Are There Universal Collective Rights?

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Abstract The first part of the paper focuses on the current debate over the universality of human rights. After conceptually distinguishing between different types of universality, it employs Sen’s definition that the claim of a universal value is the one that people anywhere may have reason to see as valuable. When applied to human rights, this standard implies “thin” (relative, contingent) universality, which might be operationally worked-out as in Donnelly’s three-tiered scheme of concepts–conceptions–implementations. The second part is devoted to collective rights, which have recently become a new topic of the human rights debate. This part provides the basis of political–philosophical justification and legal–theoretical conceptualization of collective rights, as rights directly vested in collective entities. The third part dwells on the problem of universality of collective rights. It differentiates between the three main collective entities in international law—peoples, minorities, and indigenous peoples—and investigates whether certain rights vested in these collectives might, according to Sen’s standard, acquire the status of the universal ones. After determining that some rights are, in principle, plausible candidates for such a status in international law, this paper concludes by taking notice of a number of the open issues that still need to be settled, primarily by the cooperative endeavor of international legal scholars and legal theorists.

Keywords Universality · Human rights · Collective rights · Peoples · Minorities · Indigenous peoples

Human Rights’ Claim to Universality

All those interested in human rights are very well acquainted with the fact that, in many important aspects, the contemporary discourse revolves around the topic of
their universality. For instance, Michael Ignatieff has not so long ago written: “since 1945, human rights language has become a source of power and authority. Inevitably, power invites challenge. Human rights doctrine is now so powerful, but also so unthinkingly imperialist in its claim to universality, that it has exposed itself to serious intellectual attack.” (Ignatieff 2001a). Although the main criticisms come from Islam and East Asia, and to a lesser degree from the West itself,1 serious challenges to the universality of concept could be found in other parts of the world as well. However, one should distinguish between two sorts of criticisms. Whereas in the first set of cases, the very foundation of the human rights doctrine is taken into question, for its Western, individualistic origin2, in a number of other places, claim to universality is often perceived as some kind of idolatry or—when taking the form of a stronger accusation—as a convenient ideological tool for promoting particular political interests of Western countries in certain parts of the world.

I will here dwell only on the former issue, namely, what does it take for a human rights claim to be of universal nature. It is often stated that human rights are the rights that one has simply on the account of being a human. This argument implies at least two things: (a) that human rights are grounded in some culturally transcendent and genuinely universal moral standards3; and (b) that human rights are inherent to one’s human nature, and hence that they are fundamental.4 The response to the first assumption might be that mere proclamation that something is of a transcultural value cannot in itself constitute sufficient ground for universality of a claim.5 Consequently, the mere fact of the existence of the Universal Declaration of Human Rights, or even the vast cross-cultural adherence to the basic human rights international instruments, such as the two international covenants, cannot constitute the conclusive evidence of the universality of asserted rights.6 As for the response to the second assumption, it is easy to notice the variable and historical character of certain rights that are deemed to be of the fundamental nature.7 For instance, the right to property, once conceived by natural legal theory as an absolute inalienable right of individual, was subsequently heavily modified and restricted by the rise of social legislation. Hence, one may draw the conclusion that “rights are not

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1 One of the most influential challenges is offered in Pollis and Schwab (1979).
2 For an Islamic challenge of this sort, see, e.g., (Abu-Sahlieh 1993). For an Asian challenge of this sort, see, e.g., (Onuma 2000). Both articles, nevertheless, tend also to highlight the hypocritical nature of Western policies, which use the discourse of human rights, even though they are often in plain contradiction with the very principles they allegedly promote.
3 In Waldron’s opinion, this is one of three strategies, though the most philosophical one, in defending the universality of human rights (Waldron 1999).
4 This aspect is analyzed in Bobbio’s essay On the Fundamental Principles of Human Rights. See Bobbio (1996).
5 Y. Onuma, n 3 above, 71.
6 The other way around is true as well. Thus, discrepancies between the adhered-to obligations and actual practices in certain parts of the world cannot per se be a proof of the cultural bias or the relative nature of enumerated rights. (Müllerson 1998)
7 To be sure, the stance of universality of human rights can be traced far before its proclamation in the current international legal instruments. Thus, Nickel concludes, “It would not be a great distortion to view the recent rise to prominence of the vocabulary of human rights as simply the popularization of an old idea,” namely that of natural law and natural rights theory (Nickel 1987).
fundamental by their nature. That which appears to be fundamental in a given historical era or civilization, is not fundamental in other eras or civilizations.”

Factual and Normative Claims to Universality

What are, then, implications of the aforementioned responses? The immediate implication would be to handle with care factual elements of a claim to universality. In trying to defend the universality of democracy, Amartya Sen proceeds with the following methodological question: “For a value to be considered universal, must it have the consent of everyone?” His answer is prompt and clear: “If that were indeed necessary, then the category of universal values might well be empty.” He says that he does not know of any value (not even the value of motherhood) to which no one has ever objected, and thus concludes that “universal consent is not required for something to be a universal value. Rather, the claim of a universal value is that people anywhere may have reason to see it as valuable.”

Rosenfeld follows this line of reasoning, using the case of torture to demonstrate difference between factual and normative claims to universality. Namely, from the fact that many societies practice some form of torture does not follow that “there exists a universal repudiation of torture.” Moreover, “it could still be consistent to claim that torture is morally wrong universally and that those societies which practice or condone it ought to be morally condemned.” (Rosenfeld 1999). Therefore, the real challenge to a universal claim does not stem from the mere assertion that “we are here, in our culture, doing it our way,” but from the argument that our culture provides yet another normative standard, equally universal in scope, for qualifying certain behaviors as right or wrong, acceptable or unacceptable. In the 1947 notice of concern, sent and submitted to the UN Commission on Human Rights, the American Anthropological Association wanted to stress exactly that point: “The rights of man in the Twentieth Century cannot be circumscribed by the standards of any single culture or be dictated by the aspirations of any single people.” (The Executive Board, American Anthropological Association 1947) This is what Rosenfeld rightly qualifies as relativism—“the situation in which a normative claim can only be ultimately justified in terms of a contested conception of good.”

This author is furthermore accurate in arguing that, strictly speaking, at the opposite pole of universalism is not relativism, but particularism. After all, this is only a reminder of what already Aristotle postulated, writing about differences between “natural justice,” which was universal for all peoples in all times, and “legal justice,” i.e., positive law, which was contingent and particular, designed for a

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8 N. Bobbio, n 5 above, 6.
9 However, Sen is aware of the fact that “[u]nderstood in this way, any claim that something is a universal value involves some counterfactual analysis - in particular, whether people might see some value in a claim that they have not yet considered adequately.” (Sen 1999)
10 J. Waldron, n 4 above, 311–314.
11 M. Rosenfeld, n 11 above, 252.
12 Ibid 250. He stresses that “the relation between what is particular and what is relative is multifaceted and complex. (Ibid 252)
certain state in a certain time (Aristotle 2000). In promulgating the Universal Declaration, the UN “attempted to set forth the norms that exist within enlightened moralities.” That is, human rights “were held to exist not as legal rights but as universal moral rights,” as something that would fall under Aristotle’s concept of “natural justice.” In that respect, enacting the Universal Declaration was to be understood as an act of positivizing preexisting inherent rights of human beings rather than an act of arbitrary creation of a certain set of rights.14

Universality in Scope and Universality in Aspiration

It is indeed absurd to indicate that, despite all significant differences between human beings, there is no core of shared human values that cannot be addressed legally in the form of universal human rights. However, the question remains whether the Universal Declaration, in part or in whole, is grounded in such universal values, or only in one (Western) normative standpoint, which is relative, since it can be justified solely in terms of one contested conception of good. Onuma draws attention to the fact that “in many discourses it has been assumed that ‘universality’ refers to the Western perspective, and ‘relativity’ or ‘particularity’ refers to the non-Western one, whether this is Asian, African, Islam, or some others.” He concludes that the scope of a claim—whether it is universalist or relativist—cannot depend on its source—whether it comes from Western or some other culture. This simple fact “is often forgotten because of the global predominance of Western ways of thinking.”15 Here, one may employ another Rosenfeld’s useful distinction, between visions that are universalist in scope and those that are universalist in aspiration. Namely, not all normative claims to universality are in the same time of the latter kind. He explicitly mentions Judaism, as an example of the vision, which refrains from being universalist in aspiration, even though it espouses certain norms that it postulates as universal in scope. This is the situation with some other cultures and religions as well. On the other hand, Western liberal individualism is definitely universalist in both scope and aspirations.16

Let me illustrate the problem of universality of the existing set of human rights norms with the familiar example of religious freedom.17 Müßerson admits as true the fact “that some fundamental religious concepts are in fact incompatible with international human rights instruments,” such as the stipulated freedom of religion.

13 J. Nickel, n 8 above, 4.
14 This follows from the Declaration’s introductory call for “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family.” General Assembly Resolution 217 A (III) of 10 December 1948.
15 Y. Onuma, n 3 above, note 3
16 He also mentions the Marxist collectivism as one such ideology. M. Rosenfeld, n 11 above, 251.
17 To be sure, universalism of human rights norms might be challenged on other grounds as well. For instance, Buchanan notices the tension between the universality of human rights, as enshrined in the Universal Declaration, and the particularity of certain indigenous rights. He says: “Human rights, by definition, are those which accrue to all human beings simply as human beings, regardless of their particular history or culture. But, the whole point of recognizing a separate category of indigenous rights is to stress the special needs and interests of indigenous peoples as a distinctive subclass of humanity.” (Buchanan 1993)
Yet, “even here,” he contends, “we can hardly discern any imposition of specific Western values or approaches on culturally different societies.”18 This conclusion, however, is highly unwarranted, for it is one thing to say that a normative claim to freedom of religion, one that in itself includes proselytism, heresy, and apostasy as well, is of a universal scope, but it is quite another thing to “overlook” the fact that the source for such interpretation of religious freedom is the Western liberal individualism and that this view is not shared worldwide. The result is well known—a number of Muslim countries opposed such extensive reading of religious freedom, which stems from Article 18 of the Universal Declaration and the subsequent international instruments.19

This is but one case where things might have been done with greater subtlety, concerning conflicting normative stances on the subject matter. In fact, this is clearly the case where one claim of the Western civilization is deemed to be universalist in scope even though it is obviously grounded in a contested conception of good. Namely, one should not forget that the Muslim specific regime of collective religious toleration historically predated the development of Western one (Walzer 1997; Kymlicka 1996), which gradually developed from the model of the Inquisition and harsh religious persecution to the one of tolerating individual religious beliefs. This priority in time is certainly not the trump card in the current debate, but a useful reminder that there exists an equally well-grounded competing and comprehensive normative view, the one that tends to present itself as universalist in scope but is, just as its Western counterpart, actually relativist. Yet, unlike the Western model, it has not gone through such a drastic change in the course of time.20

“Thin,” “Relative,” “Contingent” Universality

It is, thus, doubtful whether the aforementioned normative claim, at least as formulated and enshrined in the Universal Declaration, is of such a nature “that people anywhere may have reason to see it as valuable.” To employ Sen’s intuitive standard in judging the plausible universality of a claim does not imply settling problems that arise from a larger philosophical debate over the correctness of a normative claim.21 This standard, as I see it, rather points in the direction of a

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18 R. Müllerson, n 7 above, 114.
19 Article 18 reads as follows: “Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance.”
21 On a wider, philosophical plane, this task puts before itself the discourse theory, which tries to define the necessary formal conditions of the ideal discourse situation (ideale Sprechsituation) in which correctness, and thus universability, of a normative claim can be established. See Habermas (1973, 1983); On the application of this theory in the legal field, see Alexy (1983)
22 I suspect that this Sen’s standard amounts to Rawls’s more demanding concept of an “overlapping consensus” which at the domestic level concerns “a consensus that includes all the opposing philosophical and religious doctrines likely to persist and to gain adherents in a more or less just constitutional democratic society.” (Rawls 1992). It is well known that Rawls’s application of a modified version of “justice as fairness” at the international level (Society of Peoples) has led him to a restricted set of the basic human rights. (Rawls 1999).
**form of universalism** of human rights we are searching for. In that respect, it seems that this standard calls for, in Ignatieff’s words, “thin” or minimal universalism. He says: “The universal commitments implied by human rights can be compatible only with a wide variety of ways of living if the universalism implied is self-consciously minimalist.”

Instead of using earlier terminology of “weak universalism,” in his most recent paper, Donnelly employs somewhat contradictory phrase “relativist universalism” in order to point to the same thing. Namely, in a three-tiered scheme for thinking about universality, he argues that human rights are “(relatively) universal at the level of the concept, broad formulations such as the claims in Articles 3 and 22 of the Universal Declaration that everyone has the right to life, liberty and security of person and “the right to social security.” On the next level, rights concepts might have “multiple defensible conceptions.” Finally, any such particular conception “in turn, will have many defensible implementations.” For example, not only that it is defensible, but desirable as well, that the right of everyone to take part in the government of his country, directly or through freely chosen representatives (Article 21 of the Universal Declaration) is shaped through completely different electoral systems and possibly supplemented with various forms of popular vote.

All this means that “[c]oncepts set a range of plausible variations among conceptions, which in turn restrict the range of practices that can plausibly be considered implementations of a particular concept and conception.” Donnelly, however, stresses that “even some deviations from authoritative international human rights norms may be, all things considered, (not il)legitimate.” In that respect, he also explicitly mentions, as one clear example, the deviation of Article 18 by Muslim countries.

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23 We should, nevertheless, be aware of the fact that envisaged this way human rights “can be more or less minimal, so that those who agree in thinking of human rights on this model may disagree about just how minimal those rights should be.” (Jones 2000).

24 Sweet, on the other hand, argues in favor of, what he calls, “thick” theory of human rights, which should provide “middle road between libertarianism and statism.” (Ignatieff 2001b). Against the latter, “it recognizes individual dignity, autonomy, and the value of self-realization, without making individual wishes and wants absolute.” Against the former, “it recognizes the importance of our relations to others as part of our individuality and, therefore, the necessity of social responsibilities and duties.” (Sweet 2003).

25 He attempts to defend functional, international legal, and overlapping consensus universality, while discarding anthropological or historical and ontological universality, as “empirically, philosophically, or politically indefensible.” In that respect, Donnelly thinks that Rawls’s concept of “overlapping consensus” can be applied adequately to the current debate over the universality of human rights. Namely, he contends that these rights can be grounded in a variety of conflicting comprehensive doctrines because today, “the moral equality of all human beings is strongly endorsed by most leading comprehensive doctrines in all regions of the world.” (Donnelly 2007).

26 *Ibid* 299.

27 *Ibid* 300–301.

28 “Is prohibition of apostasy by Muslims compatible with the relative universality of Article 18? Reasonable people may reasonably disagree, but I am inclined to answer “Probably.”” He further notes that “the variation is at the level of conceptions—the limits of the range of application of the principle of freedom of religion—in a context where the overarching concept is strongly endorsed.” However, he rightly stresses that a state “might be justified in denying certain benefits to apostates, as long as those benefits are not guaranteed by human rights. (Protection against discrimination on the basis of religion is one of the foundational principles of international human rights norms.)” *Ibid* 301, 302.
An-Na‘im for his part demonstrates on one such basic human right as freedom of expression that it possesses “a contingent universality.” This element lies in the dependence of this right upon two different dynamics, the domestic one and the international one, and “these two dynamics carry on a perpetual interaction in which each influences and is influenced by the other.” (An-Na‘im 1997). Furthermore, Schauer emphasizes that even within the Western countries themselves one can find culturally contingent implementation of the freedom of expression. Hence, whereas the constitutional system of the United States largely tolerates Nazi speech in applying its understanding of this freedom, Germany does not, due to its specific historical heritage. Contingency and cultural sensitivity at lower levels of “conceptions” and “implementations” apply to other human rights as well. For instance, Müllerson discusses whether the practice of arranged marriages, present in certain parts of the world, would necessarily contradict Article 23(3) of the International Covenant on Civil and Political Rights, which states that “no marriage shall be entered into without the free and full consent of the intending spouses.” His answer is negative and grounded in the argument that “if spouses themselves do not object to such marriages because of their society’s age-old traditions, then this practice in itself does not contradict the covenant.”

Lawyers might surely disagree whether in this last mentioned case the mere absence of objection or refusal on the side of spouses shall be equated with their “free and full consent,” but this is one obvious way to treat the norm as a minimalist universal claim that has to be interpreted in a culturally contingent way. This is what essentially Donnelly is also arguing for, when claiming that “the (relative) universality of internationally recognized human rights does not require, or even encourage, global homogenization or the sacrifice of (many) valued local practices.” After all, this form of universality of human rights is already implied in the fact that Europe, America, and Africa have opted to introduce their own regional human rights instruments, all of which generate a variety of further distinctive constitutional implementations. The issue, however, remains whether in cases of framing certain international human rights concepts, such as the freedom of religion, this minimalist universalism has not surrendered to the Western relativist stance.

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29 He concludes that “so long as cultural differences are reflected in categorical differences, differences in the scope of constitutional protections can be expected to vary far more than might be expected merely by inspecting the relevant constitutional language.” (Schauer 1994).

30 R. Müllerson, n 7 above, 119.

31 Nickel finds two advantages for conceiving human rights as “minimal international standards”: (1) “it helps sidestep many issues of cultural relativity by limiting the role of human rights to providing a common set of minimal requirements.” (2) “this conception of human rights makes it more likely that they will be affordable in poorer countries.” J. Nickel, n 8 above, 51.

32 J. Donnelly, n 30 above, 303.

33 An-Na‘im reminds us that at the time of the adoption of the Universal Declaration, only four African and eight Asian countries were members of the United Nations. “The rest of the two continents continued to be colonised, for the next two decades in some cases, by the same European powers which were proclaiming universal human rights for all humanity.” (An-Na‘im 1998).
Legal Conceptualization of Collective Rights

Apart from debating claims to universality, the human rights discourse has recently been spiced with an additional ingredient, that of collective (group) rights.\(^{34}\) In fact, as early as in the mid-1970s, Dinstein has claimed the existence of the internationally recognized set of “collective human rights,” (Dinstein 1976), and Van Dyke has advanced similar argument among political theorists.\(^{35}\) The rise of different forms of collective self-awareness throughout the world, most notably in the last several decades, additionally inflamed this dispute.

It is noticeable that the more substantial input in the ongoing debate about collective rights is provided by political philosophers rather than by legal scholars themselves. In a way, this trend is understandable, since the concept itself might \textit{prima facie} look at least suspicious, if not deadly dangerous, to all those committed to liberal values as the undisputed basis of modern state structures and legal orders.\(^{36}\) Hence, when an academic from that camp, such as Buchanan, starts an inquiry into the area of collective rights, he immediately places it within the big picture of plausible challenges to liberalism itself.\(^{37}\)

One of the consequences of the dominant role of political philosophers in this area of law is reflected in the fact that employed arguments display less sensitivity toward conceptual distinctions that are not only important for legal theorists, but for the operation of a legal order as such. Thus, one may find that even authors, like Kymlicka, who has developed liberal theory of minority rights, are ready to state without hesitation that the collective rights concept “suggests false dichotomy with individual rights,” and that the debate over the nature of a particular right is largely “sterile because the question of whether the right is (or is not) collective is morally unimportant.” (Kymlicka 1995).

This denial of relevance of the aforementioned debate is sometimes further strengthened with the argument that nothing essentially new or interesting is here to be discussed. This stance is supported by the claim “that all rights are group rights, because they all hold for a \textit{class} of subjects.” (Barbieri 1999). Consequently, after analyzing certain legal provisions of the English law that exempt Sikhs from general rules, Berry’s laconic conclusion is that this case can be described as one of group rights “only in the uninteresting sense in which any rule (e.g. free entry to museums for students and pensioners) may be said to be a group right for all those covered by it.” (Berry 2001). Let me briefly tackle these aspects of the collective rights debate.\(^{38}\)

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\(^{34}\) I will rather use the term collective rights throughout the text, but in my opinion, these two terms could be used interchangeably, since they both denote the same thing—rights directly vested in certain collective entities, i.e., groups. In the recent literature on this topic, however, it is not rare to find distinctions between collective and group rights (see, e.g., Sanders 1991). I do not find them justifiable enough for reasons that will be presented in this section.

\(^{35}\) See, e.g., Van Dyke (1974).

\(^{36}\) Van Dyke states at the very beginning of one of his articles: “Those who espouse traditional liberal–democratic thought—whom I will call liberals, however conservative or progressive they may be—have problems in dealing with collective entities. Their ideology focuses on the individual.” (Van Dyke 1982).

\(^{37}\) One thorough examination of that sort is provided in Boshammer (2003) (Buchanan 1994).

\(^{38}\) A more detailed legal–theoretical conceptualization of collective rights might be found in Jovanović (2005).
Political–Philosophical Justification of Collective Rights

The concern for the political–philosophical dimension of the whole issue is warranted, and were scholars from this discipline not to raise it, lawyers themselves would have been inclined to move in the opposite direction and enter the domain of political philosophy, in particular axiology. Why is that the case? Simply enough, “the question of the justification of collective rights is not an empirical, but a normative one. It does not concern the question whether these rights “exist,” but rather “whether they should exist.” Therefore, employing the concept of collective rights calls for the prior investigation of the so-called “value-of-groups question,” which pertains to “the value of the existence of certain groups and the importance of protecting these groups against forces which might weaken or destroy them, perhaps even to the extent of outweighing certain rights of individuals (either within the group or outside it).” (Hartney 1991). Providing an answer to this question has obvious political implication, insofar as it might affect the normative underpinning of political institutions and their actual design.

There are at least three possible routes one may take in addressing this issue. The first one might be called ontological individualism, insofar as it argues that all groups are in the end reducible to their members. All those providing arguments in defense of whatever sort of collective rights, as opposed to those held by individuals, denounce it for obvious reasons. Instead, a majority of them endorse the standpoint of value individualism, which recognizes the ontological existence of collective entities but holds that “the lives of individual human beings have ultimate value, and collective entities derive their value from their contribution to the lives of individual human beings.” For instance, Kymlicka’s well-known argument is that the “national culture provides a meaningful context of choice” for its individual members, and Buchanan follows this line of argumentation by contending that “the

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39 Interestingly enough, in one footnote of his famous book Taking Rights Seriously (Galenkamp 1991), Dworkin simply states, without entering further normative elaboration, that “a political theory that counts special groups, like racial groups, as having some corporate standing within community, may therefore speak of group rights.” (Dworkin 1977).

40 Conceived this way, jurisprudence is departing from Kelsen’s Reine Rechtslehre (Pure Theory of Law), which is built up on the premise that legal theory should become “as exact a structural analysis of the positive law as possible, an analysis free of all ethico-political value-judgments.” (Kelsen 1992). Why this step should be taken by a putative legal theory of collective rights is more thoroughly discussed in my paper Collective Rights—A Case Study of Interdisciplinary Approach in Jurisprudence, prepared for the 23rd IVR Congress, Law and Legal Cultures in the 21st Century: Diversity and Unity, Krakow, 1–6 August 2007. Suffice now to say, along with Mitnick, that these rights, which he calls “group-differentiated rights,” “unmistakably elicit deep questions…that run to the heart of legal, political and moral theory…and also) raise questions that have received sustained examination primarily from within the fields of cultural sociology and cognitive and social psychology.” (Mitnick 2006).

41 When Buchanan discusses the possibility of incorporating collective rights within liberal framework, he proceeds by defining liberalism as “a normative thesis, a thesis about what the proper role of the state is.” A. Buchanan, n 11 above, 3.

42 Thus, Buchanan explicitly utters that “[l]iberalism is individualistic in a moral, not an ontological sense.” ibid 5.

43 M. Hartney, n 51 above, 297.

44 W. Kymlicka, n 45 above, 93; Further attempt to strengthen the grounding of collective rights in the autonomy of individual members of the group is provided in Wall (2007).
value of groups is the value that membership in groups has for individuals.\textsuperscript{45}

Taking the same route, Kis emphasizes that “the interests attributed to the community are derived” from that of individuals composing it (Kis 1996). Even Margalit and Raz, who speak of specific encompassing groups, and in doing so admit that certain “group interests cannot be reduced to individual interests,” nonetheless end up claiming that “the moral importance of the group’s interest depends on its value to individuals.” (Margalit and Raz 1995). This, then, clearly means repudiation of the position of value collectivism—“the view that a collective entity can have value independently of its contribution to the well-being of individual human beings.”\textsuperscript{46} In addition, this implies that while collective rights might sometimes legitimately restrict certain rights of individuals of a wider society (Kymlicka’s “external protections”), they should not restrict individual rights of members of a group (Kymlicka’s “internal restrictions”).

The problem here, however, arises from the two interrelated sets of issues. First, as Kukathas notices, the sort of justification of rights of certain collective entities provided by Kymlika and others from this camp “undermines many forms of cultural community,” especially those that are not organized around liberal values of individual autonomy and tolerance (Kukathas 1995). In that respect, illustrative is the case of certain rights of indigenous peoples, for instance the right to collective land ownership. Faced with such rights, Kymlicka reaches for quite different grounds of justification, arguing that the survival of indigenous cultures is heavily dependent on the protection of their land base and that history proved that the most effective way to achieve that goal is through this form of ownership. The first deviation of his theory then necessarily leads to the second one. Namely, Kymlicka is in the next step forced to abandon the strict distinction between “external protections” and “internal restrictions,” reluctantly admitting that one “natural” and “unavoidable” “by-product” of indigenous collective land rights concerns “a significant restriction of liberty of individual members,” such as those with regard to individual ownership.\textsuperscript{47}

Buchanan even more straightforwardly moves closer to the position of value collectivism. In discussing well-known Quebec language laws that restrict the use of English in this province, he acknowledges that this is the case that is “more complex” for liberals, inasmuch as it involves the clear conflict between collective and individual rights. He, nonetheless, holds that “the mere fact of such a conflict does not show that Liberalism cannot supplement the individual rights with some group rights.” Furthermore, since individual rights themselves constantly conflict, liberals have developed “various strategies for balancing the competing interests, which the rights in question protect,” and this same strategy seems to be adequate in

\textsuperscript{45} A. Buchanan, n 44 above, 7; Nevertheless, in the same article, one can find Buchanan’s statement that “[l]iberalism can and should recognize the fact that our most fundamental preferences are socially shaped, that most human beings... regard the goods of community as intrinsically good, not merely as instrumentally valuable in pursuit of private, individual goods.” (ibid 6).

\textsuperscript{46} M. Hartney, n 51 above, 297.

\textsuperscript{47} W. Kymlicka, n 45 above, 43, 44.
the “collective vs. individual right” case as well.48 This leads Buchanan to the conclusion that a group right may actually prevail over individual members’ rights if the group right in question “is sufficiently strong to warrant the kind of complex balancing strategies that invoked to sort out conflicts among individual rights.” A group right possesses this sufficient strength if it proves to be “indispensable for preserving minority cultures.”49

The aforementioned analysis demonstrates that if we are ready to endorse rights of collective entities in any meaningful sense, then we should acknowledge that they protect some inherently collective interests that concern vital and “socially irreducible goods,”50 such as language, alphabet, cultural practices and symbols, religious rites, or land base (in the case of indigenous peoples).51 Namely, “just as we can make a case for the survival of a species without basing it on the rights of individual members of the species, we might make a case for the survival of a culture or language without basing it on the rights of those who speak the particular language.”52 This, in the last instance, implies that in an adequate balancing of conflicting interests of the collective, the individual, and the state as a whole, we should not principally exclude the possibility that a collective right prevails. After a more scrutinized inquiry, one may eventually find out that this practice is already pursued, even in places where one would not expect it, such as in the case law of the US Supreme Court.53 The issue then remains, for all those committed to values of liberalism, which individual human rights should not be under any circumstances overcome by collective rights.54

What Does it Take for a Right to be Collective?

Let me now move further. In his “corporate” theory of collective rights, Jones claims that we can conceive a group as “an irreducible right-bearing entity,” only if we can

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48 A. Buchanan, n 44 above, 8.
49 ibid 9; cf M. Jovanović, n 48 above, 645–650.
50 Taylor conceives culture “as the locus of some goods,” which is “not a mere instrument of the individual goods,” and, thus, “can’t be distinguished from them as their merely contingent condition, something they could in principle exist without.” (Taylor 1997); Note that in the culture of most indigenous peoples, land is, contrary to Western view, also conceived as one such “socially irreducible good.” Taylor’s concept is, in important aspects, different from Réaume’s concept of “participatory goods.” (Réaume 1988).
51 cf (Cronin 2004).
52 For a more comprehensive grounding of group (collective) rights in the intrinsic group value theory, see Reed Garet (1981) (Haksar 1998).
53 After discussing two such cases before the US Supreme Court—Wisconsin v Yoder 406 U.S. 205 (1972) and Santa Clara Pueblo v Martinez 436 U.S. 49 (1978)—Rosenfeld concludes that “both these cases give priority to the community over both the individual and society’s general welfare as envisioned by the democratic state.” M. Rosenfeld, n 11 above, 265.
54 I have elsewhere argued (M. Jovanović, n 48 above, 648–649) that Taylor’s distinction between “fundamental liberties” and “privileges and immunities” is a good starting point in this respect. While the former rights “should never be infringed and therefore ought to be unassailably entrenched,” the latter “are important, but… can be revoked or restricted for reasons of public policy—although one would need a strong reason to do this.” (Taylor 1994).
prove that separate moral standing to groups could and should be ascribed in the
same way we ascribe it to individual persons (Jones 1999). Since the prior brief
investigation shows that the *value collectivism* route is defensible, now it is time to
address the remaining two interconnected aspects of the collective rights debate, by
more closely inspecting the defining criteria of this category of rights.

In the Preface of his book on “group-differentiated rights,” Mitnick states that the
focus of this whole debate should be “on the form of right, rather than on the type of
group in question.” 55 My claim, contrary to this, is that, if there are any peculiarities
of the form of right directly vested in collective entities, they stem from the specific
features of the right-holder itself. Differently put, what I consider one of the
distinctive and defining features of a collective right is the nature of right-bearer,
which is different from the two traditional categories—natural and juristic persons.
In claiming this, I will challenge the claim that the dichotomy between collective and
individual rights is a false one (Kymlicka), as well as the position that all rights
might be conventionally called “collective,” insofar as they cover some group of
people (Berry).

Indeed, one common way of approaching the subject matter of collective rights is
to contradict them with individual ones. For a number of authors, the starting
distinctive criterion concerns the way these rights are exercised. Hence, Buchanan
states that individual rights “are ascribed to individuals, who can, in principle, wield
the right—that is, exercise the right…or invoke it to make a claim…or waive…—
independently, in her own name, or her own authority.” Contrary to this, group rights
can be wielded in either of two ways. The first possibility is that a group right can be
wielded only *nonindividually*—“a) by the group through some collective procedure
(e.g., majority decision making) or b) by some agent (or agents) that wields it for the
group.” Buchanan calls these rights “nonindividual group rights.” 56

The second form of group rights concerns the so-called “dual standing” rights. In
this case, “any individual who is a member of the group can wield the right, either
on his own behalf or on that of any other member of the group, or the right may be
wielded nonindividually by some collective mechanism or by some agent or agents
on behalf of the group.” One such right would be the right to engage in cultural or
religious ceremonies or rituals. 57 Although the concept of dual-standing collective
rights has one common feature with individual rights, insofar as they can be wielded
by individuals qua individuals, “there is a crucial difference: if a right is an
individual right only the one whose right is infringed can invoke the right.” In the
case of the aforementioned right, however, any member of a group might invoke it,
regardless of whether that particular individual suffered interference or not. 58

55 J. Mitnick, n 50 above, vii. This orientation might be due to the fact that his concept of “group-
differentiated rights” covers both individual rights of members of certain groups and group rights that are
directly vested in groups. (*ibid* 30).
56 A. Buchanan, n 44 above, 3.
57 *Ibid* 3.
58 A. Buchanan, n 21 above, 94.
Finally, Buchanan takes the example of language rights, which are sometimes classified as collective rights and argues that even in the case of one’s right not to be interfered with in speaking one’s own language (an example of the so-called individual negative language rights), which can be wielded only individually, “there is perhaps still some point in calling them group rights.” The point, as he sees it, “is that even if the individual has standing as an individual and can invoke the right independently, the interest served by recognizing the right, and hence the ultimate justification for the rights, are not his alone.”

I do not hold that the dichotomy negative–positive language rights parallels the one between individual and collective rights. For instance, one’s right to have a language interpreter before the court is a classic case of individual right, a segment of the broader concept of the right to fair trial. In the same time, this is obviously an instance of positive rights, inasmuch as the state itself is obliged to subsidize the interpretation of the trial proceedings in one’s language. Yet, interests served by this right, and consequently the ultimate justification for its recognition, are the interests of an individual to present and defend her case before the court, in as good way as possible, and to be treated equally as the opposing party of the procedure. The same applies, I believe, to one’s right to speak publicly in one’s own language and not to be interfered in doing that. Although this right can obviously have the effect of protecting linguistic minority groups in larger multilingual states, its application is much broader, and it equally affects all those who happen to use nonofficial languages publicly. In that respect, I disagree with Buchanan that there is “some point” in calling this particular negative language right a group right. But what I take to be an important and a far-reaching consequence of his aforementioned statement is that even when some rights are exercised and invoked individually, they, in

59 A. Buchanan, n 44 above, 4.
60 The dichotomy of negative–positive language rights is similar to the one discussed by Patten and Kymlicka, who employ the distinction, initially introduced by Heinz Kloss, between tolerance and promotion-oriented language rights. These authors also separately discuss the division of individual–collective linguistic rights (Patten and Kymlicka 2003).
61 In Dominique Guesdon v France (Communication No. 219/1986), the Human Rights Committee dismisses the applicant’s claim that the right to fair trial, within the confines of Article 14 of the International Covenant on Civil and Political Rights, was violated, insofar as the court did not provide him an interpreter in Breton language. In this case, the applicant was in good command of the official language of the court, French, and the Committee finds that the requirement of a fair hearing does not mandate state “to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language. Only if the accused or the defense witnesses have difficulties in understanding or in expressing themselves in the court language, must the services of an interpreter be made available.” Decision reprinted in Phillips and Rosas (1995).
62 Recognition of this right represents an obvious progress in comparison to a situation where states were explicitly denying the public usage of minority languages. For instance, Remington and Miles mention the case of the Silver City high school in New Mexico, which in 1948 officially barred the use of Spanish language (Remington and Miles 1996).
principle, still might fall within the category of group rights, for predominantly serving not individual, but group interests. This obviously implies that the defining criterion for a collective right cannot be the way that right is exercised, but the ultimate interest that it serves. After all, there are numerous individual rights that serve individual interests, and still are not exercised individually, such as the right to assemble, to strike, or to associate freely. Consequently, vice versa is possible as well—the right to address local authorities or to obtain an identity card in one’s language will be exercised individually by the members of a respective language group but the ultimate beneficiary of this right is collective entity as such and the good protected is one from the category of “socially irreducible goods.”

Collective Entities as Right-Holders

What is, then, so special about collective entities as right-holders? Are they really in any way different from a common subset of individuals, like students or workers, who are singled out for some distinctive legal treatment from the rest of citizens of the same jurisdiction? Miller starts his inquiry into the nature of group rights by stating that it is self-evident that these rights are “ascribed to the members of a particular group and not to others.” In the next step, he emphasizes that one has to distinguish between “a category of persons, understood to mean all those people who fit a particular description, such as being under twenty-one or having red hair, and a group proper, understood to mean a set of people who by their shared characteristics think of themselves as forming a distinct group.” (Miller 2002). Although Miller admits that the dividing line is not clear and “may be crossed in either direction,” he argues that by the virtue of “group consciousness,” which is lacking in the case of category of persons, a group proper acquires group rights to preserve its existence.64

In my opinion, Miller’s analysis points to the right direction because it is obvious that the membership in, say, a national or linguistic group is completely different from the “membership” in a certain narrow class of right-holders, say, voters or pensioners. Namely, in the latter cases, the “group membership” does not exist as a given, since these categories of persons constitute “groups” created by a legislator, who authoritatively prescribes the necessary conditions for an individual to become, for instance, the holder of electoral rights, i.e., to “become a member” of the “voters-group.” This distinction does not imply that an individual cannot identify herself socially as, for example, a student or lawyer, but this will not affect the character of rights and duties of those two categories in society—they will remain individual rights and duties. The reason is not only that they protect individual interests, but also the conditions under which an individual acquires the status of student or lawyer are prescribed by the legal order. The sum of all individuals who meet the required conditions will make up a “group”—of students, lawyers—addressees of partly

63 cf M. Hartney, n 51 above, 219; (Samu 1996).
64 Ibid 179.
**general legal norms.** However, in all these cases, labels that we use, such as voters or pensioners, do not stand for group membership, but for the particular legal status of these individuals. Legal status stands for a particular set of rights and duties that a subject has as a “student,” “worker,” “voter,” etc. In each moment, a subject might simultaneously be in a number of legal statuses—“citizen,” “worker,” “father,” “resident” of particular city, “tax-payer,” etc. In that respect, it is clear that throughout life, we are constantly changing our legal statuses.

Contrary to this, collective entities, as potential holders of rights, already exist as such, based on “objective criteria,” and they are not mere bodies of associated individuals. Kis notices that “they simply are given for members and non-members alike, by the signs used and identified, by mutual recognition paid by members to each other, and by regard of outsiders.” In that respect, they also differ from juristic persons, such as corporations, insofar as their reality is not *de jure*, but *de facto*. Van Dyke observes that ethnic communities, for instance, are “unlike corporations in that they are not the creatures of law or the state.” Namely, “[t]hey come into existence—as nations sometimes do—individually of the state, raising the question whether they may have moral rights and a capacity to advance moral claims regardless of their legal status.” (Van Dyke 1995). The membership in these collective entities is, thus, a *sociological* one, and that is exactly what distinguishes

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65 For this reason, I do not think that Mitnick’s approach into this subject matter is adequate. Namely, he takes Hart’s well-known distinction between “special rights,” which arise from particular interpersonal transactions and relationships, and “general rights,” which impose obligations upon everyone (Hart 1955), and suggests that the so-called “group-differentiated rights” fall in neither of these two categories, since protecting “only the interests of some subset of individuals in society.” This, then, becomes the ground for elaborating special character of these rights (J. Mitnick, n 50 above, 2). The confusion here stems from not differentiating between *types of rights* and *types of legal norms* that regulate them. In that respect, Hart’s distinction of rights is very similar to the Roman law one—rights *in res* vs. rights *in personam*. Although this division is commonly referred to in the European continental legal systems, it is certainly not unknown among Anglo-Saxon legal scholars as well. Hence, when writing about this dichotomy of rights, Holland says that rights *in rem* are rights against definite person or persons, while rights *in personam* are rights against all persons (Holland 2006). One typical right of the latter sort, taken also by Holland as an example, is the right of ownership. In a legal order, this right is typically guaranteed by *general legal norms*, such as norms of constitutions or statutes, and in the contemporary world, these norms are *universally* applicable not only to all citizens of a state, but even to noncitizens. However, nothing prevents legislators from narrowing down the prospective class of persons that might become owners of specific properties, e.g., natural resources, mining, or oil fields. Hence, legal norms that regulate rights of this particular *subset* of owners will not be universally, but *partly general* legal norms (as is actually the case with vast majority of norms in every legal system), and yet, nothing will change in the character of this ownership right—it will remain a right *in personam*.

66 For instance, it is today generally accepted that the existence of minorities is not legal, but factual issue. Hence, if the existence of a minority group is based on “objective criteria,” a state is obliged to safeguard its rights (Sohn 1981).

67 J. Kis, n 57 above, 221.

68 In the German legal theory of corporations (cf M. Galenkamp, n 49 above, 297), it was Otto von Gierke who argued in favor of the organic theory of juristic persons as right-holders (*Gemeinschaftstheorie*; von Gierke 1887), in particular, Kapitel I. In England, this theory was developed by Maitland. See Maitland (1911).
collective rights from rights held by natural or juristic persons. On the other hand, this feature obviously constitutes one of the obstacles to the smooth implementation of these rights, when they are officially recognized by legal order.

Toward Universal Collective Rights

It is historically confirmed that one of the major incentives for the drafters of the United Nation’s Universal Declaration to abandon the language of group protection and rights, which represented a prominent part of the preceding system of the League of Nations, was the fact that the Nazi military conquests were largely grounded in the alleged violations of German minority rights in the neighboring countries. Consequently, the clear alternative to such international legal regime framed in terms of rights of certain minority groups was the one of universal, individual human rights. In the 1955 book on national minorities, Inis Claude wrote: “The doctrine of human rights has been put forward as a substitute for the concept of minority rights, with the strong implication that minorities whose members enjoy individual equality of treatment cannot legitimately demand facilities for the maintenance of their ethnic particularism.” (Claude 1955).

Nevertheless, collective entities have not been entirely exiled from the international legal system. The UN Charter at least promulgated self-determination of peoples, admittedly more in a form of a guiding political principle (Cassese 1995). At the same time, as pointed by Thornberry, “the excision of minorities from the body of international law was never complete.” (Thornberry 2002) Namely, as early as in the 1940s, the Sub-Commission on Prevention of Discrimination and Protection of Minorities was set up. However, the first major normative shift came much later, with the landmark provision of Article 27 of the 1966 International Covenant on Civil and Political Rights. Although it would be fair to say that this

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69 For instance, if a state has recognized the collective right of a language community to have court proceedings be conducted in its own mother tongue, then a member of this group may demand to exercise it, provided that she declares her group membership and that she has been as such recognized by other members of the language community. Note that the exercise of this right is dependent upon a factual condition (group membership), whose existence is essentially to be determined outside the parameters of the legal order as such. Yet, this is the only way to resolve the situation in which an individual seeks to exercise a right whose holder is a group to which he or she does not belong, thus tending to violate ratio legis of that legal provision.

70 Kis says that “two difficult technical problems result from this peculiarity of collective rights: first, how to define the boundaries of the collectivity in a non-arbitrary and non-coercive way and, second, how to designate the body which can exercise the collective rights on behalf of the group (J. Kis, n 57 above, note 6). The first problem is something that a putative legal theory of collective rights has to work out in close cooperation with sociology, social psychology, and cultural anthropology. As for the other remark, it concerns the problem of agency (A. Buchanan, n 44 above, 13; cf M. Jovanović, n 48 above, 643–645).

71 Even during the war, the Allied governments’ “Declaration by United Nations” of 1 January 1942 underlined the importance of the war defeat of the Tripartite Pact states in terms of human rights, stating that this defeat “is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice.” (Oestreich 1999). The text of Declaration is available at http://www.ibiblio.org/pha/policy/1942/420101a.html (last visited 1 July 2008)
provision is “declaratory in nature” and reflects “a minimum of rights recognized by
customary international law,” it served as the starting point for all the subsequent
changes in the international regime of minority rights. Even though not directly
assessing the status of minority groups, both the International Convention on the
Elimination of All Forms of Racial Discrimination and the International Convention
on the Suppression and Punishment of the Crime of Apartheid have further displayed
certain significant features of the group protection. At last, in 1992 came the most
important nontreaty piece of the general international minority rights regime, the UN
Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and
Linguistic Minorities, which additionally strengthened this collectivist dimension.

In the same period, the concept of peoples’ rights gained prominent currency as well.
In that respect, the cornerstone of the international legal group protection is
Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of
Genocide, which proscribes several acts that are “committed with the intent to
destroy, in whole or in part, a national, ethnical, racial, or religious group.” On the
other hand, international laws on self-determination have rapidly changed in the last
several decades as to gradually develop from the status of a political principle to the
status of a peremptory norm of international law (ius cogens). Furthermore, it is
argued that “the obligations following from the principle and rules on self-
determination are erga omnes, that is, they belong to the class of international legal
obligations which are not “bilateral” or reciprocal, but arise in favor of all members
of the international community.”

Finally, the international legal status of indigenous peoples has also gone through
several phases: from the complete nonrecognition at the beginning of the 20th
century through an assimilationist period, marked by the 1957 International Labor
Organization’s Convention on Indigenous and Tribal Populations, to the
recognition of the status of “people” in the 1989 ILO Convention on Indigenous and
Tribal Peoples, and the full affirmation of their collective and individual
rights in the 1994 Draft UN Declaration on the Rights of Indigenous Peoples.

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72 Y. Dinstein, n 41 above, 118.
73 See in particular Article II(2), International Convention on the Elimination of All Forms of Racial
on the Suppression and Punishment of the Crime of Apartheid, 1015 U.N.T.S. 243, entered into force 18
July 1976.
74 See in particular Article 1, Declaration on the Rights of Persons Belonging to National or Ethnic,
75 P. Thornberry, “The UN Declaration on the Rights of Persons Belonging to National or Ethnic,
Religious and Linguistic Minorities: Background, Analysis, Observations and Update” in A. Phillips and
A. Rosas (eds), n 76 above, 13–76.
force 12 January 1951.
77 A. Cassese, n 91 above, 140.
78 Ibid 134; More thorough analysis of the erga omnes obligations in international law and their relation to
ius cogens and actio popularis are provided in Ragazzi (1997), especially Ch. 10.
79 For a brief assessment of these ILO conventions, see e.g., Swepston (2005).
80 P. Thornberry, n 92 above, 520–521.
Scholarly Categorizations of Universal Rights of Collectives

These remarkable developments have led prominent international scholars, as early as in the end of 1970s and in the 1980s, to propose more comprehensive categorization of rights that are universally held by different collective entities. Thus, in his well-known 1976 article, Dinstein suggests that international law does not only recognize individual, but “collective human rights” as well. Yet, when he employs this concept, he refers to the rights that, in his opinion, “retain their character as direct human rights.” Namely, “[t]he group which enjoys them communally is not a corporate entity and does not possess a legal personality.” However, they are specific insofar as “they shall be exercised jointly rather than severally.”81 He differentiates between the two categories of collective human rights. On the one hand, there are rights of “peoples,” and modern international law recognizes three such rights: to physical existence, to self-determination, and to utilize natural resources.82 However, it is important to stress that Dinstein makes a distinction between the notions of “nation” and “people,” where the former refers to “the entire citizen body of a State,” while the latter refers to a particular ethno-culturally distinctive group. Consequently, “within the compass of one State and one nation, there can exist several peoples, large and small.”83 This categorization has obvious implications for the circle of potential holders of peoples’ rights in international law.

On the other hand, there are the rights of minorities, and “two collective human rights are accorded by general international law to every minority anywhere: the right to physical existence and the right to preserve a separate identity.”84 Nevertheless, when one speaks of minority rights, one should be aware that despite the obvious fact that there exists a number of minorities, defined according to specific criteria—such as, “a minority of blondes, a left-handed minority and a minority of students”—international law “accords rights—on a collective basis—[only] to ethnic, religious and linguistic minorities.”85

Proceeding from Sieghart’s identification of six classes of “collective rights” within a body of general human rights,86 Crawford for his part makes a survey into the realm of “peoples” rights.” His first remark concerns “one cardinal omission” from Sieghert’s list, namely, “the right of groups to exist, which may be conceived of... as an obligation on the part of States not to engage in, or allow, genocidal acts.” (Crawford 1988). His further observation relates to the distinction between the “group rights” that “has gone through a considerable process of development” and

81 Y. Dinstein, n 41 above, 103.
82 Ibid 105–111.
83 Ibid 103, 104.
84 Ibid 118.
85 Ibid 111.
86 Yet, Sieghart notes three problems that arise with the institutionalization of collective rights. The first concerns an appropriate definition of potential right-holders; the second concerns specifying plausible holders of corresponding duties; and the third concerns dangers of infringing individual human rights in the name of collective rights. (Sieghart 1983).
those that “are substantially new, and in the most cases embryonic.”\textsuperscript{87} The first category is composed of the right to self-determination, minority rights, and the right to physical existence, while the second comprises rights to international peace and security, to permanent sovereignty over natural resources, to development, and to the environment. At the same time, the rights from the first category “in some respect deal with the existence and cultural and political continuation of groups,” while the rights from the second category are “concerned with a variety of issues relating to the economic development and the “coexistence” of peoples.”\textsuperscript{88}

Crawford emphasizes that all seven of them “are sufficiently clearly formulated in terms of “collective” rights, and... have achieved recognition in at least one international human rights instrument in treaty form.”\textsuperscript{89} Hence, they represent “a sufficient test” for the assessment of the validity of the peoples’ rights concept as opposed to the governments’ rights, which is the primary task of Crawford’s investigation. Namely, he notes that for international legal theory, it is the term “peoples,” rather than term “rights,” which is the key feature of the phrase “peoples’ rights.” This is so, particularly because it is still generally accepted that “rights of States as communities of persons are moderated through a government (not necessarily representative, but legally the representative, of the people of the State).” Therefore, “[i]f the phrase “rights of peoples” has any independent meaning, it must confer rights on peoples against their own governments.” Otherwise, if these rights should be exercised only \textit{vis-à-vis} other states, there would be no real sense in conceptualizing them as “peoples’ rights.” Then, “the familiar” concept of the rights of States would pretty much do the job itself.\textsuperscript{90}

After having analyzed all seven classes of rights, Crawford’s concluding assessment is that, in the case of the first category, “there is no difficulty in thinking of them as rights of peoples.” As for the second category of rights, “as rights of States some are merely affirmative reformulations of existing duties,” while “[o]thers are merely contentious.” As peoples’ rights, “their real content is with respect to the government of the State in question.” Accordingly, even though drafters of these rights may not intend this, Crawford suggests that “perhaps they would do well to revert to more orthodox terminology.”\textsuperscript{91}

Are There Any Distinctive Indigenous Peoples’ Rights?

Further challenge to any systematic account of rights that are universally held by certain collective entities stems from a peculiar international legal status of indigenous peoples. Namely, on the one hand, all major international legal instruments that deal with this subject matter, both treaty (ILO Convention No.

\textsuperscript{87} Ibid 58.
\textsuperscript{88} Ibid 57.
\textsuperscript{89} Ibid 57.
\textsuperscript{90} Ibid 56.
\textsuperscript{91} Ibid 67.
16992) and nontreaty (Draft United Nations Declaration on the Rights of Indigenous Peoples93), more boldly operate with the concept of collective rights.94 On the other hand, indigenous populations, as potential right-holders, are somehow caught in-between two long-standing international legal concepts of “peoples” and “minorities.” While scholars stress that they should benefit from all the existing mechanisms of minority protection, especially in the absence of a “finalized UN Declaration on their rights,” it is obvious that “[i]ndigenous peoples may consider themselves to be more than minorities.”95 No wonder, thus, that their claims in international law range from requests for the protection of basic individual rights and the rigorous implementation of nondiscrimination clauses to that of self-determination and even full sovereignty.96 Consequently, “[t]he arguments based on indigenous self-determination at the expense of state sovereignty have met strong resistance among states.” (Ulfstein 2004).

In this discussion, however, some rights that are commonly referred to as collective and as belonging to indigenous peoples do not overlap with earlier mentioned classes of peoples’ and minority rights. One such clear example concerns the indigenous peoples’ collective right to land ownership.97 In her extensive report on the indigenous peoples’ relationship to land, Erica-Irene Daes, as the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, comes up with the following conclusions: (a) a profound relationship exists between indigenous peoples and their lands, territories, and resources; (b) this relationship has various social, cultural, spiritual, economic, and political dimensions and responsibilities; (c) the collective dimension of this relationship is significant; and (d) the intergenerational aspect of such a relationship is also crucial to indigenous peoples’ identity, survival, and cultural viability.98 Normative implications to this relationship are given in Article 13(1) of the ILO Convention No. 169, which states that “governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular, the collective aspects of this relationship.” Furthermore, Article 14(1) explicitly states that “the rights of ownership and possession of the peoples

92 Swepston underlines that “this Convention was adopted on behalf of the entire UN system...it covers a wide range of subjects and is not a “labour” Convention like other ILO instruments. L. Swepston, n 100 above, 57.
94 See Clinton (1990); cf A. Buchanan, n 21 above, 89–108.
95 P. Thornberry, n 96 above, 60.
96 Kingsbury discusses five conceptually different claims of indigenous peoples in international law: (1) human rights and nondiscrimination claims; (2) minority claims; (3) self-determination claims; (4) historic sovereignty claims; (5) claims as indigenous peoples, including claims based on treaties or other agreements between indigenous peoples and states (Kingsbury 2001–2002); cf somewhat more extensive list of indigenous claims in G. Nettheim, “Peoples” and “Populations”—Indigenous Peoples and the Right of Peoples” in J. Crawford (ed.), n 108 above, 116–125.
97 Buchanan says that “[p]erhaps most prominent among the collective rights claimed by indigenous peoples are collective land rights.” A. Buchanan, n 21 above, 91.
concerned over the lands they traditionally occupy shall be recognized.”

This is what makes this right a potential candidate for the status of a “universal collective right.”

Some Tentative Conclusions

The aforementioned analysis demonstrates that the incorporation of a certain set of collective rights into the long-standing system of universal human rights has become a legitimate subject of legal scholars’ concern. It is, however, prima facie doubtful whether one such conceptual construct as “collective human rights” is theoretically sustainable. That is, it appears to be questionable both from the perspective of the employed terminology and the traditional legal dogmatic.

Namely, if rights are somehow attached to particular collective entities, how can they still be considered “human” rights—rights that we all enjoy as individual human beings. On the other hand, even if there is a class of collective rights whose status in international law is comparable to that of universal human rights, it is still arguable whether they should be treated as a part of the same body of international law.

Yet, some authors follow Dinstein’s path in defending the concept of “collective human rights.” Freeman, for instance, says that these are rights “the bearers of which are collectives, which are not reducible to, but are consistent with individual rights, and the basic justification of which is the same as the basic justification of individual rights.”

Furthermore, by claiming that all “human rights are universal,” this author clearly implies the universality of “collective human rights” as well. However, one may ask again—if the whole underlying normative assumption of the collective rights talk concerns the recognition of the uniqueness of group particularity, as opposed to the universality of ‘sameness,’ on what grounds can one speak of “universal collective human rights?” Consequently, it seems that Galenkamp is right, when arguing that “there are both principled and political reasons for distinguishing collective rights from human rights.”

This, however, does not imply that certain collective rights might not have the status of “universal” ones.

On the previous pages I subscribed to Sen’s proposition that in order for one claim, including a human rights claim, to be of a universal value, people anywhere

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100 cf Tretter (1993)

101 It is necessary to stress that his view of collective rights is a broader one as to include rights of juristic persons—such as state, corporation, association—as well. (Freeman 1995).

102 Ibid 31.

103 cf M. Galenkamp, n 49 above, 295; On the other hand, the reason that collective rights are at the national level often introduced exactly to recognize the distinct and particular character of a group demonstrates that “universalizability” of these rights, as a conceptual precondition for their recognition, is a too burdensome request. Hence, Rodriguez-Abascal’s proposition that “the group right of one group ought not to be incompatible with the same right of other groups that share the same characteristics” might be taken to be a valid test for a right to qualify as a universal collective right, but not as a collective right as such (Rodriguez-Abascal 2003).

104 M. Galenkamp, n 49 above, 295.
should have reason to see it as valuable. Applied to the collective rights debate, this criterion would require from a proponent of the universality of these rights to demonstrate exactly the same thing—that people anywhere should have reason to see certain rights of collective entities as valuable. Surprisingly enough, put this way, this task may today seem to be more feasible than the one that would require scrutinizing in the same manner each and every individual right that has already reached the status of a “universal human right.” Namely, one might plausibly argue that, for example, the right of people to self-determination, the right of minority to cultural preservation, or the right of indigenous people to land ownership, would pass this test of universality.

It is doubtful whether the same conclusion would have been possible half a century ago, but the Zeitgeist of present day seems to be pointing precisely in this new direction. Even those who normatively disapprove this trend are ready to acknowledge its empirical existence. For instance, Franck pejoratively speaks of it as of the “post-modern neo-tribalism.” It is “post-modern,” insofar as it is aiming against the proclaimed values of modernity—globalization and homogenization; and it is “neo-tribal,” inasmuch as it is no longer “the exclusive property of so-called backward peoples,” but it is “now flaunted everywhere, unapologetically,” in the old European nations, equally as in the emerging nations of the developing world (Franck 1995). Despite the fact that this trend is so widely spread and dominant in today’s world, Franck denies its normative implications. He holds that rights of collective entities are “non-inherent historico-social constructs,” whereas rights of individual persons are “implicit and inherent in the objective fact of being.” Consequently, he terms the reality of the latter as a “moral intuition.” (Franck 1999).

Previous passages show, however, that international law has in the previous decades developed exactly to the point where “value collectivism” is intuitively morally credited, to the extent that it more or less explicitly recognizes the fundamental character of certain collective rights. As pointed out by Miller, when analyzing whether the collective right to self-determination should be included in the list of human rights, “there has been an irreversible transformation in the way that group identity is understood,” so that now it becomes possible to argue legitimately in favor of such a proposition.105 In that respect, the fundamentality of rights is indeed a “historico-social construct” of a particular era,106 but this applies both to collective and individual rights.

What is in this stage, however, a troubling fact for all proponents of “universal collective rights” concerns the lack of a supporting legal theoretical conceptualization of these rights. Thus, despite this obvious shift toward at least implicit recognition of “value collectivism,” international legal instruments in defining right-holders still give preference to the “persons belonging to” formula rather, where appropriate, to collective entities as such.107

105 Still, Miller holds that self-determination’s “justification is primarily instrumental.” D. Miller, n 79 above, 186.
106 N. Bobbio, n 5 above, 6.
107 Thornberry says that this formula, by stressing to a certain extent collectivist dimension of the said rights, “represents a via media between the rights of individuals and full collective rights.” P. Thornberry, n 96 above, 54.
One of the plausible reasons for this hesitation, which at the same time largely affects the argumentation in favor of “universal collective rights,” stems from the fact that distinctions between defining criteria of the prospective right-holders of these rights has at recent times been largely blurred. Namely, contrary to the aforementioned Dinstein’s proposition of the ethnoculturally defined understanding of a “people,” this concept in international law on self-determination has been commonly used to denote the entire population of a state. This was so at least in the period of decolonization.\textsuperscript{108} With the subsequent development of this principle, which put the larger emphasis on its \textit{internal} or \textit{democratic} aspect,\textsuperscript{109} international scholars have become more eager to designate the same status to certain ethnoculturally defined substate groups. Hence, Brownlie argues that the principle of self-determination, in order to be applicable and fully operational, should have “a core of reasonable certainty,” which would imply that the holder of the said right “has a distinct character,” expressed in terms of culture, language, religion, or group psychology.\textsuperscript{110} Crawford, for his part, makes an appeal to international lawyers to resist “the conclusion that a widely-used term (people, M. J.) is to be stipulatively and narrowly defined,” and instead argues that “our function should be to make sense of existing normative language, corresponding to widely-regarded claims of rights, and not to retreat into a self-denying legalism.” Consequently, this means that minority groups, especially those territorially concentrated that form a provincial majority, can “properly claim to be “peoples” (Crawford (2001). In a similar fashion, Capotorti, the author of the most often cited definition of minority in international law\textsuperscript{111}, holds that “[i]n so far as a specific minority is historically entitled to be qualified as a people, undoubtedly that right (to self-determination, M. J.) must be recognized.” (Capotorti 1992). The confusion is getting even bigger if one takes into account that indigenous peoples are usually treated as beneficiaries of both minority rights, as well as the peoples’ right to self-determination.\textsuperscript{112}

Apart from the problem of identification of the bearers of putative “universal collective rights,” a further difficulty follows from the unspecified content of certain rights that are the best candidates for this category. The typical case in point is, again, self-determination. In his thorough legal analysis of this right, Cassese comes to a rather frustrating conclusion that, in the form of international principle, it “poses a very loose standard,” insofar as “it does not define either the \textit{units of self-determination} or \textit{areas or matters} to which it applies, or the \textit{means or methods} of its

\textsuperscript{108} See Thornberry 1994.
\textsuperscript{109} Whereas the \textit{external} aspect of self-determination “defines the status of a people in relation to another people, State or Empire”, the \textit{internal} or \textit{democratic} aspect concerns “the relationship between a people and “its own” State or government.” Thornberry 1993.
\textsuperscript{110} I. Brownlie, “The Rights of Peoples in Modern International Law” in J. Crawford (ed), n 108 above, 5.
\textsuperscript{112} See, e.g., M. Scheinin, “Indigenous Peoples’ Rights Under the International Covenant on Civil and Political Rights” in J. Castellino and N. Walsh (eds), n 100 above, 3–15.
implementation.” That is, it does not spell out whether ‘self-determination should have an internal or external dimension, nor does it point to the objective of self-determination (independent statehood, integration or association with another State, self-government, secession from an existing State, etc.)” Simply enough, just as other fundamental international legal principles, self-determination possesses “a high degree of generality and abstraction.”\(^{113}\)

If one, however, aspires to go well beyond the level of abstract and general international legal principles, one will obviously face—at least in the international legal analysis de lege lata—the problem of universality.\(^{114}\) One plausible, cautious route in framing the category of “universal collective rights” would, then, be the one that follows Donnelly’s distinction between three normative layers of abstraction—broader concepts, multiple defensible conceptions, and many defensible implementations. Hence, when applied to certain collective rights, such as, for instance, the right of a minority to preserve its distinct cultural identity or the right of indigenous peoples to land ownership, this strategy would imply that these universally recognized collective rights (concepts) could be on lower levels regulated in a more detailed way. This would allow a more robust definition of certain universal minimal standards at the level of “conceptions” (as is, for instance, the case with the European regional minority rights regime\(^{115}\)), but it will also open the space for various historically contextualized modifications at the level of national “implementations” (as is, for instance, currently the case with the indigenous peoples’ land rights\(^{116}\)).

Even when following this route, however, we are far from solving all problems. The most important one would be to nomotechnically formulate these minimal standards of “universal collective rights,” as to retain the character of legal rights, and not mere social, high-priority goals. This implies defining not only the right

\(^{113}\) A. Cassese, n 91 above, 128, 129.

\(^{114}\) Cassese says that, aside from the principle of self-determination that might be deemed universal, “customary rules only grant the right to three specific classes of peoples (those under colonial rule or foreign occupation and racial groups denied equal access to government).” (Ibid 330).

\(^{115}\) So far, there are several legal instruments within the framework of the OSCE and the Council of Europe, the most important part being the 1995 Framework Convention for the Protection of National Minorities. See, e.g., Chandler (1999); Troebst (1998)

\(^{116}\) Allowing for modifications at this level certainly does not mean that all state practices would necessarily be regarded as compatible with the universal collective indigenous peoples’ right to land, to the contrary. Exactly for the reasons of avoiding possible arbitrariness, an expert body of lawyers from Commonwealth states, in its 2004 report on indigenous land rights, argue in favor of framing certain standards at the level of “conceptions.” Namely, this report “highlights the importance for the Commonwealth to have a policy on indigenous land rights and resource management. Currently, this issue is not being addressed at the Commonwealth level. Currently, there is an absence of any network of indigenous peoples, lawyers, and academics and therefore an absence of an avenue for information sharing and exchange of best practice in land rights and resource management on a pan-Commonwealth basis.” Commonwealth Lawyers Association/Commonwealth Policy Studies Unit, “Conceptualising Indigenous Land Rights in the Commonwealth” (March 2004), 8 at http://www.cpsu.org.uk/downloads/land_rights_concept.pdf
bearer, but also the more specific object, as well as the addressee of the duty.\textsuperscript{117} That this is not an easy task becomes obvious if one tries to analyze the peoples’ right to self-determination, which is widely held to be a right of a universal nature. Taken in its internal or democratic aspect, it poses difficulties with respect to defining both the object and the addressee of the duty. Namely, to the extent that the primary holder of this right is a people, as the \textit{demos} of the whole territory\textsuperscript{118}, would the object of self-determination consist in a vague collective claim of a population not to be subjected to the rule that is not democratic?\textsuperscript{119} To the extent that relevant minority groups also qualify for the exercise of the internal right to self-determination, what would be possible modes of the realization of this right—devolution, autonomy, regional self-government?\textsuperscript{120} Alternatively, would the core substance of the mentioned right be the \textit{effective} and \textit{democratic participation} of minorities in the political life of the state rather than some form of autonomous territorial arrangement?\textsuperscript{121} As for the addressee, if the state (government) of the people concerned is the subject under the reciprocal duty—and that is the only sensible reading of this right as the peoples’ right—then it is unclear what would be “remedial measures capable of implementing the right.” Would that be a Lockean right to revolution against a despotic regime or an international right of third states to intervene?\textsuperscript{122}

All the enlisted problems represent tough challenges, but not insurmountable obstacles for those international scholars that are ready to endorse the category of “universal collective rights.” However, the strength of their case will depend largely upon the groundwork of a comprehensive legal theory of collective rights. Thus, there is a pressing need that, in this field, scholars from international law and legal theorists collaborate more closely. This paper should be, thus, considered as a small contribution to this cooperative endeavor of the two disciplines.\textsuperscript{123}

\textsuperscript{117} J. Nickel, n 8 above, 17.
\textsuperscript{118} Cassese emphasizes that “satisfactory treatment of minorities is based on the imperative condition that internal self-determination for the whole population should first be realized.” (A. Cassese, n 91 above, 351).
\textsuperscript{119} See, e.g., Frank 1992.
\textsuperscript{120} A. Cassese, n 91 above, 332; see, e.g., Roach (2004).
\textsuperscript{121} Thornberry advances this view. However, he notices that to say this “is not to imply an antithesis between autonomy and participation; on the contrary, “active” participation in the life of states may lead to autonomous structures, as individuals and groups find levels of organization appropriate to effective participation.” (P. Thornberry, n 134 above, 134).
\textsuperscript{122} The latter possibility comes especially to the fore in the light of the fact that self-determination is regarded as \textit{erga omnes} rule of international law (A. Cassese, n 91 above, 333).
\textsuperscript{123} It was said that a legal theory of collective rights should transcend the normative approach, by employing methods of other disciplines as well. For a sociological approach to the issue, see, Berting (1991).
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Are there universal collective rights?

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