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# Do We Have A Right To Common Goods?

Andrei Marmor

Individuals have rights. I will assume that this means that individuals have interests which are important enough to justify the imposition of duties on others in order to secure those interests. Groups of individuals, such as nations or ethnic minorities, plausibly have rights as well. Groups of individuals may have group-interests appropriately protected by the imposition of duties on others, typically, on governments, or on other larger political entities. My concern in this essay is with the question of what individuals or groups may have *a right to*. In particular I want to explore the question of whether people can have a right to common goods, such as the flourishing of their culture or national heritage. First, I will explain the concept of a common good and its distinction from other, similar, concepts such as collective and public goods. Second, I will argue that individuals should not have a right to common goods, unless a particular distributive principle applies to the good in question, and then the individual's right is the right to a certain share in that common good. Finally, I will explore the question of how this analysis applies to group-rights.

## 1.

According to Raz's influential 'interest theory of rights', which I will basically endorse here, rights protect interests of potential right holders.<sup>1</sup> An interest of an individual is an aspect of his well being. Needless to say, not every aspect of a person's well being should be protected by rights, that is, by the imposition of duties on others. Some aspects of a person's well being are too trivial to deserve such protection; they simply do not justify the imposition of any burden on others. Other aspects of a person's well being, in spite of being important and worthy of protection, such as, for example, a person's interest in being loved and cherished by others, cannot be plausibly protected by the imposition of duties on others; either because the duty would be disproportionately burdensome or practically impossible to impose.<sup>2</sup> Whenever a right exists, however, it is a right to a certain good which is in the interest of the right holder.

Many goods which potentially ground rights are essentially individualistic. For instance, the right not be subject to torture is based on aspects of peoples' well being which are individual in character. Neither their production, nor their enjoyment,

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I am indebted to Chaim Gans, Elizabeth Garrett, Alon Harel and Denise Réaume for invaluable comments and suggestions.

1. See Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at ch. 7 and also, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994) at ch. 1.

2. Not always: we do tend to assume that parents, for example, have a duty to love their children.

requires a community. Other goods, however, are communal; in one form or another, such goods take a community to produce, sustain, or enjoy. However, there are important differences between the various ways in which goods have a communal aspect, and it is crucial to be clear about this. In particular, we should distinguish between collective goods, public goods, and common goods.

The concept of a collective good is the easiest to define: collective goods are those which require some form of collective action to produce.<sup>3</sup> What marks this concept of a good only concerns its typical production process. There is a considerable variety of goods in our societies which can only be produced collectively, that is, by the concerted action of numerous individuals, institutions, and agencies. Consider, for example, the goods of national security, the protection of the environment, democratic decision procedures, adequate health care, and perhaps also science and education; all these goods require collective action to produce. Note, however, that there is an element of contingency in this characterization. The production of goods may vary with circumstances. In some societies, or under certain circumstances, the production of a given good may require collective action, whereas in others, it may not. Consider the good of clean air, for example. The production of clean air becomes a collective action problem only in societies which actually face a problem of pollution. If there is no pollution, such as in distant rural communities, perhaps, there is no need to produce clean air, and clean air becomes a good people can enjoy without any communal aspect whatsoever. On the other hand, certain goods are essentially of such a nature that their production involves a collectivity. Democratic political procedures, for example, are of such an essentially collective nature. People cannot produce or have a democracy by themselves.

Be this as it may, the essential point is that the communal aspect of collective goods consists in their means of production. Public goods, however, are communal regardless of the prerequisites of their production. By the term public good I mean to refer to those goods which can be enjoyed by a multiplicity of persons in such a way that the use or enjoyment of some does not substantially subtract from the use of others. In other words, public goods are goods which once produced, benefit a whole community. Street lighting is a classical example often given for such goods. Regardless of why or by whom a street light has been installed, it benefits a whole community of potential pedestrians, and their benefit is not mutually exclusive. Similar considerations apply to public parks, or the beauty of a building, or some of the examples we have mentioned above, such as clean air or national security. As these examples show, some public goods are also collective goods, and

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3. There are two main types of collective action, and I intend to include here both of them: First, there are those cases in which the production of the good simply requires *coordination* amongst numerous participants. Second, there are those cases in which the creation of the good by a number of individuals requires more than simple coordination because participants would have a strong incentive to defect, free-ride, etc. Prisoners' Dilemma situations form the paradigmatic example of this latter category. The main difference between these two types of collective action problems consists in the fact that in the second category some form of sanction is needed to solve the collective action problem, whereas in simple cases of coordination, it is typically enough to secure common knowledge of one course of action everybody can pursue. On the difference between these two types of collective action problems I have elaborated in my *Positive Law and Objective Values* (Oxford: Oxford University Press, 2001) at ch. 2.

others need not be. What marks a good as public is the possibility of non-exclusive enjoyment, not its means of production.<sup>4</sup>

Nonexcludability, so to speak, is a matter of degree. Whether the use or enjoyment of one person subtracts from the use or enjoyment of others greatly depends on circumstances. There is rarely a case of perfect nonexcludability.<sup>5</sup> City parks can be used and enjoyed by many, and under normal circumstance, if people behave in a civilized manner, the park can be enjoyed by all without substantially subtracting from the enjoyment of others. But only up to a point, of course. The more people use the park, at some point the less enjoyable it becomes. Few goods, however, are entirely nonexcludable. Consider, for example, the beauty of a public building. It seems to be true that once a beautiful building has been constructed, all those who enjoy it can do so without the exclusion of others and without subtracting from anybody else's enjoyment. But even this relatively easy case is not so easy as it seems. Arguably, at least according to a certain 'aristocratic' conception of aesthetics, the more people come to appreciate the beauty of an object, the less appreciable it may become. So even the passive enjoyment of the beauty of an object may not be a perfect case of nonexcludability. But perhaps it is, I do not want to insist on this point.

Finally, common goods are quite different. As Jeremy Waldron rightly observed,<sup>6</sup> the essential character of a common good is that it cannot be *enjoyed* without its communal aspect. The communal aspect of the good is an essential ingredient of what makes it a good. Consider, for example, such goods as culture, national heritage, democracy, solidarity, fraternity, or, to mention one of Waldron's nicest examples, the conviviality of a party. All these, and countless such examples, refer to goods which gain their quality as goods only in connection to a community. The good is something which occurs at a collective, communal, level, and its communal aspect is an essential ingredient of what makes it a good that individuals can enjoy. The communal aspect of common goods is typically twofold. First, such goods typically take a community to create and to sustain. Culture, democracy, a natural language, and such, cannot exist without a community which sustains them. The good can only be maintained by the existence of a community which actually practices those elements that constitute the good in question. Second, but not as a necessary consequence, such goods can only be enjoyed as goods in their communal manifestations.

Consider the goods of a culture, for example. Such goods cannot be sustained by an individual acting on her own. It takes a community to create and sustain a culture. Note, however, that the creation of such goods doesn't necessarily require a collective, concerted, effort. Most common goods are actually created

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4. Nonexcludability is Raz's main characterization of public goods. See his "Right-based Moralities" in J. Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984) 182; however, the distinctions I mention here between collective, public, and common goods, more or less follows the insights of Denise Réaume, "Individuals, Groups, and Rights to Public Goods" (1988) 38 U.T.L.J. 1 and Jeremy Waldron, *Liberal Rights* (Cambridge: Cambridge University Press, 1993) at ch. 14.

5. Réaume, *ibid.* at 12.

6. See Waldron, *supra* note 4 at 355 and Réaume, *ibid.* at 10-11.

by something like an invisible-hand-mechanism. Individuals behave *as if* they are driven by a certain communal purpose, whereas in fact, it is typically the case that no such a communal purpose had been anybody's actual intention. The creation of some common goods, however, such as democracy or solidarity, does require certain forms of collective action. Be this as it may, the essential point is that common goods typically require a community to create and sustain. This aspect of common goods, however, does not necessarily entail the further element, which is crucial, namely, that the enjoyment of the good is essentially communal. In other words, the characterization of common goods should take into account their consumption, and not only their production end. What makes a good common, in a morally interesting way, is the fact that its consumption is essentially communal. This is so, despite the fact that it would be very difficult to think of a common good which is not also produced communally.<sup>7</sup>

Consider the importance people attach to their national identity and national-historical heritage. For many people identification with their nation and its historical and cultural heritage is an important good. The flourishing of one's nation or ethnic group is something which contributes to people's well being. This is undoubtedly a common good. Quite apart from the fact that national heritage and the flourishing of a national culture can only be produced by a community, it is also true, and crucially so, that people cannot enjoy such a good without its communal aspect. The flourishing of one's national culture is a good people can only enjoy in concert with others who share their appreciation of it and take pride in its achievements. In this respect, the values of nationality and national culture are very much like the conviviality of a party; they can only be enjoyed in concert with others who willfully participate in the same enterprise. Note, however, that in the case of common goods, there is typically an intimate, almost inextricable, connection between the production of the good and its enjoyment or consumption. Common goods involve communal enterprises in which the distinction between the production and the consumption of the good is often very difficult to draw. Often participation in the communal enterprise is both the production and the enjoyment of the good.<sup>8</sup>

Now, before we discuss the question of a right to common goods, it is worth noting that neither collective goods nor public goods create a special problem for the rights theorist. Consider collective goods first. The fact that the production of the good involves certain forms of collective action may have a bearing on the cost of the relevant right, and on the question of who is it a right against, but these are practical problems, endemic to the production of most goods in our societies. There seems to be no theoretical difficulty with the idea that people have a right to

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7. As a possible example of a common good which is not produced commonly I hesitate to mention the example of the arts, such as painting or literature. In some respects it is true that art is typically created by individual achievements, and the communal aspect of its production is at least not always on the surface. But we should not ignore the fact that the creation of art is very genre-dependent, and genres are common goods.

8. See Réaume, *supra* note 4 at 11. Unlike Réaume, however, I am somewhat less certain that this is an essential element of common goods. Some common goods do allow for a division of labor between producers and consumers. To a considerable extent, we can distinguish, for example, between producers and consumers of literature.

collective goods. Consider, for example, people's right to clean air. People's crucial interest in clean air grounds a right because it justifies the imposition of duties on others, and this is so, even if it is the case that discharging those duties requires collective action.<sup>9</sup>

Similarly, there is no particular difficulty with the idea that people have a right to some public goods. Consider, again, the right to clean air. Once the object of this right is produced, it happens to be a public good. Clean air can be enjoyed by everybody without thus subtracting in any significant way from the enjoyment of others. Furthermore, it is arguable that the protection of a great many traditional rights in itself creates certain public goods by creating a social-political environment which is good in itself, and can be enjoyed non-exclusively by the community at large. A society which does not tolerate torture, for instance, is a society in which a certain public atmosphere exists, and this public atmosphere is a public good, enjoyable by the community at large.<sup>10</sup> The protection of rights often creates positive externalities which amount to public goods. Positive or negative externalities, however, bear on the cost and the desirable extent of the protection of the right in question; externalities do not create any special problem of principle for the determination of whether a right can be acknowledged or not.

## 2.

Jeremy Waldron claims that there cannot be a right to *common* goods because the benefit such a right would secure to individuals cannot be adequately captured by particular benefits to individuals considered on their own. 'An individual has a right to G when the importance of his interest in G, considered on its own, is sufficient to justify holding others to be under a duty to promote G.' But the whole point of a common good, Waldron claims, is that such goods only have 'worth to members of the group considered *together*, and not as individual recipients of benefit'.<sup>11</sup> Therefore, Waldron concludes, individuals cannot have a right to common goods. This is not quite accurate, however. The fact that a good is common, namely, that it can only be consumed at a communal level, does not entail that the consumption of the good is not of paramount importance to individuals considered on their own. Culture, for example is a common good; it can only be consumed communally. From this communal aspect of culture, however, it does not necessarily follow that individuals considered on their own, namely, as the recipients of the benefit of culture, do not have an interest in culture sufficient to justify holding others to be under a duty. Even if culture can only be enjoyed communally, its benefit to individuals can be considered on its own, as an individual benefit worthy of

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9. The fact that the production of a good requires concerted action on a large scale is typically a good reason to impose the duty of the production of the good on institutions, such as the state, or some other public agency.

10. See Raz, *Ethics in the Public Domain*, *supra* note 1 at ch. 1. Raz also claims, however, that such public good externalities also tend to be non-competitive in their nature. I have expressed my doubts about this optimism in my "On the Limits of Rights" (1997) 16 *Law and Phil.* 1.

11. Waldron, *supra* note 4 at 359. Emphasis mine.

protection. The fact that I cannot enjoy something on my own does not entail that the good in question is not a good *for me*, considered on my own.<sup>12</sup>

Waldron's mistake is not so obvious, however. Some of his formulations suggest that his understanding of the idea of a common good is somewhat different from mine in a way which might explain his conclusion. At certain points he seems to suggest that the idea of a common good is not exhausted by the fact that the good in question can only be consumed at a communal level. The good in question, he claims, is '*primarily a property of the group*'.<sup>13</sup> A common good is good *for the community*, considered as a certain community, and not for the individual participants. If this characterization of common goods is correct, it would seem to justify Waldron's conclusion. But I don't think that it is, nor is it supported by any of Waldron's examples. It is true that many properties which constitute common goods are properties of groups and not of individuals: It is the party which is convivial, the society which is democratic or cultured, and so on. But we should be careful not to confuse the semantic-conceptual nature of the properties of aspects of the world which give rise to common goods, with the good, understood normatively, that they give rise to. The fact that the party is convivial is *good for its participants*, not for the party. And the fact that a society is democratic, or cultured, is *good for its members*, and not for 'the society', considered in some abstraction.

The problem with common goods, then, does not consist in the fact that they cannot ground individual interests. In fact, contrary to Waldron's thesis, I do not think that there is any *conceptual* problem with a right to common goods. The problem is a *moral* one, and it concerns the nature of the duties which would be required to secure an individual's interest in a common good. Goods are common, as we have seen, if individuals can only enjoy the good at its communal level, in concert with others who participate in the same communal enterprise. Such a communal enterprise, however, is typically a normative, evaluative matter. People can enjoy common goods because there is a whole community which enjoys it with them, that is, a community of people who *share those values which make it a good of a certain kind*.<sup>14</sup> A duty to provide a common good, therefore, would typically mean, *inter alia*, a duty to share certain values with others, and this is a type of duty which is morally very disturbing. In a liberal society, committed to the profound importance of freedom and personal autonomy, we would rarely wish to impose a duty

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12. I think that Réaume (in "Individuals, Groups, and Rights to Public Goods" *supra* note 4 at 9 and 11) makes a very similar point to Waldron's, which I find flawed for the same reason. Cf. Alon Harel, "Review Essay: Free Speech Revisionism: Doctrinal and Philosophical Challenges" (1994) 74 Boston Univ. L. Rev. 687 and Michael Hartney, "Some Confusions Concerning Collective Rights" (1991) 4 C.J.L.J. 293 at 298-300.

13. Waldron, *supra* note 4 at 355.

14. I say that common goods *typically* involve such a normative aspect just in order to be on the safe side. I find it very difficult to think of common goods which can be sustained and enjoyed as goods without there being certain values which are shared by most members of the relevant community. As Wittgenstein famously showed, even the use of a natural language necessarily involves "agreement in judgment" shared by the community of speakers. But again, I might be wrong about the generalization, in which case, I readily admit that my argument is restricted to those goods which require the members of the community to share the values which make it a common good.

on people to share certain values with others. People ought to have certain duties to promote valuable things, but this is very different from saying that they should have a duty to value those things. Perhaps people, and more plausibly institutions, should have a duty to do certain things which, for example, promote culture or solidarity. But this is, again, very different from suggesting that people should have *a duty to value* such things as culture or solidarity. However, having *a right* to such common goods as culture, or solidarity, would necessarily mean that others are under a duty to value certain things, since without such a communal sharing of values, culture or solidarity cannot become common goods. In other words, the duties which would be required to secure people's initial interest in a common good are too burdensome, morally speaking, since such duties are essentially duties to value as others do; the value cannot be realized unless it is shared by the relevant community.

In a similar line of reasoning, Denise Réaume suggested that it may be impossible, not just morally wrong, to impose duties on others to share values which constitute common goods. She believes that 'willing participation' cannot be imposed as a matter of duty. For example, if we think about an alleged right to culture, we would have to assume that it is possible to impose a duty on people to 'take an active and genuine interest in the arts, among other things...' but, she claims, 'it is impossible ... to speak of there being *an obligation* to take such an interest'. This would require 'the compulsion of that which cannot be compelled.'<sup>15</sup> I have some doubts, however, about this stronger claim. First, it seems to confuse the question of whether a duty should be held to exist, with the possibility of its 'compulsion'. People may well have a moral obligation, for instance, to love their children, though it is pretty clear that no such a duty can be compelled on them. The possibility of compulsion just does not form part of the definition of a duty. Secondly, I am doubtful that it is *conceptually* impossible to speak of a duty to share certain values or to take an active interest in something valuable. Duties are based on reasons for action. Therefore, anything which can count as a reason for action can conceptually ground a duty. Since people may well have a reason to share certain values with others, or actively participate in the creation of a common good, as matter of logic or conceptual truth, they may well have such duties.

Perhaps Réaume's point is somewhat different. It is true that there are certain values which can only become valuable if they are voluntarily entertained. Consider the values of friendship, or love, for example. People would not want such values to emerge from an obligation since it is part of the very idea of the good in question that it should emerge spontaneously or freely chosen by the other agent. Thus, for example, it is probably true that friendship cannot emerge as a valuable type of relationship if it is imposed as a matter of duty.<sup>16</sup> But the scope of this point is very limited; it would not apply to the kind of values which pertain to the creation of a great many types of common good. Culture, national heritage or solidarity, the arts, and many other common goods, do not seem to depend, certainly not entirely,

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15. Réaume, *supra* note 4 at 13.

16. It may be worth noting that these things are profoundly affected by culture.

on such spontaneous values. Many aspects of culture are created and nourished by being taught to the young in schools, often to their initial reluctance. National solidarity is often presented as a matter of duty, and at least it is not generally regarded as a kind of value which would be defeated unless it is purely voluntary. The problem with such duties, once again, is a moral one. A duty to value is problematic from an ethical point of view, that is, from the vantage point of moral autonomy.<sup>17</sup>

One of the most important commitments of liberalism consists in the profound value it attaches to a person's choices in the values she holds. What people decide to value, and to what extent, is a major constituent of their identity and their conception their own selves. Liberalism is committed to the view that people should be left to chose their own values because such a choice is what makes an adult person the person she is, and grounds her moral responsibility. Needless to say, it doesn't mean that people should be left to chose *to do* whatever they want. A duty to do something which is valuable is certainly conceivable even if the person who happens to have such an obligation does not recognize the value in question. Moral autonomy does not consist in unrestrained freedom of action. But it does consist in the commitment to let people value whatever they chose to value. A person's choice of the things she values is what makes her the kind of person she is, and substantiates her moral autonomy.

To be sure, none of this entails that a failure to value that which is valuable cannot amount to a moral deficiency. People can be wrong about the values they hold. Being morally wrong about something, however, does not necessarily amount to a breach of duty. Once again, the flaw I find in the idea of an obligation to value is a moral one, not a conceptual impossibility. The imposition of a duty to value is at odds with the values we attach to autonomy; it is morally undesirable to impose such duties on people because it undermines the ideals of choice and personal responsibility in the self-constitution of one's moral views and ethical character. A right to common good, therefore is morally undesirable, since it involves the imposition of duties to value those aspects of the world which constitute the common good. People should not have a right that involves the imposition of such burdensome duties.

We should be careful, however, to distinguish between people's initial interest in having a common good, and other interests which are related to a common good that already exists. As I have just noted, the initial interest in having a common good cannot justifiably amount to a right, since as such a right, it would require the imposition of a duty on others to share those values which make it a good. However, once a common good actually exists, it may give rise to concerns about its fair distribution, and those concerns may ground certain rights in relation to the

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17. Perhaps in both of these points Réaume could rely on something like the familiar thesis that 'ought implies can'. Note, however, that the 'ought implies can' thesis is a moral one. It is not a conceptual truth. Some philosophers believe that one may have a duty to *X*, even if one cannot actually discharge the duty under the circumstances. Perhaps they are wrong, but if so, their mistake is about substantive morality, not about the conceptual framework of duties discourse.

common good. For example, certain common goods are such that people may have a right not to be excluded from their enjoyment. Furthermore, as I will try to explain in a moment, there are certain common goods which once they exist, ought to be distributed in a fair way, and then people may well have a right to a certain share in the common good. But again, this is very different from the claim that people have a right *to the good* in question, which would necessarily entail the duty of others to provide it.

Let me first take up the issue of exclusion. Some common goods are also public goods, and therefore they are such that it is typically impossible to exclude some people from enjoying the good in question. However, many common goods are not public, and they do allow for the exclusion of some people from the enjoyment of the good. A community may develop and cherish a certain sense of solidarity, for instance, but at the same time, exclude some subset of the community from this good. People who belong to this subset of the community may well have a right not to be excluded. This right, however, derives from the adverse consequences of the exclusion, and not from the right to the good in question.<sup>18</sup> In other words, even if the creation of a good does not ground an individual right, once the good exists, it may well give a rise to the right not to be excluded from enjoying the good. This is so, since the exclusion itself is often a moral wrong, like discrimination and humiliation. Exclusion typically involves a strong message of inferiority to the excluded individuals or groups. Exclusion signals to the excluded people that they do not merit the kind of respect and concern others get, and this is undoubtedly a kind of moral wrong that people may have a right not to suffer.<sup>19</sup>

More importantly, however, there are common goods which, once they exist, give rise to distributional rights. Consider the example of culture. Once a given culture exists, it may well be the case that the cultural resources of the community ought to be distributed according to a just and fair scheme. People may have a right to a fair share of the cultural assets of their community, that is, even if they do not have a right to culture. Or consider the right to democracy, for instance. Democracy, like any other form of regime, concerns the exercise of political power. Now, political power is probably a common good; it cannot be enjoyed in isolation. Political power can become a good only at its communal level, as something that takes place and is valued in a communal context. Therefore, I do not think that people have a right to political power. But they may well have a right to a certain share of it. In other words, democracy can be seen as a commitment to an equal distribution of political power, and therefore, we can speak of a right to democracy, that is, as long as the latter is understood as a right to a certain share in political power. Political power is a common good, but once it exists, it is such that it gives rise to concerns of a just distribution. It is a kind of good that ought to be distributed

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18. Réaume raises a similar point about equality of opportunity in "Individuals, Groups, and Rights to Public Goods" *supra* note 4 at 10.

19. To be sure, I am not trying to suggest that any instance of exclusion is wrong. To some extent, groups need to define themselves by certain forms of exclusion, and I do not want to imply that any group-self-determination is necessarily bad.

in a fair manner, and people may have a right to such a fair share of the good as the distribution principle entails.<sup>20</sup>

An analogy may help to familiarize this point. Consider, for example, the idea of friendship. Friendship is not something that people can claim from others; friendship is something that must evolve spontaneously, by the mutual wish and recognition of people who interact with each other in a certain way. However, once it is the case that *A* and *B* are friends, and regard each other as such, the relationship of friendship may well give rise to certain claims from each other, claims that it would be wrong to frustrate. Thus, even if *A* cannot justifiably complain that *B* does not wish to become his friend, friendship does involve commitments; and once friendship exists, so to speak, it may give rise to certain obligations. Similarly, I have argued, people may have rights to a certain share of a good, once the good happens to exist, even if it is the case that they do not have the right *to the good* in question.

### 3.

Can groups have rights to common goods? Needless to say, an answer to this question partly depends on the initial question of whether groups, as such, can be right holders at all. Although it is somewhat controversial, I will assume here that an affirmative answer to the question of group rights is not implausible. After all, groups of individuals, such as minorities or nations, may have certain well recognized group-interests, and it is possible to hold the view that such interests are worthy of protection by the imposition of duties on others. Note, however, that the duties which are potentially justified by group interests can be imposed either on other groups or institutions, external to the right holder group, or on the individuals who happen to be members of the group itself. Let us call them external and internal duties, accordingly.<sup>21</sup> Obviously, internal duties are much more problematic, particularly when we consider non-voluntary groups, such as ethnic minorities or national groups. But let me consider the question of external duties first.

Thus the first question is this: can groups have a right to a common good *vis à vis* some other group or institution? For example, can it be the case that an ethnic minority has a justified claim to the right to its culture from the dominant majority, or the state? Now this may sound like a stalking horse; so much has been written on the rights of ethnic minorities to their culture, that one does not wish to hear about yet again. I beg for the reader's patience, however. For the sake of the argument<sup>22</sup>, I am willing to assume that, under certain circumstances, an ethnic minority has a right to maintain its ethnic culture, and that this is a right that holds against

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20. The right to democracy is the example Alon Harel used in order to show, contra Waldron, that it makes sense to speak of rights to common goods. See Harel, "Revisionist Theories of Rights: An Unwelcome Defense" (1998) 11 C.J.L.J. 227 at 241.

21. See, for example, Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995) at 35.

22. I have expressed my doubts about the special rights of minority cultures in my "Equality and Minority Cultures" (2000) 3 Democratic Culture 149.

the dominant majority and the institutions which exercise its powers. But the question is, what is it exactly *a right to*? Is it a right to a common good? Culture is, of course, a common good. But upon closer scrutiny it should become apparent that minority cultural rights are not rights to have the culture in question. It is not the aboriginal culture itself that aboriginal communities claim to deserve from the state, but the right to the material conditions which render it possible for their culture to flourish in the social and political context of the dominance of the majority culture. Aboriginal minorities claim the right to a certain share of the material resources of the larger community which would enable the minority to maintain its cultural heritage in face of, what they claim to be, an unfair competition over the community's cultural resources.<sup>23</sup> Such rights do not involve the problematic burden of the duty to share the values of the minority culture since it is not the culture that ethnic minorities claim as the object of their rights. Minority cultural rights are rights to those material conditions which would enable such cultures to flourish in face of their inherent inferiority *vis à vis* the dominant majority. This is not a right to common goods. It is only a right to the conditions which enable certain common goods to be sustained.<sup>24</sup>

The situation is quite different when we consider the *internal* duties such cultural rights may involve. The rights of minority cultures *vis à vis* their own members is much more problematic. It follows quite clearly from our discussion so far that minority cultures cannot have a right against their own members to the common good of the flourishing of their culture. This is important, since there is typically a very strong pressure minority cultures tend to exert on their own members precisely in this direction, namely, a pressure to share those values which constitute the cultural heritage they want to preserve. Many cultural minorities find it very difficult to compete with the dominant majority on the hearts of their members, particularly the young. Such competition, which tends to put the minority cultures in substantial inferiority compared with the majority, often results in a considerable social pressure exerted by the group on its members.<sup>25</sup> It is a pressure of conformity with tradition and a pressure to cherish those values and traditions which constitute the distinct minority culture. The temptation to present such claims of the group with respect to its members in the terminology of rights is understandably strong. Minority cultures, and sometimes even majority cultures, have a strong temptation to claim a right to the preservation of their culture, that is, the group's right *vis à*

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23. I rely here on the main argument of Kymlicka for rights of ethnic-cultural minorities, which I take to be the fairly standard stance of liberals who claim for the recognition of such rights. See books by Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Clarendon Press, 1989) and *Multicultural Citizenship*, *supra* note 21.

24. A comparison might help here. Consider the Yiddish language and culture, which is, practically, almost extinct. Since there isn't any particular distinct minority in any liberal country that actually practices the Yiddish culture (as opposed to merely speaking the language), it is pretty clear that Yiddish does not deserve the kind of constitutional protection Kymlicka's arguments espouse for, e.g., aboriginal minorities. If there is any right to Yiddish, it would have to be a right to a common good, that is, to the culture itself. My argument entails that under these circumstances, nobody has a right to the Yiddish culture.

25. See, for example, Chandran Kukathas, "Are There Any Cultural Rights?" in W. Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 228.

*vis* its own members. In other words, when we talk about the rights of the group *vis à vis* its own members, it is, typically, a right to culture, that is, to a common good, that the group tends to assert. And as we have seen, such rights ought not to be recognized.

To be sure, none of this is meant to entail that groups cannot have any rights *vis à vis* their members, whether in the cultural, or any other, context. The kind of rights groups should not have with respect to their members, however, is the right to the preservation of their culture, since this is a right to a common good, and one which involves particularly burdensome duties. Liberal values cannot be reconciled with *a duty* to value one's culture or ethnic, national, heritage. Once again, though, it should be noted that the absence of such a group right to the preservation of culture against its own members, does not rule out certain distributional concerns which may give rise to group rights. If a certain minority culture already exists and deserves special protection, the group may have certain rights to use its group-resources in ways which aim to facilitate the preservation of the culture. Such rights to use resources and allocate them in ways which are conducive to the flourishing of the culture, may well be internal rights against the members of the group as well. The rights cultural groups should not have with respect to their own members is the right to the common goods which constitute the relevant culture.

The practical implications of this distinction are not easy to draw. For instance, consider the question of whether a group, say an ethnic minority, has a right to impose certain unique dress codes on its members: Is this an attempt to exercise a group right to a culture, and thus to a common good, or is it only an exercise of derivative rights, those which enable the group to allocate its resources in ways which are conducive to its preservation? Presumably, much depends on the way in which the group attempts to impose its demands in practice. The details can certainly matter. For example, if the pressure of the group to impose its unique dress code is a direct social or legal pressure, asserted on behalf of the group's right, then it is clearly not a warranted. But there are other, more acceptable means of achieving similar purposes. For example, the group may subsidize certain activities, such as education, or recreation activities, in ways which tie such a subsidy to the dress code it purports to impose. This would seem to be a much more acceptable way of achieving the group's purpose, at least from the perspective of the argument explored in this essay.<sup>26</sup> But of course, the subtle differences between such social instruments are not always so easy to distinguish. Even nuances may turn out to be crucial.

To what extent does the above argument depend on the non-voluntary nature of membership in one's culture or ethnic group? Is it easier to justify a group right to some common goods with respect to its members, if the group is constituted by voluntary membership? I tend to think that voluntary membership makes a moral difference, but in practice, not that much. Certain groups may have a right that those who join them voluntarily share the values which the group, as such, cherishes.

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26. The overall considerations about the desirability of such practices are much more complex, of course. For instance, the question of feasible alternatives is often crucial.

Particularly, if those values are an essential ingredient of the communal goods which make it the kind of group it is. A golf club may have a right to impose demands on its members that include the duties to share those values which render it possible to play golf and enjoy it as an activity of its kind. As long as the membership in the golf club is really voluntary, and the costs involved in exit from the group<sup>27</sup> or avoiding membership are negligible, the duty to share the values of the group upon joining it does not seem to be particularly burdensome or problematic. However, voluntary membership in social groups is a tricky idea and rarely as simple as it seems.

Consider, for instance, the question of whether membership in the academia is voluntary in the requisite sense. Can we say that the academia, as a social group, has a group right *vis à vis* its members to share the current academic values, only because membership in the academia is voluntary? Two closely related problems can be demonstrated here. First, it is far from clear that membership in the academia is as voluntary as membership in a golf club. Joining the academic circles *seems* to be quite voluntary, as it normally takes considerable effort to join, requiring voluntary actions and, so we hope, personal achievements. But for many individuals the cost of avoiding membership in the academic club is very high, as it affects their ability to carry out their life-projects and engage in activities which are of great importance to their well being. For many projects and aspirations, the alternatives to the academic circles are meager and often very expensive. Expecting individuals to share the current values of the academia only because there is no external pressure on them to join in, may well be too burdensome a duty to expect. And this points to the second problem with the claim to such a group right: even if the group may have a right to maintain its values, it is far from clear that it should have a right to maintain its *current* values. Why should such a group, as the academia, have a right to preserve the values it happens to have at any given time? Should it not be open to change and innovation? A group right with respect to its members to share the group's values, even if warranted to some extent, need not be a right to prevent change, evolution, and even, sometimes, revolution.<sup>28</sup> The less voluntary a group is, the less of a right to its common goods should it have. And as I have tried to indicate, very few social groups are really as voluntary as one might think.

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27. This is a very crucial element of the condition of voluntary membership. Most social groups we find ourselves in we do not actually join voluntarily. The costs of exit are crucial in determining whether continued membership is voluntary or not. People can leave, for example, the national group they belong to. But the fact that such an exit from a national group tends to be very costly, renders one's continued membership highly involuntary.

28. In one sense, pointed out to me by Chaim Gans, the example is problematic: It is arguable that the values of the academia are not only the business of the academic circles, as it may well be in the interests of outsiders, that is, the community at large, that the academic institutions share certain values and instantiate them. This may well be true of some other quasi-voluntary social groups as well. The question to what extent such external interests should count is a very difficult one, but I cannot go into the details here.