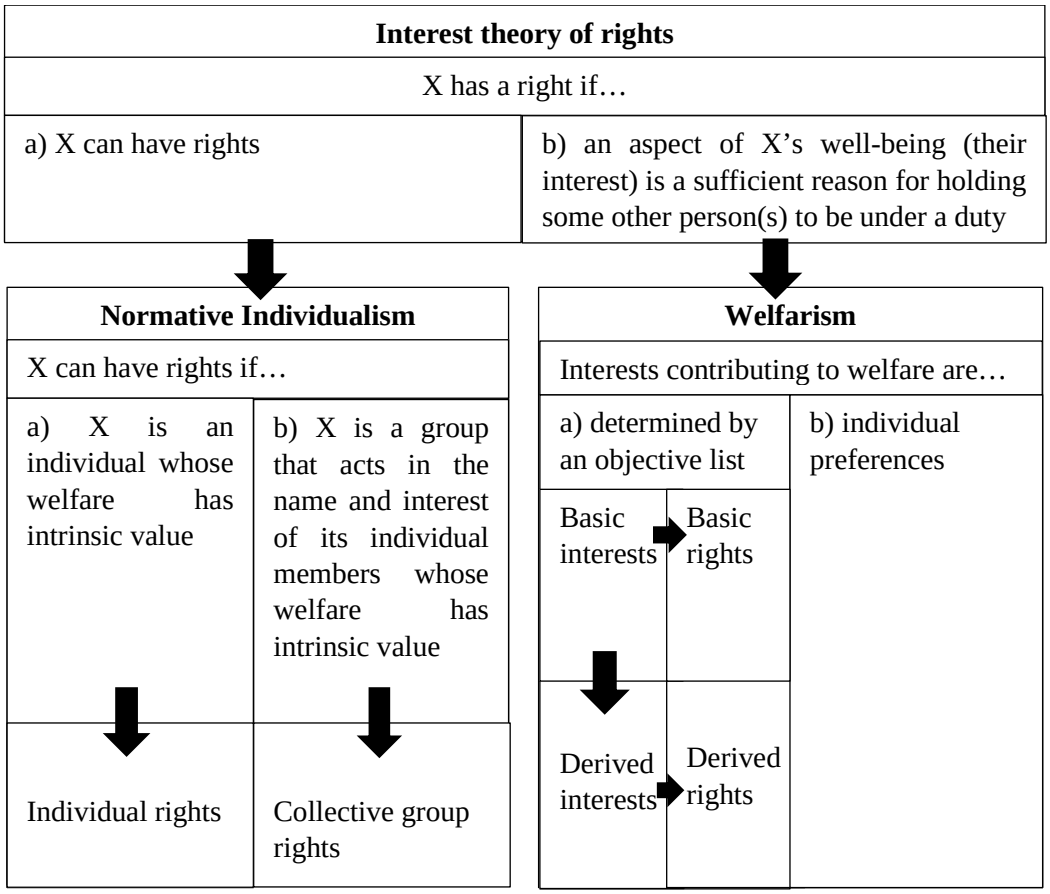
Relational duties arise out of this duty to respect the intrinsic worth and agency of all beings with whom we interact. This idea that we need to take into account the interests of those whom we affect with our actions also lies at the core of equality understood as the equal right to have one's interests considered equally and that the same interests weigh the same. The idea that each being deserves the same respect even though they have different ways of living and forms of flourishing is mirrored in the interest of self-determination understood as an equal right to pursue one's own conception of a flourishing life. Thus, while indigenous people speak of relational duties and liberal theory of rights to equal moral status, self-determination, and well-being both concepts seem to have common ground in the underlying values and goals that are pursued. Both views thus start from individual interests but differ in so far as indigenous views highlight the duties this imposes on others while an interest theory stresses which rights arise from these interests.

This is not to say that there are not still significant differences between indigenous and non-indigenous worldviews. One of these differences is the question of who counts as a potential rights bearer or who is owed the kind of respect described above. Indigenous people often assign non-human beings intrinsic moral value and equal standing with humans (M. P. Nelson

and Vucetich 2018, 31). The thesis focuses exclusively on human interests and rights and so might seem to be hostile to the more inclusive indigenous view. However, the main reason for focusing on human interests is that the thesis deals with the question of how rights conflicts between people are to be resolved. The thesis' main argument that different rights and resources can become status-conferring relies on the human ability to interpret something, a right or a resource, as a sign for something else, namely the status equality of the right bearer. As far as I know, animals do not possess this ability so that the thesis' argument is not applicable to them. So while the thesis does not engage with the question of how human and non-human rights should be balanced and integrated into a theory of territorial rights, the framework leaves it open to include non-human animals as rights bearers in a more general theory of territorial rights.[27]

This chapter has argued that an interest theory of rights is well-suited to addressing rights conflicts between indigenous peoples and settler states. It has furthermore discussed the distinction between basic and derived interests and rights. It has identified three basic interests that are tightly connected to human welfare – the interest in individual self-determination, in recognition of moral status equality, and in having one's basic needs met. The next chapter will analyse which basic and derived interests current territorial rights theories use to justify land and self-determination rights. It will show that justifications of these rights are based on the basic interest in individual self-determination and the basic interest in having one's basic needs met while almost entirely disregarding the third basic interest in having one's moral status equality recognized. The next chapter will start to point out why this interest is relevant in the context of indigenous rights in settler states. The last chapter will continue this discussion by giving an overview of the three core articles of the thesis that explain why it is important to take the interest in recognition of status equality into account when justifying indigenous rights in settler states and that will present a framework for resolving rights conflicts between settler descendants and indigenous peoples.

[27] For a proposal on how to include animals in liberal political theory, see Donaldson and Kymlicka (2013).


Interest theory of rights
X has a right if…
a) X can have rights
b) an aspect of X's well-being (their interest) is a sufficient reason for holding some other person(s) to be under a duty
Normative Individualism
X can have rights if…
a) X is an individual whose welfare has intrinsic value
b) X is a group that acts in the name and interest of its individual members whose welfare has intrinsic value
Individual rights
Collective group rights
Welfarism
Interests contributing to welfare are…
a) determined by an objective list
b) individual preferences
Basic interests
Basic rights
Derived interests
Derived rights

4. Territorial rights theories and basic interests

This chapter analyzes which interests current territorial rights theories use to justify land and self-determination rights. It will show that interests that justify land and collective self-determination rights are derived from two basic interests, namely the interest in individual self-determination and the interest in having one's basic needs satisfied. Basic interests here are understood as interests that are universal and context-independent, as chapter 3 has explained. The territorial rights theories discussed sometimes appeal directly to one of the basic interests and show how in the current political and social context territorial rights protect and satisfy these basic interests. For example, Nine appeals to the necessity of state jurisdictional rights in order to satisfy individual basic needs under conditions of scarcity and in the absence of another actor that could resolve collective action problems. Other times the theories appeal to derived interests that are specifications of a basic interest. For example, the interest in having a stable place to live in (residency or occupancy rights) is seen as a precondition for pursuing one's life plans. Thus, this interest is directly connected to the basic interest in individual self-determination as it specifies a precondition for individual self-determination.

The discussion will also show that the third basic interest, recognition of equal moral status, only plays an implicit, procedural role and not a justifying role. All discussed theories assume moral status equality and therefore that interests must be weighed in an equal manner. Yet, they do not view land and self-determination themselves as expressing moral status equality. By taking the recognition of equal moral status for granted, the theories cannot account for cases in which certain groups were *de facto* denied this recognition and thus have a special interest in having their equal moral status affirmed in the present. As the thesis' core articles argue, they thereby overlook an important interest associated with indigenous land and self-determination rights in settler states, namely the moral status-conferring function of indigenous rights. This oversight has consequences for the discussion of indigenous rights in settler states today. When discussing rights conflicts between settler descendants and indigenous peoples, the theories only compare the respective interests that are connected to individual self-determination and having one's basic needs met. They thereby try to make an all-things-considered judgment about whose rights should prevail without actually considering all things, namely they neglect the status-conferring function of indigenous land and self-determination rights. Consequently, the conclusions about the possible supersession of indigenous land rights are faulty.

The next chapter and the thesis's three core articles will explore this argument in more detail. The task of this chapter is to give an overview of some of the most prominent territorial rights theories and to show that none of them explicitly considers how land and self-determination rights can be connected to the interest in recognition of one's moral status equality. Both the theories discussed and my own argument are situated in a specific historical, political, and social context which gives rise to the derived interests and rights discussed. This context is characterized by five features. 1) Currently, the world is divided into states which also are the main actors in the international order. States are territorially defined and hold ultimate political authority over people on their territories, that is, states have sovereignty.[28] 2) The current system was preceded by a colonial system in which mainly European states possessed internationally recognized sovereignty while territories and people outside of Europe were subjected to the political authority of European powers (cf. Keal 2003; Keene 2002; Daniel Philpott 2001; Tuck 2009). 3) This colonial past still has effects today. In some cases, these effects lead to continued colonial relations (cf. Getachew 2019; Anghie 2005). 4) Human rights protect the most basic needs and interests of humans in the current world (cf. Shue 2020). 5) Nationalism is an influential concept in today's world. Many people understand their own identity in terms of nationality and many groups that make claims to sovereignty, land, and self-determination couch these claims in nationalistic terms (cf. Gellner 1983; Anderson 2016; A. D. Smith 2000).

The following sections discusses five prominent territorial rights theories presented by Cara Nine (4.1), Anna Stilz (4.2.), Margaret Moore (4.3.), David Miller (4.4.), and John Simmons (4.5.). The last section (4.6.) summarizes how territorial rights are related to the basic interest in individual self-determination and in having one's basic needs met and which derived interests connect the individual basic interests with the collective rights to land and self-determination. Lastly, it will start to introduce the idea that colonialism gives rise to a derived interest in having one's equal moral status recognized through land and self-determination rights.

4.1. Cara Nine: A collectivist Lockean theory of territorial rights

Cara Nine defends a collectivist approach to the traditionally individualist Lockean theories of territorial rights. In her theory, territorial rights are conceptualized as jurisdictional rights over

[28] I am following Philpott's description of the current international state system (Dan Philpott 2020; Daniel Philpott 2001). He also provides an overview of earlier notions of sovereignty that were distinct from the current one. Two differences that are relevant here is that earlier sovereignty was not necessarily territorial and that nationalism was less prominent.

a territory and as collective group rights. The individual members have an interest in their collective's territorial rights which gives the collective its moral status as a rightholder (Nine 2012, 15). The individual interests on which the territorial rights of the collective are based are individual self-determination, including political and material control over one's environment (Nine 2012, 34), and well-being (Nine 2012, 12). Together, these two interests cover what Nine (2012, 103) understands as individual basic needs. The satisfaction of these basic needs both justifies territorial rights and creates criteria for the exercise of territorial rights. Accordingly, groups only have a justified claim to territorial rights if they exercise them so that their members' individual basic needs get satisfied. Nine (2012, 67) calls this the criterion of minimal justice. An additional criterion for the claim to territorial rights is that the members of a group share a conception of justice. This criterion gives a group the political legitimacy to make and enforce jurisdiction over its members (Nine 2012, 68). If a group satisfies both criteria and has the wish to be politically self-determining, then it is a collective and can hold territorial rights (Nine 2012, 13/4). The two criteria of minimal justice and political legitimacy are connected to each other and territorial rights in the following way.

A group must satisfy its members' basic needs to satisfy the criterion of minimal justice. To do so, it creates legislation that organizes the individual members' actions and resource use in a way in which everyone's basic needs are met (Nine 2012, 82). Legislation contributes to the satisfaction of basic needs in several ways. It enforces and adjudicates property rights that allow individuals to pursue their own plans (Nine 2012, 48). Property rights are essential to the pursuit of plans, and thus to individual self-determination, because they ensure that people have stable access to goods so that they can include them reliably into their long-term plans (Nine 2012, 35). Property rights also create freedom of action as individuals can decide what to do with their property, free from the influence of others. Legislation can also be used to solve collective action and coordination problems so that for example a common infrastructure, health system etc. can be build to help satisfy basic needs (Nine 2012, 47, 31). Additionally, legislative activity creates institutional and legal frameworks that enable individuals to cooperate fruitfully with each other (Nine 2012, 48, 88). Thus, the jurisdictional activities of the collective create value in a territory because the rule of law allows individuals to meet their basic needs, including the need to act autonomously. The collective thereby establishes (minimal) justice, understood as the satisfaction of individual basic needs, in a certain territory (Nine 2012, 89).

While jurisdictional activity of the collective enables individuals to meet their basic needs, it also circumscribes individual freedom. Laws and policies limit as well as incentivize particular

ways of acting. Therefore, individuals' individual self-determination seems to be in tension with being under a political authority. Nine proposes to see the collective group as the mediator between individuals and political authority (Nine 2012, 51). If the jurisdictional authority is held by a collective whose members by definition share values and a conception of justice, then the interest in individual self-determination can be reconciled with being under a jurisdiction because the individual members identify with the collective that exercises power over them (Nine 2012, 64/5). Individual and collective self-determination thus become connected which gives the collective's jurisdictional activity political legitimacy. Jurisdictional rights thus allow a group to satisfy its members' basic needs and the added criterion of political legitimacy ensures that it does so in a way that is consistent with the conception of justice that its members share. If a group satisfies its member's basic needs in accordance with their shared conception of justice, then it has a general territorial right. The core of the territorial right is the right to jurisdiction over people and resources on a certain territory. The jurisdiction over people is justified when the political authority represents the interest and values of the collective, that is, when it possesses political legitimacy.

The jurisdiction over land and resources is justified because it is a precondition for satisfying individual basic needs (Nine 2012, 31) and makes it easier for the group to realize its conception of justice (Nine 2012, 48, 64). Having jurisdiction over a particular territory allows a collective to realize its conception of justice without outside interference on that particular territory (Nine 2012, 92/3). Through the collective, individuals thus have indirect control over the resources and property rights that structure the environment they live in (Nine 2012, 109). Such control over one's environment and property rights is important for the individual self-determination of the collective's members. Thus, the interest in individual self-determination and having one's basic needs met justify a general jurisdictional right over a territory. In Nine's account, jurisdiction over specific lands and the resources in, on, and under them is justified by a Lockean collectivist account. There are two main Lockean elements. First, Nine embraces an adapted version of the Lockean proviso that one must 'leave enough and as good' for others. The adapted Lockean proviso says that if the existing territorial claims of collectives do not leave any territory for a collective that has lost its territory, e.g. due to climate change, then the territorial rights of other collectives can be limited to free up some territory for the collective whose territory was lost (Nine 2012, ch.8). In a first step, such a territory-less collective might claim a 'territory where the collective is incapable of institutionalizing justice because (a) there are virtually no inhabitants, or (b) there are inhabitants but no capacity for establishing justice.'

(Nine 2012, 179) If there is no such territory or the land-less collective could not continue their former institutions and way of life in a similar way on that territory, they might get self-determination, but not full territorial rights, on the territory of another collective (Nine 2012, 177, 180).

The second Lockean element is that a group can acquire rights over a territory even without the consent of others. The way that a collective acquires rights over land and resources follows Locke's theory of first acquisition. Rights over land are acquired by labouring the land so that a value that can justify rights is created. Nine, however, gives the traditionally individualistic Lockean theory two twists. First, in Nine's account the labour of the collective, not of the individual grounds territorial rights. Second, this labour does not result in ownership but in jurisdictional rights (Nine 2012, 82/3).[29] The relevant labour is the jurisdictional activity that ensures that the individual members' basic needs, including self-determination, are met (Nine 2012, 82). The labour thus creates justice understood as the satisfaction of basic needs. Justice, in turn, is the value that justifies jurisdictional rights over a territory, and thus territorial rights (Nine 2012, 107). Consequently, a collective acquires territorial rights over the lands in which it has established a stable, legitimate, and just legislative system. Territorial rights over a specific territory therefore only arise gradually as it takes time for such a legislative system to develop.

Once a collective has established territorial rights over a particular territory, however, they continue to exist even if the collective temporarily loses its ability to meet the justice and/ or the political legitimacy criterion (Nine 2012, 14). While an external power might fulfill legislative functions as long as the collective is not able to, it must do so in a way that is just and reflects the conception of justice of the collective. Thereby the external territorial power is bound to respect the same basic interests on which territorial rights of the collective rest: an interest in having one's minimal needs met, an interest in living in a society that provides stable structures and rights that allow to pursue one's own plans, and an interest in living under laws that express, or at least do not conflict with, one's own values and conception of justice. Nevertheless, one important, additional interest of individuals is not satisfied unless the collective is self-determining. This interest is the interest in having political control which is only satisfied when the group with which an individual is identifying holds power instead of an actor who is perceived

[29] However, ownership rights over resources are justified if they are 'necessary for or directly derived from jurisdictional authority.' (Nine 2012, 142)

as alien. The interests that justify territorial rights in Nine's theory thus can be summarized as expressions of the two basic interests in individual self-determination and in having one's basic needs met.

4.2. Anna Stilz: An autonomy-based account of territorial rights

Anna Stilz presents her most recent and most comprehensive views on territorial rights in *Territorial sovereignty – A philosophical exploration* (2019). She proposes a theory that in many aspects is Kantian. At its core stands a commitment to autonomy as the ultimate value that justifies territorial rights. Stilz (2019, 106) understands autonomy as having 'two components: (i) self-directed action that reflects the agent's evaluative and moral judgments, where those judgments are (ii) supported by her authentic reasoning.' Territorial rights are justified through three core values which in turn are based on individual's interest that are preconditions for autonomy (Stilz 2019, 11). The three core values are occupancy, basic justice, and collective self-determination (Stilz 2019, 10). Occupancy gives rise to occupancy rights of individuals and thereby specifies the territory over which a group has jurisdiction (Stilz 2019, 35, 53). The values of basic justice and collective self-determination describe what it takes for a state to have political legitimacy and thus jurisdictional rights (Stilz 2019, 90). Together, occupancy rights and the right to self-determination, constrained by the criterion of basic justice, justify territorial rights (Stilz 2019, 21, 117).

The value of occupancy is related to individuals' interest in pursuing their comprehensive life plans (Stilz 2019, 40). Comprehensive life plans are connected to place in various ways. For example, life plans are based on the relationships one builds in a certain region, on the activities that local conditions favor etc. This connection between life plans and stable occupancy gives rise to two specific interests (Stilz 2019, 44). First, individuals have plan-based interests in occupancy rights and second, they have control interests. Plan-based interests mean that a person is interested in being able to live in accordance with their chosen comprehensive life plan and their values. As life plans are built around place-related factors, the successful pursuit of such a life plan depends on stable occupancy in a place. Control interests mean that a person has an interest in being in charge of how change happens when it has to happen. These two interests give rise to occupancy rights. Occupancy rights are pre-institutional rights held by individuals (Stilz 2019, 39). They are property-like rights in that they give individuals the following rights: 'the right to reside permanently in that place, to participate in the social, cultural, and economic practices ongoing there; to be immune from expropriation or removal; and to return if they leave temporarily.' (Stilz 2019, 35)

According to Stilz, occupancy rights thus enable individuals to pursue their comprehensive life plans and be self-determining agents. They thereby contribute to their well-being and to their autonomy (Stilz 2019, 41/2). However, as they are directly connected to the located life plans of individuals, they cannot be inherited as such. If, for example, a group of people has been expelled from their homeland, they have a right to return in the first generation but lose this right as the life plans of new generations become located in different places while the old homelands become central to the located life plans of the new inhabitants (Stilz 2019, 76, 79, 80). The only two exceptions Stilz allows is when later generations cannot establish life plans in a new place, e.g. because they are permanent refugees or because their religion and culture is tightly connected to their original homelands (Stilz 2019, 81).

The value of basic justice reflects what Stilz calls the 'taker' interest of individuals (Stilz 2019, 93). Individuals have an interest in being part of a state that provides stable and efficient rule of law that protects basic rights, including property rights. Basic rights, according to Stilz (2019, 113/4) comprise security rights that protect freedom and personal integrity, subsistence rights, core personal autonomy rights like the freedom of conscience or property rights, and the preconditions of collective self-determination as for example the right to freedom of expression or free association. The value of basic justice is connected to autonomy because it protects the preconditions for autonomous agency (Stilz 2019, 114). It also allows individuals to rely on a stable framework of social, political, and legal institutions when making and pursuing plans. They thereby can form expectations based on the state's rule of law.

The value of self-determination lies in what Stilz calls the 'maker interest' of individuals (Stilz 2019, 94). She (2019, 10) states 'Collective self-determination, on my account, serves individual interests, particularly interests in *self-direction*, in establishing social order through our own free agency, and *nonalienation*, in being governed in a manner that reflects our convictions about how society should be arranged.' Individuals are interested in perceiving themselves as 'makers' of the laws that they are subject to (Stilz 2019, 132). If they can affirm the rule of law, then the coercion that the state exerts on them does not feel alienating and in conflict with the individual's autonomy (Stilz 2019, 100, 125). Instead, the individuals understand the political coercion as being in their own interest because it helps to further values and plans that they themselves hold (Stilz 2019, 121/2). Stilz does not assume that individuals must actively participate in the political process or strongly identify with the state. Rather, for an individual's maker interests to be fulfilled, it is enough that they are not alienated from the political power, that is they must only minimally affirm the state (Stilz 2019, 94). If a state does not reflect at

all the interests and values of its members, then there must be a procedure with which the holders of political power can be exchanged (Stilz 2019, 128). Moreover, if a group feels persistently alienated from the state's rule and can create basic justice on its own on a territory legitimately occupied by its members, then this group has a right to split from the existing state and become independent (Stilz 2019, 116).

The Kantian aspects of Stilz's theory are threefold: First, she understands individuals to have a duty of justice to submit to some political authority that can create justice. People who accept that duty, she calls cooperators. In her theory, only cooperators who are persistently alienated from their current state have a right to found their own state. Non-cooperators, in contrast, can be coerced to join a state even if they feel deeply alienated by it. Second, Stilz assumes that a state is necessary to establish stable property rights. In a pre-institutional setting, individuals can only have non-inheritable, primitive rights of occupancy. Third, her autonomy concept is Kantian and thus demands that our plans are reflected upon and rationally embraced by us. Stilz derives the three values that justify territorial rights from interests that she sees as essential to autonomy. However, most of her arguments also work with a much thinner definition of autonomy as the interests can also be understood as weighty and valuable interests apart from their role of enabling Kantian autonomy. As Stilz herself says, the reflected choice of plans is not necessary to ground a strong interest in being able to pursue one's plans and in having a stable place in which to live (Stilz 2013, 337). The interest in pursuing one's plans would then be connected to our well-being instead of to autonomy (Stilz 2019, 41). Likewise, one can argue that we also have a strong interest in living in accordance with our values and in having control over our environment because it prevents us from feeling powerless, alienated, and externally controlled. Thus, the three core values Stilz identifies together with the interests in which she grounds them can be derived from the more basic interest in (Kantian) autonomy as well as from a thinner conception of individual self-determination together with an interest in basic well-being.

4.3. Margaret Moore: A political theory of territory

Margaret Moore introduces an approach to territorial rights that rests on the value of collective political self-determination and relational values (M. Moore 2017a, 6). Her justification of territorial rights proceeds in two steps. First, she explains how a group comes to have rights to a territory, second she explains how a group can get jurisdictional rights over that territory. To explain rights to a territory, Moore relies on the notion of individual residency and collective occupancy rights. Residency rights are individual rights to settle an unoccupied place and to

remain in that place and so that one's relations and plans connected to that place are not disrupted (M. Moore 2017a, 36, 39). An individual has a right to residency in the place where they have built relationships that structure their expectations and give value to their life and endeavours (M. Moore 2017a, 37). The relevant relationships can be with persons, for example we make friends and build a social network with the people in our vicinity, but also with the place, for example, particular places can become the foundation for place-specific activities like farming, and the structures it provides, for example we might come to rely on our neighbourhoods schools, churches etc. Moore holds that these relations have intrinsic and instrumental value (M. Moore 2017a, 38). They have intrinsic value because they allow persons to realize relationship dependent goods (M. Moore 2017a, 64).

They have instrumental value because such relations give rise to legitimate expectations about what the background context for our life and our decisions will be. Moore understands legitimate expectations primarily as expectations that are reasonable guesses about what will happen in the future and secondarily as expectations that are based on a moral right (M. Moore 2017a, 150/1). Such legitimate expectations in turn allow us to make plans and, in so far as we build these relationships ourselves, to take control of our life (M. Moore 2019a, 94). Consequently, a right to residency develops gradually over time as an individual becomes more rooted to a particular place through various relationships and starts to have legitimate expectations about the stability and continuance of these relationships (M. Moore 2017b, 244). Legitimate expectations arise faster if a place was unoccupied or has been acquired rightfully, that is with the consent of former residents (M. Moore 2013, 432). If a person resides in a place that they have taken wrongfully, then there can be neither a strong reasonable nor a moral expectation that one can stay in that place permanently (M. Moore 2017a, 148). However, the longer one is allowed to stay in a wrongfully occupied place, the stronger residency rights get (M. Moore 2017a, 145; 2013). This increasing strength of residency rights stems from the normative weight of legitimate expectations. According to Moore, it is unfair to frustrate legitimate expectations because it makes it impossible for an individual to realize those plans that were based on the legitimate expectations in question (M. Moore 2017b, 240).

As individuals settle in a territory and build relationships and legitimate expectations, they often also start to see themselves as belonging to a group with a distinct identity and a special relationship to the place that the group occupies. Similar to individuals, a group's identity can become attached to land as its members form plans and expectations about their continued locat-

edness in a particular place. Moreover, the group often also depends in important ways on specific places which have become central to group practices, to its historical identity etc. Thus, groups can build similar relations to land as individuals. Occupancy rights are the rights of a group to access and to not be removed from places that are important for the group's plans and projects. They thereby are analogous to individual residency rights (M. Moore 2017a, 40). Occupancy rights are justified through appealing to the importance of collective identities for individuals. Individuals identify with groups and the practices and places that shape the group's, and thereby its members', identity and activities (M. Moore 2017a, 40). An individual's relationships and plans are often at least partially defined through group membership. Thus, an individual's residency right often overlaps with the occupancy right of the primary and encompassing group of which it is a member.

On the other hand, a group's occupancy rights arise out of the residency rights of its members even if they can be larger in scope. Individuals that have a right to residency can then form a group that uses further land for group projects and acquires occupancy rights over the whole territory. Residency and occupancy rights therefore are tightly connected even if they are not the same (M. Moore 2017a, 42). Residency and occupancy rights thus define which territory a group can claim to live on permanently but it does not give a group jurisdictional rights (M. Moore 2017a, 44/5). To qualify for full territorial rights, that is jurisdiction over a territory, a group must be a people. Moore defines a people as possessing three traits.

> 'First, they must share a conception of themselves as a group—they subjectively identify with co-members, in terms of either being engaged, or desiring to be engaged, in a common political project and they are mobilized in actions orientated towards that goal. Second, they must have the capacity to establish and maintain political institutions, through which they can exercise self-determination. Third, the people have a history of political cooperation together; we can identify objective and historically rooted bonds of solidarity, forged by their relationships directed at political goals or within political practices.' (M. Moore 2017a, 50)

As the identity of a people is based on shared political projects, collective self-determination becomes an important good for the group's members. It protects the relationship dependent interests of individuals as well as agency-related interests (M. Moore 2017a, 64/5). The members of a people have an interest in forming political institutions that guide their life and to make these decisions together. This is the relationship-dependent interest in collective self-determination. They also have an interest in controlling the institutions that structure their lives and their relations both to each other and to the place that they occupy (M. Moore 2017a, 64/5).

This is the agency-related interest. Collective self-determination in that respect complements individual self-determination because it allows the individual to co-create the institutional framework within which it can act (M. Moore 2017a, 65). In the interest of collective self-determination agency and relationship interests merge. A people wants collective self-determination because for them it is a relationship-dependent agency good: The group members want to be in control of their destiny and they want to exercise that control together with persons that belong to the same group with which they themselves identify (M. Moore 2017a, 64). Collective self-determination thus is valuable from two perspectives. First, it enables individuals to have control over what structures their relationships with each other and with land. Second, as a people is defined as a group with a shared political project, collective self-determination is the primary project of a people. Therefore, the right to collective self-determination enables the members of that people to sustain their relationship and their group identity by exercising collective self-determination with the people with whom they identify (M. Moore 2017a, 56, 63).

In order to justify territorial rights, Moore relies on relational and associative interests of individuals to explain 1) how a group can get rights to a particular land that it occupies and 2) why a group that defines itself through a political project and meets the other criteria for being a people can have jurisdictional rights over the land the group rightfully occupies (M. Moore 2017a, 29, 35). These interests are interests in sustaining valuable relationships and engaging in shared activities with other people. The satisfaction of these interests has intrinsic value but also contributes to individual's well-being and self-determination as they are in control of the circumstances and relations that shape their life and on which their plans and projects are built. Moore problematizes the idea that ultimately these interests and goods are valuable because they contribute to individual autonomy (M. Moore 2017a, 143). However, she only criticizes a thick understanding of autonomy according to which a person must have critically reflected upon their plans (M. Moore 2017a, 38, 143). A thinner conception of individual self-determination does not draw the same kind of criticism from her and indeed underlies many of her arguments. For example, regarding the right to collective self-determination she (M. Moore 2017a, 6) states 'It is morally important – both important to individuals and morally valuable in an objective sense—that individuals have control over the collective conditions of their lives, and control in the relationships that give meaning to their lives, including their relationships with each other and with place.' As to the interests that ground residency and occupancy rights, she holds that 'If we are to have any control over our lives, we have to have control over the most fundamental elements in the background conditions of our existence, and among these is

the ability to stay in our communities, amongst people with whom we have a relationship, and not be expelled or forced to leave unless there is a compelling reason.' (M. Moore 2017a, 38) Moore thus grounds territorial rights in the fact that they are important preconditions for life plans that necessarily involve special relationships with people and place as well as activities and goods that can only be achieved through membership in a (politically self-determining) group. Thus, her account draws on the basic interest in individual self-determination as I understand it. Thus, she appeals to the individual interest in self-determination as I understand it. The thin understanding of individual self-determination that I have embraced as a basic interest also is primarily about the individual's ability to make and pursue their own life plans – including the parts of life plans that are based on relational and associative interests that Moore focuses on.

4.4. David Miller's liberal nationalist theory

David Miller proposes a liberal nationalist theory of territorial rights. It builds on the idea that there are culturally and historically defined nations, which are the primary holders of territorial rights. Territorial rights are meant to support each nation's self-determination and to aid the members in sustaining their national culture and identity. Nations are understood as communities that are actively involved in shaping their present form and building their future and that share a history, public culture, and homeland (Miller 1995, 22). Miller (1995, 22–27) introduces five criteria for nations: First, members of a nation mutually recognize each other as such by their own criteria which cannot be established by outsiders. This recognition usually involves the assumption that one shares beliefs and has reciprocal obligations towards one another. Without subjective mutual recognition, nations cannot exist. Second, national communities have historic continuity. This continuity generates and is generated by obligations towards ancestors who have created the current living circumstances and towards future generations. Individuals cannot free themselves from these obligations at will as they stand in a continuous line with their ancestors and descendants. Third, nations have an active character. A nation continuously forms itself by making decisions about its future and acting to sustain or change certain aspects of its identity. Thus, 'the quest for self-determination is built in to the very idea of being a nation.' (Miller 2020, 85)

Fourth, each nation has particular territory which it sees as a homeland and which it seeks to control politically. Fifth, each nation has a shared public culture. Miller (1995, 25–27) stresses that his idea of a public culture does not rely on a fixed list of criteria to which everyone needs

to subscribe. Rather, he favors a Wittgensteinian family approach. Thus, not everyone must adhere to the full set of national characteristics but everyone must adhere to some. This approach allows a variety of private cultures to thrive while still producing a distinct national public culture. Indeed, this public culture provides the background for meaningful life plan choices by individuals (Miller 1995, 85) (cf. Kymlicka 1996). Thus, nations are what Miller calls 'identity-based political groups' (Miller 2020, 55). As such, nations are groups with which individuals, often strongly, identify and whose members have shared values and projects that they seek to realize (Miller 2020, 86). Nations have a *pro tanto* claim to territorial rights because statehood helps them to become a vehicle for collective and individual self-determination for their members. According to Miller (2020, 36), the value of collective self-determination lies in 'the value of belonging to a group that can act so as to make a difference to the world in accordance with the formed will of its members.' Collective self-determination is connected to individual self-determination in so far as individuals have a collective identity and an interest in being able to participate in shaping the fate of their identity group. In the case of nations, this interest usually takes on a political dimension as nations often seek statehood and the associated territorial rights. This will to political self-determination is what distinguishes nations from ethnic groups (Miller 1995, 19/ 20).

Nations seek territorial rights because they are important to their collective self-determination in several ways. A first way in which states can protect national cultures and further self-determination, is by solving collective action problems for them. Miller points out that nations often face collective action problems if they must maintain their culture privately (Miller 1995, 87). For example, by declaring a nation's language an official state language, compatriots do not need to organize language classes on their own and their language does not need to compete with the official language in use. It is thus easier to preserve the language. Another way in which states can support national cultures is by giving expression to the collective autonomy of a nation (Miller 1995, 88/9). People have an interest in controlling state policies that influence their life, freedom, and ability to live according to their own values. They also have an interest in controlling those policies that enable the group that they identify with to thrive. Without this control, people feel powerless and alienated from their social and political environment (Miller 2020, 37). For members of a nation, such control is especially important if the national culture has many public dimensions and is very distinct (Miller 1995, 87). For example, a state can accommodate different languages (see e.g. Switzerland or Canada), yet it is much harder to accommodate different notions of what a justice or economic system should be

like. If nations with partly incompatible cultures must share a state, there is a risk that one of them is oppressed or that the state is so minimal that it cannot help to solve nations' collective action problems (Miller 2020, 54).

Another reason why individuals have an interest in the self-determination of their nation is that nations are encompassing groups in which members understand themselves as bearing certain duties to their compatriots past, present, and future (Miller 1995, 49). They therefore have an interest in establishing an institutional framework that helps them, or at least does not hinder them, to discharge these duties (Miller 1995, 70). A nation state can provide this support best because it enables institutional arrangements that do not conflict with the national culture and that solve collective action-problems that otherwise would keep the national culture from thriving.

Miller also argues that land and resource rights are an important part of a nation's self-determination. The argument rests on the assumption that nations 'establish a transformative relationship to land' over time which turns the land into a 'repository of value for the people in question' (Miller 2012, 258). If a nation inhabits a certain territory for a prolonged time, it transforms it both materially, e.g. by building cities, erecting monuments, or turning land into agricultural space, and symbolically, e.g. specific places will become significant for the historical events that happened here and that have shaped the national culture and identity. This material and symbolic transformation of the land forms the basis for Miller's three arguments for national land and resource rights (Miller 2012, 259–61).

The first argument stands in the Lockean tradition. It is backward-looking in that it holds that a nation has rights to the land and the resources to which it has added value over time (Miller 2020, 87; 2012). Miller points out that this value can be either universal or culturally specific (Miller 2012, 259/60). Universal value means that land has been transformed in a way that makes it more valuable independent from any specific cultural worldview. Preserving or increasing biodiversity or the fertility of land are examples here. 'Culturally specific value […] refers to outcomes that are valuable only from within a particular worldview.' (Miller 2012, 260) The protection of sacred places or the building of such places, e.g. churches or mosques, are instances of adding culturally specific value to land. Neither kind of value gives stronger rights to land and it is not necessary to maximise the value of land to claim rights over it, adding some value is enough. The second and third argument for national land and resource rights are primarily forward-looking. They are based on the fact that a nation's identity and way of life have become closely connected to the land it occupies (Miller 2012, 259).

The second argument says that a nation should have continuous control over land and resources so that its members can sustain their way of life. A nation will shape the land that they live on according to their specific way of life. At the same time, they will adjust their way of life to the conditions of the land (Miller 2012, 264). They might focus on specific industries, which in turn shape the culture and customs. They might also build specific infrastructures that enable certain ways of life, e.g. by providing different degrees of public transport networks. In order to preserve their way of life in the future, they need to be able to control its material foundation, that is, how the land and its resources are developed and used. The third argument refers to the symbolic value, which certain lands hold for a nation (Miller 2012, 261–64). Access to and control over historically significant places are important because they are sources of national identity. Places of remembrance or ceremony sustain the imagined community, which holds a nation together. Therefore, nations should have at least rights to access to these places, ideally they should have full rights over them as they are so significant for sustaining their shared identity.

According to Miller (2012, 263), nations should have the full bundle of resource rights, i.e. rights to use, access, benefit, and jurisdictional control, to be able to protect and continuously enjoy the material and symbolic value that they have added to the land. He holds that property rights are insufficient because these can always be altered and limited by a higher jurisdictional power. Moreover, much of the value that a nation adds to the land will be on public land, e.g. parks, public transport etc., which gives an additional reason why the nation should have jurisdictional, second-order rights over land and resources. Miller's argument establishes land and resource rights of a nation in its homeland, that is the region it has traditionally occupied and which it has shaped and has been shaped by the most. He shows how land and resource rights are an important aspect of national self-determination.

Miller's justification of territorial rights starts with the importance of national self-determination. He establishes national self-determination as having instrumental and intrinsic value. The instrumental value of national self-determination lies in its function to protect national culture (Miller 1995, 85/7). National cultures, in turn, provide their members with an identity and a background for choice and enables them to realize their shared goals. The intrinsic value of self-determination is that it allows the members' of a nation to actively be in control and shape their nation's future together (Miller 2020, 99). Miller then shows how land and resource rights arise from the self-determination efforts of the nation – the nation imbues land and resources

with culturally specific value – and from the nation's need for these rights to continue being self-determining.

4.5. Simmons: A Lockean theory of territory

Simmons (2016, 98) presents what he calls a hierarchical, subject-based theory of territorial rights. Hierarchical means that one right in the territorial rights bundle is primary and all other rights are derived from it. For Simmons, this primary right is the state's authority over its subjects which is expressed both in the right to make and enforce laws (legislative and executive powers). Both rights over aliens (conceived as a right to non-interference) and rights to control a fixed territory are derived from this primary right (Simmons 2016, 97). Subject-based means that the rights and interests of individuals ground territorial rights. For Simmons (2016, 20), a state obtains legitimate authority over people when they consent to be members of the state. According to Simmons, territorial rights rest on the consent of individuals to transfer some of their natural rights, including rights over the land they possess, to the state. The state thereby acquires jurisdictional powers as well as a territory on which to exercise these rights. There is no other way that a state can acquire territorial rights. As political authority in his account is exclusively based on consent, the state cannot have any legitimate power over non-consenting individuals – even if they cannot form a state of their own and instead live in a stateless, anarchical condition. At the core of Simmons' theory is a concern for individual self-government. In the context of collective self-determination this view of the right to self-governance means that while individuals have equal rights to be self-governing, there is no right to be collectively self-determining (Simmons 2016, 232). Self-government is mostly understood as independence from others and thus as a safe-guard against domination (Simmons 1994, 291, 293/4, 301, 314). It does not mean that there is a right to pursue any particular life plan. The reason is that identity claims cannot give rise to property claims (Simmons 2016, 144; 1995, 174/5) and therefore play no role in determining whether one has an equal opportunity to be self-governing.

By consenting to membership in a state, individuals agree to transfer those rights that the state needs to fulfill its purpose (Simmons 1994, 312). Simmons follows Locke in taking the main purpose of the state to be that of securing everyone's rightful property. Property here denotes anything that one has a right to. It thus includes property in external things such as land but also the property one has in one's own body and life. What one has a right to is defined by natural law. The state might clarify natural law where it is vague or leaves room for more than one solution (Simmons 1994, 313). In such cases, the state will give a binding interpretation that can be used to resolve conflicts between citizens. In general, however, the state must secure the

property which its citizens have rightfully acquired and follow natural law to determine what rightful property is and how any violations should be rectified (Simmons 1994, 307).

In order to fulfill its function of protecting property, the state needs several rights. First, it requires jurisdictional authority over its subjects and the things they own. Second, it must establish a binding procedure for decision-making (Simmons 2016, 74). Locke and Simmons both hold that this should be a democratic majority rule. Lastly, the state needs a stable territory on which to exercise its jurisdiction. The first two rights mean that individuals must transfer some of their own jurisdictional rights to the state when they become citizens. The third right, the right over a stable territory, requires individuals to transfer a part of their property rights in land to the state (Simmons 2016, 118). The state thereby attains property-like rights to control its territorial borders and to stop citizens from separating their land from its territory (Simmons 2016, 126). Thus, the state acquires a mix of jurisdictional and property-like rights over a fixed geographical territory, the people and things in it, as well as its citizens (Simmons 2016, 125). Together these rights make up the territorial rights of states which then are the sum of the rights that consenting members transferred to the state.

The state's territorial rights have three kind of boundaries. First, the state's authority is limited to those who have consented to becoming members of the state (Simmons 2016, 116). The state cannot extend its authority to incorporate unwilling subjects. Second, it has geographical boundaries. The boundaries of the state's territory are defined by the rightful holdings of its members. In Simmons's Lockean theory, states acquire rights over the lands that are rightfully owned by their members (Simmons 2016, 116). Individuals create property in land and, when entering the state, incorporate their land holdings into the state territory by transferring some aspects of their property rights to the state. The state's territory thus is an accumulation of the partially transferred individual land rights of its members. States cannot have rights to anything that its members do not have rights to.[30] Third, the state is limited in what it can legislate. The boundaries of the state's jurisdictional rights are prescribed by what the members have consented to. If there is no explicit consent, then the state only has the rights needed to fulfill its

[30] Simmons allows that states might claim some territorial rights over unowned territory when this is necessary to fulfill their core functions. For example, states might claim some right over airspace and oceans if they are needed for national self-defence. These rights, however, are strictly limited. States can neither claim rights over land that is owned by non-members nor can they claim unowned land that is not strictly necessary for its core functions.

basic purpose which is to protect members' property (Simmons 2016, 117/8). The core of jurisdictional rights then consists of enforcing valid laws, that is laws in accordance with natural law, and preventing alienation of parts of the state's territory (Simmons 1994, 312).

To know which territory a state can claim, it is necessary to determine 1) which of its subjects are consenting to the state's authority and 2) which land is the rightful property of these consenting subjects. In order to make this evaluation, it is necessary to have a closer look at what makes a property claim rightful. As Simmons' territorial rights theory builds on Locke's theory, the following discussion of property rights follows Simmons' interpretation of Locke in that regard. Locke justifies property rights by grounding property in the right to self-preservation and the right to self-government (Simmons 1994, 265). Accordingly, there are two justifications for property rights (Simmons 1994, 242). One appeals to the right to self-preservation and thus bases property rights on human need and God's intention. According to Locke, God gave humans the earth in common and it should be used for the preservation of humankind. Thus, anyone has a right to that which they need to preserve themselves. Yet, as Simmons (1994, 265) notes, this justification cannot justify the full bundle of property rights. Use and access rights would be enough. It also only justifies rights to appropriate what is needed for self-preservation.

The second line of justification grounds property in the right to self-government. Simmons interprets the labor-mixing argument as arising out of this second justification of property. The connection between property and self-government is that in order to govern ourselves by pursuing our own plans, we need secure access to the things we need to pursue these plans. If we did not have the property rights over the things we use for our plans, we could not act independently but would be dependent on the will of others. Labor and the resulting property rights are 'an expression of and necessary condition for individual autonomy' (Simmons 1994, 273). For Simmons, this right to self-government explains why individuals can appropriate things without the consent of others in the state of nature. Thus, property originates in everyone's right to be self-governing and the way that property is created is by actively using it in the pursuit of one's plan (Simmons 1994, 273). The normative basis for property rights is that we have property rights in those things we actively use to be self-governing. The value of self-government, not attachment or identity claims, thus is what founds property rights (Simmons 1994, 274–77).

This focus on the equal right to self-government also gives rise to mandatory downsizing, the only other reason that extinguishes historic property rights apart from abandonment. According to Simmons (1994, 279), everyone has a right to create property in up to what is their fair share. The notion that everyone has rights in a fair share is Simmons' interpretation of the Lockean

proviso to leave 'enough and as good' for others (Simmons 1994, 288). The reason that everyone has an equal right to a fair share of land is that everyone has an equal right to self-government and thus an equal right to an opportunity to create property (Simmons 1994, 279, 291). Therefore, property can only be created in up to one's fair share of land and resources, any further appropriation would violate the Lockean proviso and would lead to unequal opportunities for self-government. A change in distributive background circumstances, such as an increase in population or a decrease in available land, can lead to mandatory downsizing of existing land holdings (Simmons 2016, 181). This downsizing happens to ensure that everyone has a fair share of land on which to exercise their self-determination.

So, to sum up: Everyone has an equal right to have their basic needs satisfied and to have opportunities to be self-governing by independently pursuing a plan they have chosen on their own. Together, these two rights both justify property rights as well as limits of property (Simmons 1994, 284). Everyone has 'the morally protected power to create property in up-to-a-fair-share of common nature' (Simmons 1994, 226) from birth. This birthright is a right to *a* fair share of land and resources but not to a particular share. The way that property in a particular thing is created is by actively incorporating a thing into one's plans and projects. One may not create property in something that is either already owned by someone or that exceeds one's fair share (Simmons 1994, 275). In both cases, the fact that one has actively included it in one's projects does not create any rights. A state's territorial rights rest on individuals consenting to put themselves and their property under the state's jurisdictional power. Territorial rights thus derive from individual property rights which in turn are based on the value of individual self-determination and which are constrained by the basic needs of others.

4.6. Territorial rights as derived rights

Current territorial rights theories mainly use two basic interests, the interest in individual self-determination and the interest in having one's basic needs met, to justify territorial rights. They appeal to the basic interest in self-determination by making explicit how collective self-determination is a part of individual self-determination. Territorial rights can help individuals to realize different interests that all derive from the basic interest in collective self-determination. First, individuals have plan-based interests. Stilz highlights these interests by pointing out how stable background conditions are essential to a person's ability to make and pursue long-term plans. Stilz and Moore both base residency and occupancy rights on these plan-based interests. Stilz and Nine furthermore point out how jurisdictional rights can create stable social and institutional backgrounds for plans and can provide stable access to resources, including land, by

enforcing property rights. Second, individuals have interests in maintaining and building valuable relationships. Such relationships can be an important part of one's life plans and give one's life meaning and value. Stable relationships thus are an important part of being able to live a self-determined life. Moore emphasizes how territorial rights protect these relational interests of individuals.

Third, individuals have identity interests that are related to territorial rights. Having control over one's identity and the sources of one's identity is an important part of individual self-determination. Miller's theory shows most clearly how collective self-determination and territorial rights are necessary for the continued existence of one such central identity group, namely nations. Yet, virtually all other theories, except Simmons', explain the value of collective self-determination by showing how individuals to a certain extent identify with the collective self that possesses and exercises these rights. Moore and Nine, for example, both speak of a transgenerational people or collective which gives expression to the values and projects that individuals hold as members of the respective groups. Fourth, individuals have an interest in living in accordance with their own values. This interest is the most easily satisfied if the individual shares values with a group and that group is self-determining and thus can realize these values politically. In Miller's theory this connection between individual values and collective self-determination is established through the shared national culture, in Nine's theory through the shared conception of justice of the collective, and in Moore's theory through the shared political aspirations of the people.

Lastly, and maybe most importantly, territorial rights are connected to certain control interests that individuals have over the environment in which they live. Control interests are interests in having control over one's environment and the laws and institutions which structure it. Both Miller's and Moore's theories stress that individuals have a strong interest in actively forming and controlling the decisions of the self-determining group of which they are a part. Nine and Stilz present a weaker version of this argument in that for them it is central that there is some mechanism which connects the will and interests of the individuals to the exercise of political authority. Individuals do not need to be actively involved in political decision-making but they must be able to ensure somehow that the political authorities act in accordance with the groups' will (Nine 2012, 65) or the reflected interests of the individual (Stilz 2019, 109). In the latter cases, an important part of that control is ensured by demanding that there must be the possibility to revoke the government's power (Stilz 2019, 110). In Simmons's theory this control interest is reflected through the consent that gives rise to political authority and through the

right to receive a fair share of land as a precondition for exercising one's individual self-determination within or outside of a state.

All of these different interests are connected to individual self-determination in that they either create the preconditions for self-determination (plan-based interest), protect important areas for individual self-determination (relational and identity-based interests), or enable individuals to be fully self-determining as an individual and as a part of an encompassing group (control interest). The interests that justify territorial rights thus can be regarded as derived interests connected to the more basic interests in individual self-determination. Beside the basic interest in individual self-determination, some theories also appeal to the basic interest in having one's basic needs met as an interest that justifies territorial rights. This interest plays a role in all theories, yet it often is only a condition for the just or legitimate exercise of collective self-determination whereas the value of collective self-determination does the actual justificatory work. Nine's theory however makes a more direct connection between the justification of territorial rights and the basic interest in having one's basic needs met. Nine puts into focus how states help to build structures and coordinate individual actions in such a way that individuals can satisfy their basic needs even under conditions of (moderate) scarcity. She explains that without central coordination there will be all kinds of collective action problems that hinder individuals from achieving collective goods such as health care or educational systems that are important for satisfying their basic needs. Moreover, she points out that we live under conditions of (moderate) scarcity in which it is necessary to coordinate actions and distributions to ensure that everyone has access to what they need. The state's jurisdictional activities ensure that such collective action and coordination problems are resolved. For Nine, this function of jurisdictional rights is an important part of their justification.

Both the basic interest in individual self-determination and in having one's basic needs met thus play important roles in current territorial rights theories. What about the basic interest in having one's moral status equality recognised? One the one hand, all theories, at least implicitly, assume moral status equality between humans. However, none of the theories appeals to the importance of public recognition of this status equality as a justification for territorial rights. Miller's remarks on the relation between respect and collective self-determination give a first clue as to why that is. He criticises Wellman who proposes that respecting the individual members of a group and their decision-making capabilities means granting them the right to collective self-determination (Wellman 2005). Miller counters that usually we do not think that respecting a person means allowing them to do whatever they wish. Thus, the denial of self-determination

cannot be seen as disrespect on the basis that it denies a group to do what it wishes (Miller 2020, 32). However, Miller also acknowledges that the connection between respect and self-determination can be different in the colonial context. He says: 'This [Wellman's] argument looks strongest in cases where denying a right of self-determination clearly conveys a message of disrespect. Colonial rule is the best example since refusing to grant colonized peoples self-determination was often explicitly justified by asserting that their racial or cultural inferiority made them unfit to govern themselves.' (Miller 2020, 31)

What changes in the colonial context is that the denial of self-determination is not the mere denial of something that a group wishes to do but rather the denial of the equal moral status of that group and its members. The key here is that individual and collective self-determination were claimed by people who thought of themselves as autonomous and full moral agents but who denied the same rights to the colonized people arguing that they did not satisfy these criteria. Keene (2002) argues that during colonial times the international world had two, simultaneously existing orders. On the one hand, European states were seen as equal and independent with a right to sovereignty. This right was based on the view that Europeans were 'civilized' and rational which gave them full and equal moral status and enabled them to be collectively self-determining. Colonized peoples, on the other hand, were seen as barbarians unable to govern themselves, whether as individuals or as collectives. Equal status depended on satisfying morally arbitrary criteria such as skin colour, the existence of certain institutions or customs. As non-European peoples did not meet any of these criteria in the eyes of the colonizers, they were excluded from the circle of equal rightholders. Thus, they neither possessed individual nor collective rights to be treated as equals with a right to self-determination.

Thus, the denial of self-determination has become an expression of disrespect that aims directly at the core of what it means to respect a person, namely at their status as a moral equal. This connection is especially prominent in the colonial context in which both arguments and actions of the colonizers denied the colonised full and equal moral status. Outside that historical context, the relation between equal moral status and collective self-determination might be more tenuous as Miller suggests. Yet, just because this connection exists in a strong form only within the colonial context, it does not mean that we should discount it as negligible. As Miller (2020, 115) and Nine (2012, 28) also stress, the interest in collective self-determination itself is also just a context-dependent interest which has arisen in modern times. Yet, we still think that it gives rise to powerful derived interests and rights, namely that it justifies territorial rights. Therefore, it is not a stretch to also claim that a similar context-dependent interest in having

one's moral status equality recognised through territorial rights is any weaker. If that is true, however, then the interest in having one's equal moral status recognised plays an important role when it comes to the justification of territorial rights within a colonial context. Even more importantly, it plays a role when weighing the different interests that a group has in their territorial rights.

Until decolonization after World War II, the international world order replicated the relation between colonialists and colonized on the level of states. Getachew (2019) furthermore argues that even though former colonies now have been permitted into the circle of rightholders, their inclusion is still unequal as their self-determination is severely restricted by the current international system. In the case of indigenous peoples, the recognition of the equal moral status of individuals has even less translated into a recognition of equal rights on a collective level. Whereas many former colonies have reached independence, indigenous peoples in settler states still are denied collective self-determination. In that respect, indigenous peoples in settler states still live in a colonial context (Anaya 2000, 86). At the same time, their territorial rights often are in conflict with those of the settler states. Thus, the different interests of both groups in their respective territorial rights must be weighed to decide whose rights override whose in each specific case. Consequently, if a) territorial rights satisfy an added interest, namely the interest in having their moral status equality recognized, for indigenous people due to the colonial context in which they live and if b) the respective interests of indigenous peoples and settler states must be weighed in order to decide conflicts over territorial rights between them, then it is important to take the specific interest of indigenous peoples in territorial rights as a recognition of their moral status equality into account. Not doing so would lead to a distorted weighing of the different interests.

The next chapter takes up the topic of which interests in land and self-determination rights exist in the colonial context and how to weigh these interests if rights claims conflict. The chapter concludes the introductory part of the thesis by introducing the main argument of the thesis. It shows how, together, the three core articles outline an approach to rights conflicts between indigenous peoples and settler states that is nuanced and considers all relevant interests of both parties. The thesis thereby lays the groundwork for a better understanding of what is at stake in rights conflicts between settler states and indigenous peoples and how these conflicts can be resolved in a fair manner that reduces conflict and protects the most important basic interests of all parties involved. The chapter also sketches further research that can be conducted based

on the thesis's arguments and thereby shows in which discussions outside indigenous rights the thesis can contribute.

Basic interest	*Individual self-determination*	*Minimal needs*	*Recognition of moral status equality*
Derived interest	- Stable background context for plans - Living in accordance with own values - Control over important relationships - Freedoms necessary to pursue plans - Control (together with other members) over form and fate of important identity groups …	- minimal distributive justice - coordinating collective action to produce goods that are necessary to meet basic needs - property rights - protection of property and personal safety …	Procedural: - equal consideration of interests - safeguards against violations of moral status equality Expressive: - public affirmation of moral status equality
Derived rights	Collective self-determination rights, including: - Collective jurisdictional rights over territory (by group which acts in accordance with interests of members) - Residency and occupancy rights - Land and resource rights	- Jurisdictional rights over territory of actor that can satisfy minimal needs of people on territory - Land and resource rights necessary to meet basic needs of people on territory	- Indigenous self-determination rights, including jurisdictional rights over territory - Indigenous land and resource rights

Current territorial rights theories

Thesis

5. Indigenous rights, moral status equality, and supersession

This chapter does two things. First, it gives a summary of the main arguments of the three individual papers that follow. The papers discuss in greater detail some elements that so far were only mentioned briefly, namely the possible unbundling of land rights in the context of supersession, the context of basic and derived rights, and the notion of indigenous land and self-determination rights as status-conferring rights. The first article makes a case for unbundling land rights in the context of supersession and concretely shows how this could be done when it comes to indigenous land rights in settler states. Such unbundling of rights, both with respect to land and jurisdictional rights, allows a more nuanced approach to the question of rights supersession. Such unbundling of rights is often proposed and there are detailed proposals on power-sharing arrangements. However, proposals to share land rights are usually vague. The first article fills this gap and thereby also shows that even if some indigenous rights are superseded in the present, this supersession is by far not as wide-ranging as Waldron and others imply. The second and third article argue that the interest of indigenous peoples in having their moral status equality recognized must be considered as an interest that at least partially justifies indigenous land and self-determination rights in addition to the other interest in these rights that current territorial rights theories identify. The second article focuses on land and resource rights and the third article addresses indigenous claims to collective self-determination. Second, it discusses how the three different articles supplement each other and where there are further avenues for research.

5.1. Revisiting supersession: Why indigenous land rights have not been superseded

The first article 'Why indigenous land rights have not been superseded' engages with Waldron's supersession thesis. The article proposes to analyze the different rights that make up property rights to land separately and thereby introduces the notions of partial and conditional supersession. Partial supersession refers to supersession in which some rights that make up property rights are fully superseded while others are being fully restituted, e.g. the right to use land might be superseded while the right to benefit from it might be restituted. Conditional supersession refers to cases in which rights are restituted but their exercise is limited by certain conditions, e.g. the right to use the land might be restituted but with certain conditions that prescribe or rule out certain ways of using the land. I argue that distinguishing between full,

partial, and conditional supersession allows in many cases to reconcile attachment claims, redistributive justice claims, and historic rights claims with each other. Second, the paper expands on Waldron's concept of attachment that is laid out in his articles about supersession. By distinguishing between different forms of attachment, the first article shows how attachment claims can restrict property rights in land and how permanent claims based on attachment are.

Jeremy Waldron addresses the question of how changes in attachments and distributive arrangements impact historic rights. He argues that changes in circumstances can lead to the supersession of historic injustices and historic rights. The theory is attractive because it simultaneously covers claims based on attachment, history, and distributive justice. Moreover, it can be plugged into various theories of distributive justice – from pure historic rights theories to egalitarian theories. At the same time, when it comes to indigenous rights, this gives the supersession thesis a certain vagueness. Waldron gestures towards a large-scale supersession of indigenous rights but this is not a necessary conclusion of the supersession thesis. Indeed, as the article discusses, the effects on indigenous land rights depend significantly on the distributive justice theory that is chosen. The article addresses a further issue with Waldron's theory, which is the relation between claims from attachment and claims from distributive justice. Waldron assumes that as long as one reason for supersession is given (a change in attachments, in the distributive situation, or in the identity of the rights holder), this will justify a full supersession of the land and resource right in question. In practice, this would lead to an extensive supersession of indigenous land and resource rights, independently from the chosen theory of distributive justice.

The first article challenges this assumption. It argues that when it comes to questions of supersession, land and resource rights should be treated as a bundle of rights instead of as monolithic. This allows a more nuanced analysis of which rights are indeed superseded and in which cases land and resources might only be partially superseded. It proposes that in many cases, some of the rights included in property rights, e.g. the right to control access or the right to use, might be superseded while other rights, e.g. the right to benefit, are not superseded and warrant restitution. This approach gives a more nuanced picture of current indigenous land rights and allows to reconcile attachment claims by settlers and historic rights claims by indigenous peoples. In effect, this allows for much more extensive indigenous rights than Waldron's original theory. Moreover, claims from attachment, history, and distributive justice can be more easily reconciled as these claims often address only distinct parts of land and resource rights and do not require the full bundle of rights to be addressed. Although Waldron addresses primarily domestic contexts, it is a framework that can serve as a possible template for thinking about theories

about territorial rights and global distributive justice, too. Global distributive justice is the topic of the second paper.

5.2. Indigenous rights as status-conferring rights

The second article 'Global welfare egalitarianism, resource rights, and decolonization' introduces the notion of status-conferring rights. It argues that many rights have two functions. They protect certain interests and they signal a certain status of the rights bearer. As such they are status-conferring. While some rights signal a certain social status, e.g. the right to call oneself a lawyer or a medical doctor, others signal that the rightholder has equal moral status with other rightholders. For example, human rights do not just protect basic human interests, they also signal that anyone who has human rights is human and thus is a person with equal moral status to all other humans. Similarly, equal citizenship rights are not just important because they give everyone the same rights to participate politically. They also affirm that all citizens are equal and none of them enjoys a higher moral status than the others. In the following, status-conferring rights will always refer to rights that express equal moral status. Status-conferring rights therefore protect what chapter 3 of the thesis introduction has identified as one of the core interests of any human being, namely the interest that one's equal moral status is recognized.

The paper argues that indigenous rights fall into the category of status-conferring rights due to their connection with colonialism. It furthermore holds that decolonization is essential for equal access to welfare for indigenous peoples. It then argues that indigenous rights have two important roles in successful decolonization. First, they affirm status equality of indigenous peoples which historically has been denied both on the individual level and the collective level. Second, they allow indigenous people to be collectively self-determining and thus enable them to free themselves through cultural resurgence from left-over unequal dynamics of colonialism. The status-conferral argument mostly builds on the fact of external colonialism, which denotes the control of political and economic systems through a foreign power. External colonialism was based on the assumed inferiority of the colonized peoples which justified the political subordination and economic dispossession of colonies. In turn, self-determination and resource rights have come to signify the recognition of the equal moral status of (formerly) colonized peoples. Both rights therefore have become status-conferring in the colonial context.

The second argument takes internal colonization as its starting point. Internal colonialism is the imposition of the colonizer's culture and denigration of the indigenous culture. If sustained over time, it can lead to a colonial mentality in which the (former) colonial subjects internalize the

colonizer's opinion of them as inferior. The resurgence approach addresses this colonial mentality and tries to reverse it through a revitalization and revaluation of indigenous social and cultural systems. In the case of many indigenous peoples, traditional cultures and social and political systems are interwoven with particular lands and ecosystems. Therefore, successful resurgence depends on rights to access, use, and control their traditional lands and resources. The paper proposes that taking the status-conferring function of indigenous rights into account will shield them from some supersession even within global welfare egalitarian theories.

5.3. Indigenous rights as human rights

The third article, 'Can naturalistic theories of human rights accommodate the indigenous right to self-determination?', also turns to the status-conferring function of indigenous rights.[31] It focuses on the right to self-determination and argues that this right can have the status of a derived human right in the context of past colonial injustice. The article argues that indigenous self-determination in many cases is a necessary means to protect the right to individual self-determination as well as the social bases of self-respect and the status equality of indigenous peoples. All of these goods constitute basic interests of human beings so that these individual interests can motivate a derived human right which protects them. The argument relies on a division between basic and derived human rights. It thereby elaborates on a concept that has already been introduced in chapter 3 of the thesis introduction as part of the general theoretical framework.

Official human rights documents such as the UNDRIP often contain derived human rights. UNDRIP holds that collective rights to land and self-determination are necessary for indigenous peoples to enjoy their individual human rights. The article connects collective indigenous rights to the interests protected by basic human rights. It thereby also justifies collective indigenous rights as derived human rights. Indigenous rights thereby gain more weight in comparison with rights that protect interests that are not the object of human rights. This status as derived human rights shields indigenous rights in so far from supersession as the competing attachment or distributive justice based interests are not similarly connected to basic human rights.

[31] This article was written first and does not yet use the concept of status-conferring rights explicitly. It instead refers to the social bases of self-respect. I have abandoned the focus on the social bases of self-respect in the later articles as it became clearer that what really is at stake is moral status equality. Moral status equality has both intrinsic and instrumental value. The focus on self-respect unnecessarily limited the value of moral status equality to its instrumental value for self-respect.

5.4. Indigenous rights, status equality, and supersession

The main contribution of the thesis is to show that the way in which equal moral status is publicly recognized can be context-dependent. The thesis shows that while there is a basic, universal understanding of what it means to recognize equal moral status, there is also a context-dependent expression of it. The latter arises mostly in the context of pervasive injustices that involved a grave violation of equal moral status. It furthermore shows that the supersession thesis in its current form is not suited to resolving the rights conflicts between indigenous people and settler states in a balanced way. The reason is that, in its current version, it only considers changes in distributive context and attachments as relevant for supersession. The thesis argues that the context-dependent status-conferring interests in certain rights and goods are a third, relevant way in which circumstances can change what is a justified rights claim. In contrast to the changes in circumstances that Waldron considers, this third change 1) does not lead to supersession but rather leads to the preservation of the rights of victims of injustice and 2) is directly caused by historic injustice (whereas cases of historic injustice is one area where supersession applies but it is not always causally connected, that is, historic injustice is not necessary for rights supersession to take place).

This third change in circumstances is a change in what confirms and ensures the equal moral status of individuals and groups towards one another. The affirmation and protection of the equal status of all humans is a central value that underlies basically all theorizing about rights and justice. Moreover, one of the central features of grave injustices is the denial or violation of such equality. Thus, it is crucial to take the restoration of equal status into account when deciding how to address historic injustice and the rights claims based on it. My approach fills a hole in the application of territorial rights theories in the context of historic injustice connected to the denial of land and self-determination rights. The status-conferring function of land and self-determination rights only becomes relevant in the context of colonialism. Outside of that context, it does not play a role. Yet, in the colonial context it is a weighty interest and neglecting it perpetuates aspects of the past injustice.

The thesis also offers a concrete proposal on how land rights could be shared. Many territorial rights theories that are confronted with the question of supersession of land and self-determination rights suggest that rights must be shared between the two competing groups. However, while there are many proposals on how power-sharing can work, the sharing of land rights is not discussed in detail. The thesis shows how such rights sharing could work with regards to land rights. It takes the by now widely accepted idea that land rights consist of a bundle of rights

and suggests that we need to decide for each of these rights whether supersession has taken place. It thereby arrives at the possibility of partial or conditional supersession. Together with the argument for indigenous rights as status-conferring rights in settler states, rights of indigenous peoples are strengthened in two ways. First, the status conferring argument introduces the additional interest of having one's equal moral status recognized, which is relevant when deciding upon questions of supersession of indigenous rights. This additional interest can tip the balance in favor of indigenous rights when there is a stalemate between competing claims and/ or in some cases it might even mean that where settler descendants' interests were stronger, indigenous interests now are as weighty or weightier in total. Of course, the introduction of the moral status equality interest will not always lead to indigenous rights winning out and neither is that the point of introducing this new interest. Rather it leads to a more accurate weighing of interests by ensuring that all relevant interests are considered.

Moreover, considering the status-conferring function of indigenous rights might create new stalemates where before the decision was clearly in favor of settler descendants. In such cases, the concepts of partial and conditional supersession can help to solve these stalemates by unbundling the rights in question. Take for example, claims of indigenous people to land that is settled and used by settler descendants and has a high real estate value. Golf courses, university campuses, or cottage lands all fit the bill. If indigenous peoples express no interest in the land on cultural grounds but are primarily interested in benefitting from its economic value, then the old framework would see them as having no attachment claims. Thus, their restitution claims would need to be weighed against existing attachment claims of settler descendants and would need to be defended in terms of distributive justice. If the attachment claims of settler descendants are strong enough and/ or indigenous people already possess enough according to the distributive justice theory in question or distributive justice could be achieved without the restitution of these lands, then the indigenous rights to their traditional land would be superseded.

The picture changes if the respective claims are analyzed within the new framework in which status-conferring rights are considered besides attachment and distributive justice claims. Indigenous claims to restitution would then not be seen simply as claims to economically benefit from the land but also as having the added layer of asking for a status-conferring right. This addition might make indigenous rights interests as strong as those of settler descendants. If the only option is full supersession, then it seems impossible to resolve this conflict in a non-arbitrary fashion. However, if we allow partial and conditional supersession, then there are more options for resolving the conflict. If the settler descendants have attachment interests which

indigenous peoples lack, then those rights that protect these attachments would be superseded. That is, settler descendants would get these rights. Presumably, these would be rights to access and use, and to a certain degree control. Both parties might have an additional interest in the right to benefit from the land in the form of rent payments or respectively rent-free use. In this case, the fact that land rights have a status-conferring function for indigenous people might add weight to the otherwise equally weighty interest in the right to benefit. Thus, while settler descendants might retain the right to use and access the land, indigenous peoples' right to benefit might be restituted (possibly with some conditions attached).

As this example shows, including the option of partial and conditional supersession has two main advantages over only employing full supersession. First, it allows deciding rights conflicts which could not be solved in a non-arbitrary way using full supersession alone. Second, it makes it more likely that the core interests of both sides can be satisfied in a mutually satisfactory and fair way. It thereby can help to reduce conflict between the two parties. Moreover, the possibility of partial and conditional restitution lowers the stakes for the dominant settler society when they recognize the status-conferring function of indigenous rights. They might be more willing to engage in the process of re-establishing justice because they do not face the complete loss of their current legal rights. For indigenous peoples, the recognition of the status-conferring function of their rights means they do not need to engage in strategic essentialism to win back rights to land to which they have no strong or distinct attachment anymore. Additionally, it explicitly acknowledges past injustice and makes a credible effort to overcome it by reaffirming the rights that once were denied. By making it more likely that the dominant society is willing to start re-establishing justice and by reducing conflict and resentment between both parties over the restitution or supersession of rights, this approach paves the way to reconciliation in the long run.

The thesis thereby situates indigenous land and self-determination rights in the context of working towards reconciliation in the sense of restoring relations of equality that past injustice has upset. More generally, the thesis contributes to our understanding of what is necessary to overcome injustices which at least in part involved a pervasive, structural, and widely accepted violation of the equal moral status of the victims. Modern history is full of such injustices whether we look at slavery and apartheid regimes, antisemitism which culminated in the Holocaust, or other injustices fuelled by the narrative that the wronged were somehow less than fully human. The concept that certain rights, which are directly connected to such injustices, can become status-conferring offers guidance to how we should think about the current rights

of these formerly wronged groups and shows how past injustice might change what is just in the present. The thesis' main argument comes with an obvious caveat. The concept of rights being status-conferring due to past injustices applies only where injustices have had a strong connection to the denial of equal moral status and these past injustices have not yet been completely overcome. The more we move towards a state of ideal justice, the less influence will the concept of special status-conferring rights have. In a state of ideal justice, where past injustice has completely been overcome, status-conferring rights will still exist but they will be the same for everyone.

In such a state, indigenous claims to land and self-determination will be judged according to the same standards as non-indigenous claims. Yet, currently we are far away from such an ideal state of justice as the continued discrimination of indigenous peoples and the often high mistrust between indigenous peoples and settler states show. Thus, while I hope that the topic of the thesis will become irrelevant soon, it is a pressing issue today. As such, all I can hope is that the thesis will make a contribution to pushing our non-ideal real world a little bit further into the direction of the ideally just world about which philosophers dream.

5.5. Avenues for further research

As the last section has already suggested, the thesis is not just a contribution to how conflicts about land and self-determination rights in settler states should be resolved. It is also a contribution to the question of how past injustice influences rights claims in the present and to what is needed to overcome past injustices completely. It thereby is situated in the context of intergroup reconciliation and the reestablishment of relational equality between former victims and perpetrators. As such, there are at least three directions for further research. First, the thesis argues that what gives rise to especially important moral status-conferring rights is the grave, pervasive, structural, and widely accepted violation of equal moral status of a group of persons which is expressed by the denial of certain rights. Settler colonialism and the associated denial of land and self-determination rights of indigenous peoples is one example of such an injustice that imbues certain rights with a moral status-conferring function. Yet, there are other instances in which moral status equality has been denied to other groups and where that has involved the denial of rights. One further research topic thus is to identify how other denials of moral status equality have been connected to certain other rights and what this means for rights claims of the relevant groups.

Second, if reconciliation is seen as the overcoming of past injustices, then it depends on several steps (cf. Griswold 2007; Tavuchis 1991). First, the past injustice must be acknowledged as unjust and its enduring effects must be rectified. The re-affirmation of equal moral status is one important part of rectifying the enduring effects of past injustice. Yet, there are also other enduring effects of past injustices. In the case of indigenous peoples, these are of a material, a cultural, and an epistemic kind. Indigenous peoples still belong to the most underprivileged groups worldwide and their cultures are often very vulnerable (cf. Carson and Koster 2012; Mitrou et al. 2014). These material and cultural enduring injustices can often be addressed within traditional theories of justice. For example, material injustices can be addressed through redistributive measures and by creating effective equality of opportunity. Injustices regarding culture can also be addressed by taking the respective vulnerability of cultures into account. Take for example two groups that claim land that is important for both of their cultures. The decision about which group's interest is stronger should not only consider how central the land is for the respective cultures but also how vulnerable these cultures are, that is what effect the denial of the land right would have on the continued existence of the respective culture.

Rectifying enduring epistemic injustices is more complicated, however. Epistemic injustice is defined as an injustice that harms someone in their capacity as knower. 'Testimonial injustice occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker's word; hermeneutical injustice occurs at a prior stage, when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their social experiences.' (Fricker 2007, 2) Indigenous peoples experience both testimonial and hermeneutical epistemic injustice. Their traditional knowledge as well as their ontological, epistemological, and ethical systems have not been fully acknowledged (cf. L. T. Smith 1999; Tsosie 2012) and/or were often categorized as ignorance or superstition. Consequently, indigenous voices have been silenced in public and academic discourse and thus have not had a strong impact on the formulation of theories and concepts with which we operate today. As a result, indigenous peoples often struggle to express their views and interests with the concepts and categories that are dominantly in use (cf. Bhargava 2013). A first step in overcoming this epistemic injustice is to include indigenous voices and views more into the public and academic debate. The second, and maybe more difficult, step is not just to listen to indigenous views and knowledge but to also respond appropriately to them. An appropriate response includes two things. First, it means to acknowledge indigenous knowledge as knowledge and indigenous ethical systems as proper ethical systems (in contrast to superstitious beliefs). Such acknowledgement will require a

deeper engagement with indigenous views and the ways in which they contradict and/ or criticize the Western worldviews and ethical systems. Second, an appropriate response will then also require to (partially) revise, extend, or specify the traditional Western worldviews, concepts, and ethical systems.

The thesis has indicated at different points where potential conflict or connection points between current Western views and indigenous views can be. One of the most promising similarities is the notion of respecting equal interests equally and of striving to build a social order that protects and respects the most important interests of all of its members. One of the starkest contrasts between many indigenous and most western ethical systems is the question which moral status non-human beings have, that is the question of who is an equal member of a moral community. Some indigenous scholars, for example, stress that reconciliation between people always depends on the reconciliation between humans and the earth (cf. Borrows 2018; Noble 2018). For them, decolonization and the restoration of equality includes a change in how land and non-human beings are perceived and treated. Within the thesis, I have mainly accepted the traditional framework of territorial rights theories which focuses on human beings as right holders and sees land and resources as having primarily instrumental value for human welfare. The main reason is that the two main arguments of the thesis are somewhat independent from the question which status non-human beings have in a theory of territorial rights. First, the proposal of partial and conditional supersession can apply to rights of humans as much as to rights of non-human beings. Indeed, the more potential right holders there are, the more important becomes the unbundling of rights in order to satisfy all main interests as best as possible.

Second, the argument about the moral status-conferring function of some rights refers to a specific human interest in having their moral status equality publicly recognized. Thus, the inclusion of non-human beings as rightholders would not affect this argument. Nevertheless, it would be worthwhile asking how our current frameworks for territorial rights would change if the circle of rightholders is expanded. Two likely consequences are that new interests must be included in the justifications of land and self-determination rights and that new constraints on the pursuit of human interests will appear. For example, in the current framework a conflict about resource exploitation can be seen as a conflict between human economic interests and human interests in preserving the cultural, aesthetic, and/ or historical value of land. If animals or other non-human beings are accorded equal, or close to equal, moral status with human beings and/ or land is seen as having intrinsic value, then this complicates the rights conflict further.

There are already a number of researchers who focus on indigenous legal systems and the values that inform them as well as on how these legal systems can be reconciled with western legal systems (cf. Borrows 2019; Napoleon 2013; Hanna 2018). Others have also emphasized the role land plays for indigenous peoples and which status land and other non-human beings have in indigenous ethical frameworks (cf. G. Coulthard and Simpson 2016; Whitt, Roberts, and Grieves 2001; Wall Kimmerer 2018). Yet, in contrast to legal studies, this research has not yet led to a more comprehensive debate in the territorial rights literature. Kolers (2009) has made a start by discussing how territorial conflicts between different ethnogeographic groups with different ontologies of land could be resolved. Moore (2017a; 2019b) has also expanded the view of why land is valuable to include relational value. Yet, both authors remain in a largely anthropocentric framework. Thus, there is the room and need to explore the challenges, similarities, and possible reconciliations of indigenous and non-indigenous concepts and ethical frameworks with regards to territorial rights. Such further research is both valuable as an expansion and improvement of current theories and as a step in overcoming the effects of the epistemic injustice indigenous peoples have suffered and still suffer.

The third avenue for further research concerns the question of when moral status equality has been re-established. This question is important for two reasons. First, the concept of sharing land and possibly jurisdictional rights presupposes some cooperation between indigenous peoples and settler states. Such cooperation is only successful if the two parties trust each other. Yet, for indigenous peoples such trust is only reasonable to give if they can be sure that their equal moral status is permanently recognized by settler states. Second, if the moral status equality of former victims' is recognized beyond any doubt, the rights that were status-conferring due to their connection with the past injustice eventually will lose their status-conferring function. Instead, the equal moral status of both victims and perpetrators will be recognized and affirmed through the same rights for each group. At that point, the reconciliation process can be regarded as complete. One crucial factor for getting to this point of reconciliation is to not just re-establish justice (acknowledging the past wrong and rectifying its effects) but also to re-establish relations of trust between the two groups. Acknowledgement of the past wrong and the rectification of its effects addresses past and present injustices. However, for reconciliation to be successful, victims must also have good reason to believe that these just conditions will endure into the future. That is, they must be able to trust that the perpetrators will not repeat the past injustice. Otherwise, they will continually feel like they are still at risk.

In such a situation, the equal moral status of the former victims is not credibly recognized. The reason is that the denial of equal moral status was a big part of the past injustice so that the chance of a repetition of that injustice signals that the victims' equal moral status is still not entirely recognized. In general, there are two ways of creating trust. On the risk-assessment view of trust, a change of incentives makes a partner more trustworthy (Hardin 1996). If a betrayal of trust becomes immensely costly, it also becomes less likely. The third article of the thesis uses this argument as a partial reason for strong indigenous self-determination rights. If indigenous peoples legally possess these rights, they can act as a safeguard against certain forms of colonial injustice such as dispossession of land or forced assimilation. An advantage of this view is that the costliness of breaches of trust, and thus the trustworthiness of the other, can be determined in a fairly objective manner. The alternative will view of trust is much more subjective in that regard. According to the will view of trust someone is trustworthy when they have the inner disposition to act in accordance with the promises and commitments that they have taken on (K. Jones 1996). After an injustice, the perpetrator thus must demonstrate what Snow (1993) calls 'a change of heart' towards the victim.

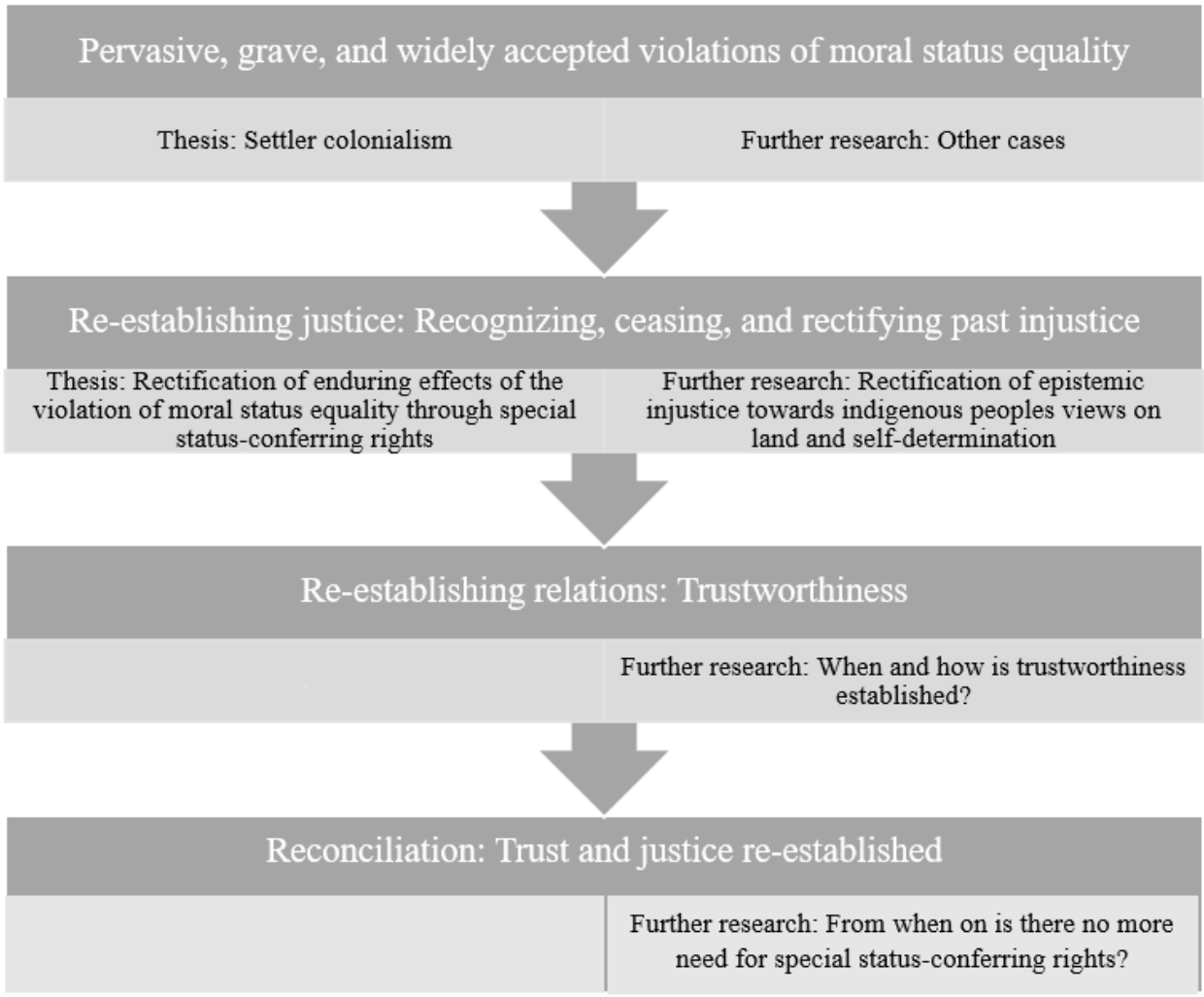
The disadvantage of the will view of trust is that there is no objective measure for when such a change of heart has taken place as it entirely depends on an internal change in the perpetrator. Perpetrators might just pretend to have had a change of heart only to act unjustly again if it is advantageous for them. Likewise, victims might have become so distrustful that they will endlessly ask for proof of this 'change of heart' without ever coming to trust the perpetrator again. Despite this disadvantage of the will view of trust, it still describes a form of trust that is important if two groups need to cooperate with each other. The thesis's proposal of partial and conditional supersession as a way to resolve rights conflicts between settler states and indigenous peoples requires at least some such cooperation. Therefore, the question of how former perpetrators, in this case the settler state, can become trustworthy[32] is central.

There is the further question whether it is possible to determine in an objective fashion when such trustworthiness has been achieved. As pointed out above, if such trustworthiness is established, it implies that the moral status equality of the former victims, here of the indigenous people, is fully recognized. The interest in having special status-conferring rights based on the past unjust denial or moral status equality thus is not supported anymore. As the moral status-

[32] I here follow Onora O'Neill's (2010) in distinguishing trust from trustworthiness. Someone is trustworthy if there are good reasons to believe that one can trust them. Trust alone can also be given without good reason.

conferring function of such rights ceases to exist, it will again shift the balance of interests when new rights conflicts arise. For example, article 2 argues that currently indigenous land and resource rights should be partially excepted from global redistribution. Yet, if these rights lose their special status-conferring function for indigenous people, there is no more reason to exempt them from the same distributive mechanisms to which all other land and resource rights are subject. As far-reaching as the consequences of recognizing the existence of context-dependent status-conferring rights are, as far-reaching are the consequences when such a right ceases to exist. Therefore, the conditions under which this happens merit more research.

The thesis has laid the groundwork for such further investigations by showing that there is a thus far unexplored concept, moral-status conferring rights after injustices, and by clarifying that the rectification of past injustice must include the re-cognition of the moral status equality of former victims. It has explored one specific case, land and self-determination rights of indigenous peoples in settler states, and thereby has opened the door for further explorations of other cases and other aspects of recognizing and re-establishing full moral equality for groups whose equal moral status has been denied in the past.


Pervasive, grave, and widely accepted violations of moral status equality
Thesis: Settler colonialism
Further research: Other cases
Re-establishing justice: Recognizing, ceasing, and rectifying past injustice
Thesis: Rectification of enduring effects of the violation of moral status equality through special status-conferring rights
Further research: Rectification of epistemic injustice towards indigenous peoples views on land and self-determination
Re-establishing relations: Trustworthiness
Further research: When and how is trustworthiness established?
Reconciliation: Trust and justice re-established
Further research: From when on is there no more need for special status-conferring rights?

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Individual papers

1. “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* (CRISPP) 2019.

2. “Global welfare egalitarianism, resource rights, and decolonization.” Global Justice: Theory Practice Rhetoric. Accepted and forthcoming.

3. “Can naturalistic theories of human rights accommodate the indigenous right to self-determination?“ in *Moral and Political Conceptions of Human Rights: Implications for Theory and Practice*, ed. Reidar Maliks and Johan Karlsson Schaffer. Cambridge: Cambridge University Press, 2017.

Paper 1: Why Indigenous Land Rights Have Not Been Superseded

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

A critical application of Waldron's theory of supersession

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).

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.

1. 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 Convention 169) 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.[33] 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.

2. Supersession due to redistribution

According to Waldron, property rights must be continuously justified against those who are excluded from them (Waldron 1992, p. 20, 1993, 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 taking 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.

[33] 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.

2.1. 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. [34] 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

[34] 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.

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.[35] 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

[35] The concept of partial supersession is also employed by Lukas Meyer and Timothy 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.

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.

2.2. 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.

2.3. 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 1997, 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.[36] 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.

3. 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).

[36] 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.

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.[37] 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 Will 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

[37] Hendrix (2008, pp. 48/9) makes this argument with respect to individual land owners that posses 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.

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 (Taiaiake 2005; Coulthard 2014; Sanderson 2011, pp. 155- 182). 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).[38] 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

[38] 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.

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.

4. 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.

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Paper 2: Global welfare egalitarianism, resource rights, and decolonization

Abstract

This paper argues that land and resource rights are often essential in overcoming colonial inequality and devaluation of indigenous populations and cultures. It thereby criticizes global welfare egalitarians that promote the abolition of national sovereignty over resources in the name of increased equality. The paper discusses two ways in which land and resource rights contribute to decolonization and the eradication of the associated inequality. First, it proposes that land and resource rights have acquired a status-conferring function for (formerly) colonized peoples so that possession of full personhood and relational equality is partially expressed through the possession of land and resource rights. Second, it suggests that successful internal decolonization depends on access to and control over land and resources, especially for indigenous peoples.

Keywords: indigenous peoples; colonialism; land rights; welfare egalitarianism; decolonization; relational equality

Introduction

The case of indigenous peoples' land and resource claims raises a profound challenge for theories of global resource justice. One challenge is ontological. Western liberal theories typically are anthropocentric so that land and animals are 'resources' to be distributed amongst humans. In contrast, indigenous worldviews usually accord non-human beings their own legitimate claims to territory. While this challenge is a serious one, I will set it aside for the purposes of this article. Instead, I will explore whether and how indigenous claims pose a challenge for theories of global resource justice even if we remain within an anthropocentric framework. Many others have already pointed out the difficulties of instituting global resource egalitarianism in a world where different groups identify and value resources very differently (e.g. Miller 1999). Global welfare egalitarianism as proposed by Chris Armstrong in *Justice and Natural Resources. An Egalitarian Theory* seems better equipped to deal with some of these problems because he endorses attachment claims. Attachment claims allow individuals to claim *particular* resources on the ground that they value them for their particular life plans. The attachment in question can be cultural, aesthetic, religious, or any other way that a particular resource con-

tributes to the welfare of that person by being included in their life plan. Armstrong also demonstrates that such attachment claims benefit indigenous peoples that have preserved their traditional cultures which link them to the land and resources they claim.

However, I will argue that when we think about colonialism, we need a different and deeper account of why land claims can contribute to equality, tied to considerations of status inequality. Armstrong considers at various points how resource justice connects to decolonization and historic power inequalities. He also acknowledges that there could be special resource claims based on what I will call the expressive function of resource rights. Yet, he does not take on this insight when it comes to discussing the importance of resource rights for decolonization. Instead, he suggests that states' resource rights are not necessary for and indeed a hindrance to decolonization. Here, I argue, Armstrong focuses too much on the economic welfare that resource rights can produce. He thereby overlooks the aspect of power relations and relational equality that is also central to the decolonization process (section 1). This aspect is especially relevant for many indigenous peoples as they still live in a colonial situation in which they are part of a colonial state. I will show that for a successful decolonization strong indigenous land and resource rights are indispensable because they are necessary to create symbolic and actual relational equality between indigenous peoples and colonial powers. Section 2 discusses land and resource rights as status-conferring rights for (formerly) colonized peoples. Section 3 turns to theories of indigenous resurgence and internalized colonialism. Section 4 examines the implications of the two arguments for resource and land rights of (formerly) colonized peoples in a welfare egalitarian framework.

Resource rights and colonization

Armstrong (2017: 151) acknowledges that the concept of full and permanent resource rights was a central achievement of the fight for decolonization. He (2017: 165/6) then evaluates whether resource rights were able to achieve what he considers three main goals of former colonies: First, to control the height of compensation payments to colonial powers when concessions for resource exploitation were ended; second, to develop economically to a standard comparable to that of the Western world; third, to change the international legal system so that it would not disadvantage former colonies but strengthen them economically. Armstrong concludes that none of the goals has been achieved and thus that resource rights did not help the decolonization process. He ascribes this failure to two reasons: First, the missing reform of the international system and second, mismanagement by internal elites. He shows how the political

self-determination of former colonies has been restricted by rules of the international legal system that protects the interests of foreign investment and thereby mostly the interests of the old colonial masters. He (2017: 159) also argues that increasing the accountability of elites does not necessarily lead to more equitable shares of resource benefits. Armstrong concludes that though reforms both of the international system and of accountability mechanisms would improve the current situation, permanent state sovereignty over resources does not help decolonization and indeed does hinder the global achievement of equal access to welfare. Thus, permanent sovereignty over resources should be abolished.

Armstrong's argument is well-supported by empirical evidence and some of the worries he raises apply to indigenous people as well. For example, indigenous peoples are not free from corruption either and they are also subject to trade systems that might disadvantage them if they were to gain resource and land rights on their traditional territories. So, for the economic goals Armstrong listed, the abolition of national sovereignty over natural resources might indeed be the most effective strategy.[39] Yet, it is worthwhile to ask whether economic development was truly the *only* goal of formerly colonized peoples when they fought, or in the case of indigenous people are still fighting, for sovereignty over natural resources, including land. My suggestion is that part of the fight for these rights also had to do with achieving an equal status with colonial powers. I will furthermore argue that this aspect of land and resource rights is especially relevant for indigenous peoples. To understand the link between colonialism, equal status, and land and resource rights, it is helpful to analyse what settler and extractive colonialism have in common and where they differ. Both kinds of colonialism share that they are a form of domination which foreign colonial powers exercise over a native population. Colonialism thereby establishes a power imbalance that devalues the native population, collectively as a people and individually as persons. This devaluation is expressed differently in settler and extractive colonialism as they were guided by different aims, yet they also share common ground.

Both forms of colonialism were built on what Charles Mills (2017: 31) calls racially restricted personhood. Full personhood in classical liberal theory and colonial practice was restricted to white people, excluding people of color. This exclusion from personhood meant that the core

[39] Yet, there are also doubts whether a revoking resource rights and instead distributing the resource benefits to the poor would actually work. For example, there is evidence that a substantial amount of foreign aid is captured by local elites and does not reach its intended recipients (Andersen et al. 2020). Thus, it seems like international distribution of monetary benefits also comes with its own problems, at least if Armstrong does not envision a wide-reaching abolishment of national sovereignty in general.

tenets of liberal theory, equality, self-determination, and protection of property rights, did not apply to colonized peoples. This denial of full personhood had two interlinked consequences: subordination and dispossession (Keal 2003: 21). Both played out on the individual and the collective level. Colonial powers justified this subordination by claiming that the colonized had a 'child-like' or 'uncivilized' nature that made them unfit for governing themselves or participating in political life (Mill 1861, Kohn/ O'Neill 2006). On the collective level, this ideological subordination led to the denial of collective self-determination rights. Colonized states were not regarded as full and independent members of the international system and thus lacked the rights and standing that European states possessed.

On the individual level, the denial of full personhood led to a denial of the colonized's basic rights to freedom and equality. Colonizers viewed the colonized as barbarians and thereby excluded them from 'the concept of equality of mankind, on which human rights are based.' (Marks 1992: 26) Accordingly, the colonial subjects were refused human rights, including basic political and social rights. Instead, colonial powers assumed exclusive jurisdiction over the native population and at best treated them as 'wardens of the state,' at worst as mere human resources to be (mis-)treated according to the arbitrary will of the white masters (Bufacchi 2017, Bodley 2015: 23-24).

Second, with the denial of full person- and statehood came also a denial of property rights, which led to dispossession. Dispossession played out differently in settler colonialism and extractive colonialism. Extractive colonialism was guided by a logic of exploitation. It is the kind of colonialism that was dominant in many African countries. Colonial powers were mainly interested in the resources that they could extract from these countries. Resources that were of interest were both natural resources as well as human labour. Human labour was a valuable resource itself which colonial powers used to extract and produce natural resources in the colonies and for services at home. Thereby, the logic of exploitation directly led to slavery, an additional, specific form of subordination. Extractive colonialism dispossessed the native population of their natural resources and, when they were turned into slaves, of themselves. Settler colonialism, in contrast, was guided by a logic of elimination (Wolfe 2006: 388). Settler colonialism aimed at an expansion of the land base of colonial powers. In extractive colonialism, land was only seen as a repository of resources that could be taken and brought home. Colonizers would only stay in colonies as long as necessary and in the number necessary to ensure the desired extraction of resources. In settler colonialism, however, land itself became the most

desired resource. Europeans moved to the new colonies permanently and tried to replicate the social and political structures of their homelands.

Indigenous peoples were only seen as a hindrance to these efforts. In order to gain the desired land, colonial powers aimed at eliminating the native population. They used three strategies of elimination: discursive, physical, and cultural. First, 'by defining away the essential humanity of the inhabitants, and by denigrating their capacity for self-government, it becomes possible to convert inhabited land… available for the first taker.' (Marks 1992: 28) This discursive elimination of the native population is expressed in the concept of terra nullius which denoted the idea that land was uninhabited and thus free for taking by settlers. Second, settlers and their government used a variety of policies to physically eliminate indigenous peoples. For example, war and other aggressions against the native population were used to enforce natural law which was taken to include the right to settle and appropriate 'unused land', to carry out missionary activities, and to travel through and initiate trade on the lands of indigenous peoples (Keal 2003: 94-94). Third, cultural genocide was a form of elimination that erased indigenous peoples as indigenous peoples from the (political) landscape. By either ignoring or depreciating indigenous cultures and their property, agricultural, and hunting systems, colonizers could demand that indigenous peoples assimilated to European ways of life, including systems of individual property and agriculture. This move was explicitly justified because it would free up land by enforcing a more 'efficient' use of it (Locke, Vattel). Moreover, if indigenous peoples were not recognizable anymore as indigenous peoples, they also lost the rights that were tied to this status, further freeing up land. Thus, within settler colonialism, subordination and dispossession meant not exploiting but eliminating the Native, discursively, physically, and culturally.

Settler and extractive colonialism thus were based on a racialized notion of personhood that led to the systemic subordination of the colonized population and their exclusion from property, land, resource, and self-determination rights. In turn, the colonizers claimed rights over land and resources both at home and in the colonies as their natural right which they held as individuals and states. Both forms of colonialism thereby established a strong and institutionalized form of relational or social inequality. This inequality is expressed through relations in which people are ranked according to their assumed superior or inferior moral status. "Those of superior rank were thought entitled to inflict violence on inferiors, to exclude or segregate them from social life, to treat them with contempt, to force them to obey, work without reciprocation, and abandon their own cultures (Anderson 1999: 312). It is noteworthy, that in the case of colonialism, this relational inequality operated on the individual as well as collective level. It

was an inequality between individuals that (involuntarily) shared a political community, colonialists and colonized, and between peoples or states, the colonizing states and the colonies. Overcoming colonialism also means to abolish this relational inequality that was rooted in the denial of full personhood of the colonized and was expressed through oppression, exploitation, and denial of self-determination, land, and resource rights. Thus, Armstrong's focus on material equality between former colonies and colonial masters falls short. The link between relational inequality and denial of land and resource rights challenges Armstrong's suggestion that decolonization without resource rights is possible.

In the following, I will present two arguments for why resource rights are necessary to achieve decolonization and relational equality. The first one builds on the link between resource rights and the notion of full personhood. It argues that during colonial times, resource rights have acquired an expressive function that is status conferring. The second argument is especially relevant to indigenous peoples. It considers the value of resource rights for cultural resurgence that enables decolonial ways of life. Both arguments justify special claims to resources independent of attachment or improvement claims. They thereby introduce a further ground for special claims, beside claims from attachment or improvement, that a welfare egalitarian theory like Armstrong's should accommodate.[40]

The expressive meaning of indigenous land rights

In the last section, I have claimed that by focusing on material equality Armstrong has unduly ignored other relevant issues between (formerly) colonized peoples and colonizers when advocating for revoking resource rights of states. I have argued that relational inequality also has been a defining feature of colonialism and that it went hand in hand with a denial of land and resource rights. Subordination and dispossession were two sides of the same coin, both justified by an ideology that posited the colonized population as inferior to the colonizers. In this section, I will argue that because dispossession and denial of land and resource rights was an outgrowth of the denial of full personhood, the restoration of full personhood requires giving land and resource rights to the formerly colonized. The reason for this is that these rights have acquired a status-conferring function during colonial times. The argument rests on the assumption that

[40] This also distinguishes my approach from critiques that point out the shortcomings of global welfare egalitarianism in truly accommodating attachments and different resource values in different cultures (cf. Moore 2019, Kolers 2009). My critique, in contrast, primarily emphasizes the symbolic and instrumental use of land and resource rights for establishing relational equality and for decolonization which is not a focus of Moore or Kolers.

rights and resources do not only have an instrumental value for our well-being, but that having or not having them often also signals a certain status. Adam Smith (1827: 368) describes this when he says

'A linen shirt … is, strictly speaking, not a necessary of life. The Greeks and Romans lived, I suppose, very comfortably though they had no linen. But in the present times, through the greater part of Europe, a creditable day-labourer would be ashamed to appear in public without a linen shirt, the want of which would be supposed to denote that disgraceful degree of poverty which, it is presumed, nobody can well fall into without extreme bad conduct.'

In the times of Adam Smith, a linen shirt had not just a use value. It also had a status-conferring function by signalling to others one's good moral character. John Rawls also acknowledges the status-conferring function of rights when he argues that equal rights and liberties should have priority over the bettering of equality of opportunity or the economic situation. Part of the reason for the prioritization of equal rights and liberties is that besides their instrumental value for pursuing a good life, they also matter for recognizing all citizens as free and equal. Thus, certain rights and resources can express an inferior, equal, or superior status. They thereby have a status-conferring function, which must be taken into account when we talk about the advantages certain rights confer. As the Adam Smith example points out, status-conferring functions are often context specific. In ancient Greece, a linen shirt had no special status-conferring function while in Smith's time it had acquired one. The same applies to resource rights in a (post-) colonial context. Land and resource rights do not necessarily have a strong status-conferring function per se. They only acquire one if they are denied selectively and without good reason as has happened during colonialism. Therefore, Armstrong's suggestion to revoke resource rights does not necessarily have to be interpreted as an attack on the equal status of states and the people they represent.

For colonized people, however, subordination and denial of land and resource rights were so closely connected during colonial times that these rights have become something like a 'sticky sign' for their inferior status. Sticky signs are words or in this case actions that have been used in a certain way many times in the past. The particular use thereby develops a certain sticking power and becomes intrinsic to the action (Ahmed, 2004: 92). This is the case for policies that deny or restrict land and resource rights of (formerly) colonized peoples. The way that these policies have been used and justified in the past, inextricably links them to colonialism and thereby to relational inequality. This stickiness is important to understand the status-conferring function of land and resource rights in the colonial context. Like speech acts, distributive acts

are imbued with a certain meaning in so far as 'that action echoes prior actions, and accumulates the force of authority through the repetition or citation of a prior and authoritative set of practices. […] the act itself is a ritualized practice' (Butler, 1997: 34]. During colonialism, the denial of land and resource rights through colonizers has become such a 'ritualized practice.' Moreover, this practice 'sticks' to the notion of racialized personhood and inferior status which justified and enabled this practice of dispossession. Resource rights thus have become a marker for full person- and statehood and thereby have become status-conferring for colonized peoples.

In a world in which colonial structures are not yet entirely overcome, the denial of resource rights then can be reasonably interpreted as a consequence of the (renewed) denial of full person- and statehood. In turn, the restitution of these rights often is seen as breaking with the colonial script and as affirming equal status (Sparrow 2000). Armstrong (2017: 74) also recognizes that certain resource rights are tied to status when he for examples states that

'We will sometimes want to avoid gender- and ethnicity-based inequalities in resource benefits, especially in societies with a history of exclusion from resource ownership where this exclusion has fed into a vicious cycle of prejudice and stigma. […] There are also many indigenous communities, members of which have been deprived of access to valued natural resources, and been the subject of enduring inequalities of status, with regard to whom the same argument is plausible. In such cases hypothecating equal natural resource benefits makes egalitarian sense — if it promises to be effective in weakening the cycle of disadvantage in question.'

Armstrong here acknowledges that certain historical contexts connect resource benefits and rights to prejudices and stigma that negatively affect the equal status of people. This is obvious from his mention of prejudice and stigma as well as his suggestion to hypothecate resource benefits in such cases. Hypothecation (Armstrong 2017: 72/3) denotes that certain goods should be distributed equally because they are in some meaningful way connected to moral status and thus cannot be substituted for by other advantages. He thus recognizes that exclusion from resource ownership can come to express a lower status of the excluded. He also proposes that the appropriate way to re-establish equal status is to distribute them equally. Armstrong therefore seems to acknowledge that resources can acquire a status-conferring function and concludes that in order to ensure equal status, these status-conferring resources should be distributed equally.

It is therefore even more surprising that Armstrong only focuses on material disadvantages in the context of decolonization. One reason for this might be that he concentrates on the hypothecation of resource *benefits* as a solution. For Armstrong, it makes sense to talk about resource

benefits and not resource rights. Resource benefits can be hypothecated even if some international institution, and not states, holds and distributes resource rights. If resource rights were hypothecated, however, it would undermine Armstrong's project. The reason is that his version of welfare egalitarianism is based on the abolition of states' resource rights. Yet, as I have argued above, it is precisely resource *rights*, not just resource benefits, that have become status-conferring in the colonial context. Thus, equalizing resource benefits will not be effective in re-establishing equal status. Equal resource rights will be better suited to this end. Yet, they are not necessary. As discussed above, resource rights are not equally status-conferring for all groups. I have proposed that they only have become status-conferring for colonized peoples. For non-colonized people, denial of resource rights has not been associated with denial of person- or statehood. Thus, it does not seem harmful if groups that were not colonized lose their resource rights to an international body. If that is true, then it is possible to grant colonized peoples strong land and resource rights while denying the same to non-colonized states. Due to the different histories of both groups, this approach will affirm the equal status of colonized peoples without decreasing the status of other groups.

In this section, I have argued for three claims: First, resource rights have a status-conferring function for indigenous peoples and other colonized peoples. Second, resource rights have this function primarily for (formerly) colonized peoples. Third, this function gives indigenous peoples and other groups with a colonial history a stronger claim to sovereignty rights over resources than other groups. The status-conferring function of resource rights grounds special claims apart from attachment or improvement claims. The next section will discuss a second reason why land and resource rights are central to decolonization and how this can establish a further ground for special resource claims. While the argument about the status-conferring function of resource rights applies both to formerly colonized states and indigenous peoples, the argument of the next section has special, though not exclusive, relevance for indigenous peoples.

Indigenous land rights and the decolonization of the mind

In the last section, I have argued that decolonization goes beyond material well-being. It extends to the re-establishment of an equal status, which includes granting those rights connected to full personhood and thus equal moral status. In this section, I will focus on a further element of decolonization connected to land and resource rights: the decolonization of the mind and decolonial ways of living. Colonialism not only dispossessed and subordinated persons. It also

justified this dispossession and subordination with the alleged cultural inferiority and backwardness of native peoples. This narrative provided reasons not just to deny resource, land, and self-government rights to the native population but also to forcefully assimilate them. It also devalued native culture and ways of living as barbarian, backwards, and uncivilized (Young 2003: 2). Part of the colonial project was to eradicate such backward cultures and to assimilate, or 'civilize', the native population into western ways of living. This feature was especially prominent in settler societies in which cultural assimilation was systematically pursued. To this end, the settler state introduced boarding schools, prohibited native religions, ceremonies, and languages, and aimed to undermine traditional social structures, for example through introducing private, instead of communal, property. In the name of progress, cultural genocide was normalized by presenting it as the eradication of something inferior (Keal 2003, Bodley 2015, Coulthard 2014). David (2013: 57) speaks here of internal colonialism which is the 'cultural imposition of the dominant group on the minority groups, and cultural disintegration of the oppressed groups' indigenous culture.'

Franz Fanon (1991) argues that this devaluation of everything native was so entrenched in the colonial state that the colonial subjects have internalized it themselves . They thereby come to loathe their own culture, ways of living, and ultimately themselves (David/ Okazaki 2006a and 2006b). Moreover, this experience leads to an alienation from their own selves and an acceptance of their subordination in the colonial state. The resulting 'colonial mentality' consolidates the unequal structures that characterize colonialism. Coulthard (2014, 140), building on Fanon, emphasizes that 'one cannot hope to restructure the social relations of colonialism if the "inferiority complex" produced by these relations is left in place.' Thus, if colonialism does lead to a colonial mentality that naturalizes and thereby preserves structures of relational inequality, then decolonization and relational equality presupposes that this internalized colonialism is overcome. To do so presupposes a revaluation of native culture and ways of life. In this vein, the negritude movement "emphasized the need for colonized people and communities to purge themselves of the internalized effects of systemic racism and colonial violence by rejecting assimilation and instead affirming the worth of their own identity-related differences" (Coulthard 2014: 131).

The question then is how such a purging of colonial mentality and reaffirmation of the colonized's way of life can be achieved. Theorists working in the decolonial tradition hold that cultural revitalization and resurgence is key (cf. Strobel 1997: 63, Whyte 2018: 68, Simpson 2011, Coulthard 2014). Simpson (2011: 17/18) highlights that

‘Building diverse, nation culture-based resurgences means significantly reinvesting in our own ways of being: regenerating our political and intellectual traditions; articulating and living our legal traditions; language learning; creating and using our artistic and performance based traditions. [Decolonization] requires us to reclaim the very best practices of our traditional cultures, knowledge systems and lifeways...’

A first step towards that goal is for the colonized to gain control over their political, social, and cultural matters. Here is where an important difference between settler colonialism and extractive colonialism comes to bear. Colonies subject to extractive colonialism partly reached this freedom and control when they gained independence. In these colonies, the native population remained a majority and took over power when the country gained independence. So at least internally, these colonies gained independence and political self-determination. They can counter the past devaluation of their culture, history, and ways of life by now promoting them and changing colonial institutions in such a way that they enabled and reflected their own values and ways of living.[41] In settler colonies, however, independence meant a very different thing. Here, the settler society, not the native population, gained political independence from the colonial motherland. The native population, indigenous peoples, are up to this day subject to a state that is not their own, in which they constitute a minority, and in which they are still discriminated and disadvantaged. Moreover, the settler state has ultimate jurisdiction over them so that they depend on the state’s permission to re-establish their traditional legal, economic, and political systems. Consequently, collective self-determination rights are one part for enabling effective decolonization for indigenous peoples. Another, equally important part are land and resource rights.

Traditional indigenous ways of life are land-based. ‘“Cultural,” here, far from sitting on one side of a nature/culture divide, extends to-and indeed from-the natural world.’ (Whitt et al. 2001: 703) Indigenous knowledge systems are similarly bound up with the land on which they developed. As Kyle Whyte (2018: 63) highlights, ‘indigenous knowledges have governance value. That is, they serve as irreplaceable sources of guidance for Indigenous resurgence and nation building.’ Thus, political, legal, economic, cultural, and knowledge systems are all interdependent and in turn all are land-based. Indigenous peoples thereby differ from most other

[41] Of course, former colonies still experience strong dependencies on international bodies and other states, e.g. through debt, conditions for foreign aid, and treaties which all restrict their internal self-determination. Yet, in contrast to indigenous people they still have considerably more leeway in how to structure their political, legal, and cultural systems as well as their land and resource use.

states whose political and cultural systems are less dependent on specific land and resources. Armstrong (2017: 138) also acknowledges this when he says that 'the example of indigenous communities supplies cases where plausible claims for resource claims can be made, [yet] it does not, typically, bolster the case for national resource rights.' The reason he allows for some indigenous communities, but not for states, to claim resource rights is their different attachment to resources (Armstrong 2017: 137/8). According to him, states cannot convincingly claim a close attachment to all resources that are on a state's territory. In some cases, the state's citizens will have very little attachment to particular resources because they do not play a part in the culture or history of the country. In other cases, it might only be subgroups, such as indigenous peoples, that have a strong attachment, and thus claim, to resources on a part of the territory. In neither case, Armstrong argues, is it the whole state that can claim all resource rights of all resources on its territory.

Traditional indigenous systems, in contrast, are based on a different understanding and relation to the natural world than that of most states. Commonly, states accord only humans membership and see land and resources primarily as instrumentally valuable to these members and their political system. Thus, the justifications for claiming resource rights are anthropocentric. Within this anthropocentric framework, a state can claim land because its citizens have certain residency and occupancy rights, it can claim resource benefits in so far as it needs them to provide for its citizens, its citizens can claim control, access, and benefit rights based on their attachment and life plans. In contrast to that, indigenous peoples have a more inclusive notion of membership. They often have cosmologies in which non-human beings like animals but also rivers or mountains are regarded as kin and members of the community (Whitt et al. 2001: 706-709). Accordingly, 'if a people belongs to a land, and land inheres in a people, it cannot be alienated or disowned. It cannot be reduced to a commodity.' (Whitt et al. 2001: 712) Belonging then does not signify ownership but rather a relation of interdependence and reciprocity that structures life, community, and identity (Whitt et al. 2001: 714-715, Kimmerer 2018: 33). It is this encompassing attachment of indigenous people to land and resources that Armstrong (2017: 137) points to when saying that indigenous peoples can claim fuller and more permanent resource rights than typical states.[42]

[42] These differences in how indigenous peoples relate to the natural world also is reflected in their economic, legal, and political systems. Therefore, in order to enable indigenous resurgence, not only land and resource rights but also far-reaching self-determination rights will be necessary.

However, what the resurgence argument proposes is not a claim from existing attachment but one from the need to rebuild attachment. Armstrong does accord indigenous peoples resource rights but only on the condition that they have preserved a strong and enduring attachment to the land and resources in question. He (2017: 137) doubts that modernized, i.e. assimilated, indigenous peoples can make such strong and extensive resource claims. Yet, if the starting point is the concept of colonial mentality, then it is exactly these assimilated indigenous peoples that most need to reconnect with the land and their traditional cultures. For indigenous peoples, resurgence means to '*re*claim and *re*generate one's relational, place-based existence by challenging the ongoing, destructive forces of colonization' (Simpson 2004: 88, emphasis K.R.). Successful resurgence and thus decolonization thus relies on access to and control of traditional land, even if and especially if there is no current strong attachment. Through the direct link between ongoing oppression, the need for internal decolonization, and land rights, indigenous land rights gain strength outside of attachment claims. At the same time, claims that are based on the need for resurgence are also constricted in their scope. They can only justify land and resource rights if indigenous peoples use them for re-building their own societies and cultures. Thus, the rights come with a condition attached and do not give indigenous peoples the freedom to use their land and resources in any way they like.

The weight of colonial history

In the last two sections, I have argued that colonial history produces at least two additional grounds for special resource claims: the resurgence argument claims a practical function of resource rights for decolonization and the status-conferral argument a symbolic function. In this last section, I will analyze what effect accepting these two arguments would have on indigenous land and resource rights and whether a welfare-egalitarian theory like Armstrong's can accommodate indigenous rights. I will first ask which rights the two new arguments can justify and under which conditions. I will then outline how weighty the claims stemming from these two arguments are within a welfare egalitarian framework.

So, which rights can the two newly introduced arguments justify? I argued that for colonized peoples, resource rights should be granted to affirm their full personhood and relational equality with their former colonizers.[43] The status-conferral argument can justify the full bundle of resource rights because its starting point are the kind of resource rights that expressed full person-

[43] The right to collective self-determination is similar to land and resource rights in that is has a status-conferring function. When it was restored to colonies, it was recognized that this is a signal for them becoming equals on the

and statehood during colonial times. The freedom to access, control, and benefit from the resources on their territory is what colonized people were denied and thus it is what should be restituted now. Thereby, resource rights of former colonies are taken out of the general welfare egalitarian scheme that allocates resource rights to equalize welfare globally.

Yet, the status-conferral argument only works as long as there is a reasonable connection between resource rights and relational inequality. If that connection loosens, the justification for full resource rights of colonized peoples also weakens. The argument thus does not provide the basis for an indefinite exception for colonized peoples' resource rights within a welfare egalitarian system. What it does provide, is a strong reason to not pressure former colonized states into transferring their resource rights to an international body that will manage and allocate them. It also provides strong grounds for restituting land and resource rights to indigenous peoples instead of directly putting them in the hands of such an international body. This restitution would break with the colonial tradition of states making decisions on behalf of indigenous peoples and would instead return this power to them. Moreover, it would emphasize that indigenous peoples have their own sovereignty, part of which is the decision when and how to join certain international systems. It would thereby reverse the current standard assumption that settler states have sovereignty over all groups, including indigenous peoples, on 'their' territory (cf. Turner 2006).

The second argument about resurgence addresses colonial mentality as a continuation of colonialism's relational inequality. Resurgence movements try to reverse it through a revitalization and revaluation of indigenous social and cultural systems. In the case of indigenous peoples, traditional cultures and social and political systems are interwoven with particular lands and ecosystems. Therefore, successful resurgence depends on rights to access, use, and control traditional lands and resources. The resurgence argument can justify these rights because they are needed to establish decolonial ways of living and to overcome colonial mentality. They thereby

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international stage. Indigenous peoples neither have received land and resource rights nor the right to self-determination after colonialism has officially ended. Thus, the status-conferral argument also works for self-determination rights. In the case of indigenous people, this means that one reason for granting them is their status-conferring function that helps to neutralize the existing relational inequality between indigenous people and settler states. In that sense, equal citizenship rights are not enough to restore relational equality between indigenous peoples and settler descendants and a nation-to-nation relationship would be preferable where possible and wished for by indigenous peoples. Yet, as Armstrong focuses on resource rights and justice, I will also keep the focus on these rights for now.

create the conditions for true relational equality in which entrenched and internalized power and status inequalities are eradicated. Yet, in contrast to the status-conferral argument, the resurgence argument cannot justify exclusive rights to benefit from natural resources. Rights to benefit can only be justified in so far as they are necessary for enabling resurgence, e.g. by providing money for setting up educational programs or funding political and social institutions, or for equalizing indigenous people's welfare in some other way. Moreover, the resurgence argument is also a conditional in two ways. First, it only justifies indigenous land and resource rights if they are used for resurgence. Second, the argument only applies in so far and so long as resurgence is needed to counter colonial mentality and as long as decolonial ways of life are impossible within the dominant community.[44]

If the resurgence argument loses force, indigenous peoples may still claim land and resource rights based on how tightly interwoven their *de facto* ways of life and political systems are with land and resources. Yet, this would be an argument from attachment not an argument from resurgence. Thus, both the status-conferral and the resurgence argument place indigenous land rights in the context of decolonization which gives them limited reach outside this context. However, for the current situation in which colonial structures and effects are ongoing, both arguments apply.[45] Yet, how strong is the foundation that these arguments provide for indigenous land and resource rights if they are weighed against other claims? So far, I have given reasons to consider that colonized peoples have *pro tanto* resource rights as long as the effects of colonization endure. The justification of these resource rights rests on their role in overcoming relational inequality. Within a welfare egalitarian scheme, we would need to weigh how much relational equality contributes to welfare against the welfare-enhancing function of other claims and take into account the relative welfare positions of the different claimants.

[44] This does not mean that if decolonial ways of life are possible in the dominant community, indigenous peoples must join the dominant society. It just means that in that case, the resurgence argument is less suitable to justify land and resource rights. Instead, attachment claims would play a more prominent role.

[45] Both arguments together speak against the settler state exclusively aiming for democratic equality between citizens and for settler states to institute equal nation-to-nation relationships instead. However, there might be many indigenous people for whom this solution is not viable, e.g. because they have assimilated, live in urban centers, and/ or are geographically scattered. For them, land and resource rights might still be important for the reasons outlined above even if they otherwise stay citizens of the settler state. Therefore, I have separated as far as possible the discussion about indigenous land and resource rights and indigenous self-determination rights. Nevertheless, I recognize the many links and interdependencies between both.

Thus, these two elements will make the strength of land and resource rights of formerly colonized peoples depend on the respective context in which they are claimed. However, it should be clear that neither the resurgence argument nor the status-conferral argument outweigh resource claims that are based on minimal needs such as food, clean water or shelter. For example, if resources on indigenous lands were needed to keep others from starving, indigenous resource rights could be limited. Yet, this limitation is only permissible if no other alternative that would impact less on the goal of equal welfare were possible. In other cases, the status-conferral and resurgence arguments introduce an additional welfare factor that must be taken into account when weighing policy and distributive alternatives. Concern for relational equality will outweigh claims that are less fundamental for human welfare such as claims based on aesthetic attachment or claims based on preferences for working in certain industries. In other cases, it might introduce an extra consideration that can act as a tiebreaker if two alternative policies would otherwise equally further welfare. To sum up, the status-conferral and resurgence argument provide grounds for respecting and restituting land and resource rights of indigenous peoples and formerly colonized peoples. They thereby introduce two additional special claims to the ones that Armstrong is considering, attachment and improvement. Moreover, the arguments add more weight to land and resource claims of indigenous people and other formerly colonized peoples. Even though they cannot justify absolute and permanent resource rights, they can justify strong resource rights in the name of overcoming relational inequality stemming from colonialism.

Young (2003: 2) says that 'postcolonialism claims the right of all people on this earth to the same material and cultural well-being.' Postcolonialism and welfare egalitarianism thus share the common goal of providing equal welfare for all. In this paper, I have argued that Armstrong focuses too much on the material well-being in the decolonial context and thus favors an abolition of sovereignty over resource rights even for (formerly) colonized peoples and states. I have then discussed in how far land and resource rights of colonized peoples are key to overcoming the entrenched relational inequality of colonial times. I have proposed two mechanism through which land and resource rights can help to establish more relational equality. The first mechanism is the status-conferring function of land and resource rights for (formerly) colonized peoples. I have argued that the denial of land and resource rights has become linked to the denial of equal status and individual and collective rights during colonial times. Thus, to overcome this entrenched status inequality, land and resource rights should be granted to (formerly) colonized peoples until this association has weakened and/ or relational equality between these

groups has been established. The second mechanism is land-based resurgence movements. They aim at countering internalized colonization that causes the (formerly) colonized to perceive themselves and their cultures as of lower status than that of the colonizers. Internal colonization thus leads the colonized to accept their lower status. It also keeps them from rebuilding and cherishing their own cultures and ways of life that would enable them to live outside of and resist oppressive colonial structures. Resurgence movements address both forms of inequality by enabling ways of life outside colonial structures and promoting a revaluation of indigenous peoples and cultures. Together, the resurgence and status-conferral arguments address a blindspot in Armstrong's welfare egalitarian theory. They show that land and resource rights are necessary for (formerly) colonized peoples in order to erase inequalities in status, power, and the ability to make and pursue one's own life plans. In a world that is still deeply shaped by colonialism and its enduring effects, the proposed amendment to Armstrong's theory will help to lay the foundations for global equality in all domains that affect welfare.

Moreover, once we recognize the importance of status inequality, it does not only argue for acknowledging indigenous land claims. It also strongly supports the importance of acknowledging indigenous worldviews and incorporating them into the frameworks for resource rights and welfare. Part of the past and ongoing oppression of indigenous peoples is the devaluation and exclusion of their worldviews and thus in order to treat and affirm indigenous peoples as equals, their worldviews and the corresponding value systems should be taken seriously. Trying to integrate indigenous worldviews into a welfare egalitarian framework might have different effects. First, it may widen the scope of application to non-human beings. Animals and other beings might become right holders with their own claim to welfare. As a consequence, there will be a change in what can be considered a natural resource to be freely distributed. Additionally, it complicated what kind of claims we can make towards beings that are both in a sense a resource and a being with intrinsic worth, e.g. the deer that is food for us but also a potential claimant of welfare rights. Second, taking indigenous understandings of welfare into account might change the welfare egalitarian framework itself. Many indigenous peoples view welfare not just as interest satisfaction but as the harmonious co-existence with humans and non-human beings. The latter then is based on respect and the fulfillment of one's duties towards each other rather than on a purely rights-based framework.

Third, incorporating indigenous worldviews into the welfare egalitarian framework might lead to a partial departure from welfare egalitarianism itself because the values on which it rests might get re-interpreted or changed if we, for example, take into account indigenous notions of

respect and reciprocity. So even the `internal' critique proposed in this article, eventually leads back to a possibly radical change of the framework if we take abolishing colonial oppression and inequality seriously. In this article, I have shown that welfare egalitarians should do so if they care about all aspects of human welfare and not just material well-being. [46]

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Paper 3: Can naturalistic theories of human rights accommodate the indigenous right to self-determination?[47]

The indigenous right to self-determination is often called a third generation human right. The notion of a third generation of human rights has arisen in the last decades when certain collective rights were introduced into the human rights discourse. The status of these rights as human rights is still strongly contested as they are perceived to fall outside the traditional understanding of human rights as individual rights that serve to protect humans against attacks and rights abuses by states. This view mainly goes back to what are called naturalistic theories of human rights. Consequently, philosophers within this tradition reject the idea that collective rights can be human rights (e.g. Griffin 2008). They argue that human rights are necessarily individual rights and that this follows from the definitional features of human rights. In contrast, political conceptions of human rights are much more flexible in incorporating such "new" rights into the official human rights body. This has led to the picture that only political conceptions of human rights can support the indigenous right to self-determination as a human right whereas naturalistic conceptions might see it as a right but not as a human right (Griffin 2008).

In the following, I will start by outlining how political conceptions of human rights include the indigenous right to self-determination into their theories. I will then challenge the assumption that naturalistic conceptions of human rights cannot do the same. In order to do so, I will first present four core features of naturalistic conceptions of human rights as they are identified by Charles R. Beitz and the criticism they attract from alternative, namely political, conceptions of human rights. I will then discuss the distinction into basic and derived human rights that is proposed as an answer to two of these criticisms. In a third step I will show that the indigenous right to self-determination can be interpreted as such a derived human right even though it is a collective right. I will argue that in many cases it is a necessary means to protect the right to individual self-determination as well as the social bases of self-respect and the status equality of indigenous peoples. All of these goods constitute basic interests of human beings so that these individual interests can motivate a derived human right which protects them.

[47] I would like to thank Will Kymlicka, Alejandra Mancilla, Seth Mayers, Johan Karlsson Schaffer, Jens Tuider, and Ursula Wolf for their comments on this paper or earlier versions of it.

Practical implications of the indigenous right to self-determination being a human right

Whether one believes that indigenous rights are human rights or not, seems to depend largely on which conception of human rights one favors: If one sticks with the more traditional naturalistic conception, collective and indigenous rights seem to have no place in the human rights discourse. Advocates of a political conception of human rights, in contrast, are much more likely to accept them as human rights. This has important implications for the practice that is informed by such background theories. According indigenous rights the status of human rights, puts them on a par with other human rights. This means that in cases of rights conflicts, a careful deliberation needs to take place that aims at balancing the different rights claims. This does not mean that indigenous rights will always win out over other human rights but this possibility at least needs to be considered. On the other hand, if indigenous rights are excluded from the human rights realm, they are seen as potentially weaker rights than those having human rights status. Consequently, if there is a rights conflict, they will always be trumped by the stronger human rights claims. In this case human rights discourse can be used strategically to strip indigenous rights of the protective function they are supposed to have.

There are two main conflict areas in which indigenous rights are especially important and in which human rights talk can and is used to undermine them. The first area is land and resource rights. These are both separate rights as well as rights that are contained within the right to self-determination. Indigenous people were accorded these rights in the UN Declaration on the Rights of Indigenous People (UNDRIP) in order to ensure that they have control over the use and development of their ancestral lands independently of the good will of the state. However, many states have taken to argue that they will honor these rights only as long as they do not conflict with the pursuit of the common good or the general interest of the state. For example, Section 40 of the Australian Aboriginal Land Rights Act states that: “An exploration licence shall not be granted to a person in respect of Aboriginal land (including Aboriginal land in a conservation zone) unless . . . the Governor-General has, by Proclamation, declared that the national interest requires that the licence be granted… “ Similar provisions that reduce indigenous land rights to simple property rights to private lands can be found in other countries’ institutions as well. In practice, this means that these rights become non-effective exactly in those situations where they are needed most, namely when the rights of the minority clash with the interests of the majority. The argument often given to justify the suspension of indigenous rights is that access to these resources and lands is essential in order to fulfill the human rights claims

of the other state citizens. The human rights cited are mostly social and economic rights as well as the right to development. Although the latter is also a third generation human right, its status as a human right is more accepted than that of the indigenous right to self-determination, thus figuring as the higher-level right in a conflict.[48]

In such cases, human rights are strategically invoked to stop any critical weighing of interests by implying that, because one of the interests is protected by a human right, this right must be the more important one. In order to counter such claims it is crucial to determine how strong indigenous rights to land and resources are – either on their own or as a subset of the right to self-determination. If they are thought to be weaker than human rights, they inevitably loose out in settings where human rights rhetoric is used to back the majority's claims. If, however, it can be shown that they can be considered human rights no matter to which theory of human rights one subscribes, this lends them considerable strength and forces the other party to engage in a weighing of the interests at stake. To resolve this issue is especially pressing if one keeps in mind that the number of such conflicts can be expected to rise in the future because the majority of today's natural resources lies on indigenous land.

A similar human rights rhetoric is used in another area of conflict between indigenous people and the state. Many indigenous communities seek full internal self-determination. Apart from land and resource rights, self-determination also includes the right to jurisdiction over the territory in question. While many indigenous communities already enjoy some jurisdictional rights on their territory, these are often carefully delineated and restricted by the state. Moreover, the members of this community are thought to be not exclusively under the jurisdiction of the indigenous community but simultaneously under that of the wider state. If laws or interpretations of rights under these two jurisdictions conflict, the state can interfere and impose its law or its interpretation of the law in question on the indigenous community.[49] The justification for this

[48] One reason why the right to development is more readily accepted as a human right might be that its connection to individual human rights such as the right to an adequate standard of living in Article 25,UDHR, or the right to education in Article 26, UDHR, seems more immediate.

[49] See e.g. Wilkins (1997) and the ruling in the Peters v. Campbell case described by Claude Denis (1996) as well as the statement by H.E. Ms. Rosemary Banks, Ambassador and Permanent Representative of New Zealand, on behalf of Australia, New Zealand, and the United States, available at: www.australiaun.org/unny/Soc_161006.html (last accessed 10 August 2015)

restriction of indigenous self-determination usually is that the state has a responsibility to protect the citizen rights and human rights of all its members, including the indigenous ones. In order to fulfill this duty, it needs the power to interfere in indigenous communities if they violate those rights of their members.

While this concern is commendable and the issue of protecting the human rights of group members against the powers exercised by a group is important, this same reasoning can be once again used to deny indigenous peoples their full rights and leave them vulnerable to outside attacks. Clashes between different human rights are not unusual and by now there is a well-established and accepted semi-hierarchy of human rights: Rights that protect the physical and psychological integrity of a person are usually taken to prevail over other rights. For example, the right to physical integrity always trumps the right to exercise one's culture or religion which is why female genital mutilation is categorically prohibited. Yet, within the group of rights that are not protecting the physical and psychological integrity of a person, there is a less rigid hierarchy. Rights to access to one's culture, freedom of religion, non-discrimination etc. can and must be weighed against each other in each individual case anew. By excluding the indigenous right to self-determination from the human rights list, however, such a balancing process does not need to take place if it conflicts with another human right. This enables the state to interfere even in cases in which there are minimal human rights violations or when it depends on interpretation whether a human rights violation has taken place.[50] Making absolute human rights compliance a condition for full internal self-determination is therefore an effective way of withholding this right indefinitely.

In contrast, if the indigenous right to self-determination would be regarded as a human right itself, this could enable indigenous communities to claim full internal self-determination in the absence of grave human rights violations. This seems a much fairer course of action, especially if one keeps in mind that although no existent state has a perfect human rights record, this does not serve as a justification to subordinate them to another state's authority. Rather, the protection of human rights and the decision when and how to interfere into the internal affairs of a politically self-determined unit is relegated to international human rights bodies and courts. If the indigenous right to self-determination can be interpreted as a human right, a strong case can be made that indigenous peoples should have full internal self-determination that can only be

[50] Cf. Denis 1996.

limited by the rulings of international human rights courts and bodies, but not by the state that surrounds them. This would comply with the Human Rights Committee's General Comments on possible restrictions on the ICCPR rights listed in art. 12, 17, and 19. The General Comment on Article 12 ICCPR, for example, reads: "Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; *they must be the least intrusive instruments amongst those, which might achieve the desired result*; and they must be proportionate to the interest to be protected. [Emphasis added]."

If a state is worried about indigenous groups possibly violating some human rights of their members and wishes to protect these members, denying the whole group self-determination is neither the least intrusive nor a proportionate means to this end. Having international human rights bodies monitor and enforce human rights would be less intrusive, as it would still allow for self-determination. It would also be more proportionate, as it would not eradicate the exercise of one human right in favor of a (potential) violation of another one but would rather balance the protection of the whole range of human rights. Consequently, denying indigenous people full internal self-determination would be wrong if there was an alternative which would both allow for full internal self-determination and the protection of the individual human rights of the group members. Again, in order to make this argument in the first place, it is necessary to show that the indigenous right to self-determination can be counted as a human right so that the general principles on limitations of human rights apply.

Jean L. Cohen (2008: 582) warns that the key problem of the naturalistic approach is that it pays too little attention to the fact that human rights and the human rights discourse today is a part of power politics. Thus, it ignores the danger of philosophical human rights concepts being instrumentalized to serve the ones in power instead of protecting the values they are meant to protect. As the examples above show, this risk is very real. Consequently, it is important to show that indigenous rights can be embraced both by political and naturalistic conceptions of human rights. This helps to prevent that naturalistic human rights conception are turned into a means to pervert the initial aims of human rights – that is to protect every individual's basic interests from attacks by states and other powerful agents.

Political conceptions of human rights

Political conceptions of human rights are united by the importance they assign to the function human rights have in the modern world. For what Cohen (2008: 584) labels "empirical" political conceptions the starting point for determining the content and status of human rights is the

entirety of official human rights documents and actual human rights practices in the international political and legal arena as exercised by courts, international organizations, and (quasi-)political actors such as statesmen, UN officials and NGOs. These political conceptions determine which values human rights should protect and which tasks they should fulfill by looking at these documents and the relevant practitioners. Abstracting from what they find there, political conceptions finally draft a catalogue of human rights and construct what features they must have. This method leads to a strong practice-dependence of human rights, although it does not necessarily just mirror the status quo. Beitz (2009), for example, identifies human rights as those rights that are the subject of international concern and can give cause to international action if a state fails to protect those rights. Accordingly, he is critical whether women's rights, rights to political participation, and rights against poverty are truly human rights. He doubts that the current practice could support such a claim as he does not regard them as proper subjects of international concern (Beitz 2009: 160).[51]

Still, the main orientation for Beitz's theory is the malleable real world politics that generate the relevant human rights documents and govern the behavior of human rights practitioners. Accordingly, the human rights list itself is equally subject to change. This enables him to incorporate "new" human rights as long as these rights are part of the international human rights practice and doctrine. This also extends to indigenous rights which are usually counted among the third-generation of human rights. In fact, he explicitly acknowledges the "Rights of "peoples" (conceived as collective entities)—most importantly, self-determination and communal control over "natural wealth and resources"" as a fifth category of human rights (Beitz 2009: 28). He thereby deviates from more conservative human rights theorists that only accept individual rights as human rights and exclude any collective rights, including the indigenous right to self-determination, from the human rights spectrum. Instead, he embraces the collective right to self-determination and a people's right to its land and resources which form the core rights of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Furthermore, he names the ILO Indigenous and Tribal Conventions (Beitz 2009: 26) among the documents constituting the international human rights doctrine and refers to the Draft Declaration on the Rights of Indigenous Peoples as a source of human rights (Beitz 2009: 29). Thus, it seems safe to say that even though Beitz does not discuss indigenous rights explicitly, they would be endorsed by his conception – at least as long as they can be regarded as proper subjects of international concern. The fact that both the Inter-American Commission on Human Rights and the Inter-American

[51] For the revisionist aspects of Beitz's approach see Hessler (2013) and Schaffer's article in this volume.

Court of Human Rights have engaged with complaints and cases brought before them by indigenous people and subsequently ruled in their favor, shows that indigenous rights have indeed become a subject of international concern and are integrated in the body of international law (Anaya 2004b).

Another influential strand of political conceptions relies less exclusively on practice. This view has been defended by Joseph Raz. Raz holds that human rights theories should have two goals: "(a) to establish the essential features which contemporary human rights practice attributes to the rights it acknowledges to be human rights; and (b) to identify the moral standards which qualify anything to be so acknowledged." (Raz 2007: 8) Similar to Beitz, the first part of his account is characterized by attention to actual human rights practice. Like Rawls, Raz identifies human rights as those rights that can be invoked to justify an intervention into another state, i.e. an interference into its sovereignty (Raz 2007: 9). Here, he employs a wide definition of intervention in that he means it to include not only armed interventions, but also trade boycotts, condemning a country's violation of the right and other diplomatic measures (Raz 2007: 9). Contrary to Beitz however, Raz's second step in construing a human rights theory assumes that one must identify the moral rights that human beings possess independently from the human rights practice (Raz 2007: 10, 18). Rather than being informed by the practice, these moral rights provide a criterion for judging whether an intervention into a state's sovereignty is justified. Human rights then, are rights for which it is morally justifiable to limit a state's sovereignty and which at the same time have this sovereignty limiting function in practice (Raz 2007: 10).

Where does that leave indigenous rights? Raz does not offer a list of human rights, so there is no sure way of knowing whether he would count the indigenous right to self-determination among them. However, he does advocate the national right to self-determination. He understands this as the right of any encompassing group to demand political self-determination, which can go as far as secession, if the members of the group deem it necessary for their self-respect and prosperity (Margalit/ Raz 1990: 461). Raz and Margalit define an encompassing group as a group that possesses "a common character and culture", marks its members with this character and culture, has a membership that is based on mutual recognition, has importance for the self-identification of its members, in whom "membership is a matter of belonging not of achievement" and which is big enough that "mutual recognition is secured by the possession of general characteristics" (Margalit/ Raz 1990: 443-447). All of these features, save for the last one in a few cases, apply to indigenous people which includes them into the circle of groups

entitled to claim a right to self-determination. Yet, is this right a human right or a lower-level right according to Raz's theory?

Raz holds that the right to self-determination is based on the aggregation of individual interests, namely the interests in the prosperity and self-respect of their group, which bestow it with enough importance to impose a duty to respect it (Raz 1986: 187, 208). Furthermore, in an earlier text on national self-determination he imposes a duty to respect, i.e. to not hinder the group in question to exercise the right to self-determination, and even to fulfill this right, e.g. to provide aid in realizing the right, on states (Margalit/ Raz 1990: 460/461). Hence, he acknowledges that there is a moral right to collective self-determination. Now, much depends on how his criterion of limiting sovereignty is interpreted. As mentioned earlier his definition of interventions is rather broad, including also non-military interventions. If understood in such a way one would need to look into the actual human rights practice concerning indigenous rights. Are there enough cases in which other states or international organizations interfered with a state's sovereignty on behalf of indigenous rights to call them rights that can limit sovereignty? The answer, I think, is yes. Not only are failings of states addressed and publicly criticized, but human rights courts such as the Inter-American Court of Human Rights increasingly take up cases that pertain to violations of indigenous rights by states and issue statements, recommendations and judicial decisions in favor of indigenous peoples (Anaya 2004a). Additionally, the UN has formed its own Permanent Forum on Indigenous Issues, an Expert Mechanism, and has appointed a Special Rapporteur on the rights of indigenous peoples who can address specific cases of alleged violations of the rights of indigenous peoples. These demands to respect indigenous rights, to compensate indigenous groups and to heed court rulings can be seen as limiting the states' sovereignty with respect to their compliance with indigenous rights. Accordingly, all of Raz’s criteria for human rights are fulfilled and one would be justified to include indigenous rights into a human rights catalogue.

Political conceptions thus indeed seem to have no problem to recognize indigenous rights as human rights. This mostly stems from the fact that their accounts rely heavily on what rights are acknowledged as human rights in international law and practice. Since indigenous rights have become part of the regular human rights practice at least since the UN Declaration on the Rights of Indigenous Peoples in 2008 (Engle 2011), they are easy to integrate in many political human rights conceptions.

The four features of naturalistic conceptions of human rights

Naturalistic conceptions of human rights predominantly view themselves as part of the modern natural law tradition which goes back to the enlightenment period. Within this tradition philosophers identified certain natural rights, which were thought to belong to humans by nature, independent of any legal decree. Today, the features of human rights that were honed during the enlightenment period and follow the natural rights tradition are still central to naturalistic theories of human rights. Beitz identifies four of them (Beitz 2009: 53-58). Even though this list is not exhaustive and there are considerable variations between different naturalistic accounts, Beitz's summary of the most common features serves as a good starting point for the discussion because most of the criticism of naturalistic human rights theories is aimed at one of these characteristics while others that are not mentioned are much less attacked.[52]

Firstly, it is commonly understood that human rights are based on a certain value, feature or interest that is thought to be specific to human beings. One example is Griffin's (2008) account that ascribe humans some inherent dignity that is expressed by the ability to be a normative agent (Griffin 2008). Human rights are then designed to protect this special human feature, value or interest. This is also the reason why many see the concept of collective human rights so critically – after all, human rights are grounded in something distinctive of humans which means that any other entity, including groups, do not possess the feature necessary to be a holder of human rights.

Secondly, human rights are taken to be pre-legal moral rights which exist independently from cultural conventions and legal recognition: Human rights are always valid, regardless of whether a state acknowledges them and/ or whether a society has values and traditions in accordance or in conflict with them. This accounts for their potential to serve as a critique of and an external yardstick for current policies and behavioral patterns (Cruft/ Liao/ Renzo 2015: 5). In this sense, they present an extralegal authority which can act as an opposing force to a country's laws and justify citizens as well as other actors disobeying the authorities on moral

[52] Gilabert (2011: 440) characterizes naturalistic theories similarily by pointing out how they are regarding human rights as pre-institutional rights that anyone has in virtue of sharing some common interests with all other human beings and that are held not only against states but against everyone be it an individual or an institution. Etinson and Liao also stress that naturalistic conceptions are usually interpreted to say that human rights apply at all times and under all institutional arrangements.

grounds. On the international level it enables other states to hold their otherwise equals accountable for human rights violations and in some cases even justifies interventions into their sovereignty. This feature accords human rights universality in scope and opposes moral relativism.

Thirdly, they are also supposed to be timeless, meaning that as long as humans have existed and will exist, they possess the human rights stemming from the initially identified core features or interests of humans.

Fourthly, human rights are thought of as pre-institutional. This is understood both as human rights existing independently from the particular institutions that ensure and protect them and as human rights being conceivable in the absence of such institutions.

These four features of human rights – being grounded in an interest or feature specific to humans, universality, timelessness, and pre-institutionality – are central to how naturalistic theories understand and see human rights.

Basic and derived human rights

However, this understanding of what makes a right a human right has attracted an array of criticism from advocates of political human rights theories. For the purpose of this article, I will focus on the two criticisms that attack the claim that human rights are pre-institutional and timeless. Critics of naturalistic human rights conceptions such as Beitz (2009) or Raz (2000) argue that human rights would not make sense as a category applied to pre-modern times and thus are not timeless. Furthermore, they hold that human rights are not only a response to threats that only emerge with the onset of modernity but are also dependent on the existence of certain institutions that did not exist previously. These institutions not only serve to implement and protect human rights, so the argument goes, but are also necessary to conceive of certain human rights in the first place. According to this critique, the list of human rights suddenly becomes very short if one wants to uphold all four characteristics of naturalistic theories of human rights. Beitz, for example, holds that it is not only obviously pointless to speak of certain rights in a pre-institutional setting, but also points out that even if there are institutions and a state, some human rights in the UDHR are still not conceivable unless one lives in a certain type of society (Beitz 2009: 55, 57). Instead of seeing human rights as timeless and institution-independent he proposes to understand these rights as a response to possibilities and threats that appear in and are distinct to modern states, thus taking up Shue's notion of human rights as responses to "standard threats" (Shue 1996).

One popular strategy to counter this criticism is to distinguish "basic" from "derived" human rights. When Beitz attacks the idea of timeless human rights, he presupposes that those who endorse that idea mean that the specific interpretations and formulations of human rights that we have nowadays are invariant. If the UDHR states that "Elementary education shall be compulsory" (UDHR art. 30), Beitz takes this to be the supposedly timeless human right that naturalistic theories speak of. However, proponents of the naturalistic conception such as Griffin dispute this interpretation of human rights. They admit that most human rights as they are worded in the UDHR are not timeless because they depend on certain institutional settings such as courts, schools or a welfare system. Yet, they argue that the reason for this is that these rights are only derived human rights and not basic ones (Liao/ Etinson: 15). Basic human rights are those rights that relate directly to the feature or interest that is thought to be the very core of human rights. These rights are often rather abstract and are thought of as timeless and independent from institutions because they aim to protect something that becomes human beings no matter when or under what institutions they live. In contrast, derived human rights are neither timeless nor institution-independent. They are thought of as specifications of basic human rights that state more precisely what is needed to do at a certain time and under certain circumstances to fulfill a basic right (Griffin 2008: 50). According to naturalistic conceptions, it is often the latter form of human rights that is found in official human rights documents such as the UDHR (Liao/ Etinson: 15/ 16). This division between basic and derived human rights allows naturalistic theories to account for the change human rights undergo and the fact that some UDHR human rights would neither have been possible to fulfill nor been conceivable in this form in former times. At the same time, it justifies the assumption that there are some core human rights that are unchanging and are owed to every human being.

Collective self-determination as a human right

Given that we accept this division into timeless, pre-institutional basic human rights and context-specific, institution-dependent derived human rights, how can this be used to include collective rights into naturalistic human rights theories? Using the indigenous right to self-determination as an example, I will demonstrate that it is possible to interpret some collective rights as derived human rights that serve to protect core human interests and features in the particular circumstances we are in today. In order to do so, I will first identify what interests are protected by the indigenous right to self-determination. I will then argue that it can be regarded as a specification of a basic human right that protects the interests discussed before. So, which values and interests of human beings are protected by the indigenous right to self-determination?

I think one can identify two main interests that lie at the core of this right. One is the interest in individual self-determination, the other one is the interest in developing and maintaining a healthy self-respect.

Collective self-determination and individual self-determination

No matter what worldviews and life plans people have, they usually always have an interest in individual self-determination in the broad sense,[53] that is they want to have control over their life in such a way that they can lead it in accordance with their convictions and life plans. If one has an interest in having control over one's life, this normally also means that one wants to have an effective say in the political decisions that shape one's life. Political decisions about rights, liberties, and the general distribution of goods impact what kind of life plans one can develop and realize. This is part of the reason why political rights feature so prominently in the Universal Declaration of Human Rights.

If a group is in a constant minority position, though, these rights might not be effective. If the majority can always outvote the minority's concerns, members of that minority find themselves in a powerless position when it comes to shaping the political community in such a way that it does not constantly threaten the realization of their life plans or makes them even impossible. There are generally two strategies to deal with this problem: Either the minority is granted special representation rights or they get some form of autonomy or self-determination rights.[54] In both cases, the collective self-determination of that group is seen as closely linked to the possibilities of individual self-determination of its members. Thus, collective self-determination can be seen as a means to protect the individual interest in individual self-determination. Whenever the right to collective self-determination or special representation rights are necessary to protect individual self-determination, we can speak of these rights as derived human rights given that individual self-determination is a basic human right.

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[53] I will use individual self-determination in this broad sense to avoid any possible assumptions about the value that different people (do not) attach to personal autonomy or self-determination understood in a specifically liberal sense as the interest in being able to critically assess and revise one's convictions, world views and life plans.

[54] As Kymlicka (1995: 32-33) points out, self-determination rights and special representation rights need not be exclusive. Special representation rights are often complementary to self-determination rights in that they allow the minority to influence decisions about their self-determination rights on the national level and as such serve as a protection against possible attempts by the majority to revoke these rights.

This assumption seems justified given that the end of many political human rights, but also of social and cultural human rights can be traced back to the protection of individual self-determination. The right to vote, freedom of thought, religion and conscience, freedom of movement or the right to choose one's occupation freely all point at the same underlying value of individual self-determination. The rights and freedoms mentioned function as derived human rights that serve to protect the more basic human right to individual self-determination in nowadays societies. Two things follow regarding the right to collective self-determination: Firstly, every group whose members do not have an effective say in the current political order has the right that political arrangements are changed in a way that allows it to participate meaningfully in the making of decisions that shape its members lives. This means that indigenous people are not the exclusive holders of this right but that any group in such a position becomes a right holder. Secondly, a right to collective self-determination can stem from this arguments, but this is not necessarily so. The fact that individual self-determination can also be protected by special representation rights, leaves it open which of these options is chosen. As long as one is chosen and implemented in a way that effectively secures the group member's right to have an effective say in decisions that shape their lives, the basic interest in securing individual self-determination is being fulfilled.

Collective self-determination and the social bases for self-respect

The second fundamental interest protected by the indigenous right to self-determination is the interest in having secure social bases of self-respect. In the following I will define self-respect as having a realistic and favorable picture of oneself based on the understanding of oneself being of equal worth as anyone else; of one's abilities as being enough to control many parts of one's life, but not being omnipotent; and of oneself as having certain entitlements but not having claims on everything. Such self-respect combines the descriptive psychological concept of self-esteem understood as "the positive or negative evaluations of the self, as in how we *feel* about it [Emphasis added]" (Smith and Mackie 2007: 107) with the more prescriptive philosophical concept of moral self-respect as "properly valuing oneself" by "affirming one's moral rights in one's thought, processes and behaviours" (Massey 1983: 247, 250).

The moral constraints on the sources of one's self-esteem, that is the grounds on which one feels good about oneself, are introduced to distinguish self-respect from egotism, pride or what psychologists would call too high self-esteem. Such phenomena describe persons with high self-esteem, i.e. someone seeing himself very favorably, but with a lack of moral self-respect. Without the guidance by moral self-respect, the sense of worth is being derived from the wrong

sources, e.g. from regarding oneself as being better than everyone else or from being able to subject others to one's will.[55] Self-esteem is included to explain why someone who has moral self-respect, that is the proper understanding of everyone as equal human agents *intellectually*, can still *feel* that he is worth less and less able than other persons.[56] This in turn can lead to refraining from pursuing one's goals, anxiety, depression, and other mental health problems (Mann et al. 2004).

In contrast, someone who has the kind of self-respect described above will trust in his competence to make and pursue plans and will be confident in his own worth, while also showing respect towards others and their interests and rights. Therefore, a healthy amount of self-respect is usually perceived as crucial for leading a good life and being able to exercise one's individual autonomy. Theorists like Nickel (1987) and Liao (2015) see the purpose of human rights exactly in protecting such basic conditions for a good life. Yet, in contrast to many other goods, self-respect cannot be provided directly. The reason for this is that self-respect is sustained from both internal and external sources which often interact in a complex way. Internal sources of self-respect correspond closely to forms of moral self-respect. Moral self-respect is derived from conforming to moral standards (Massey 1983, Hahn 2008). External sources of self-respect are mostly studied under the heading of self-esteem in psychology. Here, social acceptance and recognition influence self-esteem considerably (Leary 1999, Kirkpatrick & Ellis 2001).

Of course, in most cases people are not treated the same by everyone. There might be a difference in how their family, their friends, their peer-group, and wider society treats them and while the actions of one group might sustain a person's self-esteem, the actions of another might at

[55] I herein follow Stephen T. Massey's (1983) distinction between subjective and objective concepts of self-esteem. What he terms a subjective concept of self-respect is what I call self-esteem in accordance with the psychological literature on the described phenomenon. His objective concept of self-respect is what Henning Hahn (2008) titles moral self-respect, which is the term I will use as well. The reason of rolling these two concepts into one is that such a concept of self-respect better captures the notion of self-respect that most political philosophers seem to speak of when they say that self-respect is on the one hand derived from one's moral standing but at the same time can be undermined or enhanced by one's social environment (see e.g. Hahn 2008, Rawls 1999).

[56] The popular example of Uncle Tom, by contrast, is the depiction of someone with a lack of moral self-respect. He does have self-esteem, i.e. he does not feel bad about himself, but fails to see himself as possessing the same worth as anyone else so that his basis for self-esteem, i.e. conforming with the ideal of a slave showing blind deference and humility, is mistaken.

the same time undermine it. There is no reliable way of predicting which of these sources of self-respect is the most important one for a person and how much negative influence from one source a person's self-respect can withstand if she has alternative sources of self-respect available to her. Also, the state cannot exert influence over all of these possible sources of self-respect. However, it is true that the state can control the availability of *some* of the external sources of self-respect and that these often play an important role in the development and maintenance of a person's self-respect. This is why there can be no right to self-respect as such, but it is possible to speak of a right to the social bases of self-respect, that is a right to live in a society that does not undermine self-respect through its rules, institutions or public culture. The state can nurture its citizens' self-respect in two ways: by making them feel respected and treated as equals with everyone else and by giving them the opportunities needed to exercise control over their own lives and thereby feeling as competent actors.

Being respected as an equal and not treated as an inferior is very directly linked to self-respect. The respect of others conveys a feeling of respect toward one's own self and affirms one's status as an equal which is constitutive of one's self-respect. Having control over one's life, being able to pursue one's life plans and having a realistic chance at realizing them are essential for individuals to feel that their actions are effective and they possess the competencies needed to live an autonomous life. In the following I will discuss two interrelated mechanism through which the state can try to secure these social bases of self-respect: promoting a public culture of equal and mutual respect (Rawls 1999: 155/6) and the provision of equal rights and liberties for all (Rawls 1999: 477).

Equal rights and freedoms

Equal rights and freedoms serve a threefold purpose. For one, they are a public statement about the assumed equality of all citizens and as such can foster the adoption of this view among citizens themselves which is an expression of mutual respect (Rawls 1999: 156). At the same time they are not only a public statement about the equality of citizens but also a means to guarantee the *actual* equality of citizens by protecting them from attacks on their equal status. Thereby, each citizen's perception of himself as having the same worth as any of his fellow citizens is supported. Lastly, these rights and freedoms usually also give each citizen an equal say in political affairs which is essential for the feeling of having control over one's own life chances and circumstances by taking part in shaping them. Additionally, the basic rights and liberties act as a safeguard from unwanted intrusions into the citizens' lives and gives them control over important aspects of it like religion, family life, education etc.

This ties in with the before discussed interest in individual self-determination or control over one's own life and explains why some minority rights might be essential in this context. With regard to minorities, the guarantee of the same basic rights and freedoms might not be enough to ensure that they have the same amount of control over the political processes and the political system that shape their lives. In order to give them an effective say in public politics, they might need and want either special representation rights or (partial) collective self-determination rights. The first option is more inclusive in that it requires the majority and the minority to engage with each other and find some common ground, demanding compromises from both sides. The second option, on the other hand, gives both sides complete control over their affairs at the cost of a more or less complete separation. Which of the two arrangements is preferable in a given situation depends on various factors. One important consideration, however, should be in how far either choice would further the perceived equality and mutual respect of citizens. I will argue that in the case of indigenous people much speaks for favoring self-determination rights over special representation rights as they are more effective in protecting actual equality as well as status equality. They thereby fulfill a function that Buchanan (2010) identifies as one of the main motivations behind human rights, namely to secure status equality.

Equality and mutual respect

In the following, I will mainly talk about the paradigmatic cases of indigenous peoples, that is, peoples that have been living on a territory before the arrival of colonists and settlers from overseas and that nowadays form a minority on their original homeland territory. As such the discussion will focus on the history and present day situation of indigenous people in countries like the US, Canada, South America, Australia or New Zealand. Nevertheless, most arguments also apply to the more contested cases of indigenous peoples that were never colonized by nations coming from another continent, but who were nevertheless subjected to oppression and cultural and societal marginalization by a majority culture occupying the same or the bordering territory of their homelands. The decisive feature here is the existence of historic injustice and oppression that expresses itself in a form of cultural and territorial domination and a denial of formerly possessed self-determination rights. When deciding whether self-determination rights or special representation rights should be given to indigenous people, one important factor to consider is the history between the indigenous minority and the majority that is mainly constituted of descendants of former colonists. There are a number of reasons why in such a case collective self-determination rights are not only more desirable than special representation rights but also necessary in order to provide secure social bases of self-respect. In the case of

indigenous people, self-determination rights play a symbolic role as well as a more instrumental role.

The instrumental role is largely identical to the role of minority protections discussed above. However, in the case of indigenous people this kind of protection might be felt to be even more important because there is distrust on the side of indigenous people that the state will respect their interests and deal with them on equal footing. Against a history of broken treaties and repeated rights violations, indigenous people have come to doubt agreements with the state. Moreover, the fact that members of indigenous people today are still worse-off than the average citizen of their countries in economic and social terms reinforces the impression that against all assertions to the opposite, the majority is not really invested or even interested in making them equals and erasing the negative effects of past wrongs (Spinner-Halev 2012: 86, Sparrow 2000). Thus, one driving force behind the indigenous push for far-reaching and irrevocable self-determination rights seems to be the worry that any right short of the right to self-determination is not able to effectively protect indigenous interests or to guarantee them a fair say in decision-making (cf. Anaya 2014).

This fear seems justified if one looks at past behavior of the majority, the situation of indigenous people today, and at the ineffectiveness of alternatives to self-determination rights in this special case. One such alternative mechanism to protect indigenous interests without granting them complete self-determination is the concept of free, prior, and informed consent (FPIC). First introduced by the ILO, the FPIC concept demands that states and companies consult indigenous people before any projects are undertaken that affect them considerably. The goal is to get the consent of indigenous people for the project in question and work out ways in which the negative effects can be minimized. Note that it is only necessary to seek, not to actually get, consent before conducting such a project (ILO 169). The withholding of consent does not function as a veto power, thereby considerably lessening the possibility for indigenous people to influence the final outcome.

Besides, even though FPIC could still be a powerful tool, in practice it is not a protection against domination. There is a plethora of problems associated with the concept of FPIC.[57] For example, there exist no criteria for the question of who can act as a legitimate representative for the

[57] For example, see the report of the Australian government concerning problems with guaranteeing FPIC in the context of Uranium mining http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/uranium/rep

community in question. In the past this has been utilized to only conduct consultations with a group that is sympathetic to the project but that does not represent the whole or even the majority of the indigenous group. Nevertheless, their consent was taken as sufficient while dissenters are silenced by not being given access to the official deliberations and by ignoring their protests. Another problem is the lack of a neutral outside authority to guarantee that the information given is sufficient and accurate. This has led to a plethora of court cases in which indigenous peoples sued because they were misinformed or information was withheld from them.[58] Yet, even if successful before court, in most cases an irrevocable damage is already done, leaving indigenous people once again in a situation to which they neither consented nor from which they benefit. It leaves them feeling powerless and vulnerable to the whims of the powerful or the majority, cementing their unequal position within the state.

In contrast to FPIC, the right to self-determination is a long-standing principle of international law which is well defined and internationally protected. Thus, it is much clearer what the right in question entails and violations of it are easier to identify and less contested. Furthermore, once self-determination rights are granted, these rights are more difficult to revoke or restrict in the absence of compelling arguments – a simple majority vote is not enough to withdraw self-determination competencies from a minority. Hence, in the lights of founded distrust in the state's willingness and ability to respect their rights, the right to self-determination offers a more secure protection for indigenous people than other rights designed to protect their interests. Granting indigenous groups self-determination ensures that they effectively possess the same rights as everyone else, thereby protecting their equal status.

There is also a symbolic aspect of self-determination rights and the refusal to grant them. They stand for the historic injustices that the colonists inflicted on indigenous people and that were never repaired. Before the arrival of colonists and settlers, indigenous communities were self-governing units enjoying ownership of the lands they traditionally lived on and that formed the bases not only of their livelihood but also of traditions, rituals and beliefs that were closely connected to the land. During the years of initial colonialization both was taken away from indigenous peoples: They lost the majority of their lands as well as their status of self-governing people. Instead their living space got confined to small pockets of "reserve" land and they were incorporated into a state founded and formed by the settlers and subjected to rules and a system

ort/c11 and Banerjee (2000).

[58] See e.g. *Ángela Poma Poma. v. Peru and Pueblo Indígena Kichwa de Sarayaku vs. Ecuador.*

that was not only foreign to them but to which they never consented. Treaties that were supposed to govern the mutual relations and preserve at least some of the self-governing rights of indigenous communities were broken and the new state soon treated them as just another minority living on its territory. Against this background, it becomes understandable why indigenous people attach such great importance to land and self-determination rights. These two things are exactly what was wrongfully taken from them in the past and what was never restored although the wrongfulness of these acts has been officially acknowledged by now. In this sense, the denial of self-determination rights stands for a historic injustice that endures until this day.

Although the current state does admit that it was wrong to rob indigenous people of their land, they only hesitantly and minimally restore it. This reluctance of repairing wrongful acquisitions of territory and powers is even more pronounced with regard to self-determination rights. For example, Canada, the United States, Australia and New Zealand did not sign the UN Declaration on the Rights of Indigenous People at first. They complained that this would give too much power to wide-ranging land and resource claims by their respective indigenous groups and would undermine state sovereignty with regard to provisions concerning indigenous self-determination rights.[59] Especially this last statement weakens these states' credibility as being committed to right past wrongs. It fails to acknowledge that the state sovereignty they seek to protect does not legitimately extend over indigenous people in the first place.

Will Kymlicka (2015) draws attention to the fact that mass settlement that turns the original inhabitants of a territory into a minority and denies this minority self-determination rights is a form of imperial occupation. He holds that mass settlement is comparable to the annexation of a territory in the strategy employed by the foreign power and its effects on the thusly created minority. The strategy employed is to change the "'facts on the ground' in ways that are potentially fatal to aspirations for self-determination (and indeed in ways that are intended to be fatal to these aspirations)" (Kymlicka 2015). In contrast to colonial rule or Apartheid-like systems, citizenship and voting rights are not withheld from the other group but they are forced to exercise them within and under the jurisdiction of a state different from their own. The effect is that the existence of other collective selves with self-determination claims is concealed as everyone appears to be a free and equal citizen of the state. At the same time, the supposedly free and

[59] See e.g. the statement by H.E. Ms. Rosemary Banks, Ambassador and Permanent Representative of New Zealand, on behalf of Australia, New Zealand, and the United States, available at: www.australiaun.org/unny/Soc_161006.html (last accessed 10 August 2015)

equal members of the minority are hindered in exercising a right that the majority unquestioningly claims for itself: the right to collective self-determination. This purports a view of this minority that regards their members as anything but equal with the majority as it rests "on the assertion that the hegemonic society is fit to rule while denying the same to native peoples" (Kymlicka 2015).

This view can be found even more explicitly in early court rulings such as US vs Nice which confirmed that even if Indians become US citizens, they still remain under the guardianship of the state which therefore can limit their citizen rights. The ruling on US vs Nice declares that "When Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, tribal relations may be dissolved and the national guardianship ended, but *the time and manner of ending the guardianship rests with Congress* [Emphasis added]" and reinstates that "Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations *adopted for their protection* [Emphasis added]." It also cites US vs Kagama stating plainly that "These Indian tribes are the wards of the nation. They are communities dependent on the United States... From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and, with it, the power." These rulings explicitly ground the state's right to interference in an assumed "weakness and helplessness" of Indians and asserts their inferior status in being wards that need guidance from a guardian state. They openly purport the view that Indians are less capable than the average American to lead their lives without a paternalizing state, thereby assigning them an inferior status and less rights and freedoms than the rest of the citizens. These rulings remain good law until today, Kagama being last cited in US vs Lara (2004) and in 2015 by the 6th circuit. During decolonization "the goal was to counter the view that whole peoples where inferior in ways that disqualified them from self-government" (Buchanan 2010: 686) by granting these nations independence and their citizens the full range of political rights. At the same time, Indians in the US are still held in a position that legally affirms this colonial view of them as inferior and incapable of self-government.

Cara Nine (2008) also gives a powerful argument for the view that "changing the facts on the ground", that is turning the indigenous people into a minority on that territory, does not lead to a supersession of *all* their claims as Waldron (1992) would suggest. She agrees with Waldron that the descendants of settlers did not themselves rob the indigenous population of their land

and that they indeed do not have anywhere else to go. Therefore, she accedes, it would be wrongful to expel them from the country. Yet, she points out, the right to stay does not imply the right to impose one's jurisdiction on the original inhabitants; they retain this right even if they should become a minority on their own lands. Of course, this does not preclude that the two groups voluntarily merge at some point and share territorial sovereignty – but if one of the groups insists on preserving their own territorial sovereignty, that is their self-determination, the other one is in no position to force them to merge. Thus, an argument as Waldron's that sees historic injustices and claims as superseded when the circumstances change, becomes hypocritical if the change of circumstances was willfully brought about by the initial perpetrators exactly to the end of invalidating the claims of the wronged. Nine concludes that "the descendants of colonists have a duty of reparative justice to return territorial sovereignty to the original inhabitants of the land" (Nine 2008: 80).

If Nine and Kymlicka are right – and I suggest they are – the continued denial of self-determination rights treats indigenous people as less than equal in two essential ways: They are seen as less capable than the majority to govern themselves, instead needing the "guidance" of others and they are regarded as having less rights than the members of the majority when it comes to receiving redress for injustices and having their interest in self-determination satisfied. This last aspect also expresses a lack of concern for their interests that reflects an underlying assumption of them having less worth as persons.

To sum up: Assuming that the current state's sovereignty extends over indigenous people even though they fight for independence equals a denial that this state forcefully incorporated formerly self-governing units into its own system and unjustly imposed its rule on them. If, on the opposite, the state does admit that it violated the indigenous groups' right to self-determination, but fails to recognize that in order to repair this injustice this right needs to be restored, its apologies and assurances to treat indigenous people justly and as equals lose credibility. This stand on the issue of self-determination not only signals to indigenous people that they are still seen as inferior to the majority. It also means that they continue to be subjected to illegitimate state powers over them, thus feeding the distrust in the state being willing to honor rights that are designed to empower indigenous people against the majority's will. The state fails to publicly affirm what Buchanan (2010) calls status equality of all people and which has a distinctly social-comparative aspect. Buchanan (2010: 684) stresses that human rights aim for status equality which is compatible with a certain level of material inequality but does not tolerate any difference in the public treatment of groups and their members that would imply inferior status.

Accordingly, given the specific historical situation of indigenous people, the withholding of self-determination rights can at the same time function as a denial of their equal status. It thereby also constitutes a serious attack on their social bases of self-respect as they are being denied the acceptance and recognition they are due.

Indigenous self-determination as a derived human right

Indigenous self-determination might be necessary to ensure individual self-determination and the social bases of self-respect, but does this make the indigenous right to self-determination a human right?

I have argued that in some instances collective self-determination is crucial to create the conditions necessary for self-respect, to secure individual self-determination, and to give the group members a secure sense of status equality. Furthermore, if these goods are essential to human well-being and of high interest to human beings, there is good reason to speak of rights protecting these goods as human rights. Rawls (1999) argues convincingly for the idea that the social bases of self-respect are an important basic, or primary, good for humans because self-respect is a precondition to make use of all the other rights and freedoms persons have. Even without its relevance for the enjoyment of other rights, self-respect seems a likely candidate for the inclusion into the list of goods that make a human life (minimally) good. It is an important part of the basic psychological well-being of humans and the protection of its sources deserves the importance that comes with being a human right. Individual self-determination is a crucial component of normative agency which Griffin (2008) regards as the core value protected by human rights but it can also be regarded as an interest humans have independent of their appreciation of normative agency. Every person has certain interests and aspirations on how to lead their life and individual self-determination protects their ability to realize these plans within reasonable limits. Buchanan (2010) identifies status equality as the normative core of human rights. While status equality is a value in itself for many people, it is also instrumentally important as a way of securing the social bases of self-respect. If this is true, the indigenous right to self-determination can be interpreted as a derived human right.

It is a *human* right because it is derived from universal basic interests of humans. As such it safeguards individual interests even though it itself is a collective right. It is a *derived* human right because it is a right that is required to protect those basic interests under the specific historical and institutional circumstances of today. The right to self-determination is not a good in itself but owes its status to its significance for the fulfillment of high-order human interests. If

there is a group whose members rely on the right to self-determination to satisfy these important individual interests, we can say that the right to self-determination is a derived human right. Nowadays, indigenous people are the most obvious candidates for such a human right. Many of the features that are seen as definitional of indigenous people, qualify them at the same time for this right: Having been on the territory as self-governing peoples before the arrival of the settlers who constitute the current majority makes for a shared experience of injustice that goes back to the loss of the status as self-determined peoples; being a minority in the country makes them more vulnerable to majority rule and puts their effective participation rights at risk; having experienced or experiencing ongoing discrimination and oppression predestines them to feel as less than equals and mistrust the rest of the society to treat them with respect and uphold their rights.

Indigenous peoples have a convincing argument why they are in need of the right to self-determination in order to provide their members with self-respect and adequate individual self-determination. The same applies to any other group in a similar situation. Yet, whenever these interests can be met without granting the right to self-determination, there is no *human* right to self-determination even though there might still be good arguments for there being a right to collective self-determination. In this regard, the human right to self-determination is not universal but similar to the right to maternity care. It is non-universal because it is bound to certain features that are not universally distributed among humans, being a woman or respectively being a member of a group that cannot provide self-respect and a sense of identity without the right to self-determination. Accordingly, the right to self-determination is not recorded in the Universal Declaration on Human Rights but has been acknowledged by the UN in a separate declaration just like the rights of children or the rights of persons with disabilities. Although these rights are neither listed in the UDHR nor do they fit the criteria of basic human rights in the naturalistic tradition at first glance, there are good reasons to count all these rights among the body of human rights as they are specific implementations of the more general rights in the Universal Declaration on Human Rights and serve to protect these individual rights in today's world. In this sense, the indigenous right to self-determination can be considered a derived human right in the naturalistic conception even though it is a collective right.

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