A Critique of the Supersession Thesis with Regard to Aotearoa's Treaty of Waitangi Settlements

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73867592

2022

Word Count: 2500 (exc. Footnotes)

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I. Introduction

Beginning in 1992[1] and continuing 30 years into the present day[2], one of New Zealand's most vaunted academics Professor Jeremy Waldron, has argued for and defended numerous elements of his Supersession Thesis ("ST"). Developed in response to Robert Nozick's principle of rectification, the thesis offers a critical method of discerning what may and may not be owed to peoples who have suffered historic injustice. ST arises from Waldron's consideration of Treaty of Waitangi breach remedies in the New Zealand. Waldron raises such issues on several occasions in his work, and has published articles critiquing the validity of treaties[3] and the concept of indigeneity.[4] This essay will analyse Waldron's views over the range of his 30-year discussion of the topic, with particular regard to his original 1992 piece. With this as a foundation, it will then analyse critiques from Harrison's reparations/restitution distinguishment, Murdock's questioning of what overall justice requires and for who, and Christie's comments on Waldron's monocultural views. I will argue that whilst Waldron's contribution to the indigenous rights debate is a thoughtful contribution from the other side of the aisle, it is flawed by its tendency toward hyperbole and it's lack of engagement with reality.

II. Supersession Theory

Waldron stated his motivation to submit his ST paper in 1992 came from arguments tendered by Robert Nozick regarding the historical rectification of injustice.[5] Inspired in turn by Locke, Nozick argued for the principle of rectification, and argued that any theory of justice must consider what may be owed to the descendants of those who had suffered historical wrongs. This entailed societies making use of a "best estimate" of what might have occurred had the original transgression not taken place. Justice would then require us to reinstate this counterfactual state of affairs, by the redistribution of holdings.[6]

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[1] Jeremy Waldon "Superseding Historic Injustice" (1992) 103(1) *Ethics* 4.
[2] Jeremy Waldron "Supersession: A Reply" (2022) 25(3) *Critical Review of International Social & Political Philosophy* 442.
[3] Jeremy Waldron "The Half-Life of Treaties: Waitangi, Rebus Sic Stantibus" [2006] 11 OLR 161.
[4] Jeremy Waldron "Indigeneity? First Peoples and Last Occupancy" [2003] 1 NZJPIL 55.
[5] Waldron, above n 2, at 445.
[6] Robert Nozick *Anarchy, State & Utopia* (New York, Basic Books, 1974) at 152-153.

Waldron begins by acknowledging that "reparations may symbolize a society's undertaking not to forget" that an injustice took place, offer compensation to victims and sustain a "dignified sense of identity."[7] Waldron takes no issue with symbolic acts of reparation, but proceeds to use the rest of the article to criticise the Nozickian justification for any large-scale transfers to those who were dispossessed by generations prior.

Waldron's first point notes the difficulty one has in accurately positioning Nozick's counterfactual test. For instance, supposing a piece of Māori land had not been wrongfully taken, how can we be sure that same piece of land would remain in the wronged parties' hands when we consider "human choices and autonomy spanning generations."[8] Waldron notes the occasional tendency of humans toward the whimsical and random. He asks how we can be certain that the original landowners wouldn't have sold the land or even lost it in a poker game?[9] Waldron finishes with the reasonable assertion that "it is not clear" why Nozickian counterfactual guesses "should have moral authority."[10]

Waldron continues with this line of reasoning in relation to the return of specific stolen land blocks, by making the point that "all present holdings are called in question" when one looks back to the original injustice in any market.[11] The original injustice has an effect on all those who trade within the same market, meaning "we cannot assume reificatory transfers will be confined to those who have had dealings with tainted holdings." Waldron notes that the injustice is perpetuated by the legal system, so long as the land is not returned.[12] In New Zealand, Waldron's analysis would state that any return of land cannot be confined to just those blocks taken unjustly from Māori, such as Kemp's Deed. Therefore, all land sales within the New Zealand market would have to be reviewed and considered for return, due to the web of interconnected transfers, holdings and capital created by markets.

After identifying the practical flaws in using Nozick's theory, Waldron then moves to argue why changing circumstances can mean that the original injustice has been superseded by current events. Over decades and even centuries, people develop new modes of sustenance,

[7] Waldron, above n 1, at 6.
[8] At 9.
[9] At 10.
[10] At 10.
[11] At 12.
[12] At 14.

"making the claim that land is crucial to their present way of life less credible in the economic case".[13] Waldron also notes that famine, changes in population and shifting resource availability can all mean that original entitlements may be vulnerable to the passage of time.[14] Waldron cites the massive structural and population changes seen in North America and Australasia, noting that whilst we cannot be sure those changes supersede the injustice of continued settler occupation, "it would not be surprising if they did."[15] Waldron concludes by noting that whilst justice is of great importance, the importance is relative to what actually may happen if justice is not done today, rather than what may have happened if injustice had not occurred in the past.[16] Justice in the here and now is what's important.

Waldron delivered an address to Otago University students in 2006 that applies a similar vein of logic to treaties.[17] Waldron notes the writings of John Stuart Mill, who discouraged nations from signing Treaties due to the fact that changes in circumstance may make the fulfilment of any Treaty obligations "wrong or unwise."[18] Waldron gives an example of 20th century Turkey wishing to renege its obligations giving capitulations and special privileges to foreigners from a Treaty signed in 1535.[19] As a further example, East Germany renounced its obligations under the Warsaw pact, citing the Vienna Convention on Treaties approval of such conduct due to a fundamental change in circumstances.[20] Likewise, Waldron questions strict adherence to the Treaty of Waitangi given the fact that circumstances have significantly changed. Waldron questions whether justice still requires our adherence to the Treaty.

III. Critical Analysis

Waldron has a number of articles that more or less replicate the same fundamental argument. It is submitted that Waldron's overall point is correct, justice now does require us to consider the circumstances we live in when attempting to rectify past transgressions. However, Waldron goes beyond the plausible. Waldron states early on in his 1992 piece that "this article is about reparations", and further states that his article considers substantial transfers of land or wealth

[13] At 20.
[14] Waldron, above n 1, at 20.
[15] At 26.
[16] At 27.
[17] See Waldron, above n 3.
[18] John Stuart Mill in *Essays on Equality, Law, and Education,* Volume XXI of Collected Works of John Stuart Mill (University of Toronto Press, Toronto, 1984) at 346.
[19] Waldron, above n 3, at 171-172.
[20] At 168.

in the efforts of rectifying the past.[21] Waldron does have some "sport" as Lindsey MacDonald notes, in noting the implausible nature of trying to fully rectify wrongs done hundreds of years ago to a group of people.[22] However, Waldron is focussing on complete rectification, rather than reparations or even compensation. Likewise in his Treaty article, Waldron moves from the reasonable and widely held view that the Treaty has evolved in meaning, to the assertion that the guarantee of rangatiratanga to chiefs is "fairly meaningless now."[23] In both examples, Waldron uses the reasoning of his principle to discredit specific indigenous claims for rectification than which, as he himself notes, his theory does not cover.

Caleb Harrison argues that Waldron's supersession thesis might justify the dismissal of claims of restitution, but not those of reparation.[24] Harrison makes the point that claims of reparation are more robust and flexible than complete restitution. Reparations can be anything from a formal apology to the transfer of assets or wealth to the afflicted party.[25] Waldron claims that the needs of the many others who inhabit New Zealand today who had no hand in the injustices of yesteryear have "priority over reparation" through the application of ST.[26] Whilst Waldron's claim may be true in the case of complete restitution, it is hard to imagine circumstances that could completely override any argument from indigenous peoples for reparations. Reparations also require less of the counterfactual guesswork as proposed by Waldron, being more flexible in nature. Waldron tends to mix the concepts together in his discussion, yet as Harrison notes, they are not the same.

When one examines the actual process of indigenous reparations in New Zealand, reality echoes Harrison's point. Though land is often returned in the settlement process, the allocations granted are of a handful of individual properties, as opposed to the millions of acres acquired through dubious means by the Crown.[27] Likewise, the total amount spent on Treaty settlements by the government since 1993 is $2.2b as opposed to the overall government spend of $1322b

[21] At 6-7.
[22] Lindsey Te Ata o Tu MacDonald "The Political Philosophy of Property Rights" (PhD Thesis, University of Canterbury, 2009) at 55.
[23] Waldron, above n 3, at 177.
[24] Caleb Harrison "Supersession, Reparations & Restitution" (2021) 19(2) *Journal of Ethics & Social Philosophy* 148 at 149.
[25] At 153.
[26] At 162.
[27] Ngāi Tahu "The Settlement: Claim History" Accessed 26 May 2022 https://ngaitahu.iwi.nz/ngai-tahu/the-settlement/claim-history/

in the same period .[28] Waldron notes ST does not aim to defer formal apologies and symbolic acts of redress, which the current line of Treaty settlements may fall under. However, as noted earlier, he would apply it to large transfers of wealth or property in the name of reparations. If one accepts that continuous injustices perpetuated by the Crown against Māori are responsible for so many of the issues Māori continue to face today, it is indeed hard to imagine circumstances where justice would require us to not attempt to remedy past transgressions of such scale. Waldron's theory only serves to push back against complete restitution, something that has never been seriously argued for anyway.[29]

Esme Murdock argues that Waldron banks on the notion that settler colonial governance structures *can* provide justice, "which is a fallacious claim" in Murdock's view.[30] Murdock's article harshly critiques Waldron's theory. Murdock laments the refusal of such governance structures to engage in the original and ongoing "sin" of colonial injustice and the attempt to switch the narrative into one of a benevolent Western state carrying the "racialised other" into "the progressive now of western liberal democratic governance."[31] The core argument made is a rejection of the idea that contemporary neoliberal government structures and powers are best placed to help indigenous peoples today. Murdock attacks the settler state as "parasitic", with mass land acquisition, imposed settler dominance and surviving colonial institutions the intended outcome of early imperial actions, rather than an unfortunate early consequence.[32]

Murdock uses this discussion to ask Waldron who justice in the here and now is for? Using a fire brigade analogy provided by Waldron in earlier discussions on the ST, Murdock asks: "Suppose that the fire brigade does put out the fire out that burned your house down, but that they also set the fire to begin with. Is that fire brigade functioning properly? This is not an exaggeration when we talk about the injustices here and now that Indigenous and Black folks are facing."[33] If one accepts that Māori face similar challenges to Indigenous and Black populations in the states, the same question remains. Māori are on the wrong end of numerous

[28] Andy Fyers "The amount allocated to Treaty of Waitangi settlements is tiny, compared with other Government spending" *Stuff* (3 August 2022, online ed).
[29] See E.T. Durie "Waitangi: Justice and Reconciliation" (paper presented at the School of Aboriginal and Islander Administration, University of South Australia: Second David Unaipon Lecture, Adelaide, 10 October 1991) where Durie acknowledges that "changed circumstances have made any full redress all but impossible."
[30] Esme G. Murdock "Indigenous Governance Now: Settler Colonial Injustice is Not Historically Past" (2002) 25(3) *Critical Review of International Social and Political Philosophy* 411 at 416
[31] At 418.
[32] At 416-420.
[33] Murdock, above n30, at 420.

health and wellbeing indicatory statistics, whilst continuing to suffer the harm of racism.[34] Surely justice in the here and now requires some remedy of this?

Indigenous scholar Gordon Christie notes Waldron's assimilation with a perceived general course of action for Western institutions and academics- the neglect of indigenous perspective in favour of western ideals and outcomes.[35] Christie begins by asserting that "justice is constrained to non-indigenous understandings…Possibilities of debate are therefore contained within a single horizon." Christie asks why no discussion of indigenous land/people relationships are examined as well as what might constitute moral relevance from an indigenous point of view.[36] Waldron himself acknowledges this point, but doubts it would make much difference.[37] To Christie, it is all the difference, stating that he "cannot productively work with the material."[38] As an indigenous scholar, any position that attempts to engage in the indigenous world that neglects indigenous viewpoints is of little value.

Christie's critique goes further than simple distaste for a monocultural view. Following discussion on a number of indigenous rights cases and of recent innovations in the Canadian legal system on that topic[39], Christie arrives at a bleak conclusion. Even methods of integrating and recognising indigenous knowledge and custom, so widely supported by indigenous people themselves, are simply further iterations of the colonial state attempting to enclose indigenous culture and tikanga within the state infrastructure.[40] Christie does not engage with ST itself, but instead chooses to analyse how it suffocates indigenous viewpoints in bicultural interactions. Indigenous customs and beliefs become divorced from their foundations to be repackaged into forms palatable to colonial interests.

Christie cites the adversity faced by Indigenous Canadians in having any rights concretely recognised in this system. Despite the theoretical possibility of large-scale land return flowing

[34] For example, see Toon van Meijl "Culture vs Class: Towards an Understanding of Māori Poverty" (2020) 62(1) *Race & Class* 78.
[35] Gordon Christie "The Supersession of Indigenous Understandings of Justice & Morals" (2022) 25(3) *Critical Review of International Social and Political Philosophy* 427.
[36] At 429.
[37] Waldron, above n2, at 448.
[38] Christie, above n35, at 427.
[39] See for example *Tsilhqot'in Nation v British Columbia* [2014] SCC 44.
[40] Christie, above n35, at 435.

from Canadian jurisprudence, very little land has actually been returned.[41] Furthermore, the tests for Aboriginal title are devised in settler courts and by settler jurists. These court processes are incredibly stringent, time costly and like all litigation, unimaginably expensive.[42] In reality, settler forms of reparative justice require large pools of capital, experience and time before even small amounts of compensation and rights validation are achieved. This is as true for Ngāi Tahu in New Zealand as it is for the Tsilhqot'in.[43]

Christie finishes with a strong critique of Waldron as a beneficiary of colonialism that serves to "express trumped up notions of self-interest."[44] How else can one explain such a desire to ensure other ways of moulding societies, that as we have seen are of no real threat to the current way of life, are "swept off the table"?[45] Waldron's 20 year defence of ST is incomprehensible to Christie when efforts to recognise and recompensate indigenous grievances make such piecemeal progress anyway.

IV. Author Analysis and Conclusion

Waldron has conceded that his positions have changed over the years. So much so that he states ST does not apply at all to compensation.[46] As Harrison points out, this is not at all clear in the rest of his scholarship, and the difference is worth noting so that ST arguments are not used to simply dismiss any efforts to redress past wrongs.[47] ST likely provides a strong argument against complete restitution, but does little to repel arguments of reparations or compensation.[48]

Furthermore, Waldron's ST scholarship often verges on hyperbole when related to actual practice. His example of treaties losing credibility looks to a 16th century pact in Turkey on international commercial affairs, a matter with very little relevance or similarity to New

[41] Following on 20 years from *Delgamuukw v British Columbia* [1997] 3 SCR 1010, just one piece of land in remote territory is under aboriginal title, Christie, above n 35, at 434.
[42] At 435.
[43] For example, see discussion of the $800,000 loan Ngāi Tahu Claim Board members were forced to ask of Japanese businessman, Masashi Yamada, after the bankers withdrew. Yamada gave several more loans on the strength of a handshake. Martin Fisher *A Long Time Coming* (Canterbury University Press, Christchurch, 1991) at 36. *Clarke v Takamore* [2012] NZSC 116 is a also good example of the strenuous tests imposed by the settler court to recognize tikanga Māori.
[44]Christie, above n35, at 440.
[45] At 440.
[46] Waldron, above n2, at 450
[47] Harrison, above n24, at 162-163.
[48] Note Harrison at 155, on the difference of compensation and reparations.

Zealand's Treaty, widely considered "simply the most important document in New Zealand's history."[49] His counterfactual hypothesis well illustrates the perils of undertaking such an exercise, but discounts the fact that it seems no one anywhere has ever actually attempted such an exercise in the indigenous reparations context.

Though the author will not direct critique as harsh as Christie's toward Waldron, Christie and Murdock both make further valid critiques of ST. Waldron is devoid of any indigenous perspective in his writing. Māori are mentioned sparingly in his 1992 piece, and only to create the platform for his otherwise monocultural theory.[50] Waldron concludes his arguments with instructions to do justice in the here and now, but as Murdock notes, indigenous peoples are crying out for exactly that. Christie further illustrates the divorce of Waldron's argument from any indigenous perspective on what is morally just.

Christie's view of the state packaging indigenous values and concepts in a manner that is more palatable to settler interests with the prevention of further unrest is cynical but likely true.[51] All of this ties in to settle the conclusion that ST is a very weak argument against reparations. Though a refreshingly not-racist contribution to the opposite side of the Treaty debate, ST serves to dispel only Nozickian theories of absolute restoration, rather than reparation.

[49] Lord Cooke "Introduction – Special Waitangi Edition" (1990) 14 NZULR 1.
[50] Waldron, above n 1, at 9.
[51] See the discussion around *Ellis v R* [2020] NZSC 89, in which the Supreme Court was willing to entertain the tikanga of mana as part of New Zealand's common law. Any tikanga that is to be legally recognized must go through the costly and arduous court process.

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