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Miodrag Jovanović, *Collective Rights. A Legal Theory*, Cambridge University Press, Cambridge 2012, p. 230.

Early this year, Cambridge University Press published the new book of Miodrag Jovanović, a professor of the Belgrade University, Faculty of Law. It concerns the topic that he has started to research almost ten years ago in his PhD thesis.<sup>1</sup> Although the thesis developed some of the core ideas only in a nutshell, it served as a starting point for this book which can be regarded as his final statement regarding the problem of collective rights.

The book is divided into four chapters. The first one (*What it means for a theory of collective rights to be legal – reflections on methodology*) is, in a deeper sense, introductory. It is, so to speak, a separate essay about the methodology of jurisprudence. Jovanović lays down the methodological foundation of his enterprise and he contemplates about the purpose of jurisprudential efforts in general. After the first, “foundational” chapter, the reader is faced with two pivotal parts of the book. The second chapter (*Theories of rights and collectives as right-holders*) is, on the one hand, an extended and scrupulous analysis of the existing and dominant theories of rights and, on the other hand, an analytical preparation for the next chapter. This is so in virtue of the fact that Jovanović takes the very possibility of the right holding capacity of groups to be the crucial condition for the existence of collective rights. In the third, and essential chapter for the book’s topic (*Collective rights as a distinctive legal concept*), the author exposes several important conceptual clarifications (and I would add, classifications). Finally, the book ends with a chapter dedicated to the problem of the alleged universality of collective rights (*Are there universal collective rights?*)

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<sup>1</sup> M. Jovanović: *Kolektivna prava u multikulturalnim zajednicama* [Collective Rights in Multicultural Communities], Beograd 2004.

What is the main achievement of this book? Let us mention and describe only two, in my opinion, the most important ones. The first one is substantial and it concerns the conclusions which Jovanović developed in the pivotal parts of the book. The second chief accomplishment is, strictly speaking, of methodological significance.

Let us begin with the substantial achievement. Jovanović claims that a theory of rights has to tackle four different issues:

- (1) what does a claim of right consist of (e.g. protection of choice or interest),
- (2) what is the form and extent of that protection
- (3) what is the nature of the right-holder and
- (4) what is the nature of the good which the right is claimed to (p. 86).

Jovanović looks for the answer to the first and the most important question in Raz's interest theory of rights. Namely, he dismisses the alternative, so-called "choice" theory of rights as empirically incorrect, because this theory insists on autonomy and will as preconditions for the right-holding capacity, and due to this insistence it excludes children and mentally ill persons as right-holders. As Jovanović says "in that respect, this theory seems to be in stark contrast with a number of the existing general and regional international legal instruments that stipulate the right of everyone to recognition of his/her legal personality"(p.74). Therefore, the author turns to the rival theory of Joseph Raz. This theory attempts to ground *subjective rights of individuals* as follows: "X has a right if and only if X can have rights and... an aspect of X's well-being (his interest) is a sufficient reason for holding other person(s) to be under a duty". The second part of the definition concerns the 'capacity for possessing rights': "An individual is capable of having rights if and only if ... his well-being is of ultimate value". The cited "definition" solves the first and the third question and implies answer to the fourth. However, does the definition pertain to the concept of *collective* rights? Are there collective rights, after all? Are there "collective interests" protected by these rights? In addition, what kind of goods can generate collective interests? Finally, who is the subject of such kind of interest? All of these questions must be answered if one wants to construct a theory of collective rights. And Miodrag Jovanović has done it.

Groups can be conceived to hold rights only to "participatory goods" or precisely – it is one correction which Jovanović attaches to the concept of "shared" or "communal" or "participatory" goods – only to "socially irreducible goods". If one community *perceives* good in a way that it can be enjoyed only "by the group and that this enjoyment is not

reducible to the sum of the enjoyments of individuals”,<sup>2</sup> we can say that such good is “communal” (like language, culture or national heritage) and *it can generate collective interest*.

Nevertheless, although the existence of such collective interest is a necessary condition for the existence of collective rights, it is not a sufficient condition. Actually, it is not accepted (neither in theory nor in legal practice) that any set of individuals who possess a joint interest can have group rights. For instance, speakers of Esperanto can have an interest in using this language in the communication with local officials, but that interest could not give rise to their legal right to communicate with them in Esperanto. It transpires that the problem of *right-holder* comes to the fore of the debates about collective rights. In that respect, the main task of Jovanović’s theory is exactly to provide some characteristics of groups which would qualify them for the status of right-holders.<sup>3</sup>

First of all, it must be noted here that there is a crucial difference between “a *category* of persons, understood to mean all those people who fit a particular description” (such as being minors or voters), and “*group proper*, understood to mean a set of people who by their shared characteristics think of themselves as forming a distinct group”.<sup>4</sup> First set of persons is a creation of law, as it is the case, for instance, with voters or workers. Contrary to this, some entities (for example, national minorities) already exist as such, based on ‘objective criteria’ (p. 125). The law does not create such kind of groups.<sup>5</sup> They are not legal creation, but “*de facto*, pre-legally existing *non-reducible* collectivities” (p. 58). As such, they must be clearly differentiated from juristic persons as a separate type of right-holders.

However, it should be stressed that what is important for these groups being potential right-holders *is not only* their independent, social existence, but *their moral distinctiveness* as well. At this point, Jovanović brings into play and defends the moral standpoint, which a Canadian scholar Michael Hartney labeled as “value collectivism”. According to this view, cultural identity and distinctiveness of a group are not instrumental, but intrinsic values. Therefore, the existence of *some* collectives or communities (e.g., indigenous peoples, national or religious minorities) is one moral good that can not be reduced to moral worthiness of

<sup>2</sup> J. Waldron, *Liberal Rights*, Cambridge 1993, 355.

<sup>3</sup> As Jovanović rightly observes, “the whole mess with ‘collective rights’... is exactly about whether the status of a separate legal personality could be extended to groups qua groups”, 44.

<sup>4</sup> D. Miller, “Group Rights, Human Rights and Citizenship”, *European Journal of Philosophy* 2/2002, 178.

<sup>5</sup> M. McDonald, “Should Communities Have Rights? Reflections on Liberal Individualism”, *Canadian Journal of Law and Jurisprudence* 2/1991, 218–19.

individuals, i.e. members of these collectives, and this is the reason why moral rights of groups are not reducible to the moral rights of its members. Following some other authors<sup>6</sup>, Jovanović holds that only by keeping in mind this property of collectives, it is possible to construct their legal subjectivity. And exactly this moral worthiness, coupled with the pre-legal existence of a collective, is the reason and justification for the existence of collective rights which protect collective interests of such collectives.

Finally, Jovanović steadily demystifies the truism that collective rights are rights which “shall be exercised in community with others”. Collective rights can be exercised individually – for instance, exemption from compulsory wearing of crash helmets for Sikhs, as in the British law.<sup>7</sup> On the other hand, some individual rights can be exercised only collectively, for instance the right to assemble, to strike or to associate freely. A single person cannot enjoy these rights, and yet they are fundamental *individual* rights. Accordingly, *definiens* for a collective right cannot be determined by the way of its exercise (i.e. rights exercised collectively), but it must be found, as previously indicated, in the collective interest which is protected by these rights and in the nature of the right-holder. Eventually, Jovanović summarizes his theoretical account as follows: “Ultimate beneficiary of collective rights is the collective entity *as such* and the protected good is the one from the category of ‘socially irreducible goods’” (p. 119).

This is short and, as in any other case of the book review, inevitably uncompleted elucidation of the main substantive conclusions of this book. Let us now turn to the second achievement of this book, i.e. its methodological “message”. In this respect, one can, first, notice that the title of the book itself determines its “genre”. Namely, it is the work of *legal theory* or, in terms of the Anglo-American legal philosophy, it belongs to the province of *jurisprudence*. It is well-known that, as a general and philosophical legal discipline, jurisprudence is inclined to self-reflection. Put differently, jurists are prone to investigate and contemplate about the boundaries and scope of jurisprudence, as well as about its methods. Questions like, “What is jurisprudence?”, “What are the basic methods of jurisprudence”?, are the most important questions raised by jurisprudence. And jurists have to answer them before they can

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<sup>6</sup> “Someone or something can hold rights only if it is the sort of thing to which duties can be owed and which is capable of being wronged. In other words, moral standing is a precondition of right-holding”, P. Jones, “Group Rights and Group Oppression”, *Journal of Political Philosophy* 4/1999, 361–2.

<sup>7</sup> Of course, collective rights can be exercised collectively as well and there is also the third way of exercising a collective right, i.e. via some representative body or agent, 115–116.

turn to other tasks. Consequently, proper theorizing about law cannot begin in any other way.

And it is exactly the way that Jovanović follows. How does he do it? The one of purposes of jurisprudence is to produce concepts and theories which participants will be able to recognize as correct when they face them. Therefore, jurisprudence does not only record actual conceptual framework of law, but it scrutinizes and reconsiders this framework. Jovanović explicitly refers to this task in numerous places, most notably in the opening chapter of the book. He is permanently concerned with the role and the very meaning of jurisprudence, generally, and with the purpose and usefulness of his own task of establishing a theory about one general legal concept, particularly. It is important to emphasize that this is a theory about a practical (not theoretical concept) and, as Jovanović claims (for instance, at p. 3), an “emerging” concept as well. He is undertaking this theoretical endeavor by using all the panoply of the modern conceptual analysis. He sets out to prove his points from the truisms about collective rights; then, he analyses ruling theories about rights in general; finally, he focuses on collective rights, putting them in the grid of all other kinds of rights, trying to conceptualize and make theoretical use of them and, by analyzing the relationships of this and other similar concepts. Although it should be noted that this book is a true piece of art in conceptual analysis, we would get a wrong impression if we neglect avowed interdisciplinary approach on which Jovanović constantly insists. He is convinced (it seems rightly) that without helping hand of empirical and axiological methods, his task would never be accomplished so extensively and thoroughly.

Finally, one can certainly find a few misinterpretations, mistakes and overstatements in this book. For instance, Jovanović sometimes, in my opinion mistakenly, identifies conceptual analysis with Hart’s early method of paraphrasing, whereas paraphrasing is only one among a few of its possible means (40, 73). He also sometimes confuses ontological and axiological questions (45). Finally, he stresses too much the practical justification of his enterprise (41–2, 64), and while I find this useful, it is not so pressing, because if jurisprudence *can* take part in creation of legal concepts, than I do not see any argument why it *should not* do so. Nonetheless, Jovanović constantly offers contra arguments against one such elusive argument. However, it seems to me that it would be hairsplitting to insist further on the quibbles while talking about this, in all other ways, excellent book.

Let me sum up this review with a short observation on its relevance and potential influence. This book is, in several ways, important for Serbian academic jurists and for domestic legal culture in general. First of all, its subject is very well connected to domestic legal practice. Serbian

society is multicultural and multinational, and different kinds of collectives (national and religious minorities) are recognized and established as legal entities. Consequently, his analysis could be of pragmatic use. As Jovanović says, “the undertaken clarificatory work of jurisprudence... (can) significantly affect legal-drafting practice...”(65).

Secondly, when jurisprudence deals with its own methods and nature, it makes a good deal of useful job for other legal disciplines, especially for practically oriented legal science. When studying, for instance, methodological questions, jurisprudence instructs academic jurists who study practical legal concepts. One of the greatest virtues of this book is that its author puts forward this insight so clearly. Moreover, this book is an exceptional example of well performed theoretical analysis of a relevant legal concept and, as such, it can serve as a standard for other authors willing to undertake this kind of analysis of a legal concept, be that theoretical or practical in nature.

Last but not the least, it seems that this book puts a luminary of the Serbian legal theory back on the European jurisprudential sky. It would be more than welcome that some of its stardust falls on other Serbian legal theorists as well and prompts them to maintain the shine of that star alive.