Introduction

I recall an event from the workshop on territorial rights that was organized at the Queen's University in Kingston, just one week after I had been offered to publish this book with Cambridge University Press. After the whole day of thought provoking discussions, participants relaxed over a nice dinner and drinks downtown, and when they finally returned to their hotel rooms, each of them was welcomed with a chocolate bonbon and a short wisdom of one of the famous philosophers. The one on my night-desk was from Nietzsche's *Beyond Good and Evil*: 'Insanity in individuals is something rare – but in groups, parties, nations and epochs, it is the rule.'[1] Having worked for several years recently on the topic of the rights of nations and other groups, I could not resist laughing at this Chinese fortune cookie style of message. Despite the profoundness of this thought, to which many contemporary thinkers, particularly from the liberal camp, would easily subscribe, I decided to test my fate and pursue an attempt to provide legal theoretical grounding for the concept of collective rights.[2]

What might be a plausible justification for one such endeavour? To start with, collective rights talk has recently gained currency both in the scholarly literature and in international and domestic legal instruments. However, those who are more energetically engaged in theoretical debates about collective rights are political philosophers, rather than legal scholars. To a certain extent, this trend is understandable, since the concept itself might prima facie look at least suspicious, if not deadly dangerous, to all those committed to liberal values as the undisputed basis of modern state structures and legal orders. Simply put, the very idea that collectives can be said to hold rights is perplexing for the political philosophy that puts the individual at the centre of its world. Yet, one of the consequences of the

[1] Friedrich Wilhelm Nietzsche, in Helen Zimmern (trans.), *Beyond Good and Evil: Prelude to a Philosophy of the Future*, (New York: The Macmillan Company, 1907) p. 98.

[2] Throughout the book, I use the terms collective and group rights interchangeably, as synonyms, though not all authors do so. From the overall argumentation of the book, it will become clear why this latter stance seems to me untenable.

dominant role of political philosophers in this debate is reflected in the fact that their arguments display less sensitivity towards certain conceptual nuances, which seems to be critical not only for legal theory, but for the daily functioning of legal systems as well.

The aforementioned is the main reason why this book tries to provide a legal theoretical account of the topic. As the title already suggests, this is only one of the possible theoretical approaches to the subject matter, but I intend to demonstrate why this one is superior to its rivals. This task necessarily takes me back to a more general problem of methodology. Chapter 1, thus, addresses the question what it means, methodologically, for a theory of collective rights – or, a theory, in general – to be legal. Does this imply, as suggested by Kelsen, 'purification' of legal theory and its reliance on the genuine legal method of description and analysis of valid legal norms, which is free of all ethico-political value judgements? Or, to phrase the question in the preferred terminology of the dominant strand of Anglo-American legal positivism, does legal methodology amount to 'conceptual analysis', that is, description, rather than evaluation of the legal order in philosophical terms?

I will argue that, while the 'descriptive' approach in legal theory is principally defensible,[3] it often tends to undermine the other methodological aspiration of both Kelsen and Hart and many of their adherents – the 'generality' of legal theory. While this antinomy does not necessarily come to the fore in discussions about law, as the most abstract legal concept,[4]

[3] See, e.g., Andrei Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral', *Oxford Journal of Legal Studies* 4 (2006) 26: 683–704. Nevertheless, this position is least controversial, if it is additionally claimed, as legal positivists sometimes do, that descriptive approach is not *the* methodology of legal theory. For instance, Hart says: 'I do not regard analytical jurisprudence as exclusive of other forms of jurisprudence. There is room, of course, for other approaches.' Herbert Hart, 'Analytical Jurisprudence in Mid-twentieth Century: A Reply to Professor Bodeheimer', *University of Pennsylvania Law Review* 7 (1957) 105: 974. Leslie Green is even more explicit: No legal philosopher can be *only* a legal positivist. A complete theory of law requires also an account of what kinds of things could possibly count as merits of law (must law be efficient or elegant as well as just?); of what role law should play in adjudication (should valid law always be applied?); of what claim law has on our obedience (is there a duty to obey?); and also of the pivotal questions of what laws we should have and whether we should have law at all. (Leslie Green, 'Legal Positivism', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Spring 2007 edn), at http://plato.stanford.edu/archives/spr2007/entries/legal-positivism/.)

[4] See Joseph Raz, 'Can There Be a Theory of Law?', in Martin P. Golding and William A. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell, 2005), pp. 324–42. Cf. Brian H. Bix, 'Ideals, Practices, and Concepts in Legal Theory', paper presented at the conference *Neutrality and Theory of Law*, Girona, May 2010, available at www.filosofiayderecho.es/congreso/ponencias/bix.pdf.

it becomes far more visible in the jurisprudential treatment of less abstract, operative legal concepts. At that level, the distinction between the methodology of legal theory and that of legal practice becomes also highly blurred. I will, furthermore, argue that these open issues turn into even more intricate problems in a *genuine* legal situation of an *emerging* general legal concept. This situation is genuine in so far as, even though the law constantly changes, jurisprudence is not that often faced with the dilemma of whether some existing general legal concept is to be significantly modified, or some completely new legal concept is to be established. For instance, it would be absurd to deny that with the birth of the modern state and legal system, virtually all general legal concepts of the medieval age were either substantially changed or completely substituted with the new ones. It would be equally absurd, from my point of view, to argue that in such times – not necessarily of such pervasive and revolutionary changes – jurisprudence is to behave as an innocent bystander, with the task simply to sit and wait for everything to be authoritatively settled by legislation and the courts, and then to start its real work. In fact, jurisprudence never did nor does behave in such a way. When I say this, I do not imply that the task of a jurisprudent should be that of a revolutionary or a philosopher, but simply that in situations when there is enough legal material (statutory norms, judicial decisions, expert opinions, etc.) to work with, and yet there are serious doubts as to whether this leads to the emergence of some new general legal concept, legal theory has to get actively involved.[5] This involvement, in turn,

[5] One should here probably try to draw a parallel with what, from our current perspective, might appear as a peculiar position of the first Roman jurists. Even though not acting as state officials, but rather, as legal practitioners *and* jurisprudents at the same time, they managed profoundly to shape the outlook of Roman law. They often did so by providing 'conceptualization' to what was inconclusive and contradictory legal material. Hence, while grounding their jurisprudential work on existing practice, they also tended actively to reshape and direct it. Watson provides an example of the concept 'possession', which, from an examination of the praetorian interdicts, seemed to be an unfamiliar concept to praetors. For this reason, interdicts often pointed in different directions, leaving many substantial legal questions open. 'In these circumstances', Watson says, 'it was the jurists (acting in that capacity) who subsequently created the separate concept of possession based on the individual remedies granted by praetors for discrete situations of fact. They gave the notion substance and sought to create rules of general application.' Watson, generally, qualifies this trend of juristic conceptualization of that time as 'no visible hand' and explains it in the following way: 'Law develops in stages. New law often does not drive old law out, but builds on it without the lawmakers taking a fresh look at the issues. The result may be something approaching chaos.' It is in these situations that Roman jurists came in, providing theoretical conceptualization and the more coherent guidance for practice. Alan Watson, *The Spirit of Roman Law* (Athens, London: The University of Georgia Press,

requires *justificatory* work and this justification is rarely just of the theoretical or rational kind,[6] it is also moral or political justification.

I argue that we are currently in such a genuine situation with 'collective rights', as a seemingly emerging operative legal concept of a general kind. This notion can be found in various international and municipal legal instruments; references to it are made equally in a number of judicial decisions or expert legal opinions, as well as in numerous academic articles and books. However, it is often used as a synonym for some other expressions (e.g. jointly exercised rights, or rights designated to a class of subjects, or class action, i.e. collective litigation[7]); or it is simply translated into well-established concepts such as that of 'individual rights'; or, even when legally guaranteed, it is made non-operative, by being not justiciable, etc. Consequently, collectives are rarely perceived as a separate category of right-holders. In contrast, I argue that the current state of affairs in the relevant legal practice provides enough grounds for jurisprudence to provide a coherent construction of the concept.

An alternative approach to the one suggested would be to endorse the so-called 'legal omnipotence' argument, according to which the plausibility of a new category of right-holder depends decisively on the will of a law-making authority. This means that, in so far as legal authorities have power to vest rights in whatever entities they like, legal theory might find itself conceptually analysing and describing, say, stones,

1995), pp. 92, 94. Even though current lawyers find themselves within a fairly developed system of divided labour, where state authorities, legal practitioners and jurisprudents have their own respective areas of functioning, I believe that the aforementioned remark of Watson's about the nature of the law's changes is still valid, which in turn might sometimes require an engagement of jurisprudence comparable to that of their Roman predecessors.

[6] Summers argues that rational justification is a type of activity 'that is, in its own way, analytical'. According to him, this would imply asking questions, like the following one: 'What, if any, is the rational justification – the "case" – for punishment as such?'. Questions like this 'call upon the jurist to "make out a general case" – to marshal and articulate general justifying arguments'. Robert C. Summers, 'The *New* Analytical Jurist', *New York University Law Review* 5 (1966) 41: 875.

[7] I will not dwell much on the 'class action' understanding of collective rights. According to this understanding, 'all consumers who have been disadvantaged by Bell Canada's exceeding the legal limits set on phone rates might be regarded by the courts as a single litigant simply because it is too expensive and inconvenient to have each Bell customer take legal action on his or her own.' However, as rightly pointed out by McDonald, 'class action rights are too thin a model for collective rights'. Michael McDonald, 'Should Communities Have Rights? Reflections on Liberal Individualism', *Canadian Journal of Law and Jurisprudence* 2 (1991) 4: 218.

bridges and planets as bearers of certain rights.[8] However, this would certainly be at odds with the common wisdom of elementary textbooks in jurisprudence, which operate with only two traditional categories of right-holder: natural and juristic persons. On the other hand, this does not imply that legal authorities cannot take steps towards shifting the status of certain entities – from being *objects* to becoming *subjects* – in their legal orders. Take, for example, the provision of Section 90a of the German Civil Code (*Burgerliches Gesetzbuch* (BGB)), which goes as follows: 'Animals are not things. They are protected by special statutes. They are governed by the provisions that apply to things, with the necessary modifications, except insofar as otherwise provided.'[9] Furthermore, there are other similar provisions on animal welfare in the German legal system that give rise to the arguments in favour of the legal personality of animals. Nevertheless, the final say in the debate about the legal personality of animals, or various collective entities alike, is on legal theory. I stress again that an initial incentive has always to be given by respective legislative authorities – international and/or municipal – because legal theory cannot simply come up with a new operative legal concept out of nowhere. However, a legal concept can be said to eventually 'exist' as a general legal concept – and not merely as a concept of German, English or Serbian law – only when it is duly constructed by general legal theory. This task, as it will be demonstrated, requires going beyond the specific methodological apparatus of *Reine Rechtslehre* (method of 'imputation') and analytical jurisprudence (method of 'paraphrasing' or 'meaning in context').

In cases of both collective and animal rights, it transpires that the debate very much revolves around the problem of justification, that is, whether these rights could exist, and whether these entities should be recognized as a new general type of right-holder that is distinctive from the existing ones. As I said, this justification is not only theoretical, but also moral, in so far as, in the case of collective rights, it requires taking

[8] Hartney, for instance, advances this position, when saying that [w]hatever legal authorities say is a legal right, is a legal right, whether this agrees with what philosophers would say about moral rights. If a statute says that trees have rights, then trees have certain rights, whether we consider this to be morally defensible or even morally possible. The utterance of legal authorities constitute the raw data upon which our theory of legal rights must build. This theory must make room for all the rights and the kinds of rights which utterances of legal authorities say have been conferred (Michael Hartney, 'Some Confusions Concerning Collective Rights', *Canadian Journal of Law and Jurisprudence* 2 (1991) 4: 301–2).

[9] BGB, English translation at: www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html.

the normative-moral point of view with respect to the issues of moral standing of groups and the value they have, particularly for individual members of the group. Chapter 1, thus, proceeds by presenting the case for *value collectivism*. This is the view that collective entities can have inherent value, which is independent of its contribution to the well-being of individual members. This stance is defended, first, on the grounds of the inability of the rival and the still dominant, political philosophy of *value individualism* to provide coherent grounding of certain forms of collective rights, especially those vested in groups that are not organized around liberal values of individual autonomy and tolerance (e.g. indigenous peoples); and, second, on the grounds that adopting the standpoint of *value collectivism* allows the putative rationale of the respective body of international and municipal law to be rendered more intelligible.

Chapter 1 closes with the exposition of the problem of constructing the legal personality of collective entities. At first glance, this seems again to be an issue of *nomotechnique*, that is, legal drafting. On a closer look, however, it transpires that this is an issue which necessarily reflects fundamental value judgements over the status of certain groups and their relationship with individuals, and as such has the potential to reshape significantly the everyday perception of the social life of the affected social actors. Moreover, the way a right-holder is nomotechnically formulated will largely influence the subsequent processes of legal interpretation and adjudication. Consequently, this problem cannot be treated as falling within the exclusive domain of legal-drafting authorities, but has to be addressed by legal theory as well. In pursuing this task, legal theory has to rely on the methodological assistance of social sciences, such as sociology and anthropology, particularly when dealing with problems of defining group membership in a non-coercive way, avoiding the imposition of elitist or static reading of a group's values, etc.

By the end of Chapter 1, it becomes apparent in what sense legal theoretical construction of a concept is methodologically distinctive from description and conceptual analysis. However, the question remains whether a theoretical approach that employs methods of moral philosophy, sociology and even anthropology still deserves the label 'legal'. I believe it does, because it transpires that the implementation of these methods is necessary for a coherent jurisprudential conceptualization of 'collective right' and its differentiation from other similar legal concepts. In taking this route, the proposed legal theory of collective rights, as a

segment of general legal theory, does not abandon the description and analysis of valid legal norms as its primary methods, but it nonetheless emphasizes that, at least when dealing with the emerging legal concepts, axiological and sociological methods need to be employed as auxiliary ones.[10]

After providing a more general methodological set-up for discussing this issue, Chapter 2 proceeds by asking how to theorize rights. It is argued that Alexy's framework for theorizing rights, which differentiates between normative, empirical and analytical issues, could serve as a useful starting point. In order to construct the concept of collective rights, legal theory has to tackle not only analytical questions, but normative ones as well. More precisely, it has to take a normative-moral point of view at the level of concept formation. In the next step, it is investigated whether a legal theory of collective rights can be grounded in some of the existing right theories. The first to be discussed is Raz's highly influential version of the 'interest theory' of rights. It is argued that this approach provides not only the most coherent general account of rights, but a well-developed elucidation of collective rights as well. However, the major problem with Raz's concept of group (collective) rights is that it is based on the moral standpoint of *value individualism*, which, then, creates room for major inconsistencies. Hence, in his exposition of the right to self-determination, Raz tends to restrict plausible right-holders only to the so-called 'encompassing groups' (e.g. nations, peoples). On the other hand, it seems that his general definition of collective rights leads to a larger circle of potential right-bearers, many of whom would hardly qualify for the status of 'encompassing group'. This is so because the definition appears to put greater emphasis on the weight of the joint interests of individuals, rather than on the nature of the right-holder.

Some authors try to improve the interest theory of rights by arguing that genuine collective rights can be held only over the particular type of goods. This is the basic tenet of the theoretical approach that puts at its centre of interest the concept of 'participatory goods'. Denise Réaume, for instance, defines this type of goods as a special type of public goods, which can be created and enjoyed only collectively. She argues that individuals can hold rights exclusively over those goods that can be

[10] I am intentionally leaving as unstated the possible implications of this argument for a legal theoretical treatment of law, as the most abstract general concept, because it is obvious that this would go far beyond the intended scope of this book.

enjoyed individually, and, conversely, since participatory goods can be enjoyed solely in groups, collective or group rights can only be rights over such goods. One of the major weaknesses of this account lies in the fact that it essentially relies on the way one right is enjoyed as the fundamental criterion for defining the nature of that right, which is not warranted. Furthermore, it is argued that Réaume's account does not pay much attention to the fact that what constitutes one good as 'participatory' is not so much its formal qualities, as it is the social meaning attributed to the good by the group in question. Indigenous peoples' collective right to land, for instance, could not be justified within Réaume's theory, because land does not meet criteria for being defined as 'participatory' good, and, accordingly, it could not serve as a good over which collectives can hold rights. It is, thus, argued that Taylor's concept of 'socially irreducible goods' is more adequate for the purposes of conceptualizing collective rights. Finally, it is demonstrated, contra Réaume, that individuals can have rights over some aspects of 'participatory goods'. An obvious case in point is language. Some of the language rights (e.g. the right to speak one's language in public) are there primarily to serve individual interests.

Besides this, Réaume seems to be unconvinced that collective entities, as such, have the capacity to hold rights. It is exactly at this point that Peter Jones starts to sketch his 'corporate theory' of group rights. He argues that in the phrase 'group (collective) rights', the emphasis should be on the first, rather than on the second word. More precisely, Jones claims that we can conceive a group as 'an irreducible right-bearing entity', only if we can prove that separate moral standing to groups could and should be ascribed in the same way we ascribe it to individual persons. Consequently, the potential right-holder is the group, as a unique corporate entity, and not a mere aggregate of separately identifiable individuals that happen to share the same interest. In the conclusion of Chapter 2, it is argued that Raz has eventually fine-tuned his initial exposition of the case for collective rights by more or less explicitly endorsing some of the tenets of 'corporate' conception. The most important step, in that respect, is Raz's acknowledgement that *value collectivism* is not an unreasonable justificatory ground for the concept of collective rights. Furthermore, he more strongly embraces the idea of the genuine character of collective interests, just as he introduces the notion of 'shared goods', which resemble Taylor's 'socially irreducible goods', and which are more plausible candidates for goods over which collectives can hold rights.

With Raz's refined definition of collective rights in mind, Chapter 3 starts further elucidation of the distinctive nature of a new legal concept. The major finding of this chapter is that general legal theory should reassess its traditional classification of right-holders in order to recognize collectives as the third distinctive type, which differs both from natural and juristic persons. Hence, Chapter 3 focuses on clarifying several important distinctions in the construction of the collective rights concept. The first part concerns a common fallacy of defining the nature of rights via the way it is exercised. In order to realize this fallacy, one need only take into account the rights to assemble, to strike or to associate freely, which cannot be enjoyed by a single person, and yet they are all fundamental individual rights. They are so on account of primarily serving the interests of individuals. Consequently, it will be shown that collective rights can be exercised in any of the three following ways: they can be exercised by the group itself (e.g. the right to self-determination); by some agent of the group (e.g. the minority right to participate in designing the curriculum in publicly funded schools, which will be exercised by some representative of the minority group); or by an individual member of the group (e.g. the right to address authorities in one's own language). What in all cases – including the last one – qualifies the right as collective is the fact that it ultimately serves the interests of the group as such, and not of individuals.

The second part stresses the importance of not confusing collective entities, such as ethnic or linguistic groups, with narrow classes of subjects, such as students, construction workers or civil servants. This is important to emphasize, because there are authors who tend to trivialize the whole discussion by arguing that all rights might be conventionally called 'collective', in so far as they cover some group of people. The major difference, however, is that the existence of groups is largely a question of fact, and not of legal construction. In other words, groups 'objectively' exist, prior to official recognition by the state, whereas in the case of students, for example, the 'group' label is actually the designation of a particular legal status of a person in question.

The third part of Chapter 3 addresses the agency issue. Opposition to the concept of collective rights is very often grounded in arguments about the problems of getting 'the authentic voice' of the concerned groups. It transpires, however, that we are here faced with the standard difficulty of all principal–agent relationships, in which there are credible agency risks. It is argued that a plausible solution to this problem lies in the creation, through a public law instrument, of a special representative

body for the relevant collective entity whose members would be democratically elected by the persons belonging to this group, so that its interests could be represented as authentically as possible.

The fourth part of Chapter 3 deals with a delicate issue of the relation between collective and individual rights. At this point, it becomes clear why grounding the concept of collective rights in the standpoint of *value collectivism* is both theoretically and practically superior to rival approaches. Even authors who explicitly endorse the conflicting stance of *value individualism* have gradually come to acknowledge that collective rights principally *may* – and in practice often *do* – prevail over individual members' rights. This outcome, however, is defensible within the former, but hardly within the latter axiological standpoint. It, nonetheless, leads us to the next question: under what circumstances can a collective right override an individual right? The most a legal theory can say at an abstract level of discussion is that this would happen if the collective right in question protects some sufficiently strong interest of a right-holding entity as to outweigh the conflicting interest of an individual member of the group. This, in return, implies resorting to some instruments of interpretative techniques that are widely used in conflicts between two individual rights or between an individual right and a right of a wider society, such as the *test of proportionality* and *minimum impairment analysis*. However, just as there are limitations to the recognition of the legitimate claims of a wider society when they come into conflict with individual rights, so, too, collective rights can, under no circumstances, override some of the most fundamental human rights.

Chapter 3 closes with a preliminary discussion regarding collectives as plausible duty-holders. Recent scholarly works in ethical theory have addressed the problem of moral duties and responsibilities of groups. After a brief review of some of the most important contributions, I conclude that barely one of them proceeds from the separate moral agency of the group qua group, but instead they focus on the form of 'shared moral responsibility'. Moreover, they are mostly preoccupied with the problem of a 'backward-looking' type of responsibility. In contrast, for a legal theory of collective rights, it is important to determine whether collectives can, in principle, hold a 'forward-looking' type of legal duty. While the duty-holding capacity does not necessarily, conceptually speaking, go hand in hand with the right-holding capacity, it is argued that collectives can hold legal duties. Namely, just as collectives may have interests that generate rights, so they may be forbidden from pursuing those interests. This would, then, take the legal form of a