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# Race, Rights, and Justice



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distributive only: the moral right to bear offspring, if it does exist, seems to be just such an example insofar as it might be said that an ethnic group possesses this right. Nevertheless, I argue that Moral Rights Collectivism is sound to the extent that the moral right to secede, if it is a moral right at all, is a purely collective right. Thus some collectives can and do qualify as moral right holders, though their rights may be exercised distributively or by a recognized representative of the collective. The plausibility of this claim is sufficient to defeat the extremism of Moral Rights Individualism in denying the very *existence* of collective moral rights.

Often what the critic of collective rights confuses is the possession of a right with its exercise. Simply because corporate rights are often *exercised* by a duly acknowledged party within the corporation (or by proxy), this does nothing to discount the fact that collectives can and do *possess* certain rights that in some cases are exercised by individuals. Moral Rights Collectivism supports the claim that it makes sense to attribute moral and legal rights to certain collectives, regardless of who or what claims those rights. Furthermore, I am not arguing that a substantiated harm is a *sufficient* ground for a collective's claim to a right to something. For the interest that is set back (in the harming) might not be the sort of interest to which a collective has a legitimate claim! If an illegitimate interest is set back or denied (in one way or another), this does not mean a putative right to something is violated. For I have no legitimate right to act on my interest given that such an action would be unjustified.

Again, a collective moral right may be *exercised* by some subset of the collective, or by an official representative of the collective. In fact, one difference between a right the subject of which is an individual and one the subject of which is a collective is that a collective moral right, unlike an individual one, gives some member of the collective the power to claim that right *for* the collective. The chief manner in which a corporation exercises its moral right is by way of representation determined by a set of rules, organizational or institutional. For example, the rules of the corporation might state that its Chief Executive Officer or another high-ranking officer of the corporation share the "role responsibility"<sup>27</sup> of claiming or exercising: the corporation's moral right, if it has such a right, to due process when it is sued; its moral right that others keep promises made to it when it enters legal transactions such as renting a building (where the obligation to pay rent is incumbent upon the corporation, not its members), when it makes binding declarations

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<sup>27</sup> H.L.A. Hart defines "role responsibility" as that duty or set of duties one has by virtue of the role one occupies. [Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 1968), pp. 212–214].

with the community, etc. Such rights, if they accrue to corporations, are created by the individual agents or representatives of the corporation.

Not only may corporations have their respective moral rights exercised in various ways, so too can nations. The U.S., it might be argued, exercises its moral right (and its perfect duty, according to Immanuel Kant<sup>28</sup>) to punish criminals whenever its representatives incarcerate a criminal.<sup>29</sup> As Hans Kelsen states, “[t]hough, in reality, it is always a definite individual who executes the punishment against a criminal, we say that the criminal is punished “by the state” because the punishment is stipulated in the legal order.”<sup>30</sup> The imputation of a state official’s action (of say, punishment) to the state is made on the basis of a complete or partial legal offender that is presupposed to be valid.<sup>31</sup> Similarly, the state is said to exercise a certain moral right when one who has the legitimate role responsibility (defined by the rules of the system)<sup>32</sup> to act on behalf of the state in fact acts for the state. Thus with nations and corporations, it is a rule-defined representative of that nation or corporation who, for example, claims the moral right for the nation or corporation. This is partly because nations and corporations are artificial collectives, created and sustained (when they are sustained) by humans for their own particular purposes and aims.

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<sup>28</sup> Immanuel Kant, *The Metaphysical Elements of Justice*, John Ladd, Translator, (London: Macmillan Publishing Company, 1965), pp. 23, 26, 29, 100, 107; also see J. Angelo Corlett, *Responsibility and Punishment*, 3rd Edition (Dordrecht: Springer, 2006), Library of Ethics and Applied Philosophy, Volume 9, Chapter 3.

<sup>29</sup> This claim is supported by Hans Kelsen, who writes:

A right of the state exists when the execution of a sanction is dependent upon a law-suit brought by an individual in his capacity as organ of the state in the narrower sense of the term, as “official.” Especially within the field of civil law, the state can possess rights in this sense to the same extent as private persons. The right of the state here has as its counterpart a duty of a private person. The relationship between the state and the subjects of the obligations created by criminal law allows for the same interpretation, insofar as the criminal sanction is applied only upon a suit by the public prosecutor. The act by which the judicial procedure leading to the sanction is put into motion is then to be considered an act of the state: and it is possible to speak of a legal right of the state to punish criminals, and to say that the criminal has violated a right of the state [Hans Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press, 1949), p. 200].

<sup>30</sup> Kelsen, *General Theory of Law and State*, p. 192.

<sup>31</sup> Kelsen, *General Theory of Law and State*, p. 194.

<sup>32</sup> Kelsen calls such an individual an “organ” of the state (Kelsen, *General Theory of Law and State*, p. 195).

In the case of an ethnic group (considered in terms of each one of its members, collectively), however, collective moral rights possession is different. While artificial collectives such as corporations and nations might possess certain moral rights based on their having specific legitimate moral claims, “natural” collectives such as ethnic groups might possess certain moral rights based on their having legitimate moral interests. Just as natural persons are said by many (save Benthamites) to possess certain natural or moral rights, so do ethnic groups possess certain moral rights. The difference, of course, is that individual rights are often (but not always) exercised by the subjects of the rights, whereas collective rights are exercised by representatives of the subjects of the rights. Thus there is reason to believe that moral rights may be justifiably ascribed to certain artificial and natural collectives.

But moral rights may be possessed, it seems, by subjects of an ethnic group based on the fact that such groups (as a collective) have legitimate moral claims. Take the example of an Orthodox Jewish Synagogue. Here there is an organized and decision-making group of Jewish persons that makes collective claims. To the extent that such claims are legitimate, such a collective possesses a moral right to do or to have something. Moreover, Jewish people as an ethnic group, it might be argued, have a putative moral right to become or form an artificial conglomerate, such as an Orthodox Jewish Synagogue. It would seem that Jews’ putative moral right to form such a collective needs to be both respected and protected.

Thus in the example of the CAIN, it has a legitimate moral interest in self-preservation in the context of the CAIN’s being significantly harmed by the U.S. Moreover, its legitimate moral interest *holds the U.S. to a moral duty* not to interfere with the exercise of CAIN’s right to secede from the U.S. Thus we have an example of a collectively held moral right.<sup>33</sup>

But what does it mean to say that individuals in a collective share a common interest? Basically, it means that they share a common lot, and that the harming of one member of the collective constitutes (to some significant extent) a harm to each and every other member of that collective. Moreover, there are different ways in which members of a collective can share an interest together. First, they may do so by being born into an ethnic group,<sup>34</sup>

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<sup>33</sup> It might plausibly be argued that the moral right to secede might be extended to corporations that, for political reasons, wish to secede (taking property with them) from the country or nation to which they belong. Perhaps in such cases corporations seek to preserve themselves as autonomous agents from government that (they believe) seriously threatens their autonomy and legitimate moral interest in self-preservation.

<sup>34</sup> This is not to deny, however, that one may choose to become a member of a certain ethnic group if indeed such a group permits membership status by such means. My normative point is that, for purposes of public policy administration, one’s being a member

a religious group, a nation, etc. In such cases, the members in question have little or no choice in the matter of being a member of the collective to which they belong. In some cases, such as being born into a nation, a member can use his or her freedom to defect to another country. But in the case of ones being born into an ethnic group, one lacks the right of defection from that group. One is, say, Latino (or partially so), and no amount of choosing to become otherwise makes a difference. Thus, members of a collective may share a common interest by being born into that group, and in some cases, members would have no freedom to leave that group.

In other sorts of cases, however, members of collectives, such as corporations (or the CAIN), voluntarily agree to become parts of a collective. They may do so by agreeing to assume certain responsibilities of collective members having a common interest. For instance, one may accept a position at the Exxon Corporation, assuming certain responsibilities, which promote the interests Exxon's constituents have in common. Or, one may voluntarily become a member of a religious sect, agreeing to carry out the religious plans and ideals of that group based on the shared interests of group members. In such cases, it seems reasonable to attribute to such a collective certain moral rights against its membership: namely, the rights against embezzlement, fraud, etc.

Must the members of a collective who share a common and legitimate interest do so *knowingly*? I think not, for the following reason. Although within some collectives, such as corporations, membership or sharing a common and legitimate interest is done knowingly, the case of ethnic groups is different. For instance, a visually impaired hermit may go through life never knowing that she is black (if her parents and family never informed her of her color while she was young). Yet, we would say she is still a member of the ethnic group: blacks. Thus, her inability to know the color of her skin and whatever else goes into making her a member of that ethnic group does not affect her membership status in that group.

Finally, the Principle of Collective Moral Rights mentions that a collective's moral interest<sup>35</sup> must be "legitimate." But what makes a moral interest legitimate? A moral interest is legitimate to the extent that it is supported by an objectively valid moral principle, which states that that interest is permissible, morally speaking. For instance, the moral principle, "innocent parties should not be unduly harmed" implies the moral interest parties have

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of an ethnic group is a matter of genealogical heritage, not choice. For a philosophical analysis of ethnic identity, see J. Angelo Corlett, *Race, Racism, and Reparations* (Ithaca: Cornell University Press, 2003), Chapters 2–3.

<sup>35</sup> What makes an interest moral is that its content is moral.

in not being unduly harmed. Since this principle is plausible, the interest it implies is legitimate. And, since it is justified to say that collectives such as corporations and nations should not be unduly harmed, this implies an interest of that group not to be unduly harmed.”<sup>36</sup>

If the Principle of Collective Moral Rights is plausible, then it is justified to ascribe some moral rights to certain collectives, given the plausibility of the claim that such collectives do at times have legitimate moral interests or claims. Moreover, it seems justified to say that some collectives, such as nations and corporations, have interests or make choices. And if it is justified to make some collective moral rights ascriptions, then there may be a *prima facie* case in favor of the claim that a liberal society ought to recognize such rights in its system of government.

Having set forth an analysis of collective moral rights attributions, it is important (for the sake of providing a plausible theory about their ascription) to provide a view of collective moral rights conflicts, to state which collectives can justifiably be ascribed moral rights, to delineate the varieties of collective moral rights, to say why collective moral rights ascriptions are valuable when they are, and briefly to explain the place of collective moral rights ascriptions in political philosophy.

*A plausible theory of collective moral rights attributions ought to, it seems, explain how conflicts between collective moral rights claims are to be resolved.* Consider the case of ascribing to a corporation the moral property right to strip mine a mountain versus a nation’s putative moral right to preserve natural resources, such as mountains, from destruction. Clearly this is a conflict of collective moral rights ascriptions. How should it be resolved? In general, it is important to recognize that, given any two conflicting claims to a collective moral right,<sup>37</sup> one of the collective claims to that right is weaker than the other. This follows from the Principle of Rights Conflict: where claims to a right are in conflict, at least one of the claims must be invalid or less valid than other competing claims. Thus, either the corporation’s claim to strip mine the property is invalid (at the time in question), or the nation’s claim to use it for recreation or preservation is invalid (at the time in

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<sup>36</sup> This notion of collective moral interest is a distributive one. But there seems to be no obvious reason why a distributive conception of collective moral interests cannot support a nondistributivist notion of collective moral rights possession without embracing Moral Rights Individualism. After all, if there is a moral right to secede, it is a purely collectively *held* one. But even here it is not obvious that there is a purely collectively shared *and recognized* moral interest that grounds the moral right to secede.

<sup>37</sup> In this case, the right to use the mountain in a certain way, by preserving it, strip mining it or using it for recreation.

question). Both claims cannot both be equally valid at the same time and in the same respect.

How is this dispute to be settled? Conflicting collective moral claims to rights are to be settled by an appeal to deeper moral principles concerning the respective parties' claims. In this case, one might consider the plausibility of public goods over those of private gain and argue that a moral principle based on this notion would favor the nation's right to the mountain over the corporation's right to it. Such a utilitarian view would give greater weight to the nation's right to the property over the corporation's right to the same, assuming, of course, that the result of respecting the nation's right would maximize either average or overall satisfaction. On the other hand, it might be argued that a moral principle the content of which reveres personal integrity over utility considerations would trump the nation's right to the property in question. The point is that debates about collective moral rights claims conflicts will result in disagreements about deeper conflicts about moral theory. Thus, such conflicts must be resolved, ultimately, at the level of moral theory. No simple moral principle is able to inform one how to resolve conflicts of collective moral rights. A collective moral right claim is as valid as the overall moral theory supporting it, contextual factors being taken into account.

*Another important criterion of a plausible theory of collective moral rights is that these explain which collectives can possess moral rights and why.* What is it that makes certain collectives plausible subjects of moral rights? Which collectives are plausible candidates for moral rights ascriptions? The answer to this query is that *only* conglomerates, not aggregates, are the plausible candidates for moral rights ascriptions. The reason for this is a unity present in conglomerates, which is crucially lacking in aggregates, and it is this unity, which justifies one's referring to a collective as the subject of a moral right. It is this unity which indicates the legitimate moral interest that the members of the collective share, which in turn indicates the collective's moral right. This is why only conglomerates such as organizations, associations,<sup>38</sup> corporate-collectives, ethnic groups, federations, and coalitions are plausible candidates for collective moral rights ascriptions.

If collective moral rights do exist, then what are some of the moral rights that might be properly ascribed to collectives of the conglomerate type? First, there are moral rights that protect a collective's interest in existing or preserving itself from extinction or being extinguished. Such rights might be called "collective moral rights to life" and include a political or religious group's right to exist, a political group's right to self-preservation and development,

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<sup>38</sup> For an argument supporting the attribution of moral rights to associations, see L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Oxford University Press, 1987), Chapter 3.

etc. Second, there are those moral rights which protect a collective's interest in freedom of expression, decision-making, etc., including, more specifically, a corporation's right to make its own decisions, a political group's right to express its own views without persecution, etc. Third, collectives have moral rights that promises made to them by other parties be kept, that their debtors repay debts, etc. A more complete theory of collective moral rights should also enumerate the varieties of collective moral rights, as well as showing how and why some moral rights are possessed by certain collectives, but not by others. It would also involve explaining how and why some moral rights are possessed by certain collectives, but not by individuals, and vice versa.

To this point, it might be objected that U.S. corporate law is replete with cases of corporations claiming corporate legal personhood status in order to have their interests in profiteering protected by the Fourteenth Amendment to the U.S. Constitution, an amendment devised specifically to protect the equal rights of blacks and other legally unprotected groups in the U.S. And many have succeeded in protecting their own interests over the protections of various public goods such as clean air, water, and the protection of various other elements of the environment, and over the claims and interests of the very groups that the amendment was designed to protect. While this is morally problematic and a misinterpretation or misapplication of the Fourteenth Amendment, there is no principled reason prohibiting the content of the Constitution from applying to natural, rather than artificial, persons only. Nothing in my argument is intended to support the corporate appropriation of the Fourteenth Amendment or any other part of the Constitution. But even if corporations do rightly qualify as moral and legal persons, as Peter A. French argues,<sup>39</sup> there is no good reason to think that corporate rights claims or interests ought to win out over claims to genuine public goods, or that they ought to override certain basic individual rights when a conflict of such claims arises.

Of some moral rights, it is not clear whether collectives—even conglomerates—actually possess them. Take the right to civilly disobey the law. Rawls construes civil disobedience as a “right,”<sup>40</sup> and defines it as “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.”<sup>41</sup> This definition of the right to civilly disobey the law states that the

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<sup>39</sup> French, *Collective and Corporate Responsibility*, Chapter 3.

<sup>40</sup> For an argument supporting the attribution of moral rights to associations, see Sumner, *The Moral Foundation of Rights*, Chapter 3.

<sup>41</sup> Rawls, *A Theory of Justice*, p. 364. When Rawls defines civil disobedience as a “conscientious act” he means that civil disobedience is a sincere appeal to the sense of justice of those in political power, of those whose views and practices need to be altered. Also



subject of this right is a “conscientious” agent. But it is far from clear whether or not conglomerates *are* conscientious agents (or *agents* in the true sense).<sup>42</sup> This does not mean that conglomerates *cannot* become conscientious moral agents. Rather, it suggests that they do not typically act conscientiously. To the extent that collectives do not act conscientiously, and assuming that the Rawlsian (traditionalist) definition of “civil disobedience” is sound, then such collectives are typically not the legitimate subjects of the moral right to civilly disobey the law. Thus it is not justified to attribute to a collective the moral right to civilly disobey the law (unless it is in turn justified to believe that that collective acts conscientiously).<sup>43</sup>

*A plausible theory of collective moral rights should clarify why collective moral rights are valuable when they are.* Of course, collective moral rights may be seen as valuable in at least some of the ways in which Feinberg argues that individual rights are valuable.<sup>44</sup> However, there might be ways in which collective moral rights carry with them a special or unique value for their possessors. This possibility needs exploration. *Why* are collective moral rights valuable? Individuals and collective can adversely affect the legitimate moral interest/claims of collectives. And since collectives (at least some of them) are important to human societies, their legitimate moral interests/claims must be protected by a system of moral rights. Thus collective moral rights are valuable in that they protect from infringement a conglomerate’s legitimate moral interests/claims, which, in turn, protect those conglomerates themselves. Collective moral rights are indicative of the moral importance of certain collectives. In turn, they demand that the moral considerations of such collective be taken seriously.

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see Hugo Adam Bedau, “On Civil Disobedience,” *The Journal of Philosophy*, 58 (1961), 653f.; J. Angelo Corlett, *Terrorism: A Philosophical Analysis* (Dordrecht: Kluwer Academic Publishers, 2003), Chapter 2; Martin Luther King, Jr., *Why Can’t We Wait* (New York: Harper and Row, 1964). For an insightful and critical discussion of the traditional view of the nature and moral justification of civil disobedience, see Paul Harris, Editor, *Civil Disobedience* (Lanham: University Press of America, 1989), “Introduction.”

<sup>42</sup> See Corlett, *Responsibility and Punishment*, Chapter 7.

<sup>43</sup> This line of reasoning does not contradict my earlier claim about the possibility of some collectives qualifying as subjects of the moral right to civilly disobey the law. If a collective is structured such that it is justified to believe that it *is* a conscientious moral agent, then it seems to be a plausible candidate for its having a moral right to civil disobedience (other conditions obtaining). For a discussion of political, religious groups’, and nations’ rights to civil disobedience and to secede (respectively), see Corlett, *Terrorism: A Philosophical Analysis*, Chapters 2–4.

<sup>44</sup> Joel Feinberg, “The Nature and Value of Rights” in *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), Chapter 7.

The Principle of Collective Moral Rights provides part of the basis for an explanation of the value of collective moral rights attributions. The formation and development of social, corporate, and other sorts of collectives is important to a society. In order to protect such collectives from wrongful harms and possible extinction, it might be argued, moral rights are ascribed to them so that they may protect themselves (or have a means of being protected). This, of course, is an argument from collective self-preservation.

Moreover, like any rights theory, *a plausible theory of collective moral rights should explain the place of collective moral rights in a moral/political philosophy, while avoiding the problems of political individualism, i.e., treating rights as solely fundamental to such a philosophy.* Joseph Raz makes a similar point about theories of individual rights.<sup>45</sup> Surely collective moral rights, though they have a central place in more general theories of rights, do not occupy the exclusively central role in a more general moral/political philosophy. Neither collective nor individual moral rights are the be-all or end-all of a promising moral or political philosophy.<sup>46</sup> Collective moral rights, though they are critical for moral rights and general rights theories insofar as such theories strive for completeness, are not *the* basic core of a moral and political philosophy. Nevertheless, the concept of collective moral rights plays a significant role in such a theory. But the concepts of moral duty, moral obligation, moral responsibility, etc. also play central roles. In a wider-reaching project than this one, it would be necessary to link the moral notions of rights, duties, responsibilities, etc. into an overall coherent philosophical framework.

Furthermore, *a plausible theory of collective moral rights ought to explain the basic relations between collective moral rights and the moral duties with which they are generally correlated.* Correlated with collective moral rights ascriptions to the subjects of rights are ascriptions of moral duties to the objects of rights. If a certain collective has a moral right to do or have *X* at a given time, then it has this right against either a collective or an individual (or both) at that time. This means that the right of one collective correlates with a duty of another collective or individual not to interfere with the exercise or enjoyment of that right. Moreover, such a right may at times correlate with more than one duty of one or more parties. For instance, if the CAIN has the moral property right to the land mentioned in the above story, then it is a right which correlates with (i) the moral duties of individual citizens,

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<sup>45</sup> Joseph Raz, "Right-Based Moralities" in R.G. Frey, Editor, *Utility and Rights* (Minneapolis: University of Minnesota Press, 1984), pp. 42–60.

<sup>46</sup> Loren E. Lomasky, *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press, 1987), pp. 228–229.

the corporation, and the U.S. not to interfere with the exercise of its right, and (ii) the moral duty of others to honor all terms of the treaty. Thus, for every justified collective moral rights ascription there is some justified collective and/or individual moral duty ascription. To the extent that collective moral rights ascriptions are justified, so are attributions of moral duties to collectives and individuals.<sup>47</sup>

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<sup>47</sup> What are some additional criteria for a plausible theory of collective moral rights? By “criteria” I mean a list of independent desiderata for such a theory and a list of independent questions for the theorist to answer concerning collective moral rights ascriptions. One such criterion is *that it does not minimize the separateness of persons*. For an explanation of the separateness of persons objection to utilitarianism’s treatment of individual rights, see Rawls, *A Theory of Justice*, Chapter 3; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), Chapter 7; and J.L. Mackie, “Rights, Utility, and Universalization” in R.G. Frey, Editor, *Utility and Rights* (Minneapolis: University of Minnesota Press, 1985), 86f. That is, a theory of collective moral rights should recognize the significance of persons as autonomous individuals in that the life each lives is the only one each has. Moreover, *it ought not to emphasize the importance of collective moral rights at the expense of individual welfare*. For individual autonomy, concern for one’s own welfare, and the like are essential to self-respect, the protection and promotion of which should be among the primary aims of any theory of moral rights.

However, just as a theory of collective moral rights ought not to minimize the separateness of persons, *it ought not to inflate its importance either. While preserving individual autonomy and individual welfare, such a theory must also place such concerns alongside the crucial significance of collective goods and their realization*. For collectives, it might be argued, ought to be construed as having their *own* separateness, which requires protections and respect.

Another criterion for a plausible theory of collective moral rights is *that it does not view persons or collectives as mere means to the end of, say, social utility*. Rawls and Nozick each make this point against utilitarianism’s not respecting individual rights (Rawls, *A Theory of Justice*, Chapter 3; Nozick, *Anarchy, State, and Utopia*, Chapter 7). This Kantian point stresses the importance of human dignity, individual and collective, in any theory of moral rights. It cautions against an act-utilitarian theory that would place such an emphasis on the value of collective goods or rights that individuals may be used as mere means, say, to the end of social stability by permitting a country’s right to peace and security to always trump an individual’s right to free speech.

Next, *a plausible theory of collective moral rights ought to safeguard against not differentiating between the distinct sorts of rights which might be possessed by a collective, and recognizing that justified attributions of collective legal rights and collective moral rights require separate analyses*. Much confusion results in failing to see that if a collective can have a right, it can have a moral right without having a legal one, and vice versa. This does not mean that a collective cannot possess a right that is both a legal and a moral right. For there is some overlap in the contents, subjects and objects of both moral and legal rights. The content of a right is what it is a right to. The subject of a right is the one (or collective) who (which) possesses the right. The object of a right is the one against whom the right holds to a duty. For more on the distinction between collective legal and moral rights, see Hartney, *supra* note 1 at 304.