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Collective and Group-Specific: Can the Rights of Ethno-Cultural Minorities be Human Rights?

Peter Jones ¹

1 Introduction

The human rights tradition has viewed the idea of minority rights with ambivalence. On the one hand, the tradition has been protective of minorities simply by virtue of according them the same fundamental rights as majorities. If human rights are universal, minority individuals necessarily have those rights on the same terms as everyone else. Moreover, the protection afforded by universal rights is often of greater significance for minorities, simply because, as minorities, they are more vulnerable than majorities to mistreatment or to less than equal treatment.

On the other hand, the kinds of claim associated with minority rights, especially the rights of ethno-cultural minorities, have not always sat comfortably within the human rights tradition. One reason is that minority claims are sometimes collective in nature. Culture, language, nationality, religious affiliation, and the like are collective phenomena and the rights minorities seek in relation to them often make sense only as collective rights – as rights possessed by the minority as a group rather than by its members severally. Those rights are at odds with the tradition that conceives human rights as rights possessed only by human individuals. While some have dissented from that tradition, the idea that human rights can be held by groups has generally been resisted, either because it has been deemed incoherent or because it has been thought to endanger individual human rights.

Minority rights have also proved difficult for human rights thinking insofar as they are rights that are in some way special to minorities. That specialness is at odds with the belief that human rights are necessarily universal. Consider language rights. If human rights are universal rights, majorities and minorities can have human rights in respect of their language only insofar as they are precisely the same rights. If there is good reason why the language rights of majorities and minorities, or of different minorities, should differ, those different rights cannot be human rights. That simple all-or-nothing dichotomy, forced on us by the demands of universality, seems too stark. There is often good reason why language rights should differ. For example, the cost and inconvenience a society

¹ Earlier drafts of this chapter benefited from discussions at the Symposium on Ethno-Cultural Diversity and Human Rights held at the School of Law and Social Justice, University of Liverpool; the inaugural meeting of the Globalising Minority Rights Project held at the Department of Philosophy, University of Tromsø; and a meeting of the Durham and Newcastle Political Theory Group. Special thanks to Gaetano Pentassuglia, Kaspar Lippert-Rasmussen and Annamari Vitikainen.

would incur if it were to make a minority's language an official public language on terms precisely equal with the majority language could be prohibitive, especially if the society contained more than one linguistic minority. On the other hand, it might be equally inappropriate that a minority should possess no rights in respect of its language beyond those possessed indiscriminately by all, including a single individual who was the only individual in the society to speak his or her language. If human rights are always and only universal rights, those sorts of consideration would seem to be, of necessity, excluded from the purview of human rights thinking.

In this chapter, I shall challenge the orthodoxies that human rights must be individually-held and universally-held. I shall argue that human rights can remain authentically 'human' and yet be collective in form and 'group-specific', that is, different for different groups. Human rights thinking need not therefore be embarrassed by the rights of ethno-cultural minorities.

Making an argument of that sort has been complicated by the emergence in recent years of different conceptions of what we should understand a human right to be. The traditional moral conception of human rights takes seriously the 'human' in 'human right', so that a human right is a right we hold in virtue of being human. People may have rights as citizens and other rights as members of non-state associations, but they possess some rights just as human beings. Those are human rights. That has been the dominant conception amongst those who have conceived human rights as moral rights, at least in the first instance, including those who have undertaken philosophical analyses of human rights. I shall follow Pablo Gilabert in describing that traditional conception as 'humanist'.² Some contemporary philosophers who keep faith with it are James Griffin,³ John Tasioulas,⁴ and Carl Wellman.⁵

Human-rights thinking has always been highly political in inspiration. It has been strongly motivated by what follows politically if people possess human rights; but for humanists those political implications are just that, 'implications'. They are not part of the very idea of human rights. In that respect, the humanist conception contrasts with the 'political' conception espoused by John Rawls,⁶ Charles Beitz,⁷ and Joseph Raz.⁸ On their view, we should understand what a human right is with reference to the meaning the term has, and the role human rights perform, in contemporary political practice. A human right is a right that is legitimately of concern to the international political community and a right whose violation may justify (albeit defeasibly) some form of international

² P. Gilabert, 'Humanist and Political Perspectives on Human Rights', 39 *Political Theory* (2011) p. 439.

³ J. Griffin, *On Human Rights* (Oxford University Press, Oxford, 2008).

⁴ J. Tasioulas, 'The Moral Reality of Human Rights', in T. Pogge (ed.), *Freedom from Poverty as a Human Right* (Oxford University Press, Oxford, 2007).

⁵ C. Wellman, *The Moral Dimensions of Human Rights* (Oxford University Press, Oxford, 2011).

⁶ J. Rawls, *The Law of Peoples* (Harvard University Press, Cambridge, MA, 1999).

⁷ C. R. Beitz, *The Idea of Human Rights* (Oxford University Press, Oxford, 2009).

⁸ J. Raz, 'Human Rights without Foundations', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, Oxford, 2010) p. 321.

intervention – military, economic or diplomatic. Exponents of the political conception differ in their accounts of quite how human rights figure in international political practice, but they agree in conceiving them in terms of their international political role rather than with reference to a supposed link to our humanity.

‘Political’ theorists do not deny that determining which rights should fall into the category of human rights is properly a matter for moral argument. What makes their view ‘political’ is their conception of what it is that we justify when we justify a human right. Their thinking can be distinguished from a third school of thought whose conception of human rights I shall describe simply as ‘legal’. Legal human rights have existed ever since they were incorporated in international law many decades ago and the legal conception is not distinguished by mere recognition of that fact. Rather, it is distinguished by the sharp separation it makes between moral human rights and legal human rights. Moral thinking on human rights has often assumed that legal human rights are, or should be, merely moral human rights translated into international law. Allen Buchanan describes that as the ‘mirroring’ view.⁹ He believes it to be profoundly mistaken, since all sorts of consideration other than moral human rights actually feed into, and rightly feed into, the make-up of legal human rights. Moreover, many legal human rights have no moral equivalents. While he does not reject the very idea of moral human rights or deny that moral human rights can sometimes be relevant to the justification of legal human rights, he believes it quite wrong to suppose that a system of international human rights law either can be, or should be, merely the legal instantiation of a philosophical theory of moral human rights.¹⁰ Patrick Macklem separates legal human rights from moral thinking even more radically.¹¹ He conceives both the substance of, and the case for, legal human rights as entirely internal to international law. Legal human rights are rights through which international law has sought to correct pathologies of its own making. In investing sovereign power in states, international law has distributed political power in a way that makes possible seriously adverse consequences; human rights law is the device international law has used to curb the power that it has itself conferred upon states.

In considering whether rights that are collective to and specific to ethno-cultural minorities can also be human rights, I shall take seriously the ‘human’ in human rights. I shall assume, along with the humanist conception, that human rights are rights people hold in virtue of being human. If we do not make that assumption, the issue of whether human rights can be collective or group-specific can easily become a non-issue. If legal human rights are whatever international law declares them to be and if international law declares collective rights or group-specific rights to be human rights, that

⁹ A. Buchanan, *The Heart of Human Rights* (Oxford University Press, Oxford, 2013).

¹⁰ Although Carl Wellman, *supra* note 5, aligns himself with the humanist conception of moral human rights, he, like, Buchanan, argues that other sorts of consideration bear on the appropriate content of legal human rights.

¹¹ P. Macklem, *The Sovereignty of Human Rights* (Oxford University Press, Oxford, 2015).

declaration settles the matter. Similarly, on the political conception, if collective rights or group-specific rights figure amongst the rights that are of legitimate international concern and whose violation can justify international political action, that suffices to make them human rights. So the question of whether there can be collective human rights or group-specific human rights remains a significant question only if the 'human' in human rights continues to have something like its traditional meaning.

In following the humanist tradition in that respect, I do not mean wholly to reject the claims of either the political or the legal theorists. The political theorists are right to challenge the assumption that we can leap straight from human rights traditionally understood to rights that are serious candidates for international political action. If we take a hard-headed look at the political structures and the political realities of our world, and give due weight to the limits, costs and dangers of international action, there may well be moral rights that people possess as human beings which are insufficiently important to warrant international political action. Not all of the humanist's human rights need therefore rank as the political theorist's 'international human rights'. Similarly, the legal theorists make a convincing case against supposing that legal human rights can be, or should be, merely legalised moral human rights, which take no account of the consequences of making rights part of international law or of the larger purposes of an international legal human rights system. There is also no reason to jettison legal positivism's insistence on separating what law is from what it ought to be, just because the subject of law happens to be human rights.

On the other hand, the political and legal conceptions can take forms that render the 'human' in human rights of little or no consequence. If human rights are no more than rights that the international political community recognises as sovereignty-limiting, why should we persist in describing them as 'human' rights? We might ask the same of legal conceptions, if the 'human' in human rights law turns out to be no more than a conventional but misleading tag. We have reason to pause before tossing aside the very idea of human rights along with humanist thinking in general.

In making my arguments, I shall mix modes. I shall use a conception of human rights largely associated with humanist thinking but I shall make extensive use of UN and regional human rights declarations and conventions; I shall draw, in other words, on soft and hard forms of international human rights law. I do so partly because examples and instances that are already recognised formally as human rights are likely to carry greater weight than rights of my own devising. I also have an eye to extending the relevance of my arguments beyond humanist approaches to human rights. However, I do not aim to give a comprehensive account of the human rights currently ascribed to ethno-cultural minorities. I mean only to point out instances in which those rights are already collective or group-specific in nature, or cases in which rights could be collective or group-specific consistently with their remaining human rights.

The term 'ethno-cultural minority' sometimes includes, and sometimes excludes, indigenous peoples. I shall include indigenous peoples in the groups I consider but, since they are now treated as

a separate category for human rights purposes, I shall consider them alongside, but separately from, other sorts of ethno-cultural group.

2 Collective Human Rights

2.1 *Indigenous Peoples and Collective Rights*

The human rights instrument that attributes rights to groups most expressly and most abundantly is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007. Here are some examples:

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 10

Indigenous peoples shall not be forcibly removed from their lands and territories.

These rights are self-evidently group rights. They ascribe rights to indigenous people as peoples rather than to indigenous people as discrete individuals. Of the thirty-seven articles of UNDRIP that expressly declare rights, twenty-six declare group rights in the form of rights ascribed to indigenous peoples. Of the remaining eleven, nine articles ascribe rights to both indigenous peoples and indigenous individuals; two ascribe rights to indigenous individuals only.

There may be reason to doubt whether the group rights that UNDRIP ascribes to indigenous peoples should really be understood as human rights. The Declaration's Preamble includes the following clause.

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples

That clause may suggest that, while the individual rights of indigenous people are human rights, the collective rights of indigenous peoples belong to a separate category of peoples' rights. Yet the first article of UNDRIP contradicts that interpretation.

Article 1

Indigenous peoples have the right to the full enjoyment, *as a collective or as individuals*, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. (My emphasis)

That article indicates that UNDRIP intends its collective rights to be human rights, so that the rights it ascribes to indigenous people as peoples are also rights that those peoples hold as human beings.¹² Why should there be any objection to that? Why should not indigenous people hold human rights both as individuals and as groups?

2.2 *Both Human and Collective*

For some objectors the answer lies in the very idea of group rights, particularly the idea of group moral rights. Groups, as distinct from their members taken severally, are not, they would protest, the types of entity that are capable of bearing moral rights.¹³ Other objectors are willing to accept that groups can hold rights; they deny only that group rights can be human rights. The most common objection to ascribing human rights to groups is succinctly stated by Jack Donnelly.

If human rights are the rights that one has simply as a human being, then only human beings have human rights. Because only individual persons are human beings, it would seem that only individuals can have human rights. Collectivities of all sorts have many and varied rights, but these are not human rights¹⁴

¹² On this issue, see S. J. Anaya, 'The right of indigenous peoples to self-determination in the post-Declaration era', in C. Charters and R. Stavenhagen (eds.), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Work Group for Indigenous Affairs, Copenhagen, 2009) p. 184.

¹³ E.g. M. Hartney, 'Some Confusions Concerning Collective Rights', 4 *Canadian Journal of Law and Jurisprudence* (1991) p. 292; J. Narveson, 'Collective Rights?', 4 *Canadian Journal of Law and Jurisprudence* (1991) p. 329.

¹⁴ J. Donnelly, *Universal Human Rights in Theory and Practice*, third edition (Cornell University Press, Ithaca, 2013) p. 30. See also, J.A. Graff, 'Human Rights, Peoples, and the Right to Self-Determination', in J. Baker (ed.), *Group Rights* (Toronto University Press, Toronto, 1994) p. 186; J. Griffin, *supra* note 3, pp. 256-276; M. A. Jovanović, *Collective Rights* (Cambridge University Press, Cambridge, 2012) pp. 166-195; J. W. Nickel, *Making Sense of Human Rights*, second edition (Blackwell, Oxford, 2007) pp. 163-166; J. Waldron, *Liberal Rights* (Cambridge University Press, Cambridge, 1993) pp. 339-369; C. Wellman, *supra* note 4, pp. 66-69.

Before we can assess Donnelly's claim, we need to look more closely at what a group right is. A group right is generally understood as a right that a group holds as a group and only as a group. It is not a right that each of the group's members holds individually, such as the right of a university student to use the university's library or the right of an adult citizen to vote in her country's elections. A right is a group right only if it is possessed by the group as a group rather than by its members taken severally.

When we move beyond that basic idea, we encounter widespread disagreement on how we should conceive a group right. We can, however, distinguish two fundamentally different conceptions, which I shall describe as 'corporate' and 'collective'.

The corporate conception of group rights might also be described as the traditional conception in that it is the way in which group rights have been most commonly understood until recently. On this conception, we should conceive a right-holding group on analogy with a right-holding individual person. A person holds his rights as a single integral entity and so too must a group (which is why I describe this conception as 'corporate'). We might think of the right-holding group as a group-individual or a group-person. In law this can be achieved by the ascription of legal personality to a group; having recognised the group as legal person, law can then assign that artificial person legal rights and legal responsibilities. The attribution of the properties of a natural person to a group is more problematic but proponents of the corporate conception need attribute to a group only those natural properties that they reckon are essential for right-holding.¹⁵ For the groups it conceives as moral right-holders, the most fundamental distinguishing feature of the corporate conception is its ascription of moral standing to the group as a group. Moral standing is a precondition of moral right-holding, just as legal standing is a precondition of legal right-holding, and that leads easily to the thought that, if groups can possess moral rights, they must possess moral standing as groups – a standing that is separate from, and independent of, the moral standing of the individuals who make up the group's members.

It is this conception of group rights that most frequently attracts scepticism. The sceptics are unwilling to accept that we should conceive groups as person-like entities or as possessing moral standing in their own right. I shall pass over those issues. Here the relevant question is whether group rights corporately conceived might be human rights. The answer is fairly obviously 'no'. On the corporate conception, the entity that holds a group right is quite different from a natural human being so that, if we take seriously the 'human' in human right, group rights corporately conceived cannot be human rights.

We can, however, conceive group rights in a quite different fashion. We can conceive them as rights that the members of a group hold collectively rather than separately, jointly rather than severally. I describe this conception of a group right as 'collective'. I do so because something that is

¹⁵ E.g. P. A. French, *Collective and Corporate Responsibility* (Columbia University Press, New York, 1984).

held ‘collectively’ is, by implication, something that has more than one holder and, as I use the term, a collective right does indeed have a plurality of holders. By contrast, a group right corporately conceived has a single holder, the group conceived as a unitary entity.¹⁶

On the collective conception, there is no right-holding group that has a being and moral standing separate from the people who make it up. The right-holding group is simply the set of individuals who constitute the group and the moral standing that underwrites their collective right is that of the several individuals who make up the group. But the collective right they hold is an authentic group right since it is a right that they hold only together and not separately. The conception here is not therefore one in which individuals hold rights as separate individuals and in which they, or we, somehow aggregate their individual rights into a collective right. On the contrary, a collective right is a right that the group’s members hold jointly and *only* jointly. If, for example, we conceive the right of a people to collective self-determination as a collective right, it will be a right possessed by the flesh-and-blood individuals who make up the relevant people and who hold their right only collectively. If a linguistic minority which is concentrated in a particular region of a society has a collective right that public signage in that region should be in the minority’s language as well as in the society’s official public language, that right will be a right that the individual members of the minority hold jointly but not separately. In both cases, the group’s members will hold a right together that none of them holds individually.

Provided a group right takes that form, there is no obvious barrier to its being a human right. Donnelly’s objection to the possibility of collective human rights is that, since human rights are held by human beings and since human beings are individual persons, only individual persons can hold human rights. But collective rights *are* held by individual persons; they are distinguished only by being rights that individual persons hold collectively rather than separately.

Of course, whether we should deem a particular collective right a human right will need to be argued. Not all collective rights will be human rights, just as not all individual rights are human rights. But the mere fact that a right is a collective right should not, of itself, stand in the way of its being a human right. We might argue over whether all or any of the collective rights in UNDRIP should figure in a human rights declaration, but that argument should not be foreclosed merely because many of those rights are collective rights.

2.3 Ethno-Cultural Minorities and Collective Rights

¹⁶ Even so, proponents of the corporate conception most commonly use the adjective ‘collective’ to describe group rights; e.g. P. A. French, *supra* note 15; M. A. Jovanović, *supra* note 14; D. Newman, *Community and Collective Rights: A Theoretical Framework for Rights held by Groups* (Hart, Oxford, 2011). There is no commonly accepted vocabulary that marks the distinction I make between the two conceptions. I use the terms ‘corporate’ and ‘collective’ only because each seems aptly to describe its conception of a right-holding group.

If we turn from UNDRIP to human rights instruments that are intended to provide for the ethno-cultural groups usually described as ‘minorities’, we have to search much harder for any hint of group rights. That is because the drafters of those instruments made studied efforts to avoid ascribing rights to groups, perhaps in the belief that, if the rights were to remain human rights, they could not be held by groups.¹⁷

That is true of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, 1992 (hereinafter the ‘Declaration on Minorities’), and the European Framework Convention for the Protection of National Minorities, 1995 (hereinafter the ‘European Framework Convention’). Both ascribe rights not to minorities as groups but to ‘persons belonging to minorities’.

In fact that form of words lends itself easily to collective right-holding. ‘Persons belonging to minorities’ might hold rights collectively just as they might hold rights individually. However, neither the Declaration on Minorities nor the European Framework Convention means to concede that possibility. Both impose upon states obligations that are directed at the collective interests of minorities and, had those interests been made the objects of rights, those would have been rights that minorities possessed collectively. Thus, the first article of the Declaration on Minorities reads,

States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.

The Declaration’s fourth article requires states to take several measures that will establish background conditions favourable to the maintenance and promotion of minority identities. The European Framework Convention imposes on Parties to the Convention an even wider range of obligations in respect of minorities and, if those obligations were tied to rights, many of those rights would be collective rights. But neither the Declaration nor the Convention takes that extra step.¹⁸

Even so, neither document wholly ignores the collective character of much that matters to ethno-cultural minorities. Both allow that, while the rights they recognise are always and only rights

¹⁷ The Human Rights Committee, in adjudicating cases relating to article 27 and other articles of the ICCPR that bear on the rights of ethno-cultural minorities, has been willing to take account of the collective dimensions of minority claims. See P. Macklem, *supra* note 10, pp. 112-114, and Y. M. Donders, *Towards a Right to Cultural Identity?* (Intersentia, Antwerp, 2002) pp. 176-191. For a comprehensive analysis of judicial discourse on international law relating to minority rights, see G. Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Martinus Nijhoff, Leiden, 2009).

¹⁸ I do not mean to suggest that either document refrains from recognising a greater range of rights only because those would have been collective rights. The primary purpose of a convention is to set out the obligations of those who are party to it and it makes sense therefore that its articles should give primacy to those obligations. In addition, both the Declaration and the Convention sometimes require states to take measures of a very general background nature and recognise that the appropriate measures can vary legitimately according to local circumstances; that too may have encouraged sparing use of the language of rights.

possessed by persons individually, those persons may nevertheless join with others in exercising their individual rights; so, while the *possession* of rights may be individual, their *exercise* can be collective. Article 3.1 of the Declaration on Minorities provides,

Persons belonging to minorities may *exercise* their rights, including those set forth in the present Declaration, *individually as well as in community with other members of their group*, without any discrimination. (My emphases)

Similarly, Article 3.2 of the European Framework Convention provides,

Persons belonging to national minorities may *exercise* the rights and enjoy the freedoms flowing from the principles enshrined in the present framework Convention *individually as well as in community with others*. (My emphases) ¹⁹

If members of minorities have the option of exercising their individual rights in community with others, do they need collective rights? Can they, through collectively exercising their individual rights, be entitled to all to which they would be entitled were they to possess collective rights?

That is a possibility that must tempt those who want human rights to provide for the needs, vulnerabilities and identities of ethno-cultural minorities but who shun the idea of collective human rights. The proposition we need to examine then is that, through exercising their individual rights together, individuals can gain access to the collective goods that are possible objects of collective rights. To test that proposition, consider rights to the two goods that I previously instanced: a linguistic minority's right to public signage in its own language and the right of a people, including an indigenous people, to collective self-determination. Could a group of individuals secure a right to those goods through the simultaneous exercise of their individually-held rights?

Individuals can exercise only rights they possess. Might an individual member of a linguistic minority possess, as an individual, a right that the public signage in his region should be in his language? That is highly improbable. The right we are considering is a claim-right and therefore a right that would impose a duty on the rest of the society to provide public signage in the individual's language. Given the cost of making that provision, it is most unlikely that a single person's interest in having public signage in his language would suffice to justify that duty and, if it does not suffice, the individual will possess no corresponding claim-right. If individuals, qua individuals, start out with no right to public signage in their language, it is hard to see how they could arrive at a shared right to that

¹⁹ Article 27 of the ICCPR implies that individuals will exercise the rights it recognises only along with others: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, *in community with the other members of their group*, to enjoy their own culture, to profess and practise their own religion, or to use their own language" (my emphasis).

signage merely by exercising their individual rights. If, on the other hand, we consider the interest of the entire linguistic minority in having public signage in their language, their combined interest may well suffice to justify the duty.²⁰ In that case, they will possess a right to public signage collectively that none of them possesses individually.

The case of public signage is an example of a good that is only contingently collective.²¹ Having public signage in one's language is a good (let's suppose) but its goodness is not dependent on its being shared with others. Even if a person were the only person in a society to speak his language, he could still have an interest in there being public signage in his language. Some goods are, however, necessarily collective. They can be the goods they are only if they are shared with others. An example is the good for a society of being collectively self-determining. Could a single individual have a right to that good? Logically, that is possible. I could be the only individual in my society who is entitled to its being collectively self-determining, perhaps because my interest in its being self-determining is the only interest that counts; my fellow citizens may possess interests identical with my own but, for some reason, their interests do not count.²² While that is a logical possibility, it is not a moral possibility that need detain us, since we are operating on human rights assumptions. If I were to have an individual right that my society should be collectively self-determining, I would have a right not only over the organisation of my own life but also over the organisation of the lives of all of my fellow citizens, and that right would be inconsistent with each of my fellow citizens' having a status equal to my own – an equality that is fundamental to human rights thinking. Unsurprisingly therefore, no individual can possess, qua individual, a human right to a society's collective self-determination.²³

Suppose we attribute to each individual a right to that individual's self-determination. Could individuals then exercise their individual rights of self-determination to achieve the collective self-determination of themselves as a group? There is no immediate route from one right to the other. An act of collective self-determination is not the same as a multitude of simultaneous acts of individual self-determination and individuals cannot, merely through exercising rights over their own lives, turn those rights into collective rights over the lives of one another.

If, however, individual rights of self-determination are alienable, individuals might trade in their rights, partially if not wholly, in order to form themselves into an association. They might, that

²⁰ I follow here the reasoning of J. Raz, *The Morality of Freedom* (Oxford University Press, Oxford, 1986) pp. 207-209.

²¹ On the relationship between collective rights and collective goods, see further P. Jones, 'Collective rights, public goods, and participatory goods', in G. Calder, M Bessone and F. Zuolo (eds.), *How Groups Matter* (Routledge, London, 2014) p. 52.

²² Note that the individual right here is not a right that only the individual right-holder shall determine the course of the society's life since that would not be a right to collective self-determination. Rather the right-holder possesses a right that the society shall be determined by himself along with his fellow-citizens. The right-holder might declare to his fellow citizens, "I have the right that we shall be self-determining".

²³ See further, P. Jones, 'Human Rights and Collective Self-Determination', in A. Etinson (ed.), *Human Rights: Moral or Political?* (Oxford University Press, Oxford, 2017) forthcoming.

is, follow the path of John Locke's social contractors and agree to become members of a common association and to subordinate themselves to the authority of that association. They might also each agree that their association should be collectively self-determining. In that case, they will have exercised their individual rights to create a self-determining association which, as an association, can have collective rights to goods that are collective to the association.

The context in which that move from the individual to the collective is most plausible is religious practice. Article 18 of the UDHR gives people the freedom to manifest their religion "either alone or in community with others", as do the International Covenant on Civil and Political Rights (ICCPR) (Art. 18) and the European Convention on Human Rights (ECHR) (Art. 9).²⁴ Much of religious practice takes a collective form. People practise their religion through becoming members of religious organisations, such as churches and mosques. They also engage in collective religious practices, such as a *nagar kirtan* (a public religious procession) staged by a Sikh community, or an integrated act of Christian worship in which the participants assume different roles and play different parts. If there is a right to stage a *nagar kirtan*, or a right to a collective act of worship as a collective act, it must be a collective right. Individual participants may have individual rights to participate in the collective act but those individual rights should not be confused with a right to the collective act as a collective act. That collective right will be held collectively by the participants in the act. Similarly, if we think of the rights of a religious organisation as rights possessed by the organisation's members, those will be rights held collectively by the members. But we can then ask how there came to be those collective rights. If membership of a religious organisation is voluntary and if participation in a collective religious act is also voluntary, the answer will be through individuals' exercising their individual rights of religious freedom. It is through their exercise of those rights that they have become members of religious organisations or participants in collective religious acts.²⁵ In that way, collective religious rights can be grounded in the exercise of individual religious rights and the violation of a collective religious right can be, at a deeper level, the violation of several individuals' individual religious rights.

We can, then, tell something like the social contract story to explain how people can, by exercising their individual rights together, gain access to collective religious goods which, if they are objects of rights, will be objects of collective rights. That story depends crucially on people's religious membership and participation being matters of choice which is not always the sociological reality, especially when religion forms part of an ethno-cultural identity; but, according to the human rights canon, it ought to be the reality. To what extent can we apply that model more generally to the collective aspects of the lives of ethno-cultural minorities? It certainly applies to some. Members of

²⁴ The ECHR uses the same words. The ICCPR's phrasing is, "either individually or in community with others".

²⁵ Cf. the European Framework Convention, Art. 8: "The Parties undertake to recognize that every person belonging to a national minority has the right to manifest his or her religion or belief and to establish religious institutions, organisations and associations".

minorities might, for example, exercise their individual rights of freedom of association to establish or join associations devoted to their shared culture, language or history. But it does not apply to all. Consider the two examples I gave previously. People do not join their native language group; they simply find themselves to be members of it. Similarly, they cannot join an indigenous people; they just are, or are not, members of that people. If they are members of an indigenous people, they might opt to abandon that people, either territorially or culturally, just as individuals might choose to give up their native tongue for another language. But they cannot wilfully become members of an indigenous people or wilfully turn a non-native language into their native language. Nor can they wilfully adopt a nationality that is not already their nationality (in the sense of ‘nationality’ relevant here) or lay claim to a culture of the kind we associate with ethnicity if it is not already their culture. Hence, the contractual route from individual rights to collective goods and collective rights will be more often than not unavailable. We cannot plausibly use the idea of social contract to ground the collective right to self-determination of indigenous peoples in the joint exercise of their members’ individual rights. Nor can we use that idea to explain how it is that a linguistic minority might have a right to public signage in its own language.

In large measure therefore, people will not be able to secure rights to the collective goods associated with their ethno-cultural identities merely by exercising human rights that they possess as discrete individuals. In general, if there are, or ought to be, human rights to those collective goods, they must be collective human rights and, what is more, rights that are fundamentally collective rather than collective rights brought into existence by the simultaneous exercise of individual rights.

2.4 *Collective Human Rights – A Threat to Individual Human Rights?*

Even if the notion of collective human rights is both coherent and plausible in the form I have proposed, that notion is likely to attract another sort of doubt. People often shun group rights because they fear those rights will be used to the detriment of individuals, particularly the individuals who constitute the group’s members. That fear is likely to be exacerbated if we assert group rights in the context of human rights and if the right-holding groups have, like ethno-cultural minorities, involuntary memberships. Should that fear make us reluctant to concede that groups might hold human rights?

The principal source of that fear is the possibility that a group may wield its rights over its own members and do so in a way that significantly impairs their freedom or harms them in some other way. If we accord human rights to groups, we may simultaneously imperil the human rights of those who fall under the authority of those groups. Group human rights may therefore exist to the detriment of individual human rights.

In considering that possibility, the distinction between the corporate and collective conceptions of group rights is once again crucial. A group right corporately conceived creates the possibility that a group will hold rights against its own members. It does so because, on the corporate

conception, a right-holding group is an entity that is distinct from its members and that possesses moral standing independently of that of its members. If we separate the group from its members in that fashion, we make it possible for the group as one party to hold rights against its individual members as other parties. On the collective conception, however, there is no group that exists independently of its members; the group is simply the individual members who jointly hold the right. It makes no more sense to hold that the rights jointly held by those individuals might be rights that they hold against themselves than it does to hold that a right held by a single individual might be a right he holds against himself. So, if we operate with the collective conception, a collective right can be directed only outwardly as a claim upon parties external to the right-holding group. It cannot be directed inwardly towards the collectivity's own members.

If that simple logic is less than fully reassuring, the obvious course is to provide that collective human rights must always be consistent with individual human rights. The individuals who hold human rights collectively will be the same individuals who hold human rights individually, so that collective and individual human rights must together form a coherent set. Safeguards for individual human rights of the relevant sort are already written into UNDRIP (Arts 1, 46), the Declaration on Minorities (Arts 3.2, 8.2), and the European Framework Convention (Arts 3.1, 22).²⁶

3 Group-Specific Human Rights

By a group-specific right I mean a right that is specific to a particular group rather than universal to mankind. Group-specific rights can also be group rights, but they do not have to be. I borrow the term 'group-specific' from Will Kymlicka.²⁷ Most of the group-specific rights that Kymlicka identified and defended in his *Liberalism, Community and Culture* were also collective rights²⁸ but, as he has been subsequently at pains to point out, the group-specific nature of those rights was logically independent of their being collective rights, and the issue of whether those rights were rightfully group-specific was quite separate from controversy over whether they could or should be collective rights.²⁹ A right specific to an ethno-cultural group can be a right held by the group's members severally rather than collectively. For example, Sikhs in Britain have legal rights specific to themselves to ride a motorcycle, or to work on a construction site, without wearing a safety helmet

²⁶ I consider the issues raised in this section more fully in P. Jones, 'Cultures, Group Rights, and Group-Differentiated Rights', in M. Dimova-Cookson and P. M. R. Stirk (eds.), *Multiculturalism and Moral Conflict* (Routledge, London, 2010) p. 38, at pp. 46-53; and 'Groups and Human Rights', in C. Holder and D. Reidy (eds.), *Human Rights: the Hard Questions* (Cambridge University Press, Cambridge, 2013) p. 100, at pp. 109-112.

²⁷ W. Kymlicka, *Multicultural Citizenship* (Clarendon Press, Oxford, 1995).

²⁸ W. Kymlicka, *Liberalism, Community and Culture* (Clarendon Press, Oxford, 1989). E.g. the rights of aboriginal groups to self-government, their rights over their territories, and their right to restrict the mobility, property and voting rights of non-aboriginal people with respect to aboriginal communities and their lands.

²⁹ W. Kymlicka, *supra* note 27, pp. 45-47.

provided they wear a turban. They also have the right to carry a knife (the kirpan) in public while most other British citizens do not. Those rights are entirely intelligible as rights possessed and exercised by individual Sikhs.³⁰

The general run of rights, other than human rights, are group specific; e.g. rights that people possess as citizens of particular countries or rights they have as members of particular associations. Rights may also be specific to different categories of individual; e.g. rights specific to children or the elderly, such as rights to special care and protection. Thus, the ‘group’ in ‘group-specific’ can signify a group that takes the form of a community or an association but it does not have to. A right can also be group-specific in being specific to a particular type of group rather than to each token of that type.

The challenge facing the idea of group-specific human rights is readily evident. I have defined group-specific rights in opposition to rights that are universal to human beings, yet human rights are commonly thought to be universal rights. That universality is generally reckoned a defining feature of human rights.³¹ How then can a right be both group-specific and human? Before turning to that question, I want to comment briefly on how far the rights currently ascribed to indigenous peoples and ethno-cultural minorities are group-specific.

3.1 *Indigenous Peoples and Group-Specific Rights*

Some of the rights found in UNDRIP are rights ascribed to indigenous peoples or indigenous individuals in common with other peoples or other individuals. Article 3, for example, ascribes to indigenous peoples the same right of self-determination as the first articles of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the ICCPR ascribe to all peoples.³² Other articles ascribe rights to indigenous individuals that the UDHR and the International Covenants ascribe to everyone. Article 7.1, for instance, states that indigenous individuals “have the rights to life, physical and mental integrity, liberty and security of person”.³³ Article 2 ascribes to both indigenous peoples and indigenous individuals “the right to be free from any kind of discrimination, in the exercise of their rights”.³⁴

For the most part, however, the rights that appear in UNDRIP are clearly tailored to indigenous peoples – to their specific character, circumstances and historical treatment. Here are three examples:

Article 25

³⁰ For a different view, see M. A. Jovanović, *supra* note 13, p. 123.

³¹ ‘Generally’ here includes my former self; for example, P. Jones, *Rights* (Macmillan, Basingstoke, 1994), pp. 81-82.

³² “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

³³ Cf. UDHR Art. 3; ICCPR Arts 6.1, 7, 9.1.

³⁴ Cf. UDHR Art. 2; ICESCR Art. 2.2; ICCPR Art. 2.1.

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 28.1

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Article 31

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

It is hardly surprising that a declaration devoted to the rights of indigenous peoples should address the specific character, circumstances and experience of indigenous peoples. But, insofar as those rights are specific to indigenous peoples, they confront us with the question of how they can also be human rights.

Earlier I raised and dismissed the suggestion that the collective rights that UNDRIP ascribes to indigenous peoples could belong to a special class of peoples' rights that is separate from human rights. But suppose that suggestion were correct. The issue of universality would still arise. If the rights of peoples are supposed to be universal to all peoples, just as human rights are commonly supposed to be universal to all human beings, how can rights be both rights of peoples and rights specific to indigenous peoples?

3.2 *Ethno-Cultural Minorities and Group-Specific Rights*

If we turn to UN and regional instruments designed to provide for ethno-cultural minorities, we find a mixed picture. We can take as our starting point rights that minorities possess along with everyone else. Some of the rights ascribed to minorities in the Declaration on Minorities and the European Framework Convention are not group-specific at all. Both the Declaration on Minorities (Art. 4.1)

and the European Framework Convention (Art. 4.1), for example, assert the right of persons belonging to minorities to equality before the law, a right already ascribed to all in the UDHR (Art. 7) and the ICCPR (Art. 14). The European Framework Convention (Art. 7) replicates the UDHR (Arts 18-20) and the ECHR (Arts 9-11) in asserting the rights of minority individuals to freedom of peaceful assembly, association and expression and to freedom of thought, conscience and religion. Emphasising that minorities possess those rights equally with everyone else is not without practical point since, *ceteris paribus*, minorities are more vulnerable to their denial or infringement, but reasserting those rights does no more than confirm their universality.

The term ‘minority rights’ is normally reserved for rights that are specific to minorities – rights that are “special rights recognised to the exclusive benefit of minority groups”.³⁵ An example is article 27 of the ICCPR.

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.³⁶

No similar article caters for majorities. The Declaration on Minorities and the European Framework Convention similarly ascribe a number of rights specifically to minorities. The Declaration (Art. 2.3) attributes to persons belonging to minorities the right to participate in national and, where appropriate, regional decision-making. The Convention, while allowing policies of integration, requires its Parties to refrain from policies or practices aimed at assimilation (Art. 5.2), and it attributes to persons belonging to minorities rights to use their language in private and public (Art. 10.1), to be addressed in a language they understand should they be accused or arrested (Art. 10.3), to use their name and have it recognised in their own language (Art. 11.1), to display signs in their language (Art. 11.2), to manage and maintain their own private educational and training establishments (Art. 13), and so on.

Both documents also oblige states to take measures designed to protect the rights and identities of minorities. The Declaration on Minorities requires states to create favourable conditions enabling persons belonging to minorities to “express their characteristics and to develop their culture, language, religion, traditions and customs” (Art. 4.2); to secure adequate opportunities for minority persons “to learn their mother tongue or to have instruction in their mother tongue” (Art. 4.3); and “to encourage knowledge of the history, traditions, language and culture of minorities existing within their territory” (Art. 4.4). The European Framework Convention includes similar provisions (Arts 5.1, 6.1, 12, 14).

³⁵ G. Pentassuglia, *Minorities in International Law* (Council of Europe, Strasbourg, 2002) p. 48.

³⁶ The text of the article reappears in modified form in article 2.1 of the Declaration on Minorities. The Declaration substitutes “have the right” for “shall not be denied the right”.

These rights, and the state-obligations with which they are associated, are clearly group-specific, but they do not privilege minorities. Rather, they address and aim to provide for the disadvantaged position in which ethno-cultural minorities are liable to find themselves relative to majorities. There is no article providing for majorities, equivalent to Article 27 of the ICCPR, not because majorities matter less than minorities but because the working assumption is that majorities, since they are majorities, will experience no obstacle to enjoying their culture, professing and practising their religion, or using their language. If that assumption proved misplaced because a minority dominated a society and used its dominance to prevent the majority from enjoying its culture, professing and practising its religion, or using its language, persons belonging to that majority would suffer a violation of their rights (morally if not legally) no less than had they been a minority. Similarly the special rights and measures set out in the Declaration on Minorities and the European Framework Convention are not replicated for majorities simply because, it is assumed, majorities have no need of them. Thus, while the rights and measures instanced above are clearly group-specific, they aim only to narrow the gap between minorities and majorities by securing states of affairs for minorities that majorities can take for granted. That is why they do not privilege minorities even though they are special to minorities. We might describe them as group-specific devices that are ultimately universal in aspiration.

That description would, however, be less than accurate since there are differences in the end-states that current provision for minorities aims to achieve. According to Article 4.2 of the European Framework Convention,

The Parties undertake to adopt, where necessary adequate measures in order to promote, in all areas of economic, social, political and cultural life, *full and effective equality* between persons belonging to a national minority and those belonging to the majority. (My emphasis)

On inspection, however, the rights the Convention assigns to minorities fall short of the “full and effective equality” it ostensibly requires. The Convention does not require, for example, that a minority’s language must be an official language of its society.³⁷ Nor does it require that a minority’s culture must figure equally with the majority’s in the society’s public culture, or that its religion must figure equally with all other religions in the society’s public ceremonies, or that a society should not have an officially established religion. There is nothing necessarily untoward in those states of affairs but they do indicate a significant way in which the rights of ethno-cultural majorities and minorities can be group-differentiated and so group-specific.

³⁷ “The Parties’ obligations regarding the use of minority languages do not in any way affect the status of the official language or languages of the country concerned.” Council of Europe, *Explanatory Report on the European Framework Convention for the Protection of National Minorities* (Strasbourg, 1995), para. 66.

Still more striking is the way in which rights of different minorities can differ. The European Framework Convention provides differently for differently situated minorities. It requires Parties to the Convention to endeavour, as far as possible, that “in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers”, those persons should be able to use their language in their relations with the administrative authorities (Art. 10.2).³⁸ In the case of such minorities, the Parties should also endeavour to ensure that persons belonging to those minorities “have adequate opportunities for being taught the minority language or for receiving instruction in this language” (Art. 14.2). It also requires Parties to endeavour “in areas traditionally inhabited by substantial numbers of persons belonging to a national minority” that “traditional local names, street names and other topographical indications intended for the public” shall be displayed in the minority’s language as well as the majority’s (Art. 11.3). None of these articles is formulated in the language of rights, but the implication of each is that minorities that meet the qualifying conditions (those that have been “traditionally” present in an area and/or that exist “in substantial numbers”) have claims that minorities who fail to meet them do not.

The European Framework Convention is more explicit than the Declaration on Minorities on the different provision that should be made for differently situated minorities, but the Working Group on Minorities of the Sub-Commission on the Promotion and Protection of Human Rights, in commenting on the Declaration, is still more forthright.³⁹ It expressly recognises “factors that can be relevant in distinguishing between the rights that can be demanded by different minorities”.

Those who live compactly together in a part of the State territory may be entitled to rights regarding the use of language, and street and place names which are different from those who are dispersed, and may in some circumstances be entitled to some kind of autonomy. Those who have been established for a long time on the territory may have stronger rights than those who have recently arrived.⁴⁰

Again, there is nothing necessarily untoward in these differences in minorities’ rights and I do not cite them in a spirit of criticism. They have eminently reasonable justifications.⁴¹ I cite them only to highlight how the rights that figure in human rights instruments can differ between different

³⁸ “This provision does not cover all relations between individuals belonging to national minorities and public authorities. It only extends to administrative authorities.” Ibid., para. 64.

³⁹ *Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, E/CN.4/Sub.2/AC.5/2005/2.

⁴⁰ Ibid., para. 10; see also paras 60-64.

⁴¹ The most contentious form of differentiation is the privileging of ‘old’ over ‘new’ (i.e. migrant) minorities. For a recent examination of that issue and a qualified defence of the old/new distinction, see A. Patten, *Equal Recognition: The Moral Foundations of Minority Rights* (Princeton University Press, Princeton, NJ, 2014) pp. 269-297. The European Charter for Regional or Minority Languages, 1992, Art. 1(a), excludes altogether the languages of migrants from its remit; however, the Charter is less concerned to provide for the rights of language-speakers than to preserve, protect and promote European regional and minority languages as goods in their own right.

minorities as well as between majority and minority. The overall picture is one of rights that differ between groups according to relevant differences in their circumstances.

3.3 *Making Sense of Group-Specific Human Rights*

How then can rights be both human and group-specific? The apparent conflict between those two adjectives arises from the widely-shared assumption that human rights must be universal rights. Must they?

3.3.1 The Primacy of Human Status

Take the phrase commonly affirmed by adherents of the humanist conception of human rights: a human right is a right we possess ‘in virtue of being human’. What does that phrase mean? It does not present us with a mere biological description; more importantly, it affirms a status, either moral or legal. A human right is a right that we hold in virtue of possessing the status of being human. It is a right that we hold because we are human. In like fashion, a right we hold in virtue of being citizens is a right we hold because we are citizens and a right we one hold in virtue of being a member of an association, such as a natural history society, or a member of an institution, such as a legislature, is a right we hold as a member. That is what a right’s being a citizen’s right or a member’s right connotes. In like manner, a ‘human right’ connotes a right we possess as human beings.

In the first instance, therefore, the ‘human’ in ‘human right’ signals the status in virtue of which the bearer holds the right, rather than the scope of those who hold the right. It will, in the second instance, imply a description of scope if we can infer, as people commonly do, that a right that someone holds in virtue of his or her human status must be a right that every other human person holds too – if, that is, we can infer universality of right from universality of status. Before proposing that we should not draw that inference, I say a little more about the primacy of human status in the idea of human rights.

The words most commonly used in UN documentation to refer to the moral status that people possess as human beings are ‘dignity’ and ‘worth’. The opening lines of the UN Charter affirm the UN’s “faith in the fundamental human rights” and “in the dignity and worth of the human person”. That faith is restated in the preamble to the UDHR, which also recognizes “the inherent dignity” and “the equal and inalienable rights of all members of the human family”. According to the preambles to the ICESCR and ICCPR, “the equal and inalienable rights of all members of the human family” are rights that “derive from the inherent dignity of the human person”. Similarly the Preamble to the Vienna Declaration and Programme of Action, 1993, recognizes and affirms “that all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms”. The word ‘derive’, rather than indicating only a status that undergirds human rights, may imply that the entire catalogue of human rights can be

inferred from human dignity and human worth. That is hard to find plausible and it is perhaps idle to look for analytic precision in these preambles. Certainly, the term dignity occurs in them with more than one meaning.⁴² Nevertheless, amongst those various usages, ‘dignity’, along with ‘worth’, is used to indicate that people possess moral status as human beings and that, as bearers of that status, they bear human rights.

Something else affirmed in human rights declarations and conventions, not only in their preambles but also in the rights and standards they set out, is the equal status that people possess as human beings and as the bearers of human rights.⁴³ We therefore have a double-barrelled claim: human beings have both *status* and *equal status*; they *matter* and they matter *equally*. Thus, whatever rights people hold in virtue of possessing human status must be rights that are consistent with their equal status. If human rights can differ for different people, as I shall suggest, those differences must be compatible with the equal status of their holders. They must be ‘horizontal’ rather than ‘vertical’ differences of right; they cannot imply that some matter more than others and are, for that reason, entitled to more and better than others.

The status in virtue of which we hold human rights is also crucial to the political role we look to those rights to perform. In the humanist conception, unlike the political conception, that role does not figure in the very idea of human rights; rather, it is an implication that follows from the possession of human rights. The status in virtue of which we hold those rights is critical to that implication. If we conceive a right as a right we hold as human beings, we do not conceive it as a gift of the state. It is not granted by the state, nor is the state at liberty to remove it. Even if a human right imposes positive rather than merely negative obligations on the state, it is still not a right we possess by the grace of the state. Thus, if we look to human rights to play their familiar role of limiting the sovereignty of states – limiting what states may do but also what they may not do – the status in virtue of which we hold human rights is crucial to their performing that role.

3.3.2 Both Group-Specific and Human

Why do commentators so frequently suppose that human rights must be universal? The answer may be simply that they treat universality as an axiomatic feature of human rights: human rights, they may suppose, simply *are* rights possessed by all humans. But, amongst humanist theorists, there may be another answer: rights that we possess in virtue of being human must be rights that derive from, and only from, our common human nature, and rights so derived will be rights common to all human

⁴² C. Beitz, ‘Human Dignity in the Theory of Human Rights: Nothing But a Phrase?’, 41 *Philosophy and Public Affairs* (2013) p. 259; J. Habermas, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’, 41 *Metaphilosophy* (2010) p. 464. On the idea of dignity more generally, see G. Kateb, *Human Dignity* (Harvard University Press, Cambridge, MA, 2012); M. Rosen, *Dignity: Its History and Meaning* (Harvard University Press, Cambridge, MA, 2012); J. Waldron, *Dignity, Rank, and Rights* (Oxford University Press, Oxford, 2012).

⁴³ On which see Buchanan, *supra* note 9, pp. 28-31, 68-72, 88-92, 134-145.

beings. However, if human rights are to reach beyond the natural rights of the seventeenth century and to bear any resemblance to the rights incorporated in the UDHR, that view is unsustainable. Certainly human rights need to take account of our natures as human beings, but they must also take account of the conditions and circumstances in which we live. The extent to which the rights in the UDHR are geared to particular socio-political conditions is frequently noticed. Rights relating to judicial processes and to legal punishment, to personal security, to nationality and asylum, to education and to other welfare goods and services, provide examples.

The account of human rights given by James Griffin comes close to a ‘human nature only’ account. For Griffin, the foundation of human rights lies in the human capacity for normative agency; human rights properly conceived are rights that protect the development and exercise of that agency. The most basic of those rights are rights to autonomy, liberty and minimum material provision. But even Griffin accepts that, in order to give determinate shape to those very general rights, we must take account of ‘practicalities’, including the nature of human societies.⁴⁴

Of course, once we have taken account of those practicalities, the rights that emerge may still be universal rights. Griffin ensures that outcome by allowing practicalities to figure in his argument only insofar as they are practicalities common to the human condition across time as well as space. Why impose such an extraordinarily exacting constraint? The answer seems to lie in Griffin’s determination to ensure that human rights will remain universal across both time and space. Others, such as John Tasioulas, suggest that we should impose a time-constraint upon the universality of human rights, so that we can claim human rights in the contemporary world without their having to make sense for people living in the mediaeval era or the Stone Age.⁴⁵ But, if temporal differences can compromise the universality of human rights, why should not other sorts of difference?

In fact, amongst the rights already recognised as human rights by the UN, some do. Consider the rights of children recognised in the Convention on the Rights of the Child, 1989, and its two Optional Protocols.⁴⁶ Some of those are also held by adults; e.g. the right to life (Art. 6) and the right not to be tortured (Art. 37). Some are formulated in the same language as the rights of adults but, assuming the Convention does not mean to challenge traditional parental authority (cf Art. 5), cannot be precisely the same rights; e.g. rights to freedom of association and religion (Arts 14, 15). Still others are rights special to children; e.g. rights to care and protection (Arts 3, 20), the right not to be separated from their parents (Art. 9), rights relating to their development (Art. 27), the right to be protected from any form of exploitation (Arts 32-36), and special rights relating to armed conflict (Art. 38 and Optional Protocol I). All adults will have had a childhood and most children will go on to have an adulthood so that, in the course of a normal human life, a person will have held rights both

⁴⁴ J. Griffin, *supra* note 3, pp. 37-39.

⁴⁵ J. Tasioulas, ‘Taking rights out of human rights’, 120 *Ethics* (2010) p. 647, at pp. 666-672.

⁴⁶ The UDHR (Art. 25.2), the ICESCR (Art. 10), and the ICCPR (Art. 24), also include children within their purview.

as a child and as an adult. But that does not remove the puzzle of how human rights can be universal and yet different for children and adults. However, there is no puzzle if what makes them human rights is the common status in virtue of which the rights are held. Human rights so understood can be rights that provide differently for the conditions of childhood and adulthood, and it would be decidedly odd if they did not.

For the most part, the human rights of women and men are the same, even though women are often more vulnerable than men to violations of some of those rights. But some rights differ because women, unlike men, are capable of pregnancy and child-bearing. Two striking examples are the rights of women not to be subjected to forced pregnancy and to forced abortion.⁴⁷ Here too it would be perverse to insist that rights providing against such grotesque wrongs cannot be human rights, simply because they are possessed only by women. Their being less than universal is no bar to their being human rights if what makes them ‘human’ is the status in virtue of which they are held.

Human rights theorists sometimes wring their hands over the case of people who are comatose or who have lost command of their faculties through illnesses such as dementia. Clearly, these conditions will affect the rights of those who suffer them. We do people no favours if we continue to ascribe them freedoms that presuppose a self-direction of which they are no longer capable. But we also have reason to ascribe them rights to special care and protection that non-sufferers do not possess. The non-universality of these rights is entirely consistent with their being human rights – rights that people hold in virtue of their equal status as human beings.

Consider now differences that we might describe as differences of circumstance rather than condition. One such is the different circumstances in which human beings have lived in different centuries. Those differences are inescapably relevant to the content of some rights, such as welfare rights, which in turn creates difficulty for those, like Griffin and Wellman, who insist that human rights must be universal through time as well as space.⁴⁸ That difficulty disappears if rights are ‘human’ in virtue of the status of the holder rather than the universality of the right. The rights that people can possess in virtue of their human status will vary, intelligibly and reasonably, according to the different historical circumstances in which they live.

Now let’s return to the human rights of ethno-cultural minorities and consider those that depart from universal rights in the most radical way: the different language rights of differently situated linguistic minorities. We have seen how the language rights of a society’s majority may differ from those of its minorities and how the rights of its different minorities may differ according to circumstances, such as their relative size and geographical concentration. Those differences in right can be entirely consistent with the equal human status of all whose rights are at stake. They hold different rights neither because they are differently valued as persons nor because their languages are

⁴⁷ Beijing Declaration and Platform for Action, Fourth World Conference on Women: Action for Equality, Development and Peace (1995), Annex II, para. 11.

⁴⁸ J. Griffin, *supra* note 3, pp. 48-51; C. Wellman, *supra* note 5, pp. 27-28.

differently valued, but because they are differently circumstanced in relation to the make-up of the society to which they belong. The differences in right are neutral with respect to both the identity of particular persons and the identity of their language in that *any* person speaking *any* language in the same circumstances would possess the same rights. Different language speakers can therefore possess different rights in respect of the public use of their language, even though the rights at stake are rights they possess as human beings and therefore human rights.

The case of linguistic minorities is noteworthy because the language rights of different minorities can differ in extent. In that respect, their rights can be correctly described as unequal but, so long as that inequality is justified, they are unequal in a way that is consistent with the equal human status of those who make up the relevant minorities. The more common case will be rights that differ according to the different conditions and circumstances of groups, but which we have no reason to describe as unequal. The human rights of indigenous peoples exemplify that more common case. In many respects those rights are more complex than the rights of linguistic minorities, since they range over multiple aspects of people's lives and have to provide for people whose specific circumstances and ways of life differ and whose members may adhere in different degrees to the ways of life traditionally associated with their group. Here I shall not enter into any of those complexities. I draw attention only to the way in which rights that indigenous people hold in virtue of their human status can still be rights that are sensitive to their special features and circumstances as indigenous people. Just as Kymlicka has argued that rights can be justifiably group-differentiated even though they are rights that people hold as citizens of the same society,⁴⁹ so rights can be justifiably group-differentiated even though they are rights that people hold in virtue of their common status as human beings.⁵⁰

3.3.3 Group-Specific Human Rights – Apparent Rather Than Real?

Those who cling to the belief that human rights must be universal can deal in one of three ways with the rights I have suggested are both human and group-specific. They might accept that the rights are indeed human rights but deny that they are (fundamentally) group-specific; or they might accept that the rights are group-specific but deny they are human rights; or they might deny that they are rights of any kind.⁵¹ How might the first sort of denial be made? How might apparently group-specific rights

⁴⁹ W. Kymlicka, *supra* notes 27 and 28. See also W. Kymlicka and W. Norman, 'Citizenship in Diverse Societies: Issues, Contexts, Concepts', in W. Kymlicka and W. Norman (eds.), *Citizenship in Diverse Societies* (Oxford University Press, Oxford, 2000) p.1.

⁵⁰ For another argument that arrives at the conclusion that human rights need not be universal, though in a different way and in a more radical form, see R. Cruft, 'Human rights, individualism and cultural diversity', 8 *Critical Review of International Social and Political Philosophy* (2005) p. 265.

⁵¹ Griffin and Wellman, whose thinking on this issue I consider *infra*, deny that some of the rights I have identified as group-specific human rights are moral human rights or moral rights of any kind. Both deny that young children and severely mentally incapacitated adults possess moral human rights, while allowing that they can be the objects of moral duties. For Griffin, the foundation of all human rights lies in the capacity for normative agency so that those who lack that capacity have no human rights. For Wellman, the capacity for

be reconfigured as universal rights? Two sorts of strategy are available: we might show that an apparently group-specific right is either (a) merely a variant of a universal right, or that it is (b) a universal but conditional right – a right that is possessed universally but that applies conditionally. My principal objection to both strategies is that they are wrongly motivated; they are driven by the mistaken belief that rights have to be universal to be human. That said, I comment briefly on each.

Proponents of the first strategy usually characterise a non-universal human right as a right that ‘derives’ from a higher-level universal right. The derived right is then accounted a human right because of its derivation. Wellman, for example, accepts that both children and pregnant women possess human rights to special care which other people do not.⁵² What makes those non-universal rights human rights is their deriving from a basal human right that *is* universal: the right to be rescued from potential harm.⁵³

If a human right must be universal, it is unclear how a non-universal right can satisfy that criterion merely by being linked to a right that is universal. That objection might be met by reconceptualising what a derived right is. Rather than being separate from the right from which it derives, as a child is separate from its parent, it may be no more than an aspect or application of a universal right. That is implicit in Griffin’s notion that all other human rights cascade from the three basic human rights to autonomy, liberty and minimum provision.⁵⁴ But we then need to be convinced that all non-universal rights can be accounted for fully as mere realisations of abstract higher-level rights. The rights in UNDRIP do not lend themselves easily to that task, nor do language rights. James Nickel suggests that the right of minority individuals to use their native language can be derived from the universal right to freedom of expression or communication.⁵⁵ That proposal is unconvincing on three counts: the considerations that motivate language rights are quite different from those that motivate the right to free expression; free expression provides no rationale for prioritising native language-use over other language-use; and it does not explain how different linguistic groups can legitimately have different language rights.

The other possible strategy – the ‘conditional’ strategy – works by characterising an apparently non-universal right as a right which is held universally but applies only in specific conditions. Wellman presents the right to social security as a right of that sort.⁵⁶ The right itself is possessed irrespective of time and place but its ‘application’ depends on conditions that make its

moral agency is a precondition for holding moral rights, so that those who lack that capacity cannot bear moral rights of any sort. (Both allow that children can bear moral human rights once they have acquired a capacity for agency.) Both also deny that groups can bear moral human rights and are sceptical about moral group rights more generally. J. Griffin, *supra* note 3, pp. 83-95, 256-276; C. Wellman, *supra* note 5, pp. 21-22, 27-28, 66-69; C. Wellman, *Real Rights* (Oxford University Press, Oxford, 1995) pp. 113-132, 157-177.

⁵² His words echo those of the UDHR Art. 25.2.

⁵³ C. Wellman, *supra* note 5, p. 29.

⁵⁴ J. Griffin, *supra* note 3.

⁵⁵ J. W. Nickel, *supra* note 14, p. 161.

⁵⁶ C. Wellman, *supra* note 5, pp. 28-29.

realisation possible. Thus, while people in the ancient world possessed the same right to social security as people living now, the right did not ‘apply’ in the ancient world because the circumstances necessary for its enjoyment were absent. That seems little more than a makeshift designed to maintain an appearance of universality. While human status is universal across time, the rights which that status grounds are not. If people in the ancient world were living now, they would have the same right to social security as we have now, and, if we had been living in the ancient world, our right to social security would have amounted only to what was possible then. It is not merely the application of the right that is conditional but the content of the right itself.

Even rights that are more straightforwardly conditional, such as rights to assistance if we are disabled or involuntarily unemployed, are arguably non-universal. If these are human rights, all human beings will be eligible for them, but only those who meet the qualifying condition will actually have the right to assistance. Here again, it is the status that is universal and the eligibility that follows from it, rather than the right. That may seem unnecessarily precise given that unemployment and disability are misfortunes that may befall any of us. But it would not be overly precise if we were to use Wellman’s conditional strategy to transform all group-specific into universal rights – if, for example, we were to say that all human beings possess rights relating to pregnancy conditional on their being women, or that all possess the rights in UNDRIP conditional on their being indigenous, or that all possess certain sorts of language right conditional on their belonging to a linguistic minority of a particular type.

4 Conclusion

My main purpose has been to argue that there is scope for the rights of indigenous peoples and those of ethno-cultural minorities to be both collective and group-specific and still be human rights. That argument does not require us either to abandon or to trivialise the ‘human’ in human rights. On the contrary, we can conceive human rights as rights that we possess in virtue of being human whilst allowing that some of those rights can be collective or group-specific or both. Collective human rights are rights that are held jointly by individuals in virtue of their status as human beings. Typically, they will be rights to collective goods, such as collective self-determination. Group-specific human rights are rights that are specific to a group rather than rights held by all, but are still rights which the group’s members hold, either individually or collectively, in virtue of their status as human beings. The universality of the status upon which human rights are founded, and in virtue of which they are ‘human’, does not entail that rights themselves can be human rights only if they are universal across space or time or both.

In making that argument, I have drawn on UNDRIP and declarations and conventions relating to the rights of ethno-cultural minorities. In doing so, I have not attempted to argue that the rights announced in those documents can be claimed, with full justification, as human rights. My claim has

been more limited; I have argued only that their authenticity as human rights need not be in doubt merely because they are either collectively-held or less than universal in scope.

In a similar fashion, my conception of what makes a right a ‘human right’ has been modest and minimal: it is a right that people possess in virtue of their human status. My argument is not therefore tied to any particular justificatory theory of human rights or to any substantive account of the content of human rights. It is a conceptual rather than a normative argument. It therefore stands free of any particular normative theory of human rights, although it may be more congenial to some normative theories than to others.

The idea that rights are ‘human’ in virtue of the status in which they are held is one that is most associated with the traditional moral thinking about human rights that I have described as ‘humanist’. Little distinguishes my argument in this chapter as ‘humanist’ beyond my use of the idea that human rights are rights we hold in virtue of our human status. Is it the case, even so, that my argument remains trapped within the confines of humanism and has no significance beyond humanist thinking about human rights?

While proponents of the political conception continue to use the language of human rights, their understanding of what a human right is renders the adjective ‘human’ of little or no significance, although that is more clearly true of Beitz’s and Raz’s versions of the political conception than of Rawls’s. Political theorists are therefore likely to remain unmoved by an argument that rights grounded in human status can be collectively-held or group-specific, even though the individualism and universalism commonly associated with the idea of rights held ‘in virtue of being human’ contribute to Beitz’s and Raz’s reasons for dismissing that idea.⁵⁷

My argument is more significant for legal conceptions of human rights. Here, of course, the status relevant to the bearing of human rights will be legal rather than moral, even though, if we sought a moral justification for that legal status, we might find it, with Allen Buchanan, in an equivalent moral status.⁵⁸ If we conceive legal human rights as rights that are so-called because their legally recognised bearers are human beings, legal human rights can still take the form of collective rights or group-specific rights. The legal ascription of human rights to indigenous peoples and ethno-cultural minorities in those forms need not betoken either ad hocery or incoherence at the heart of human rights law. Rather, those rights can be part of a logically coherent scheme of legal human rights.

⁵⁷ Rawls, by contrast, shows no inclination to deviate from a conception of human rights as rights held by human beings individually and universally. For critical discussions of the political conception, see P. Gilibert, *supra* note 2; S. M. Liao and A. Etinson, ‘Political and naturalistic conceptions of human rights: a false polemic?’, 9 *Journal of Moral Philosophy* (2012) p. 327; D. Miller, ‘Joseph Raz on human rights: a critical appraisal’, in R. Cruft, S. M. Liao and M. Renzo (eds.), *Philosophical Foundations of Human Rights* (Oxford University Press, Oxford, 2015) p. 232; J. Tasioulas, ‘Are human rights essentially triggers for intervention?’, 4 *Philosophy Compass* (2006) p. 938.

⁵⁸ A. Buchanan, *supra* note 8, p. 89.

