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ESSAYS ON RIGHTS

GROUP RIGHTS

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Group Rights

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ASHGATE

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Series Preface

Much of contemporary moral, political and legal discourse is conducted in terms of rights and increasingly in terms of human rights. Yet there is considerable disagreement about the nature of rights, their foundations and their practical implications and more concrete controversies as to the content, scope and force and particular rights. Consequently the discourse of rights calls for extensive analysis in its general meaning and significance, particularly in relation to the nature, location of content of the duties and responsibilities that correlate with rights. Equally important is the determination of the forms of argument that are appropriate to establish whether or not someone or some group has or has not a particular right, and what that might entail in practice.

This series brings together essays that exhibit careful analysis of the concept of rights and detailed knowledge of specific rights and the variety of systems of rights articulation, interpretation, protection and enforcement. Volumes deal with general philosophical and practical issues about different sorts of rights, taking account of international human rights, regional rights conventions and regimes, and domestic bills of rights, as well as the moral and political literature concerning the articulation and implementation of rights.

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The editors are selected for their eminence in the study of law, politics and philosophy. Each volume represents the editor's selection of the most seminal recent essays in English on an aspect of rights or on rights in a particular field. An introduction presents an overview of the issues in that particular area of rights together with comments on the background and significance of the selected essays.

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Series Editor

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Introduction

The assertion of rights brings with it a well-known repertoire of questions. What is a right and what are the implications of possessing a right? How do rights relate to duties? What rights do people have, or should they have, and how might we justify those rights? Are rights properly treated as ‘absolute’, so that they always trump competing considerations, or are they ‘defeasible’, so that extraordinarily, if not ordinarily, they can be overridden?

All these questions arise for group rights as they do for individual rights, but the assertion of group rights raises issues special to itself. Prominent amongst these is the question of whether groups can possess rights. Many people think not. They hold that only human individuals can possess rights and that talk of group rights is either misplaced or merely a shorthand way of describing rights that are really the rights of sets of individuals. Ascribing rights to groups is, for them, no more acceptable than ascribing rights to flowers or forests or cars or computers. Others stoutly resist that scepticism. Some insist that we should regard groups as moral entities in their own right, so that groups, as right-holders, are analogous to individual persons. Their claim is not that all groups have rights; it is that some groups possess the features that are necessary and sufficient for having rights. If possession of those features is reason to ascribe rights to individuals, it is equally reason to ascribe rights to groups. Other proponents of group rights agree with the sceptics that groups as such have no independent moral status, but, unlike the sceptics, hold that individuals can hold some rights only in combination with other individuals and that those rights are properly conceived as group rights.

If we allow that groups can have rights, we confront a further set of questions concerning how those rights relate to the rights of individuals. We ascribe rights to individuals partly so that their freedom and well-being shall not be sacrificed without limit to the pursuit of collective goals. Many people fear that, if we ascribe rights to groups, we destroy the protection that rights afford individuals; the right of a mere individual will not fare well when it comes into conflict with the right of a mighty group. Moreover, a group can wield its rights over its own members, so that it may be those inside the group who are burdened by the duties and liabilities imposed by a group’s right. Defenders of group rights regard these fears as either misplaced or exaggerated. There is nothing, they point out, in the very idea of group rights that need threaten individuals. Indeed, group rights and individual rights are frequently grounded in the same concerns and aim to protect the same fundamental interests, so that the two sorts of rights can be allies rather than foes.

If we turn to the relationship between group rights and human rights, we find a similar division of view. Some theorists insist that human rights are the rights of human individuals, so that there simply cannot be collective human rights, and many of those go on to characterize human rights as standing in an essentially antagonistic relation to collective claims, so that it is part of the purpose of human rights to fend off the claims of groups. Others see no need for rivalry between the two sorts of right. Still others argue that group rights can themselves be human rights: some of the things that matter most to human beings are goods that they share

with others, and people can have collective human rights to those collective goods just as they can have individual human rights to important individual goods.

The groups that might be alleged to have rights and that are subject to these controversies can be of various sorts. They can be organized groups, such as churches or business corporations or trade unions. But they can also be groups that lack any institutional form and that are distinguished only by features such as culture, ethnicity, language, gender, sexuality or shared belief. Sometimes rights have been ascribed to groups as intermediaries between individuals and the state, in which case group rights have been seen as checks on the power of the state. But group rights are also claimed at the level of the state itself. One of the most commonly asserted group rights is the right of national self-determination – the right of a nation to be an independent state that can conduct its affairs free from external control or interference.

Group rights have also been ascribed to minorities, especially in recent years. Sometimes ‘the rights of a minority’ refer only to the rights of individuals who find themselves in a minority. Their individual rights are described as minority rights because the protections and guarantees provided by those rights matter most when individuals are in a minority position. But sometimes the rights ascribed to a minority relate to goods that are collective to the minority, in which case the minority’s rights will be collective rather than individual in form. For example, much of the contemporary debate about group rights has focused on cultural minorities, in part because cultures are necessarily group phenomena and some of the rights that relate to respecting cultural differences make most sense as collective rights. Similarly, an indigenous minority frequently presents the larger society within which it exists with a distinct collective form of life; respecting that form of life typically entails extending to the minority a right to a significant measure of collective self-rule, which can only be a group right. Another sort of group that has attracted the attention of proponents of group rights are linguistic minorities, such as French-speakers in Canada or Welsh-speakers in Britain. Rights are sometimes claimed to special measures designed to protect and maintain a minority language, and to enable or facilitate its use in the larger society’s public processes. It is hard to conceive those as other than group rights.

This volume brings together several of the most significant contributions to contemporary thinking on group rights. Together, the essays assembled here grapple with, and take stands on, all the highly controversial issues that surround group rights.

What is a Group Right?

In confronting those issues, we first need to consider what a group right is. Simply stated, a group right is a right that is held by a group as a group rather than by its members severally. The ‘group’ in ‘group rights’ describes the nature of the right-holder. Thus group rights are standardly contrasted with rights held by persons as individuals. A group right is not a mere aggregation of individual rights. In one conception of group rights, they are rights held jointly by the individuals who make up the right-holding group; but even in that conception, the rights that individuals hold jointly with others are rights that they do not possess as separate individuals.

Individually held rights are commonly associated with group memberships or group identities and that can lead to confusion between individual rights and group rights. For example, the right to vote in elections in the United States is a right unique to US citizens, but

the mere fact that it is a right unique to that group does not make it a group right rather than an individual right. The right of US citizens to vote in US elections is an individually held right. Similarly, the right to use the facilities of a sports club is commonly limited to the members of the club, but the members possess and exercise that right as individuals, not as a group.

Nowadays, people sometimes conflate group rights with what Will Kymlicka (1995) has described as ‘group-differentiated’ or ‘group-specific’ rights. That, too, is a mistake. As we have just seen, rights can be specific to a group without being group rights. In fact, Kymlicka uses those terms to describe a more particular sort of right: a right that a society accords to a minority – typically an ethnic or cultural minority – that it does not accord to other members of the society. Often those group-differentiated rights are also group rights. For example, if a minority is accorded a special right to govern its own affairs, that collective right of self-government will be both a group-differentiated and a group right. But other group-differentiated rights can be individual rights. In Britain, for example, turban-wearing Sikhs are uniquely entitled to ride a motorcycle without wearing a crash helmet, but that group-differentiated right is one possessed and exercised by individual Sikhs, not by Sikhs as a group.

Rights are distinguishable according to the type of ground upon which they are held. Thus we distinguish rights as legal, moral, conventional, customary and so on. Any of those labels might apply to group rights. Group rights are least controversial when they are legal rights since, if a legal system vests rights in a group, we need be in no doubt that, within that legal system, the group has rights. However, that does not free legal group rights of all controversy, since we can still ask whether a group should be vested with legal rights – a question that raises many of the controversies already described. Many proponents of group rights think of them as moral rights: groups, like individuals, have moral rights, and those moral rights should shape a society’s political, constitutional and legal arrangements. Indeed, if they are the moral rights of nations or peoples, they should shape international arrangements. Clearly, rights that claim a moral foundation are open to challenge in a way that legally founded rights are not, but that has done nothing to deter claims to moral rights, including claims to moral group rights.

Understanding Group Rights

The Rights of Groups as Moral Entities

Traditionally, group rights have been understood as the rights of groups conceived as unitary entities. Although it is common to contrast group rights with individual rights, on this view a group is itself a sort of individual. Just as the right of an individual person is a right held by that person as a single integral entity, so the right of a group can be conceived as the right of a single integral entity or ‘group-individual’.

On this view, attributing moral rights to a group entails ascribing moral standing to the group, since moral rights can be possessed only by beings that possess moral standing. That is not to say that we should ascribe moral standing to every gathering or aggregation of individuals that we might describe as a ‘group’. Groups have to possess a significant measure of unity and identity, and perhaps other features besides, if they are to possess moral standing as groups.

But, if a group passes the necessary tests, we can think of it as a moral being, possessed of a moral status, analogous to that of an individual person. In other words, the group holds rights as an entity in its own right: its standing and its rights are not reducible to the standing and the rights of its individual members.

The account of group rights given by Peter French in Chapter 1 of this volume is an unambiguous example of this conception of group rights. Legal systems commonly recognize corporations as persons in law. French argues, much more unusually, that we should recognize corporations as moral persons. Indeed, he maintains that moral personhood and legal personhood are two entirely separate phenomena, so that a corporation's being a moral person is in no way dependent on its prior recognition as a legal person. Corporations, as moral persons, should be treated 'as members of the moral community, of equal standing with the traditionally acknowledged residents: biological human beings'; they have 'whatever privileges, rights and duties as are, in the normal course of affairs, accorded to moral persons' (p. 5). So corporations have moral rights and responsibilities in the same way as do individual human persons.

French makes these strong claims only for a particular type of group: one that is organized with an internal decision structure so that it is capable of intentional agency. It is also crucial to French's view that the agency, and therefore the rights and responsibilities, exercised by a corporation are not reducible to those of the various human individuals who staff or own it. He distinguishes this sort of group from an 'aggregate collectivity' such as a mob, which has no formally constituted structure or organization and whose rights and responsibilities are reducible without remainder to the rights and responsibilities of the individuals who make it up. While, in the essay reproduced here, French focuses only on business corporations, he indicates elsewhere that he would make the same claims for other organized groups, such as political parties, legislative assemblies, country clubs, university departments, armies and charitable organisations (French, 1984, p. 13).

French sets the bar quite high for a group to qualify as a right-holder. He treats intentional agency as a necessary condition for moral personhood, so that only groups satisfying that condition will have the rights of moral persons. Keith Graham, in Chapter 2, sets the bar a little lower. In his view, although some groups are capable of moral agency, possession of that capacity is not a necessary condition for the possession of moral status. It is enough that the group, as a group, can be an object of moral concern. Moral patients can be, but do not have to be, moral agents. Graham points out that groups, such as families, committees, clubs and battalions, have continuing identities as collective entities that persist despite changes in their membership. There are also some things that only groups can do: for example, only an electorate can return a government and only an orchestra can play a symphony. We cannot therefore write groups out of our account of the world. In addition, groups can be, as collective entities, victims or beneficiaries of others' conduct: for example, they can be deceived or harmed, or treated justly or unjustly. They can also flourish, and a group's flourishing qua group is not the same as the flourishing of its individual members. Graham does not claim that we should assign collectivities precisely the same moral status as individual persons, but he does argue that some groups share sufficient relevant features with individuals to justify our treating groups as independent members of the moral realm. Although Graham nowhere in his essay expressly ascribes rights to groups, the independent moral status that he gives collective

entities, and the benefits and harms that he indicates they can undergo, provide the essential ingredients for group rights.

Dwight Newman is another theorist who is sympathetic to what I have described as the 'traditional' view of group rights, although he supports it in a novel fashion. His very rich essay (Chapter 3) ranges over many aspects of group rights, but it is immediately relevant here for the way in which he makes the case for group rights through his understanding of collective interests. We might suppose that the interest of a group derives from the interests of its members, but that, argues Newman, would be to get things the wrong way round. It is the interests of a group's members that derive from the interest of the group of which they are members.

Newman distinguishes between sets and collectivities. A set has no identity that is separate from its members, so that it becomes a new set each time its membership changes. A collectivity, by contrast, remains the same collectivity despite changes in its membership. We think, for example, that a football club or trade union remains the same football club or trade union, even though new members join and old members leave. A collectivity, therefore, has an identity separate from its members. It also has interests, as a collectivity, that are not reducible to the interests of the individuals who populate it. For example, a football club has the stated aim of winning against rival clubs and therefore has an interest in achieving that aim. Promoting that interest may involve acting contrary to the interests of some individuals in the club, such as dropping poor players or firing the current management. Of course, we do relate members' interests to the club's interest, but Newman's point is that it is the club's interest that defines the interests of the members qua members, not vice versa. We can arrive at group rights by combining that point with the interest theory of rights, according to which having a right entails having an interest that grounds a duty (Raz, 1986, p. 166). Collectivities will have rights whenever their interests as collectivities are of sufficient moment to ground duties for others.

An important common feature of the analyses of French, Graham and Newman is that they conceive a right-holding group as having a being and an identity that is independent of its membership at any particular moment. That helps to make the case for conceiving the rights of groups as the rights of independent moral entities. We cannot reduce the rights of groups to the rights of their members if groups themselves are not reducible to their memberships. However, not everyone who assigns moral standing to groups wishes to separate groups from their members in that way.

In Chapter 4 Michael McDonald locates the critical feature that makes a group a right-holding group in the group's subjectivity rather than in its objective characteristics or formal organization. What matters is that the group's members 'see themselves as normatively bound to each other such that each does not act simply for herself or himself but each plays her or his part in effectuating the shared normative understanding' (p. 76). The group may have a formal organization and decision-making rules, but it is still the shared understanding of its members, rather than institutional structures, that is crucial to its moral being and to its possessing rights. That shared understanding may correlate with, and be promoted by, shared objective features, such as a shared heritage, language, belief or social condition, but once again what matters is the intersubjective understanding that those objective features help to sustain, rather than the objective features in and of themselves. It is perhaps significant that McDonald is less concerned with formally constituted groups, such as clubs and corporations, than with ethnic,

cultural, language and belief groups. If these sorts of group are to have a community being and community interests, such that they are ‘fundamental units of value’ that ‘matter in their own right’ (p. 95), perhaps their ‘groupness’ can reside only in their members’ conception of themselves as members of a group. But, in that case, there is no way we can think of the group as existing separately from its members.¹ McDonald feels the pull of liberal reservations about group rights, but still believes that those reservations are trumped by the communitarian case for group rights.

The Shared Rights of a Group’s Members

Accepting that groups can have standing as groups is often thought essential to embracing group rights. The battle line that divides supporters from opponents of group rights is often presented as the line that divides those who are willing to give an independent moral status to groups from those who confine that status to individuals. However, that is too simple. There is a way of understanding group rights that gives groups no standing independently of their members.

This is the conception of group rights that I set out in my own contribution to this collection (see Chapter 5). I distinguish between two ways of conceiving group rights: the ‘corporate’ and the ‘collective’. I use the label ‘corporate’ to describe conceptions of group rights of the sort described in the previous section. They are ‘corporate’ because they conceive a right-holding group as a corporate entity that has standing in its own right (even though proponents of this conception often prefer to use the adjective ‘collective’). A ‘collective’ conception, by contrast, understands a group right as a right that is shared by the individuals who make up the group. It is so-called because it is a right held jointly by a ‘collection’ of individuals.

How can a right that is shared by a collection of individuals be a genuine group right? The answer is best explained by reference to Joseph Raz’s interest theory of rights. According to Raz, X has a right ‘if and only if X can have rights, and, other things being equal, an aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty’ (Raz, 1986, p. 166). So, simply stated, to have a right is to have an interest that grounds a duty for others.² Now suppose that we have a case in which the interest of a single individual is insufficient by itself to create a duty for others, but the combined interests of several such individuals do suffice to create that duty. In that case, the individuals will possess a right together that none of them possesses separately (cf. Raz 1986, pp. 207–09). The interest might be, for example, that of a linguistic minority in being able to use its language in the public domain. If we take any single member of the minority, that individual’s interest is unlikely to be sufficient to impose the relevant duty on the majority society, given the high costs and inconvenience of making public provision for a minority language. But, if we take

¹ For other accounts of group rights that give moral standing to groups, but that, like McDonald’s, locate the essential quality for that standing in a group’s intersubjective features and so do not conceive groups separately from their members, see Galenkamp (1993) and May (1987).

² Raz’s definition of a right implies that the interest that grounds the right can be only the interest of the right-holder, but elsewhere he indicates that the case for a right can also be made by the interest of others in the right-holder’s having that right. For example, the right of journalists not to reveal their sources is grounded not only in their own interest in that right, but also in the public’s interest in their having that right. See Raz (1986, pp. 245–63; 1994, pp. 44–59; 1995).

the combined interests of all members of the minority, they may well suffice to ground the duty. If they do, the linguistic minority will have a right as a group that none of its members possesses singly.

What I describe as a 'collective' right is, therefore, genuinely a group right since it is a right that individuals hold only as a group. However, on this conception, we do not need to conceive a group's interest as something other than the interests of its members, since it is the several, if identical and shared, interests of the members that makes the case for the group's right. In addition, we need not ascribe moral standing to the group separately from its members. The right is collectively or jointly held by the individuals who make up the group and is underwritten by their moral standing as individuals. The corporate and collective conceptions not only present fundamentally different understanding of groups as bearers of rights, but also surround group rights with different issues.

Seumas Miller's account of group rights (Chapter 6) is a clear example of a collective, rather than a corporate, conception. Miller conceives group rights as the joint rights of individual persons and accordingly sees no need to interpret right-bearing groups as supra-individual entities. He understands a joint right as a right to a collective good that any particular individual holds only jointly with others. For example, the right of two people to own the house they have built together is a joint right. So is the right to political participation, if it is understood not merely as an individual's right to vote but as a right to political participation as a shared activity and a collective good.

Miller reserves the term 'collective right' for a right that is jointly held by the members of a social group. He identifies a 'social group' as a group that possesses common conventions, norms and institutions, and that has shared in a common life over generations. His paradigm examples of social groups are national, cultural and ethnic groups, including indigenous peoples. He does not immediately assign collective rights of autonomy and cultural self-preservation to these groups. A group must be viable as an independent entity before it can have those rights. It must also pass certain moral tests: for instance, it must not be a predatory group and it must promote the autonomy and well-being of its members. However, all these conditions relate only to the content of the rights that social groups might claim; in their structure, the rights of social groups remain rights held jointly by their members.

In her account of group rights, Carol Gould (Chapter 7) also abjures holistic conceptions of groups, which regard them as reified entities that exist over and above their individual members. But she is equally keen to resist simple individualist accounts that conceive groups as no more than aggregations of individuals. Instead, she argues that we should see groups as 'individuals-in-relations' (see also Gould, 1988, pp. 91–113; 2001). That is because individuals become the people they are in and through social relations. It is also because, as group members, individuals can have common purposes and can engage in joint activities that they could not as independent individuals. We need the idea of group rights if there are to be rights to goods that only individuals-in-relations can enjoy. In some ways, Gould's thinking on group rights is similar to McDonald's. But, whereas McDonald gives moral status to groups as such, Gould does not. Indeed, she goes on to derive group rights from individual rights.

It is important to recognize that we can take full account of the way in which social relationships affect those involved in them, and of the interests and aspirations that people can have only as group members, while still holding that ultimately only individual persons have moral standing. Group membership matters for what it makes possible and for the impact

it has on people's lives, but it matters ultimately because it matters for the persons – the individuals-in-relations – who are the members of groups.

Leslie Green's argument on group rights in Chapter 8 has a similar thrust, although he makes his case in a quite different way. Green identifies misgivings about individualism as a major motivating concern behind the assertion of group rights. While he argues that many worries about individual rights – that, for example, they promote egoism and social conflict – are misplaced, he does recognize that there are collective goods, such as fellowship and cooperative activity, that individual rights cannot capture. If we wish to make provision for the collective dimensions of people's lives by recognizing group rights, what should we regard as the crucial factor that makes those rights 'collective'?

Green identifies two possible answers. One is that a right is a collective right if and because it is the right of a collective agent. By a 'collective agent' he means roughly what I described previously as a 'corporate' entity that has a capacity for agency, typically an organized group with a decision-procedure. According to this answer, it is the collective nature of the *subject* of a right that makes it a group right. The other answer looks more towards the *object* of the right: a right to a good is a group right if it is grounded in a collective interest in that good. So a right is a collective right if and because it is grounded in a collective interest in the object of the right. Green argues that group rights will better serve the communitarian concerns of their advocates, if we conceive them as rights grounded in collective interests, rather than as the rights of collective agents. He does not expressly address the question of how we should think of the subject of a right grounded in a collective interest but, by implication, that subject would seem to be the individuals who share in the collective interest and therefore in the right.

Group Rights and Collective Goods

Green's argument signals another way of approaching the questions of whether and why there are group rights. Instead of focusing on the possible subjects of those rights, we might focus on their possible objects – on what they are rights *to*. Some goods may have a necessarily collective character. If they do, and if there are rights to those goods, it would seem that those must be group rights.

This is the issue that drives the essay by Denise Réaume (Chapter 9). Are there goods which, if they are objects of rights, can be objects of group rights only? We might suppose that public goods fit the bill; these are goods that are public to a group in that they are non-excludable and non-rival in consumption for the members of the group. Réaume points out, however, that some public goods may reasonably be considered objects of individual rights. Clean air is a standard example of a public good, yet we can reasonably hold that individuals have a right to clean air as individuals: someone who pollutes the air of a community violates the rights of each individual member of that community, rather than a group right of the community as a whole.

Réaume focuses instead on what she calls 'participatory goods'. These are goods whose enjoyment by an individual depends on their also being enjoyed by others. Examples are friendship and a team game. I can enjoy genuine friendship with others only if they enjoy it with me, and I can play a team game only if others play it too. Of course, we do not normally think that people have rights to goods such as friendship but, Réaume argues, some

goods commonly associated with rights do have a participatory aspect, such as the goods of living in a cultured community, sharing a language with others and engaging in collective expressions of belief. Because of their participatory nature, rights to such goods can only be group rights.

Are there, then, group rights to participatory goods? We have already seen one obstacle to simply answering ‘yes’: some participatory goods, such as love and friendship, may not be suitable objects for rights of any kind. But another issue is what exactly rights to participatory goods would be rights to. Rights impose duties. So if some people have rights to participatory goods, do others have duties to provide them with those goods? This is the question that Andrei Marmor takes up in Chapter 10. He describes participatory goods as ‘common goods’, but I shall continue here to call them participatory goods.³ For Marmor, the problem with a right to participatory goods lies in the very fact that those goods depend for their goodness on their being valued by a community of others. A right to those goods would imply that others are duty-bound to share in those values, and a duty of that type is, he says, ‘morally very disturbing’ (p. 204). It is at odds with the freedom and personal autonomy that are fundamental to a liberal society. Moreover, if a group has right to a participatory good, such as its culture, language or traditional way of life, that may justify its suppressing internal dissent and change, and compelling people to remain members of the group in order to maintain its good.

In fact, Réaume herself rejects rights that would yield those burdensome duties. Participatory goods may often, though not always, require voluntary participation to be the goods they are. But, anyway, Réaume does not argue that rights to those goods should spawn duties of participation. Rather, she suggests that they may yield duties for ‘outsiders’ not to interfere with or destroy the good and perhaps duties to provide conditions in which the good can continue and flourish. For example, the right of a linguistic minority to its language as a participatory good might generate duties of that kind for the majority society.

Elsewhere Réaume proposes that we should understand group rights as rights to participatory goods (1994, pp. 123–24), but that seems a step too far. Even if only groups can have rights to participatory goods, they need not have rights only to participatory goods. She has also associated rights to participatory goods with what I previously described as the corporate conception of group rights (Réaume, 1994, pp. 124–25). That, too, seems misplaced. Arguing for group rights through participatory goods implies that the right-holding group consists of all of those who participate in the good, which implies the collective conception. The good of a group conceived as a corporate entity need not be a good that is shared in by all whom the group encompasses. Indeed, as Newman shows in Chapter 3, the good of a group so conceived can be defined independently of the good of the individuals who belong to it.⁴

Scepticism about Group Rights

As I indicated at the outset, group rights are deeply controversial. The starkest challenge that the idea of group rights faces is that it does not make sense. Many people deny that it is

³ These goods have also been labelled ‘communal goods’ (Waldron, 1993, pp. 339–69) and ‘shared goods’ (Green, 1988, pp. 207–09; Raz, 1995, pp. 35–36).

⁴ For a challenge to Réaume’s basic claim that rights to participatory goods cannot be individual rights, see Morauta (2002).