CHAPTER I

THE INTERNATIONAL AND INDIAN DISCOURSES ON GROUP RIGHTS

For over five decades, the idea of human rights has been a contentious issue due to the external constraint it creates on the sovereignty of states. Debates regarding the legality of humanitarian interventions, the use of human rights as an issue in foreign policy, the role of transnational advocacy groups in states in matters of the relationship between the state and the individual and the conflict between western and non-western values have been some of the main constituents of the discourse on human rights. The last two decades have witnessed the rise of many groups who have claimed human rights as collective rights. This seems to have created greater controversy since not only does it symbolize yet another challenge to the idea of the sovereign nation-state, it also challenges the very philosophical foundations of the liberal-individualist human rights regime.

This chapter seeks to understand the praxis of group rights in the international human rights regime and in liberal-democratic India with the aim of bringing out some similarities and differences in the two discourses. For this purpose the twentieth century is divided roughly into four periods of twenty-five years each, which will be discussed in the various sections of this chapter. In each of these phases, four issues will be discussed: western theoretical writings on group rights, developments in international law concerning group rights, theoretical perspectives on group rights in India and in the context of developments in the Indian polity and society. The final section will analyze the experience of various marginalized groups in their interaction with the human rights regime and Indian judiciary.

Claims to Rights as Groups until 1925

Tracing the history of the advocacy of group rights since the 18th century, we cannot but take note of the tradition of pluralism in England.¹ The inspiration

for this were the ideas of Otto von Gierke of Germany, who argued that ‘groups were free-forming and free-developing’ in contradiction to the Roman theory of groups propounded by Savigny in which groups were regarded as mere ‘fiction’ and considered to be creation by ‘concession’ of the sovereign, thereby having no independent existence. Defending the institution of the English ‘trust’, a legal historian, F.W. Maitland, challenged the subordination of groups to sovereignty, the State and/or the Church by Austin and Pope Innocent IV. His concern was the very technical treatment of the ‘trusts’ in England by most English lawyers. He saw them rather as ‘representing a cardinal force in English history, constituting the main agent of social experimentation.... a channel for practices, the success of which provided the basis of subsequent legislation’ such as the Married Women’s Property Act of 1882 and the Companies Act of 1862.

Criticizing the Hellenist influence in the thought of T.H. Green, L.T. Hobhouse and Bernard Bosanquet, reflected in their advocacy of ‘homogeneity’ as a measure of development of political society, R. M. MacIver furthered the pluralist tradition. Making a distinction between the state and the society, he spoke of voluntary groups such as the district, the city, the village and other associations. He argued that ‘social life can no longer in practice be and should no longer in theory be centralized into state-life. The individual should not be summed up in his citizenship, otherwise the claim of citizenship will itself become a tyranny and its essential moral value lost.’ He further argued that in a similar manner, there were certain universal interests that extended beyond the boundaries of the state, in which case the single state could no longer ‘ratify the society’ and international relations were born with varying degrees of social integration in the form of alliances, federations, treaties, conventions and extradition laws.

G.D.H. Cole symbolized the extreme end of pluralist thinking, for in propounding guild socialism, he argued that groups should be functionally

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2 Ibid., p. xi. Gierke’s exposition came from his understanding of the rich consociational life in Germany, which for him completely repudiated the Roman theory that groups were nothing more than a collection of individuals.
3 Ibid., p. xiii.
4 Ibid., p. xii.
5 Ibid., p. xvii. Also see, R.M. MacIver, “Society and State”, in ibid., pp. 61-75.
6 Ibid., p. 71.
7 Ibid., pp. 73-74.
sovereign. Making a distinction between associations of the 18th century that were mainly political and were therefore seen as conspirators against the sovereign state by thinkers like Rousseau, he made a case for the functionally specialized associations of the nineteenth century such as the church and the guilds that were essentially non-political. These, according to him, would at most lead to controversies and prejudice the common good but not to conspiracies against the state. He attempted to limit the role of the state to those interests of individuals that need to be served due to their location in the state and said that in spheres of action that affect men unequally, such as religion and industry, the state should not intervene and special associations should control these spheres. ‘Inhumanity arising from a lack of understanding is the mark of the State in its dealing with man in his religious aspect, and his capacity as a worker.’ In addition to this, the late nineteenth and early twentieth centuries were witness to a debate regarding the rights of involuntary or ascriptive groups, J.S. Mill advocating the right to self-determination versus Lord Acton, favouring the idea of diversity within one nation.

Since minorities have transcended national boundaries, the history of international law is replete with treaties for the protection of minorities. It is also interesting to note that the objects of protection in most of these treaties were religious minorities with the right to freedom of religion. In fact, the origin of minority rights law was in the protection of religious minorities and minority rights treaties in the first half of the twentieth century. After the Congress of Vienna,

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9 Ibid., p. 98.
10 Ibid., pp. 102-107.
11 Ibid., p. xxii.
12 See Patrick Thornberry, International law and the Rights of Minorities, Oxford: Clarendon Press, 1991. Among the treaties cited by Thornberry between Christian and Islamic peoples of powers are the unilateral promise of St Louis of France in 1250 to protect the Maronites, the Austro-Ottoman treaty of 1615 etc. In addition there were treaties for the protection of one Christian sect from another i.e. the Protestants in Catholic majority areas and vice-versa. For example, the Treaty of Vienna (1607), Treaty of Olivia (1660), The Peace of Westphalia (1648), the Treaty of Paris (1763) . There was one difference between the inter-Christian instruments and those between the Christians and Islamic powers like Turkey. The Millet system in the Ottoman empire (until 1920s) gave wide-ranging powers to religious minorities whereas within Europe, such protection was granted only to minorities in the ceded territories. For more details see pp. 25-37.
there was a shift of focus from protection of religious minorities to protection of national minorities, both individual and collectivities. Thus churches, religious courts, people of Jesus Christ, inhabitants of ceded territories, all became objects of protection. There was a gradual broadening of rights of religious minorities from freedom to worship to granting of some civil and political rights, while the general tone was one of tolerance than encouragement.\textsuperscript{14} The actual implementation of these treaties posed many problems.

The aftermath of the First World War saw the burgeoning of international debates on groups that were minorities within multinational cultures, the ill treatment of whom endangered international peace. Woodrow Wilson made a case for non-discrimination and collective rights to racial and national minorities within new states as well as others seeking admission to the League of Nations. There was strong resistance to this attempted widening of the traditional scope of minority rights, although the negatively framed religious article, along with the principle of non-discrimination, continued to be part of the League clauses.\textsuperscript{15} Moreover these rights were granted to individuals belonging to minority communities. The League also showed an inclination towards minority rights rather than human rights. Also, there wasn’t much of a concern with racism at this stage.\textsuperscript{16}

The League may be credited with acknowledging the need for international protection of minority rights.\textsuperscript{17} The redrawn map of Europe at the end of the First World War created many minorities that were sought to be protected through bilateral treaties, to be enforced by the League Council and in case of conflict, to be submitted for arbitration by the Permanent Court of International Justice. There were fourteen such treaties involving seventeen countries, which were designed to protect religious, ethnic or linguistic minorities.\textsuperscript{18} The Polish treaty served as a model for the other treaties.\textsuperscript{19} Minorities of different hues were to be protected in Poland, Austria, Yugoslavia, Czechoslovakia, Bulgaria, Hungary, Greece, the Free City of Danzig, Albania, Lithuania, Latvia, Estonia, Iraq and Turkey. The

\textsuperscript{14} Patrick Thornberry, op.cit., p. 32.
\textsuperscript{15} Ibid., pp. 38-39.
\textsuperscript{16} Ibid., p. 40.
\textsuperscript{19} Patrick Thornberry, op. cit., p. 42.
protections guaranteed were a combination of provisions of non-discrimination and special measures when needed.\textsuperscript{20} However, the mechanism for implementation of these protections was weak. Only states, as members of the League could petition the League Council for violation of minority rights in other states; groups themselves had no legal standing in the Council.\textsuperscript{21} As a result, political considerations determined whether or not a particular violation of rights would be reported to the Council. Moreover, the protection of minorities was made obligatory only for 'empires', consciously excluding Allied powers which were colonial powers or 'nation-states', thus excluding from the purview of the League large minorities in these areas and their colonies.\textsuperscript{22} While the treaties focussed on the 'right to identity' of the minorities,\textsuperscript{23} they were centered on the individual and some members of the Permanent Court underlined the assimilationist/integrationist intent of the treaties.\textsuperscript{24}

The earliest instances of international concern for minority rights may be seen in the advisory opinions of the Permanent Court of International Justice (PCIJ). Expressing its opinion with regard to the position of non-citizens in the case of \textit{Polish Nationals in Danzig}, the Court said that making a distinction between citizens and non-citizens was not unreasonable or unjust, although it recognized that this may not be entirely satisfactory from the point of view of a certain group or a group of foreigners.\textsuperscript{25} In the advisory opinion on \textit{Acquisition of Polish Nationality}, the Court clarified the difference made between minorities in the broad sense and minorities in the narrow sense in the minority treaties of the inter-war period. Accordingly, members of minorities who were not citizens of the state were to enjoy the protections granted by the League of Nations, namely those of life and liberty and the free exercise of their religion, whereas minorities in the

\textsuperscript{20} Jejna Pejic, op.cit., pp. 1010-1011.
\textsuperscript{21} Ibid., p. 1012. Thornberry however argues that petitions could emanate from individuals or associations, these did not have to belong to the minority concerned or even to the country referred to in the petition, Patrick Thornberry, op.cit., p. 49.
\textsuperscript{23} Patrick Thornberry, op.cit., p. 51.
\textsuperscript{24} Ibid., p.49-50.
narrow sense, meaning minorities the members of which were citizens of the state were to enjoy under the same guarantee equality of civil and political rights and in matter relating to primary instruction. 26

In the Greco-Bulgarian Communities Case the Court defined a community as 'a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and tradition in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.' 27 In the Oscar Chinn Case, commenting on the issue of discrimination based on nationality, the Court opined that since Article 1 of the Treaty of St. Germaine provided for commercial equality nationals among the signatory powers, Article 2(2) provided for equal protection and favour to religious, scientific or charitable institutions without distinction of nationality or religion, and Article 3 made a provision for equal treatment of nationals of the signatory powers in the given territory, the treaty forbade discrimination 'based on nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups.' 28

In an interesting interpretation of the law extending the applicability of law to subjects not mentioned in the text of the law, in the Case of German Minorities in Poland, the Court said that, 'the fact that no racial discrimination appears in the text of the law of 14 July, 1920 and that in a few instances the law applies to non-German Polish nationals who took as purchases from the original holders of German race, makes no substantial difference. Article 8 is designed to meet precisely such complaints as are made in the present case. There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law.' 29 In the case relating to Minority Schools

26 Ibid. PCIJ Advisory Opinion No. 7, paragraph 244, p. 39, at pp. 199-200.
27 Ibid. Greco-Bulgarian Communities Case, PCIJ Series B, Advisory Opinion No. 17, paragraph 343, p. 21 at p. 287.
28 Ibid., The Oscar Chinn Case, PCIJ Series A/B, Advisory Opinion No. 63, paragraph 319, pp. 86-87 at p. 265.
29 Ibid., Case of German Minorities in Poland, PCIJ Series B, Advisory Opinion No.6, paragraph 313, at p. 259. See paragraph 315, p. 28 at p. 261 and paragraph 248-249, p. 19 at p. 203, which make a reference to and reassert this opinion in the two cases respectively.
in Albania, the Court clarified several aspects of minority rights. Underlining the importance of institutions for the preservation of the minority identity, the Court stated that the two things that had formed the subject of the minority treaties were first, ensuring that ‘nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with other nationals of the state’ and second, ensuring ‘for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.’ The Court went on to conclude that ‘there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to announce that which constitutes the very essence of its being a minority.’ The Court also opined that if the members of the majority were being given more extensive rights than those provided to minorities in the Declaration, then that extensive right should also be granted to the minority. Interpreting the Declaration of 2 October 1921 in the context of the same case, the Court found that Article 5(1) of the said Declaration ensured for ‘all Albanian nationals belonging to racial, linguistic or religious minorities the right to maintain, manage and control at their own expense or to establishing the future charitable, religious, social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.’

In the Case of Rights of Minorities in Upper Silesia, the Court opined that ‘the question whether a person does or does not belong to a racial, linguistic or religious minority, and consequently is entitled to claim the advantages arising under the provisions which the Treaty comprises with regard to the protection of minorities, is a question of fact and not solely of intention.’ The PCIJ commented extensively on the interpretation of the texts of minority treaties and was of the opinion that anything that detracted from the value of the treaties would be considered inadmissible. Thus, within its limited mandate, the Court’s opinions reflect a sincere concern for the rights of minorities in Europe. Perhaps the earliest

30 Ibid. “Case of Minority Schools in Albania”, PCIJ, Series A/B, Advisory Opinion No. 64, paragraph 247, p. 17 at p. 203.
31 Ibid., paragraph 250, p.20 at p. 204.
32 Ibid., paragraph 251, p.22 at p. 204.
example of the inadequacy of international legal mechanism to deal with concerns of indigenous peoples was the failed attempt of the Levi General Deskaheh representing the Six Nations of the Iroquois to obtain a hearing from the League Council in its dispute with Canada in its claim for tribal self-government.34

The League-PCIJ position on the rights of minorities thus highlights the following: There was a distinction made between rights of nationals and non-nationals but the distinction was eventually narrowed down. The package for minorities included measures to prevent discrimination and special rights to preserve their culture, specially through provision for establishing educational institutions with permission to teach in the particular minority language. The concept of protection of the ‘community’ was considered important enough to be defined in one of the cases in the context of minorities; it might be based on race, religion, language or tradition. And finally, although Woodrow Wilson had propounded the idea of self-determination for minorities in the Empires, the idea of self-government for indigenous communities was still considered anathema.

The period until 1925 may be seen as one in which, on the one hand, there was concern more with voluntary groups at the domestic level in the western states, while at the international level there was widespread concern with the rights and protection of ascriptive groups. Interestingly, at the domestic level, religious associations in the west were seen as voluntary whereas in the international law religious groups were seen as ascriptive.

The Indian discourse was more along the lines of that of the League of Nations, but in many ways more advanced than those in lands of colonial powers. Since the British encouraged the concretization of religious and caste identities in India, the most pressing issue at this time was political representation of religious minorities and the mobilization of the low castes and ‘untouchables’. Both these movements were a response to the Hindu reformism of the late-nineteenth century and later to the rise of Hindu communal organizations, namely the RSS and the Hindu Mahasabha. Sir Syed Ahmad Khan who tried to mobilize Muslims and urged them not to join the Indian National Congress in 1885, however believed

34 Ronald Niezen, "Recognizing Indigenism: Canadian Unity and the International Movement of Indigenous Peoples", Comparative Studies in Society and History, Vol. 42, No.1, 2000, pp. 119-149 at pp. 122-125. His appeal had been sent to the League; it was entitled “The Red Man’s Appeal to Justice” in which he made a case for self-government of the Six Nations and criticized the presence of the Royal Canadian Mounted Police on their reserves.
that the Hindus and Muslims were two nations (quams) and were the two principle limbs of India.\textsuperscript{35} He clarified in a later address that ‘by the word ‘quam’ he meant both Hindus and Muslims, who inhabited the same territory and were ruled by the same rulers, and that he therefore chose to call the two nations as ‘Hindu’ i.e., the people of Hindustan...\textsuperscript{36}

In the early years of the twentieth century, the Ali brothers supported the creation of a Muslim University at Aligarh in 1904 and then the formation of the Muslim League in 1906. Leading an Indian Muslim delegation, they made a deputation to the Viceroy, Lord Minto, in which they claimed that ‘the Muslims were a distinct community in India, who although had many interests in common with the other communities in India had some additional interests of their own, and that these had suffered from the fact that they had not hitherto been adequately represented even in the Provinces in which the Muslims constitute a distinct majority of the population.'\textsuperscript{37} The Morley-Minto reforms had granted separate electorates to the Muslims. However, the ideologues of the Muslims League, Mohammad Ali and Shaukat Ali, saw it as a means of securing representation and other benefits from the colonial government. In 1916, the Congress and the Muslim League signed the Lucknow Pact wherein they decided to cooperate and worked out an arrangement for contesting elections. Mohammad Ali regarded this arrangement of communal representation as being satisfactory for the present and hoped that ‘swaraj’ would bring a re-adjustment of communal shares in representative bodies.\textsuperscript{38} This cooperation came to its fruition in the coming together of the Khilaftat and Non-Cooperation movements in 1921-22. Addressing the Khilaftists, Mohammad Ali said that, ‘... it will be our endeavour up to the last moment to strengthen this unity while maintaining our religion.’\textsuperscript{39} While the mobilization of Sikhs had started in this period with the Akali Dal demanding and


\textsuperscript{36} Ibid. “Reply to the Welcome Address of Indian Association Lahore, 1883”, p. 163.


\textsuperscript{39} Ibid. “Presidential Address at the All-India Khilaft Conference, Karachi, 8 July 1921”, pp. 226-227. However, with the outbreak of riots in different parts of the country in the decade of 1920s and Gandhi’s attitude towards them, the two leaders parted ways.
acquiring control over Gurudwaras, they were yet to make demands for political representation.

The mobilization of the Dalits had started as far back as 1875 when Jotirao Phule established the Satyashodhak Samaj and started a campaign in some regions of Maharashtra for their right to education and temple-entry. By the 1920s and 1930s, many low caste activists organizing as non-brahmans and Dalits were using various ideologies such as the anti-caste, anti-brahman, anti-Hindu ideology in different parts of colonial India. The movement was particularly strong in the Tamil speaking areas. The common claim of these movements was that they were the original inhabitants of these lands. This was evident in the names of the movements -- Ad-Dharm in Punjab, Adi-Hindu in Uttar Pradesh and Hyderabad, Adi-Dravida in Tamil areas, Adi-Andhra in Telugu areas and Adi-Karnataka in Kannada speaking areas. They had organized in a more militant fashion to counter the Hindu Mahasabha and the RSS, which had been formed in the 1920s. There also some who had joined with Mahatma Gandhi and yet others who had joined the Hindu Mahasabha. The strategy of conversion to other religions to escape the ills of Hindu society was already part of the movement by this time.

The Congress leadership therefore perceived the demands of these groups negatively since they were seen as threats to the emergent ‘Indian nationalism’. The strategy to combat this was to make the Congress more mass-based, a task that Mahatma Gandhi accomplished to a considerable extent.

To summarize group rights in thought and practice, both within India and abroad, in the period before 1925, the following features stand out. Analyzing the relationship between international law and western political theory at this stage, there seems to be a great deal of similarity in thinking on group rights. Both appear to realize the growing importance of groups and the need for their protection, though for varying reasons. The main reason for their recognition in internal law being preservation of international peace, while in political theory, it was based on the growing involvement of people in voluntary groups, religion being considered

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41 Gail Omvedt, Dalit Visions, Tract for the Times, No.8, New Delhi: Orient Longman, 1996, p. 34.
42 Ibid., p. 35.
43 Ibid., p. 39.
as one. Thinking on group rights of minorities in India was advanced compared to both western thought and international law of the period. Groups themselves were active in asserting their right to their culture and education. Moreover, they were asserting special rights to political representation.

The Wariness with Rights of Minority Groups, 1925-1950

While on the one hand the League system provided no protection to groups such as the Jews in Germany nor to ethnic and racial minority groups outside Europe, the working of the Nazi German state led to a strong theoretical critique of the idea of group rights. 44 Ernest Barker was among the most prominent critics of the idea of group rights and he argued that groups were only ‘organizing ideas’ or ‘organizing minds’ with no real personality of their own and thus incapable of contesting the personality of the state. 45 Further he said that ‘groups merely possessed a legal personality while moral personality and responsibility belong solely to the individuals who constituted them.’ 46 He argued that ‘groupism’ led to totalitarianism. Barker was skeptical about encouraging the self-conscious communities formed by blood, history and tradition, let alone granting them rights as he saw them reappearing as undesirable manifestations in German Romanticism which transformed ‘folk’ into ‘race’ in Nazi Germany, absorbed social elements into the state in Fascist Italy and interpreted ‘folk’ as ‘class’ in communist Russia. 47

German manipulation of minority rights guarantees under the League as a pretext for aggression against Poland and Czechoslovakia became the main cause of the inter-war and post-war wariness with the idea of minority rights. This was witnessed in the massive transfers of minority populations in Europe, which were accompanied by violence, in total disregard of the spirit of the League-sanctioned minority treaties at the end of the Second World War. Worse still, such transfers were endorsed by the western states at the Potsdam and Paris Peace Conferences. These were an indication that at this stage there was no recognition of the right of

46 Ibid., p. xxvi.
47 Julia Stapleton, op.cit., p. xxv.
minorities to their identity. At the San Francisco Conference the United States and the Latin American states were active in promoting the idea of non-discrimination, due to concerns arising from the large immigrant populations in these countries. While the UN Charter did not abrogate the obligations incurred under the inter-war treaties, there was a distinct change in the philosophy of international protection of rights, from the emphasis on minority rights before the Second World War to universal human rights and fundamental freedoms of the individual. Thus, the United Nations renounced its commitment to promoting the rights of 'subject nationalities' and focussed instead on guaranteeing the rights of individuals. This individualistic conception of rights articulated in the American Declaration of Independence and French Declaration of the Rights of Man consequently made its way into the International Bill of Rights proclaimed by the United Nations. This was also a move away from guaranteeing special rights for protection and promotion of minority cultures.

The Universal Declaration of Human Rights (UDHR) was devoid of any reference to minority rights. There was tremendous resistance to the idea of including a provision on minority rights in the UDHR as well as the setting up of a Sub-Commission under the Human Rights Commission (set up by the Economic and Social Council (ECOSOC)) of the UN to deal specifically with issues of minorities. The Human Rights Committee was directed to submit proposals, recommendations and reports to the ECOSOC regarding:

a) An international bill of rights.

b) The protection of minorities.

c) The prevention of discrimination on the grounds of race, sex, language or religion.

48 Patrick Thornberry, op.cit., p. 114-117.
49 Ibid., p. 121-123.
50 Ibid., p. 53.
51 Julia Stapleton, op.cit., p. xxiv-xxviii.
In the first session of the Commission of Human Rights, the representative of Australia considered that the question of minority nationality, statelessness, right of opinion, right to property and discrimination were all integrally related to the general problem of human rights and so the commission should submit one single report concerning all related problems. With slight modifications this suggestion was accepted. Yet another development that sidelined the issue of minorities was the setting up of a common sub-committee on protection of minorities and prevention of discrimination on the recommendation of the representative of the US rather than a body exclusively for minorities. An interesting explanation for why the Universal Declaration was devoid of a provision for protecting minorities is that when the provisions of the Declaration were being negotiated in the Sessions of the Human Rights Commission, the UN Ad Hoc Committee on Genocide was deliberating the Genocide Convention, in a draft of which it had included the concept of ‘cultural genocide’, which according to the Human Rights Commission addressed the concerns of minorities adequately.

The UDHR was proclaimed as a common standard of achievement for all peoples and all nations and was premised on the fact of equal dignity and respect of each individual. However, Article 22 reflects the liberal multicultural perspective by stating that economic, social and cultural rights are indispensable for the dignity and free development of an individual’s personality. Article 26(2), while conceding the fact of heterogeneity of national culture and the international system, makes the crucial connection between education and inter-group harmony among racial and religious groups at the national level and among nations at the international level, thus addressing the issue of multicultural education in plural

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53 For details see Urmila Haksar, op.cit., pp. 9–57. All the committees or commissions which were of a technical nature such as the Human Rights Secretariat the Drafting Committee and the Sub-Commission on Protection of Minorities and Prevention of Discrimination which consisted of experts and favoured the inclusion of a minority rights clause in the UDHR. But those bodies composed of members representing various governments namely the Commission on Human Rights and the General Assembly resisted this proposal and was responsible for its final rejection.

54 Johannes Morsink., op.cit.

55 Adopted by General Assembly resolution 217 A (iii) of 10 December 1948.
societies. Article 27(1) confers on the individual the right to participate in the cultural life of the community and Article 29(1) stipulates duties towards the community with no indication of pluralism of the national as well as sub-national communities. Every ‘group’, however, is enjoined not to act in a manner contradicting the ‘declared rights’. Thus firstly, the UDHR does not account for cultural diversity within or across nations, which may or may not validate these universal standards. Second, it does not recognize the legitimacy of any ‘group’ except the ‘family’. It seems to aspire for a substantive good that the proceduralist liberal theory does not permit.

Since the Genocide Convention was one of the main reasons for the exclusion of minority rights provisions from the UDHR, it will be interesting to note how the notion of genocide itself was trimmed and what limitations it has with regard to the protection of minorities. The Convention on the Prevention and Punishment of the Crime of Genocide was the earliest in the field of humanitarian law of armed conflict to recognize the dangers faced by minority groups such as ethnic, racial and religious groups. In international law, the Convention recognizes the right to existence of minorities. As early as 1933 in a special report to the Fifth International Conference on Penal Law a prominent jurist, R. Lemkin argued that genocide meant much more than ‘denationalization’, which at best conveying deprivation of citizenship to a certain ethnic group. He therefore delineated the following categories of genocide: political, social, cultural, biological, physical, religious and moral. At the end of the Second World War, the General Assembly at its first session adopted Resolution 96(1) on 11 December 1946 on the Crime of Genocide and after going through various stages of formulation adopted the Convention by Resolution 260(III) of 9 December 1948. There were certain positive elements in the Convention, namely that states could not enter any reservations to the treaty, genocide which was earlier considered to be a war crime, came to be defined as a crime against humanity under international

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56 Similarly Article 17 of the Recommendation concerning education for International Understanding, Cooperation... (1974) urged member states to ‘promote the study of different cultures ... in order to encourage mutual appreciation of difference between them.’
58 This characterization has been borrowed from Patrick Thornberry.
59 Ibid., pp. 61-62.
60 Ibid., pp. 64-67.
law, and finally in subsequent deliberations on the Vienna Convention on Law of Treaties, representatives of states and scholars identified prevention of genocide as *jus cogens* along with such principles as the right to self-determination, the injunction on use of force by states, prevention of racial discrimination, slave trade and piracy.\(^{61}\)

However, there were many limitations in the Convention which reflect a certain bias against minority group rights. The term genocide was not to include crimes against political, linguistic, economic and cultural groups since some of these concepts were considered vague and the groups unstable.\(^{62}\) So the idea of genocide was developed *sui generis*, without any relation to human rights or minority rights.\(^{63}\) Secondly, the notion of *mens rea* or intention was excluded from the consideration of the convention so that states could not be found guilty on that count. This limited the notion of existence to bare survival, with no right to develop or flourish.\(^{64}\) Thirdly, only individuals could be punished for the crime of genocide, not states per se.\(^{65}\) Fourthly, the emphasis was on punishment rather than prevention of genocide.\(^{66}\) And finally, the International Court of Justice could intervene in instances of genocide only if the concerned parties had accepted the jurisdiction of the court.\(^{67}\) In this regard, the ICJ's treatment of genocide has followed the norms set out in 1948. An example is the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))* (Provisional Measures), in response to a suit filed by Bosnia and Herzegovina on 20 March 1993.\(^{68}\) The Court order found Yugoslavia in breach of

\(^{61}\) Ibid., p. 82, p. 93 and pp. 95-97 respectively.

\(^{62}\) Ibid., p 104, p.107, The dominant view of majority of the states opposed to including political groups seems to have been that there was a central core to genocide associated with Nazi practice which had been condemned as a crime. Beyond that core practice, the UN resolution merely indicated the possibilities open to the drafters of any eventual convention.

\(^{63}\) Ibid., pp. 68-73.

\(^{64}\) Ibid., pp. 73-74.

\(^{65}\) Ibid., p.75.

\(^{66}\) Ibid., p. 80. Only Article VIII of the Convention deals with the issue of preventing the occurrence of genocide.

\(^{67}\) Ibid., p. 82.

legal obligations under the Genocide Convention and called upon Yugoslavia to 'immediately... take all measures within its power to prevent commission of the crime of Genocide.' The Court, in another order stated its limitations of not being able to deal with broader claims of the kind Bosnia had made in requesting the Court to interdict plans to partition Bosnian territory, to declare annexation of Bosnian territory to be illegal, and to hold that Bosnia must have the means to prevent acts of genocide and partition by obtaining military supplies under the Genocide Convention.

Thus in this period, the right of minorities to existence was recognized in a rather limited manner. The principles of equality and non-discrimination embodied in the Charter and UDHR were considered as sufficient to prevent discrimination of individuals belonging to minority communities. There was no international recognition of the right of the minority the protection of its identity.

India during this period was greatly charged with the issue of special rights for minority groups. As regards the ‘untouchables’, the period beginning in the 1930s was witness to a sharp division among Gandhi and Ambedkar on the rights of the depressed classes. They were designated as the ‘depressed classes’ in the 1931 Census of India. Ambedkar was demanding for them, special representation as had been given to the Indian Muslims through separate electorates. However, by the infamous Poona Pact of 1932, Gandhi prevailed over Ambedkar and made him relinquish the demand in favour of joint electorates. The difference in their approach was due to the fact that Gandhi believed that ‘untouchability’ was a mere aberration of the caste system that could be reformed, while Ambedkar believed that ‘untouchability’ was inherent to the caste system and would go away only with the ‘annihilation of caste’. In a statement to the Harijan Ambedkar said, ‘(T)he outcaste is a bye-product of the caste system. There will be outcastes as long as

and the General Assembly on 22 May 1992. For the debate regarding admissibility of the petition of Bosnia and Herzegovina and preliminary objections to non-considerations of a similar request from Yugoslavia for the protection of the Serbian minority in Sarajevo (Bosnia), see Judgement of 11 July 1996, pp. 104-108.

69 Ibid., p. 45.
71 Oliver Mendelsohn and Marika Vicziany, “The Untouchables” in Oliver Mendelsohn and Upendra Baxi, eds. The Rights of Subordinate Peoples, Delhi: Oxford University Press, 1994, pp. 64-117. The 1931 census was the only census that enumerated the Dalits as a distinct group. Since then, the decenial Censuses of India have not enumerated castes or sub-castes within Hinduism.
72 Ambedkar made a strong case of this at the Round Table Conferences.
there are castes. Nothing can emancipate the outcaste except the destruction of the caste system. Nothing can help to save Hindus and ensure their survival in the coming struggle except the purging of the Hindu Faith of this invidious and vicious dogma.\textsuperscript{73} In response, Gandhi said that '(I)t is wrong to destroy caste because of the outcaste, as it would be to destroy a body because of an ugly growth.'\textsuperscript{74} Since Gandhi's attempt was to keep the 'harijans' in the Hindu fold, he stressed on the importance of temple-entry for them and went so far as to term the movement against 'untouchability' as a religious movement.\textsuperscript{75} So while Ambedkar was in favour of the educational and economic upliftment of the untouchables, Gandhi felt that this upliftment would be incomplete without the throwing open of temples to the 'harijans'.\textsuperscript{76}

The debate on Constitutional development of India had regained momentum. These debates reflected a concern for minority identity more than anything else did. Responding to the White Paper of 1933, which formed the basis of the Government of India Act of 1935, the Indian National Congress demanded the creation of a Constituent Assembly (CA) that would represent 'the will of the people of India.' This Constituent Assembly was to be elected based on adult franchise and provided, 'if necessary, (for) the important minorities to have their representatives elected exclusively by the electors belonging to such minorities.'\textsuperscript{77} At subsequent sessions of conferences and in legislative bodies the Congress reiterated the requirement of a constitution framed without the interference of a foreign authority. Despite being a 'one party assembly' the CA was representative of India's diversity and was democratic in its internal functioning.\textsuperscript{78} Gandhi and other leaders considered a representative constituent assembly as the best way to approach the communal problem.\textsuperscript{79} However, leaders of the two prominent and politicized groups, Ambedkar who was the President of the Scheduled Caste

\textsuperscript{74} Ibid., p. 3, Col. 2.
\textsuperscript{75} M.K.Gandhi, "Quantity vs. Quality", \textit{Harijan} (Ahmedabad), 19 August 1933.
\textsuperscript{76} M.K.Gandhi, "The Temple Entry Bill", \textit{Harijan} (Ahmedabad), 2 September 1933.
\textsuperscript{78} Ibid., p. 2.
\textsuperscript{79} Ibid. "The Only Way", cited from \textit{Harijan}, 12 November 1939, p. 3.
Federation and Mohammad Ali Jinnah, who led the Muslim League opposed the creation of the Constituent Assembly. Ambedkar considered the provisions of the 1935 Act as sufficient.\textsuperscript{80}

In the 1930s, the communal parties merely asserted claims of protection of culture, language and religion and representation. 'They tried to strengthen ties within their own fragmented communities by such tactics as \textit{tabligh} (propaganda), \textit{tanzim} (organization), and spreading Urdu among Muslims and \textit{Shuddhi} (purification), \textit{sangathan} (reabsorption) and exclusive use of Hindi among North Indian Hindus.\textsuperscript{81}

Jinnah in the meanwhile had proposed the ‘two-nation theory’ at the Lahore Session of the Muslim League in March 1940. He argued that ‘...Hinduism and Islam represent two distinct and separate civilizations, and moreover, are as distinct from one another in origin, tradition, and manner of life as are the nations of Europe. They are, in fact, two different nations.’ \textsuperscript{82} He argued that ever since the Morley-Minto reforms, most people had assumed that Muslims were a minority and as such needed safeguards for the protection of their rights; but when we used this term we meant it in an entirely different sense. ‘What we meant was that the Muslims were political entity and that must be preserved at all costs....(T) hey (Hindus) thought that the Muslims were a mere minority who should be governed and ruled by the Hindu majority. The Muslims were constantly bamboozled in a false sense of security, and the term minority came to be regarded as historical, constitutional and legal. The Muslims were by no means like the minorities in European countries.' \textsuperscript{83} And on this basis he argued that the ‘... (M)ussalmans are a nation according to any definition of a nation, and they must have their homelands, their territory and their state.' \textsuperscript{84}

\textsuperscript{80} Ibid., p. 3.
\textsuperscript{83} Ibid. “Speech delivered at the Muslim University Union, Aligarh, 6 March 1940”, pp. 137-143, p. 137.
\textsuperscript{84} Ibid. “Presidential Address at the All-India Muslim League, Lahore Session, March 1940”, pp. 143-63 at p. 162.
Several Muslims who were part of the Congress condemned the Lahore Resolution. For instance, Abul Kalam Azad said that the resolution was:

(H)armful not only for India as a whole but for the Muslims in particular (sic). I must confess that the very term Pakistan goes against my grain. It suggests that some portions of the world are pure while others are impure. Such a division of territories on a pure and impure (sic) is unislamic and a repudiation of the very spirit of Islam. 85

Azad also denied that the Muslims were a minority of the ground that though they were numerically smaller, they were not so small as to be incapable of protecting their interests against the larger majority and so they should not feel oppressed on this count. Moreover, he reiterated the Congress belief that the constitution of India would consist of full guarantee of the rights and interests of minorities and that the decision regarding these interests and safeguards shall be taken by the minorities themselves and not by a majority vote. 86

The British Government then dispatched the Cabinet Mission to help the Viceroy in setting up the CA and to mediate between the Congress and the Muslim League so that the two communities of India could be constitutionally united. 87

However in 1945, Jinnah refused to participate in the Constituent Assembly of the Congress and demanded a separate CA for Pakistan. The Congress however was willing to consider the maximum possible autonomy for groups short of independence. Initially the Muslim League contributed to the membership of the CA, but later withdrew from it. Thus when the CA met on 9 December 1946, nearly 100 million Muslims were not represented in it. Several Sikh members had also for a while boycotted the Assembly but rejoined it in August 1949 expressing their faith in the Congress. 88 Representatives were drawn from the Provincial Assemblies according to the Cabinet Mission plan and minorities from each

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87 The other communities such as Sikhs, Christians, and Scheduled Castes had not demanded a separate state, rather only some special privileges, each of a different nature. It may also be argued the Muslim demand overshadowed the concerns of other communities and this was reflected in the dilution of their demands as reflected in the Constitution.
88 Ibid., p. 7.
province were allowed proportional representation in the provincial committees. The Cabinet Mission had made provisions for representation of Muslims and Sikhs only; the Congress then included other communities such as the Scheduled Castes and Tribes, Parsis, Anglo-Indians, Indian Christians and women into the General category along with the Hindus. So minority representation in the Assembly was as follows: Nepalis, one (elected from Bengal), Sikhs, five; Parsis, three; Christians, seven; Anglo-Indians, three; Backward Tribes, five; Muslims, thirty-one; and Scheduled Castes, thirty-three. The Hindu Mahasabha was represented by conservatives within the Congress like P.D Tandon, M.R. Jayakar, S.P. Mukherjee, and N.B Khare, all on Congress tickets but formerly presidents of the Mahasabha. Ambedkar joined the Assembly in order to secure the interests of the Scheduled Castes.

The Advisory Committee of the CA consisted of the two sub-committees—one on fundamental rights and the other on minorities. Following the liberal tradition, the following rights were constituted as fundamental rights: right to Equality, Right of Freedom, the Right against Exploitation, Right to Freedom of Religion, Cultural and Educational Rights, the Right to Property (later abrogated) and the Right to Constitutional Remedies. While the leaders of the independence movement had not made any distinction between negative and positive rights, it was the Assembly that made this distinction between Fundamental Rights and Directive Principles of State Policy. The fundamental rights first and foremost guaranteed the civil rights that had been on the Congress agenda for over sixty years since its formation. The 1920s and 1930s saw a change in the discourse in that it moved from mere liberties to ‘Swaraj’— among the many influences on the discourse being Wilson’s doctrine of self-determination. Drawing further inspiration from the Commonwealth of India Bill of Annie Besant (1925) and in response to the creation of the Simon Commission for drafting a Constitution for

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89 Ibid., pp. 11-12.
91 Ibid. Also see note 54, p. 15.
92 Ibid., pp. 19-20.
93 Ibid., p. 51.
94 Ibid., p. 52.
95 Ibid., p. 53.
India, the Congress decided to prepare a Swaraj Constitution for India.\textsuperscript{96} So the Congress constituted a Committee headed by Motilal Nehru which dealt drawing extensively on Annie Besant's Commonwealth of India Bill and clearly reminiscent of the American and post-war European constitutions.\textsuperscript{97} Most of them found their way into the Indian Constitution, as did the rights of minorities; rights such as that to freedom of conscience, to the free profession and practice of religion and special provisions for the elementary education of members of minorities and rights relating to languages. These were mainly negative rights. Certain positive rights were added at the Karachi Session of the Congress in 1931, the focus of these was the underprivileged sections of society,\textsuperscript{98} and herein, no distinction was made between various communities. Similar demands for rights were made at the Round Table Conferences. The Sapru Report of 1945 was aimed at placating minority fears. It called for equality between different communities in the enjoyment of the fundamental rights. It was in favour of laying down standards of conduct for the governments, legislatures and courts in this regard. The report made a distinction between justiciable and non-justiciable rights of minorities. In due course, the negative Fundamental Rights were made justiciable, while the positive Directive Principles of State Policy were made non-justiciable, and this had interesting implications for different communities/groups.

CA members were sensitive to the international interest in the idea of human rights in the 1940s. Whereas 'the inclusion of negative rights was primarily a product of the national revolution and of the minorities situation, the impetus for the inclusion of the state's positive obligations came largely from the social revolution and reflected the social consciousness that had increasingly characterized the twentieth century both in India and abroad.'\textsuperscript{99}

The debate on minority rights centered around two issues, one regarding the right of religious and linguistic minorities to their culture and thereby to establishing and manage their own educational and cultural institutions.\textsuperscript{100} These rights were granted to minorities, though the only right given to them exclusively

\begin{itemize}
\item \textsuperscript{96} Ibid. Austin argues that there was already a feeling among Indians that India was a federation of minorities'. He however does not cite the source of this argument, p. 54.
\item \textsuperscript{97} Ibid., p. 55.
\item \textsuperscript{98} Ibid., p. 56.
\item \textsuperscript{99} Ibid., p. 59.
\item \textsuperscript{100} Ibid., p. 66.
\end{itemize}
was the right to establish educational institutions. The rest of the rights were granted to all cultural (religious) groups. These may be regarded as individualist rights that may be exercised in collectivity, along the lines of Article 27 of the International Covenant on Civil and Political Rights (ICCPR) which was formulated as late as 1966. So, these may be considered as rights given to preserve the identity of groups. Moreover, many of them are in the nature of rights against discrimination, in the manner in which the UDHR was framed. Thus, Article 16(2) prohibits discrimination in public employment on grounds of race, religion or caste. Article 25 of the Indian Constitution gives to all individuals the right to practice and profess religion subject to public order and morality. Article 29(1) gives to all citizens the right to conserve their distinct language, script or culture. Article 350 A directs the state to provide facilities for primary education in their mother tongue to children belonging to linguistic minorities. Article 29(2) prohibits discrimination in admission to state educational institutions on grounds of religion, race, caste, language or any of them. Article 30(1) is the right to religious and linguistic minorities to establish and administer educational institutions. Article 30(2) prohibits discrimination in the grant of aid to minority educational institutions.\textsuperscript{101}

The positive right of representation in legislatures and public services and separate electorates however became a very contentious issue, especially since the partition of the country. In discussing these rights, the Muslims and Sikhs made a strong case for special representation rights. However, the communities chose not to demand such rights and respecting the general mood in favour of the unity of the country, these two communities also gave up their demand (not very willingly).\textsuperscript{102} The rights to proportional representation in legislatures and educational institutions and the right to reserved constituencies were granted to the Scheduled Castes and Tribes, since Gandhi had endorsed them.\textsuperscript{103} Vide Article 15(4), special measures for the advancement of Scheduled Castes and Tribes are exempt from the general ban against discrimination of grounds of race, caste etc. A


\textsuperscript{102} See Austin, op. cit. For details of the debate see pp.146-56. For a detailed discussion on the demands of each group see the chapter on Dalits and Religious minorities.

\textsuperscript{103} Ibid., p. 154.
similar clause, Article 16(4), makes an exception in case of public employment, consistently, however, with the maintenance of efficiency of administration (Article 335). Article 338 provided for the appointment of a National Commission for Scheduled Castes and Tribes by the President. There is also a provision for financial aid from the Union to the States to implement welfare schemes for these groups (Article 275(1)). There are special provisions for protection of tribal/scheduled areas inhabited by the Tribes. Special representation in legislatures is guaranteed by Articles 330, 332 and 334.104

During the drafting of the constitution, the issue of language was more an issue of selecting an official language among the many languages prevalent in the country. The issue was resolved by making Hindi the Official Language (in Devanagari script), since it was spoken by 46 per cent of the 91 per cent people speaking 14 other languages, to be complemented by English for a period of 15 years. The other languages were recognized as official languages of different states (Article 345) in the Eighth Schedule of the Constitution.105

Thus a ‘subtle but basic distinction was made between the cultural rights of religious minorities and political group rights of communities which were socially discriminated through forced segregation or physical isolation.’106 Cultural community rights, including the right to personal laws were granted to all communities and not just the minorities and therefore came to be valued and defended by all communities.107 ‘Being premised on the notion of equality of communities, cultural rights endowed by the Constitution underlined principle of pluralism and discouraged the politics of majoritarianism versus minoritarianism.’108

Thus, to summarize, the chief characteristics of the discourse on minorities from 1925-50, there is a clear link between political thought in the west and international law, both moving away from protection of groups and towards protection of individuals instead. They were clearly influenced by the context in

105 Ibid., pp. 376-377.
107 Ibid., p. 4.
108 Ibid. The authors conclude that this idea was equality was replaced by the majority-minority discourse due to the nature of politics in subsequent years.
which they were being formulated. Irredentism of groups and their misuse by neighbouring nations were the main reasons for this. Coincidentally, some of the same concerns were voiced in the CA debates after the partition of India along religious lines. As a result, most fundamental rights have been granted to individuals. However, since the CA was representative of most minorities in India, there were some collective rights, such as that to culture, that were recognized as fundamental rights of all groups, majority and minority. Right to educational institutions was the only exclusive right granted to both the religious and linguistic minorities.


Continuing the trend of defending individual rights was the leading work on contemporary liberal theory, in which John Rawls established the primacy of the individual as the bearer of rights. According to this theory, the ‘group’ or ‘community’ is merely an agglomeration of individuals and has no moral standing of its own.\(^{109}\) The liberal view of the ‘unencumbered self’ contributes to the abstract egalitarian theory of equality among individuals, without any recognition to the group on the basis of a commitment of procedural justice.\(^{110}\) Another critique of group rights came from philosophers like Michael Oakeshott and Frederick von Hayek who criticized the idea of modern welfare state that according to them succumbed to the pressures of various groups that sought to use the state to further their ends. They criticized the modern affiliation to groups as reflecting a pre-modern/tribal sensibility.\(^{111}\)

As stated earlier, the American Declaration of Independence and the French Declarations of the Rights of Man and Citizen found their way into the International Bill of Rights proclaimed by the United Nations. David P. Forsythe also makes this connection and proceeds to argue that the post-1945 attempt to create a universal human rights regime is an ‘attempt to liberalize international relations...to make international relations conform to the liberal prescription of a

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\(^{111}\) See chapters by them in Julia Stapleton, *op.cit.*
good society'. So to the extent that liberal political ideology, and more specifically, in the particular manner in which the liberal societies of America and France were ordered, international protection of human rights was liberal-individualist. It is also asserted that a coalition of liberal-democratic countries, and the NGOs based in them have been the driving force behind the projection of these human rights in world affairs since 1945. However, France and the United States, which have been important countries of this coalition were reluctant parties to the various international declarations and conventions in the area of human rights. It is also commonly argued that in the International Bill of Rights, the civil and political rights were a contribution of the ‘west’, while the socio-economic and cultural rights were contributed by the ‘east’ meaning the Communist bloc of countries, usually supported by states comprising the Third World. However, the language of Covenant on Economic, Social and Cultural Rights was ‘western’ since the covenant was drafted by Latin American Social Democrats in association with Sir John Humphrey, a Canadian social democrat and then an international civil servant with the UN. Vincent also argues that ‘the social and economic rights that are often associated with Marx’s criticism of bourgeois rights, and which countries with a Marxist-Leninist ideologies lay special claim to, are in some degree the product of nineteenth century thought of positive freedom’ associated with the French Revolution. It was these rights that the Eastern-bloc projected as group rights, but they were rights that would be exercised individually rather than collectively.

The period from 1950-75 is significant for the work of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities on

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113 R.J. Vincent, *Human Rights and International Relations*, Cambridge: Cambridge University Press, 1986. Vincent argues that the theory of natural rights that underpinned the French and American revolutions was individualist both in its assumption that individuals came before the communities in the imaginary history of the state of nature and the origin of civil-society, and in its assertion of the priority of the moral claim that individuals had over groups, p. 25.
114 Forsythe, op.cit., pp. 7-8.
115 Ibid. France actively supported repressive regimes in former African colonies up until 1990s. During the Algerian war of 1954-62, it operated a torture bureau as part of its military structure. The United States acted similarly in Central America.
116 Ibid. Forsythe argues that the Latin American political elite reflected Iberian rather than indigenous Indian values and hence should be considered western, p. 39.
117 Vincent, op.cit., p. 27.
the inclusion of Article 27 on rights of minorities in the ICCPR. Article 27 states that:

(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 other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language.

This goes a step beyond Article 18 of ICCPR, which confers the right to freedom of thought, conscience and religion. This provision is of immense importance since for long it was the only international provision that granted the minorities a right to preserving their distinct identity. It gives to minorities the right to enjoyment of culture, profession and practice of religion and the right to use their own language. From the debates during the framing of the Convention, it may be deduced that right to culture would include the right to set up minority educational institutions, use of minority languages in press, schools, media etc, modifications of family law, property law and criminal law to preserve customary social institutions and laws.

However, the scope of Article 27 is very limited. Firstly, it is applicable to countries that admit to having such minorities in their jurisdiction. It is said to reflect the view of countries of immigration (North American and Latin American countries) that the sense in which the term minority was used in the article was applicable only in the European and Asian contexts. It excluded groups such as new immigrants and indigenous people in erstwhile colonial powers as in Australia. Some of these problems arose because the term minority was not defined. Secondly, as defined by the Special Rapporteur of the Sub-Commission, Francisco Capotorti the term is applicable only to nationals:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members — being nationals of the State — possess ethnic, religious or linguistic characteristics.

118 For a history of the drafting of Article 27 see Patrick Thomberry, op.cit., pp. 149-53.
119 Patrick Thomberry, op. cit., p. 141.
120 Ibid. The elaboration of the religious right came much later in 1981 and will be the subject of discussion in the next section. Article 27 is not very clear on the development of a linguistic identity, in addition to the use of minority language, p. 200.
121 Ibid. For other restrictive interpretations of the applicability of the Article to groups, see pp. 156-158.
differing from those and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.122

This definition clearly excludes non-nationals from its purview. Thirdly, it is negatively phrased ('shall not be denied' rather than 'shall have') and this has been the subject of considerable debate. In this context, the drafting of the Covenant revealed that proposals that called for State action to support minorities were rejected. The only new duty imposed by Article 27 was that of tolerance of minorities.123 And finally, it leaves open the question of the subjects for protection in this matter, individuals or groups.124 The reason for doubt is also due to the observation while Article 18 has been designated as a non-derogable, the same has not been done with Article 27.125

The loyalty of minorities had been one of the major concerns of UN Sub-Commission debates on minorities. However, the representative of the Philippines made a convincing argument against the inclusion of the criterion of loyalty in defining a minority at the Third Committee of the General Assembly. He contended that loyalty was a 'political matter and a reference to it in a definition based upon ethnic, religious or linguistic traditions would, therefore, be out of place. A State is entitled to protect itself against overt acts of treason, sedition, or rebellion but those were acts that anyone could commit irrespective of membership in an ethnic, religious or linguistic group.'126

Article 1 of both the Covenants that make up the International Bill of Rights guarantee the right to self-determination to peoples. Although this is an explicit and probably the only positive recognition of a group right, its has severe limitations. The Charter of the United Nations laid down the realization of this group right as the principle purpose of the U.N. vides Article 1 (2). However, a study of the evolution of this right tells us that this right was only conferred on colonial peoples, clearly excluding dissenting minorities within the nation-states from its purview. The Declaration on the Granting of Independence to Colonial

123 Patrick Thornberry, op.cit., p. 179.
125 Patrick Thornberry, op. cit, p. 174.
126 Ibid., pp. 166-167. This was also the view of the League of Nations.
Countries and Peoples limits the mandate of the right to self-determination to those people in non-self governing territories or those not yet independent.\textsuperscript{127} Clause 6 of the Declaration made this right subservient to the territorial integrity of a country and clause 7 required external powers to observe 'non-interference' in the internal affairs of all states so as not to encourage irredentism.

As defined in Article 1 of the International Covenant on Economic, Social and Cultural Rights, the right is to enable a 'people' to freely determine their political status and pursue their economic, social and cultural development. Legal appraisals of the International Covenant on Civil and Political Rights based on the debates and discussion preceding its adoption state that the 'peoples' mentioned in Article 1 of this convention refer to:

1. Entire populations living in independent and sovereign states.
2. Entire populations of territories that have yet to attain independence.
3. Populations under foreign military occupation.\textsuperscript{128}

Even the right of internal self-determination was the right to be free from authoritarian regime and was not a right for the minorities. So it was argued that Article 27 of the Covenant, which provided a limited recognition to minority rights, might not be read cumulatively with Article 1 pertaining to self-determination.\textsuperscript{129}

The final development in this regard, though it was registered outside the human rights regime, was the Declaration on Friendly Relations among Nations (1970) that conferred the right of self-determination on racial or religious groups. They were also granted the right of secession if internal self-determination proved beyond their reach. However, for other groups defined in terms of national origin, culture or language, there were different considerations since it could mean a compromise on the territorial integrity of the state.\textsuperscript{130}

The International Court of Justice has had three opportunities of elaborating on the meaning of the right to self-determination, all three being in the context of

\textsuperscript{127} Adopted by General Assembly Resolution 1514 (XV) of 14 December 1960.
\textsuperscript{129} Ibid.
\textsuperscript{130} Ibid., p. 70.
colonial peoples. Two among them belong to the period under consideration while a third will be examined in the next section. In the Namibia Case the court was asked to give its advisory opinion regarding the legal consequences of the continued presence of South Africa in Namibia despite the General Assembly and Security Council resolutions declaring this control as illegal. The court ruled that this control was illegal since the principle of self-determination had become an ‘overarching principle of the international community’ since 1945.\textsuperscript{131} In addition, it legally endorsed the fact that between 1945-50, the principle had come to be applied not only to territories under the trusteeship system but also to non-self-governing territories.\textsuperscript{132} Thirdly, it took the view that in international law ‘peoples’ could become holders of rights and obligations. However, the court looked upon apartheid as a gross violation of individual human rights despite there being the possibility of it being considered a fit case for internal self-determination of a racial minority, a concept endorsed by the Declaration on Friendly Relations.\textsuperscript{133}

In the Western Sahara Case, the Court displayed ‘admirable anthropological sensitivity to the specific cultures of North African Nomadic societies’ and held that ‘ethnic people-defined by their sense of collective identity, mode of political self-regulation, and predictable territory of economic activity could, absent traditional indices of formal government, stable population, and demarcated territory, still claim sovereignty and assert self-determination.’\textsuperscript{134} As in the previous case, the court reasserted the rights of non-self-governing territories to self-determination. It further made a case for self-determination based on the ‘freely expressed wills of peoples’\textsuperscript{135} and that this was an issue of decolonization and therefore of self-determination.\textsuperscript{136} Also, the PCIJ supported idea, that protection of minorities as equals cannot be reduced to a formula of prohibition of discrimination and therefore justifying special measures for them, found its way into the dissenting opinion of Judge Tanaka in the Western Sahara Case in 1966.\textsuperscript{137}

\textsuperscript{131} Ibid., p. 72.
\textsuperscript{132} Ibid.
\textsuperscript{133} Ibid.
\textsuperscript{135} Antonio Cassese, op cit., pp. 88-89.
\textsuperscript{136} Ibid. Moreover, considering the existence of indigenous populations and their agreements with the colonial powers, it concluded that Western Sahara was not \textit{terra nullius}.
\textsuperscript{137} Patrick Thomberry, op. cit., pp. 314-318. In addition, Judge Tanaka also established non-discrimination as a rule of customary international law which could be applied retroactively,
The idea of internal self-determination has found favour with most western states. This creates the possibility of autonomy for minorities.\textsuperscript{138} But surprisingly, where the indigenous groups have asserted their right to self-determination, the UN has had trouble accommodating this broadened interpretation of the right to self-determination, a discussion which belongs to the next period of study.

Finally, a discussion of the right of minorities to non-discrimination and the anti-discrimination provisions adopted by various UN bodies is needed. Most of these have been in relation to racial discrimination. This is an issue that received attention not only from the human rights organs of the UN, but also other bodies notably the United Nations Educational Scientific and Cultural Organisation (UNESCO) and International Labour Organisation (ILO). The developing countries, supported by the USSR, were responsible for putting some concerns of a collective nature on the agenda of what is essentially an individualist human rights regime. Foremost among them was the collective right of colonial peoples to self-determination. Developing countries were concerned about the absence of racial equality and economic opportunity in the existing international order, and attempted to express their concerns through the elaboration of the concept of self-determination in these contexts.\textsuperscript{139} The tilt towards collective social and economic rights was spelt out in the Proclamation of Teheran (1968) and in the substantive list in Resolution 32/130 of the General Assembly in 1977. Priority was to be given 'to rights of peoples and persons affected by apartheid, racial discrimination, colonialism, foreign domination and aggression, and by the refusal to recognize fundamental rights of people to self-determination and of every nation to the exercise of full sovereignty over its wealth and natural resources.'\textsuperscript{140} Vincent however argues that even the right of self-determination can be traced back to the idea of (positive) individual freedom of the French revolution, although it became consolidated as a group right in the German thought of Hegel and concludes that the principle of self-determination was a western principle used by the new states

\textsuperscript{138} Patrick Thornberry op.cit., Ian Brownlie quoted in note 18. 'The recognition of group rights, more especially when this is related to territorial rights and regional autonomy, represents the practical and internal working out of the concept of self-determination. Such recognition is therefore the internal application of the concept of self-determination.' (p.218.)

\textsuperscript{139} Vincent, op.cit., pp. 52-53.

\textsuperscript{140} Ibid., pp. 81-82.
against its very authors. The international crusade against racial discrimination may be more convincingly attributed to the developing countries. While the UNESCO took a leading role in scientifically exploding the myth of the existences of races through several conferences held on the issue, the newly independent countries utilized the General Assembly as a forum for formulation of Conventions and Declarations relating to racism.

The first among them was ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation. By pronouncing that special measures designed to meet the particular requirements of persons who for reasons such as sex, age, disablement, family responsibilities or social or cultural status were generally recognized to require special protection or assistance should not be deemed discriminatory, sought to resolve the supposed contradiction between liberal equality and preferential treatment.

The UNESCO Convention against Discrimination in Education vide Article 2(b) allows for 'the establishment or maintenance, for religious or linguistic reasons, of separate educational institutions offering an education which is in keeping with the wishes of the pupils, parents... if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities.' The importance of the Convention is that it aims to protect one of the most important means of preserving the identity of minorities. It recognizes minorities as minorities rather than merely as groups. Moreover, it is more insistent on the theme of the group dimension of discrimination compared to some of the race

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141 Ibid., He concludes that '(I)n this respect, the common cosmopolitan culture has been received and then added from beneath, not imposed and entrenched from on top. It is possible to interpret the whole of international law of human rights as an example of the operation of this process of adaptation.'


144 Adopted by the General Conference of the International Labour Organization at its 42nd session on 25 June 1958. Entry into force: 15 June 1960. Thus as early as 1960 the relation between equality and special protection for certain groups was declared as mutually compatible.


146 Patrick Thornberry, op.cit., p. 287.
conventions adopted later. Article 2 of the Convention against Discrimination in Education specifically states that

(T)he establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil’s parents or legal guardians, if participation in such systems or attendance is at such institutions is optional and if the education provided confirms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level shall not amount to discrimination.147

The General Assembly adopted several declarations on racial discrimination, the first among them being the Declaration on Elimination of All Forms of Racial Discrimination.148 Article 2(1) of the Declaration enjoins upon the state, institutions, groups and individuals not to discriminate while Article 2(2) prohibits state support (including police action) to any group, institution or individual practicing discrimination. It forbids discrimination based on race, colour and ethnic origin but does not include the category of religion or language despite being so proclaimed by the commission on Human Rights as early as 1946. Article 2(3) in stipulating that special concrete measures should be undertaken in order to secure adequate development or protection of individuals belonging to certain racial groups provided such measures did not result in maintenance of unequal or separate rights for different racial groups perhaps aims at avoiding a situation like that in South Africa where white minority enjoyed considerable rights while the underprivileged majority did not.149 Moreover, it does not explicitly preserve the right to identity and results in a ‘very tentative endorsement of “special measures”.’150

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965) defined racial discrimination as meaning exclusion, restriction, or preference based on race, colour, descent or national or ethnic

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147 Ibid., pp. 288-89.
148 Adopted by General Assembly Resolution 1904 (XVIII) of 20 November 1963.
149 Patrick Thornberry, op.cit., p. 258.
150 Ibid., p. 259.
No reference was made to the discrimination faced by religious and linguistic minorities. The convention does not apply to aliens, but it does prohibit denial of nationality on the basis of race. Like in the previous Declaration, it endorses the view that special measures for minorities are needed for equality and may not be considered discriminatory (Article 1(4)). Article 2.1(e) encourages states to set up integrationist multiracial organizations and movements and promote other means of eliminating barriers between races. The Convention is less individualist than the Declaration preceding it. This is also reflected in the procedure for petitioning the CERD, in which groups are allowed to petition the Committee for violation of their rights (CCPR allows only individuals the right to petition). The denial of existence of particular groups identified in the convention has proved to be the greatest difficulty in the implementation of the measures envisaged by the Convention.

In addition to the dissenting opinion of Judge Tanaka, which made valuable contribution to the discourse of non-discrimination and special rights as customary international law cited above in the context of the right to self-determination, the advisory opinion of the ICJ on Namibia made another significant contribution to the discourse on anti-racism. According to the opinion, South Africa had violated the terms of its mandate over Namibia by pursuing policies of apartheid there and therefore its mandate should stand terminated as decided by the General Assembly Resolution 2145(XXI).

Shifting attention to India, the period immediately after independence in India witnessed the controversy over the Hindu Code Bill. This was the first issue of conflict among the Hindu organizations and the Government. The fact that the

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151 Ibid. Adopted on 21 December 1965, p. 263. Based on the debate on the meaning of nationality and national origin, Schwelb concluded that the 'three terms “descent”, “national origin” and “ethnic origin” among them cover distinctions both on the ground of present or previous “nationality” in the ethnographical sense and on the ground of previous nationality in the politico-legal sense of citizenship.'

152 Ibid. For an interesting debate on whether the Jews were a racial group or a religious group and whether Anti-Semitism, which was a form of Nazism should be regarded as racial discrimination along the lines of Zionism, see pp. 264-265.

153 Ibid. According to McKean, this is the method by which the twin concepts of discrimination and minority protection can be fused into the principle of equality (Italics in original.) p. 266.

154 This reflects the overwhelming concern of human rights with segregation and apartheid. It overlooks the desire of certain groups to maintain some degree of separation to protect and pressure their culture and raiser feels of assimilation in their minds.

155 For a brief but illustrative discussion of this issue, see Patrick Thornberry, op.cit., pp. 272-280.

156 Ibid. For the status of non-discrimination as jus cogens in international law, pp. 319-328
Parliament had reformed some aspects of Hindu Civil Code while not interfering in the rights of the Muslim Personal Law or the personal laws of other religious groups, was cited by these organizations as an example of the pseudo-secularism of the Indian state. A second issue that involved the state in matters of group rights was the politicization of linguistic identities. Responding to the demands made by Pattabhi Sitaramiah, Nehru reluctantly gave in to the idea of linguistic states, which were formalized by the States Reorganization Commission in 1956. And yet the demands of the Sikhs for a Punjabi-suba were not endorsed. There was a long agitation until 1966 when the Punjabi-Suba was created. This period was also witness to Tamil linguistic nationalism which demanded greater power vis-à-vis the centre and/or secession. Tamil nationalists attacked the Congress-Brahmin alliance in the period immediately following independence. The Brahmins who were antagonistic to the imposition of Hindi as the national language, became leaders of the Dravidian movement and found the support of the numerous urban backward castes. They first asked for internal self-determination in the form of more powers to the State and also demanded the creation of Dravidistan. The linguistic reorganization of states was able to counter the demand for a separate state. Eventually they formed the Dravid Munnetra Kazhagam (DMK), a party of the intermediate castes which, since 1967, has deprived the Congress from ruling the state of Tamil Nadu.

The Congress was the ruling national party during this entire period (1950-1975). As early as 1951, the party adopted a resolution that:

(1) It is the particular duty of the state to protect these rights (profess and practice religion) of all minority communities in the country and to give them full opportunities for development....(T)he Congress will make every effort to ensure proper representation for them in the legislatures and other public bodies.

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157 Sheth and Mahajan, op.cit., pp. 4-5.
159 Ibid., p.19.
In trying to correct the legacy of the partition, the Congress, led by Jawaharlal Nehru, came out strongly against communal forces in the country. The All-India Congress Committee (AICC) said that it would combat communal and separatist tendencies from any section of the community including Hindus, Muslims, Sikhs or any other as well as the political use of caste, i.e., casteism. The AICC resolution of 1964 spelt out clearly the concerns of the Congress regarding communalism, casteism, provincialism and linguism that hampered national integration and reiterated its ‘firm resolve to maintain and consolidate national integration based on secularism as a necessary condition for the country’s march towards democratic socialism.’ The growing instances of communal violence remained a constant source of consternation for the Congress. However, at the same time the Congress opposed the right-wing insinuations against Muslims and declared that it rejected the ‘reactionary theory of Indianisation of Indian Muslims and considers the call to them to prove their loyalty to India as an affront to crores of Indian citizens and challenge to the very basis of (our) secular constitution tendencies of the discrimination and pleadings for inequality of human beings on the basis of birth, religion, caste, colour or creed should be ruthlessly dealt with.’ It expressed grave concern regarding the functioning of paramilitary organization such as the RSS and the Jamaat-e-Islami. This was the first time since independence that it overtly named these organizations in its resolution.

It is also interesting to note that until 1967, various Congress resolutions relating to caste considered the issue of casteism as a disruptive force preventing national integration. At its 1956 Session in Bombay, it briefly expressed a concern regarding the prevalence of ‘untouchability’ and the need for enacting suitable legislation to abolish the caste system. Since then, it was only the 1967 Election Manifesto that made a special reference to the well-being of Scheduled Castes and Scheduled Tribes and other economically under-privileged groups and areas which should therefore receive special focus in the Fourth Five-year plan.

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166 Ibid. Extract from Congress Election Manifesto, 1967, pp. 255
first time, the Election Manifesto of the Congress included Scheduled Castes /Tribes and Backward Classes under the category of ‘minority’.\textsuperscript{167}

In furtherance of the constitutional provision under Article 338 (1), the Office of the Special Officer, Commissioner for Scheduled Castes and Tribes came into being in 1950. The Protection of Civil Rights Act was enacted in 1955 with the sole purpose of prescribing punishment for the preaching or practice of ‘untouchability’ that had been made punishable by Article 17 of the Indian Constitution. Meanwhile, in protest against the rigidity of the Hindu religion in this matter, Ambedkar and about 300,000 of his followers converted to Buddhism. Under the Office of the Commissioner, seventeen regional field offices had been set up to monitor the working of the constitutional safeguards by 1965. They were all abolished and regrouped into five zonal offices of Backward Classes Welfare between 1967-1978.\textsuperscript{168} The constitutional provisions were enforced by the specific legislation in the form of Acts. First among them was the Untouchability Offences Act (1955), which was amended and renamed as the Protection of Civil Rights Act (PCR Act, 1976). This Act made the practice of untouchability an offence under the Indian Penal Code. However, the mandate of the Act was very limited since actions recognized as a violation of the Act were limited to prohibiting entry in public places and derogatory name-calling. In order to assess the impact of the Act after a decade of its enactment, the Elaya Perumal Committee was set up in 1965. Its report submitted in 1969 was a dismal reminder of the ineffective implementation of legislation in India. The Committee reported, among its findings, that copies of the 1955 Act were not available in many district offices. It was found that in the Kurha village in Maharashtra, which had won a commendation from the government for successfully eradicating ‘untouchability’, the Scheduled Castes were not served by barbers and washermen, and they were not allowed to make use of the village cremation ground. In yet another village, Pagandai in Tamil Nadu, members of the community had to remove their footwear

\textsuperscript{167} Ibid. Extract from Congress Election Manifesto, 1971, pp. 265-66. In the CA, Ambedkar had referred to them as 'minorities' while submitting his proposals for special rights of these communities.

\textsuperscript{168} This brief history is from the National Commission for Scheduled Castes and Scheduled Tribes, \textit{A Handbook}, 1997, pp. 1-2.
while passing through street inhabited by caste Hindus.\(^{169}\) In 1973, Protection of Civil Rights Cell was established to ensure that cases were registered and complaints heard. However, this did not increase the rate of conviction.\(^ {170}\) The two main weaknesses of the Act were that it was difficult to prove that a person had been excluded, say from entering a temple, solely on grounds of untouchability and that the law enabled parties to compound cases with the permission of the court.\(^ {171}\)

The two main initiatives of the Government for improving the situation of the Scheduled Castes since independence had been the proportional reservations of seats in public services and in state educational institutions and adoption of poverty alleviation programmes. For two decades after independence, the seats reserved for the community in the public service had not been totally filled. The argument of the Government was that there was a shortage in the availability of qualified candidates to fill these positions. Since 1971, most of these positions at all levels, except the Class I category of the bureaucracy, have been filled.\(^ {172}\) Government assistance for education has been too little and flawed, and the representation of the community in institutions of higher education is merely 7 per cent.\(^ {173}\)

In contrast to their low-key political mobilization during this period, there was a vigorous socio-cultural mobilization in the form of the Dalit Panther movement (1972) that was born in the state of Maharashtra among the young, educated poets and writers of Dalits.\(^ {174}\) The Panther movement was characterized by opposition to 'brahminism', 'targeting of the mythical Brahman law-giver Manu as the source of oppression, identification of such submerged figures as Shambuk, Ekalavya, and Ravana (the non-aryans, Dalits, tribals, demons of

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\(^{173}\) Ibid., p.142.

epics...). A revival of Dalit literature and theatre was also witnessed in the state of Karnataka under the aegis of Dalit Sangharsh Samiti.

Thus, summarizing the salient features of the discourse on minority rights in this period, we see that western theory and international law lean toward individualism, the former probably influenced by the latter, as exemplified in the individualistic protection of identity by Article 27. In the Indian scenario, a greater concern was shown for the Scheduled Castes and many statutory provisions were made to protect their constitutional rights. In sharp contrast, none were made for the religious minorities. Continuing the legacy of the colonial era, the problem of communal riots was considered a problem of law and order and was handled as such. The issue of rights of linguistic minorities was partially resolved with the linguistic reorganization of states but created new minorities within them. Yet, when compared to international law, rights of religious minorities in India were better recognized. International law was not even close to discussing the kind of problems faced by the groups in India. The judiciary was faced with cases of balancing the right to equality with the special rights of certain communities, mirroring the primary theoretical and legal argument against group rights, despite the ILO Convention 111 regarding Discrimination in Education and Employment justifying such special measures as not amounting to discrimination.

**Group Rights in the Global World, 1975-2000**

Critics of contemporary liberals may be credited with the revival of interest in rights of ‘disadvantaged’ as opposed to ‘dissident’ minorities in the post-1975 era. Notable among them are works of Vernon van Dyke who criticized Rawls’s *A Theory of Justice* as being a ‘travesty of reality’ since it assumed a homogenous society. Van Dyke argues that collectivities like states and peoples have a moral worth and therefore have rights to self-determination (autonomy), reasonable representation, preservation of their identity (minority languages) and affirmative action. Iris Marion Young makes an argument against the kind of universal

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175 Ibid. These were to become the vocabulary of the women’s movement and for most sections of the environmental, peasant and tribal movements in India, p. 58.
176 Ibid.
177 Julia Stapleton, op.cit, p. xxx.
citizenship offered by most states and makes her case for 'differentiated citizenship' for marginalized groups such as the disabled, women, homosexuals, old people and immigrants which would entail special rights for these groups. She advocates self-identification as the criterion for determining the identities of members of the group and recommends veto powers to groups on matters that affect them directly.179

Another prominent argument on the liberal defense of minority rights may be seen in the writings of Will Kymlicka.180 Kymlicka makes a distinction between multination states and polyethnic states and says that the demands of national and ethnic groups against the state are quite distinct.181 Writing in the American context, he has argued that threatened by the movement for desegregation in America, which was seen as reaching new heights in the judgement of Brown vs. Board of Education, and the ethnic revival among immigrant groups in the US, turned the official discourse against the rights of national minorities like the American Indians within the United States and in international law.182 Chandran Kukathas however questions the moral worth of a collectivity and argues that 'collectivities matter only because they are essential for the well-being of the individual.'183 He argues that '(f)rom a liberal point of view, the divided nature of cultural communities strengthens the case for not thinking of cultural rights.'184 Unlike Kymlicka who bases his argument on the liberal values of choice and autonomy, Kukathas makes his case on the liberal right to freedom of association and therefore gives importance to individual’s right to exit her community.

The communitarians have based their case for rights of collectivities based on the substantive notion of good-life possessed by a community thereby making

179 Ibid., p. xxxi
180 Will Kymlicka, Liberalism, Community and Culture, Oxford: Clarendon Press, 1989. Kymlicka reinstates culture as a primary good and as basic to the identity of the individual in order to defend the cultural rights of vulnerable groups. He presents a re-reading of prominent liberal thinkers like J.S. Mill, T.H. Green, L.T. Hobhouse and Dewey as recognizing the importance of the community. Even John Rawls revised his theory of justice in Political Liberalism (1993) to give culture an important place in it. For a brief review of another prominent liberal multiculturalist, Joseph Raz, see Bhikhu Parekh, Rethinking Multiculturalism, London: Macmillan, 2000, pp. 90-99.
181 Elsewhere he argues that national minorities should be granted more rights than ethnic minorities.
182 Will Kymlicka, "Liberalism and the Politicization of Ethnicity", in ibid., pp. 233-257 at p. 244.
184 Ibid., p. 271.
the community valuable. Michael Walzer makes a case for rights of voluntary as well as ascriptive groups that reflect the pluralism of the civil-society. He advocates a 'critical associationalism' that would overcome the 'singularity' of the notions of good-life in the republican, socialist, capitalist and nationalist versions of good-life. These he elaborates as being realized by decentralizing the state, socializing the economy with communal and private agents and pluralizing and domesticating nationalism so as to sustain historical identities (mainly but not only religious).

International law in this period was increasingly concerned with the issues brought up by the proliferated Third World. The UNESCO Declaration on Race and Racial Prejudice recognizes the importance of the group by stating that all peoples and all human groups, whatever their composition or ethnic origin, contribute according to their own genius to the progress of civilizations and cultures, which in their plurality, and as a result of their inter-penetration, constitute the common heritage of mankind. According to Thornberry, '(T)his represents a vigorous affirmation of the value of diversity in the progress of humanity and the importance of conserving as much as possible of this diversity as the inheritance of human beings. The reference to the dynamics of 'interpenetration' also reflects the assumption that the process of conservation is not a process of attempted cultural ossification, nor a futile exercise in archaism.' Article 1(2) recognizes the value of diversity of groups and outlaws apartheid and racism. Article 1(3) is about internal liberalism and grants to individuals the right to differ from his/her group. This right to be different has as its corollary 'the right to maintain cultural identity' and so in some ways resonated the spirit of Article 27 of ICCPR, though the former is universalist in that it applies to all groups and the latter only to minorities. Article 4 makes apartheid a crime against humanity, like genocide. Article 5(1) provides a multicultural justification

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185 Michael Walzer, "The Civil Society Argument", in ibid., pp. 299-319 at p. 308.
187 Adopted by the General Conference of the UNESCO at its 20th session, 27 November 1978.
188 Patrick Thornberry, op.cit., p. 292.
189 Ibid. p. 293.
for preserving the culture of a group; it states that culture is essential to the identity of the group. Only groups are holders of rights according to this Article. This, for Thornberry, 'represents the highest development in the Declaration, and among contemporary legal instruments, of the notion of group rights.'\textsuperscript{190} Article 6(1) confers a legal status on the group. Finally, Article 9(3) recognizes the right of migrant workers to their culture and values as well as the right of their children to be taught in their mother tongue.

Led by the developing world, the General Assembly Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief recognized that disregard and infringement of the right to freedom of thought, conscience or belief had brought wars and great suffering to mankind, especially where they had served as a means of foreign interference in the internal affairs of other states and that religion or belief was one of the fundamental elements in a person's conception of the good life.\textsuperscript{191} It conferred on individuals the right to worship and maintain places of worship; to establish and maintain charitable institutions; to write, issue and disseminate relevant publications in these areas; to teach a religion in suitable places; to receive voluntary financial aid; to train, appoint, elect, designate leaders; to observe days of rest and celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief; to establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels. It is a valuable right in case of minorities that are not territorially confined. When the draft of this declaration was presented to the General Assembly in 1967, the main concern of states was the work of missionaries and proselytizing, pilgrimage through their territories and provision of alternate religious education. The Declaration subordinated religious freedom and non-discrimination to world peace, social justice and friendship and in some cases public morality.\textsuperscript{192}

The first exclusive declaration on the minorities was proclaimed in 1992 as the Rights of Persons belonging to National or Ethnic, Religious and Linguistic

\textsuperscript{190} Ibid. p. 295.
\textsuperscript{191} Adopted by General Assembly Resolution 36/55 of 25 November 1981.
\textsuperscript{192} Patrick Thornberry, op.cit., p. 324. No such restrictions apply in the international proscription of racial discrimination.
Minorities.\textsuperscript{193} The preamble of this declaration acknowledges being inspired by Article 27 of the ICCPR. The reasons provided for protection of the rights of these minorities is that of political expediency for preserving the political and social stability of states. This is a weak philosophical defense of minority rights since it has no moral basis.\textsuperscript{194} Moreover, unlike the ills of racial discrimination and prejudice or the violation of the rights of child or the curtailment of the right to self-determination which are projected as impinging on international peace and stability, minority rights are to be secured only in the interest of the stability of the state. Article 1(1) enjoins the state to protect different kinds of minority identities. Similar to the restrictions on aboriginal groups, Article 4(2) prohibits such specific practices that violate national laws or are contrary to international standards. Article 8(3) clarifies that special rights of minorities may not prima facie be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights. In a 1994 general comment, the Human Rights Committee held the view that recognition of Article 27 entailed on the part of the State Party \textquoteleft ...an obligation to ensure that the existence and the exercise of this right are protected against denial or violation. Positive measures of protection are, therefore, required not only against acts of the State Party itself, whether through its legislative, judicial or administrative authorities, but also against acts of other persons within the State party.\textsuperscript{195}

The ICJ in the Frontier Dispute Case held that the principle of \textit{uti posseditis}, i.e., respect for the boundaries of the colonial countries once they have attained independence did not contradict the right of self-determination. Considering the nature of issues confronting states and the minorities within them, it has been argued that the notion of self-determination as it has been endorsed by the UN needs to be expanded and its reluctance in recognizing movements for self-

\textsuperscript{193} Adopted by General Assembly Resolution 47/135 of 18 December 1992.

\textsuperscript{194} Concerns of real-politik and stability were the bases on which consociationalists advocated minority rights. Kymlicka (1989) considers them as the weakest foundations for a theory of minority rights. (p.215.)

determination should be changed. The moral argument that may sustain such a
move is the democratic right of autonomy. 196

Under the aegis of the Commission on Human Rights, declarations and
conventions addressing the concerns of other groups were also adopted.
Significant among them are those relating to women and the rights of children,
although these are non-cultural universal rights. Also, re-inventing the 1957
Convention, the 1989 ILO Convention (No.169) was concerned with the
conditions of employment of indigenous and tribal people. 197 This convention was
adopted with the express purpose of removing the assimilationist orientation of the
1957 convention. The only restriction it places on the indigenous people is on such
creations, institutions and punitive measures incompatible with fundamental rights
defined by the national legal system and with internationally recognized human
rights.

The structure of the decision-making apparatus of the UN has meant that
non-state actors could not contribute to the drafting of these individualist
declarations and conventions. And to the extent that they did, they have taken their
inspiration from the already endorsed international declarations and so the
principles that they seek to uphold are predominantly those ‘associated with the
western list of civil and political rights.’ 198 There is now increasing recognition of
the role of some non-state actors, such as the Amnesty International, in framing
some of them. 199 But this focus is also limited to the role of certain NGOs.

The main struggle for the indigenous peoples in the human rights regime
has been the struggle for recognition of ‘indigeneity’, as distinct from recognition
as yet another minority/ethnic group. In the early years since the formation of the
UN, from 1945-58, the indigenous peoples were characterized as being the

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196 Daniel Philpott, “In defense of Self-Determination”, Ethics, 105, January 1995, pp. 352-385. Philpott says that the right to self-determination is collectively exercised individual right. (p. 369.)


199 Ibid., p. 98. Amnesty International along with the Dutch Government has played a crucial role in the framing of the Convention against Torture.
‘ignoble primitives’ who were backward, uncivilized and leading a miserable life. This is most evident in the studies conducted by the International Labour Organization, which therefore called for the assimilation of tribal people into modern ways of life. In the most recent literature since 1971-1993, the image is that of a noble primitive, defined by a spiritual relationship to their land and resources. They are portrayed as threatened by progress and more often the focus is on harmful effect of development on their way of life and culture. They are also constructed as having a ‘utopian aspiration to transcend and redeem progress and modernity’ which then denies them treatment as equals in the modern world. This ‘pragmatic’ approach towards indigenous peoples has resulted in flexible interpretations of the concept of self-determination and autonomy, and in controversies regarding definitions of the indigenous as populations or peoples. Integral to this pragmatic engagement with the indigenous peoples was a proliferation of studies concerning them, such as the 1971 study of Hernan Santa Cruz entitled *Study on the Problems of Discrimination Against Indigenous Peoples.*

The indigenous peoples have built their resistance in opposition to their ‘primitivization’ and ‘historical oppression’ and have demanded recognition of their right to ‘self-determination, full legal and political capacity and the general right to choose and determine their own future.’ A large part of their struggle has also been procedural aimed at securing greater participation in the international forums that deliberate on indigenous issues. Since the 1970s, indigenous movements have associated themselves with the ECOSOC in consultative status. A beginning in this regard was made in 1972 by the General Assembly of the National Indian Brotherhood and it was followed in 1973 by the International Indian Treaty Council. The World Council of Indigenous Peoples was a result of

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201 Recall the ILO Convention of 1958.

202 Chris Tennant, op.cit., p. 16.

203 Ibid., p. 17. He argues that “indigenous peoples are represented in the literature as having these characteristics because the characteristics are needed to support a polemic against modernity.” (p. 20.)

204 Ibid., pp. 22-23.

205 Ibid., pp. 24-32.

206 Ibid., pp. 37-38.
the coming together of such efforts at attaining accreditation with the UN apparatus. The creation of the UN Working Group on Indigenous Populations in 1981 was a result of the lobbying of these organizations, which were also active in the formulation of ILO Convention 169, revising the Draft Declaration on the Rights of Indigenous Peoples which was drawn up by the Sub-Commission on Prevention of Discrimination and Protection of Minorities before its final adoption.

United Nations' action in the area of anti-racism galvanized many movements of marginalized peoples to seek protection of their rights and international mobilization of the indigenous peoples was no exception to this phenomenon. When the United Nations declared the period from 1973-1982 as the first decade to combat racism and racial discrimination, it set up the Sub-Committee on Racism, Racial Discrimination, Apartheid and Decolonization to organize NGO conferences on racism. In 1977, the Sub-Committee organized a conference on Discrimination against Indigenous Populations in the Americas. The Conference was attended by indigenous organizations from fifteen countries. Another conference was organized in 1981 and the ECOSOC followed this up with the creation of the Working Group of Indigenous Populations. Over the years, indigenous organizations representing Aborigines of Australia, Maori of New Zealand, Sami of Finland, Norway and Sweden, Ainu of Japan, Tuareg of Niger and Evenkis of Transbaikalia (southeastern Siberia) have associated themselves with the Working Group. They present reports of the status of their peoples and their views on the developments relating to indigenous peoples in the UN.

Moving to the Indian scenario, by the 1970s, the leadership of Prime Minister Indira Gandhi had gradually weakened the democratic institutions of the country and India had entered the phase of populism. This was the period of the rise of two ethno-national movements, that of the Sikhs in Punjab and Muslims in

207 Ibid., pp. 45-47.
208 Ibid., pp. 51-57. The first session of the Working Group on Indigenous Populations in 1982 was attended by three indigenous NGOs with consultative status and by eleven other indigenous organizations; the eleventh session in 1993 was attended by nine indigenous NGOs in consultative status and 121 other indigenous organizations. (pp. 54-55.)
209 Details to substantiate this argument will be provided later.
210 Ronald Neizen, op cit., at p.127.
211 Ibid., p. 128.
212 Ibid. In this article, the author dwells at length on the engagement of one such indigenous group, the James Bay Cree from Quebec, Canada. (pp. 133-139.)
Kashmir, both on grounds of religious nationalism. The roots of these conflicts lay in the political developments of the previous years. During the years of Emergency in 1975-76, many Sikh leaders were arrested. When Indira Gandhi returned to power, elections were held in Punjab, and yet again, the Congress won a clear majority with the Akali Dal securing only 27 per cent of the popular vote. In a state created for the Sikhs, their continued political marginalization became a cause of consternation for the Akalis, who then used their close links with the Sikh religious organizations to construct a 'Sikh nationalism'. In a short while, moderate Sikhs lost ground to militants and so moderate demands that were made of the Indian state were relegated to the background and the demand for secession came to characterize Sikh nationalism. What followed was a decade of extreme militancy and counter-insurgency/repression at the end of which the militants were subdued.213

The second religious nationalist movement was that of the Muslims in Kashmir, which continues till date.214 There were those led by Farooq Abdullah who demanded regional autonomy for Kashmir against the militants demands for secession. Farooq Abdullah’s government was dismissed on the spurious ground that he had lost majority in the legislature. In the subsequent 1987 elections, Abdullah’s National Front made an alliance with the Congress, an action that was perceived as an electoral fraud betraying the Muslims of Kashmir. The latter, in turn, formed another party, namely, the Muslim United Front. However, the Front was defeated in the 1987 elections. This commenced the cycle of militancy and counter-insurgency in Kashmir, with the State being accused of human rights violations.215 According to Kohli, ethnic conflicts in India are a sub-set of larger power conflicts along class, caste and political party lines that typically characterize the political landscape of developing democracies.216

The Central Government created the Minorities Commission as late as 1978, which initially functioned as a department of the Home Ministry and later till

214 According to Kohli, one of the reasons for the longevity of this movement is the large-scale internationalization of the movement. (p. 25.)
215 Ibid., pp. 25-29.
216 Ibid., p. 30.
1922 was attached to the Ministry of Welfare. The reason provided for the creation of the Commission was that the minorities continued to feel a sense of inequality and discrimination, which needed to be corrected by the proper implementation of the constitutional provisions. This, it was stated, was important to uphold the secular tradition and to promote national integration. In 1983, the Prime Minster's 15-point Programme for Minorities was announced, which addressed itself to some basic concerns of the minorities such as prevention of communal riots and punishment of the guilty by trial in special courts, recruitment in State and central services and implementation of government guidelines at the local level. In 1986, the Minorities Commission drew up a document entitled Certain Guidelines for Determination of Minority Status, Recognition and Related Matters in Respect of Minority Educational Institutions under the Constitution of India, based on the decisions of the judiciary. Following this, the Government Policy Norms and Principles, 1989, for Recognition of Minority-managed Educational Institutions was adopted. In 1992, this Commission was given statutory status with the enactment of the National Commission for Minorities (NCM) Act and in 1997, the Commission adopted the (Procedures and Processes) Regulations. In addition to over-seeing the implementation of the various programs of the government relation to minorities, the Commission undertakes studies concerning minorities, as well as enjoys the powers of a civil court in addressing the grievances of minorities that appeal to the Commission for violation of their rights by the State or by the majority.

In relation to the Scheduled Castes, in 1977 the Government announced the Protection of Civil Rights Rules for better enforcement of the 1955 Act. In 1978, a multi-member Commission was set up and the seventeen regional offices under the 1950 ordinance were revived yet again. In 1987, the functions of Commission were modified to include advisory powers on policy and development issues and

218 Ibid., pp. 84-85.
219 Ibid. For Full Text see Appendix 6, pp. 182-83.
220 Ibid. For Full Text see Appendix 7 (A), pp. 185-87.
221 Ibid. For Full text see Appendix Seven (B), pp. 188-190.
222 Ibid., pp. 84-87.
the Commission was renamed as the Commission for Scheduled Castes and Scheduled Tribes. In 1989, in order to check the rise of violence against these groups, the *Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act* was adopted. Chapter two of the Act lists the kind of acts that would constitute atrocities and would hence be punishable and there are detailed guidelines for the amount of compensation to be paid for violation of different kinds.\(^{224}\) And finally, by the sixty-fifth Amendment to the Constitution the statutory National Commission for Scheduled Castes and Tribes was established in 1990.\(^{225}\) The Commission has powers of a civil court in trying cases of violation of rights of the concerned communities. It also performs monitoring and advisory functions, much like the NCM.

Of the several poverty alleviation programmes initiated as late as 1980-85 during the Sixth five-year plan period, mention may be made of the National Rural Employment Programme, which was a food-for-work programme initiated to provide seasonal employment to the landless tiller in public work such as construction of roads or irrigation facilities during the lean season. A better initiative was the Integrated Rural Development Programme (IRDP), which provided aid to the poor to create assets such as milch-cattle, rickshaws or sewing machines, or even a small-scale industry. Training of Rural Youth for Self-Employment (TRYSEM) was launched in 1992 to develop entrepreneurial skills among them. A Special Component Plan was also initiated, which made it mandatory for all plan outlays to have some amount specifically for the benefit of the Scheduled Castes.\(^{226}\)

However, the discontent with the ineffectiveness was manifesting itself in many forms of protests. Thus, in 1981, about 1100 Dalits from Meenakshipuram village in the south Indian state of Tamil Nadu converted to Islam.\(^{227}\) Including the series of conversions that had been taking place in Tamil Nadu since 1979, their numbers in 1981 were estimated to be around 12,000.\(^{228}\) Their conversion was a

\(^{224}\) Ibid. For Full text of the Act see Annexure IV, pp.47-61. Also See Annexure I of Annexure VI, The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules 1995 for Norms of Relief Amount, pp.65-84 at pp. 80-84.

\(^{225}\) Ibid. For Full Text of the Act see Annexure I, pp. 19-22.

\(^{226}\) Mendelsohn and Vickziany, op.cit., pp. 147-175.


\(^{228}\) Ibid., p. 46.
symbolic protest and their method was peaceful, as opposed to the violent protests witnessed in other parts of the country during this period.②²⁹ On the fiftieth anniversary of the Ambedkar-led conversion, on 14 October 2001, one million Dalits from all over India embraced Buddhism.②³⁰ Since the 1980s, the mobilization of Dalit Christians has been the mark of the Dalit movement and their main grudge is that they are denied reservations on religious grounds.

There were some community conflicts that were a result of the combination of the politics of caste and religion and they were sustained due to institutional, more so political factors.②³¹ The attempted implementation of the Mandal Commission recommendations providing reservations to the ‘other backward classes’ (OBC) by the V P. Singh government in 1989 led to riots and massive student protests. V.P Singh therefore said such reservation would be limited to public employment and would not apply in the field of higher education. The Hindu right-wing Bharatiya Janata Party perceived the Mandal agitation as dividing the Hindu vote and therefore started its campaign for the demolition of the Babri Masjid, which took place in 1992 and was followed by riots in several parts of the country.②³²

With regard to the politicization of ethnicity, India’s northeast has been one of the most turbulent region. In Assam, the largest state of the region, this period witnessed a shift away from the moderate religio-linguistic nationalism of the Asom Gana Parishad (AGP) and the All Assam Students Union (AASU) against Bengali Muslim immigrants/settlers and autonomy for Assam in the federation to organizations like the United Liberation Front of Assam (ULFA) who believed in use of militant tactics against the ‘outsiders’ and independence/self-determination of Assam. In this process however, ‘(A)ssamese leaders equated the territorial

②²⁹ Ibid. The author argues Islam was the most attractive to people in this region due to the futility of violent protests as naxalites, conversion to Christianity which was as caste-ridden or to Buddhism, which now represented the Dalits exclusively, 80-86. The author argues that those who converted were economically well off and therefore did not value the benefits of government reservations that were available to Hindus. (pp. 46-53.)

②³⁰ For details see http://www.ambedkar.org.


②³² Ibid. For the evidence that rioting relating to the two issues in the states of Gujarat, Bihar, Karnataka, and Delhi in 1990 and 1992 depended to a large extent on the ruling party and its support base among lower castes and its relations with Muslim minorities see pp. 47-57. Most of the contributions in this volumes try to find a middle ground between the primordial (Walker Connor) and instrumentalist (Paul Brass) theories of ethnicity.
identity of multi-ethnic Assam with the ethno-linguistic identity of Assamese
speakers of the Brahmaputra Valley, (and thereby) they pushed the other ethnic
groups to seek security through their own autonomous structures.\textsuperscript{233} However, the
demands of the plains-tribes, namely the Bodos (Boro Kochari community), which
is the largest indigenous community in Assam were not heeded. Their nationalism
was organized around the Bodo language, which they regard as being indigenous
to Assam, and resist the imposition of Assamese language on their community.\textsuperscript{234} After over three decades of peaceful agitation, which did not yield the desired goal
of a Union territory status to the Bodo ‘homeland’ the 1980s saw the creation of
the militant Bodo Security Force. This forced the Congress Government in the
State to sign the Bodo Accord, which only created a Bodoland Autonomous
Council within the state. The Council was given all powers regarding cultural
matters, customary laws and land-use and transfers, law and order remained with
the State Government. The militants rejected the Accord while the moderates
continued to work through the Council. However, their continued dissatisfaction
with the centralized working of the Council reopened another round of militancy
led by the Bodo Liberation Tigers.\textsuperscript{235} It was as late as 1991 that constitutional
provisions were added to the Sixth Schedule of the constitution regarding the
governance of tribal areas within autonomous regional or district councils.\textsuperscript{236}

And finally, and very significantly, this phase of Indian history may be
studied for the rise of the Hindu-right groups in Indian politics. The rise of the BJP
at the Centre has been accompanied by the rise of religious nationalism in some
states of India, notably with the reincarnation of the Shiv Sena in Maharashtra.\textsuperscript{237}

\textsuperscript{233} Ibid. Jyotirindra Dasgupta, “Community Authenticity and Autonomy: Insurgency and
Institutional Development in India’s North-East”, pp. 183-214 at p. 198. This had already led
to the creation of separate hill-states of Nagaland in 1963 and Meghalaya in 1971. Later,
Manipur and Tripura were also carved into separate states and Mizoram and Arunachal Pradesh
became Union Territories in 1971. (p. 206.)

\textsuperscript{234} Ibid., p. 199. Most tribal languages including the Bodo language, are born from the Tibeto-
Burman cluster, while Assamese belong to the Indo-Aryan cluster of languages.

\textsuperscript{235} Ibid., pp. 202-205.

\textsuperscript{236} Ibid., p. 206-207. Special provisions for ‘protection’ of tribal areas in other parts of the country
were included in the Fifth Schedule of the Constitution. However the model of the North-East
served as an inspiration for Jharkhandis of Bihar (and now in Madhya Pradesh) in demanding
autonomy of the kind in the Sixth Schedule. The author regards the experience of the North-
East including the state’s engagement with secessionist Naga and Mizo movements as an
element of constructive constitutionalism in managing ethnic conflicts. (p. 214.)

\textsuperscript{237} Mary F. Katzenstein, Uday S. Mehta and Usha Thakkar, “The Rebirth of Shiv Sena in
Maharashtra, The symbiosis of Discursive and Institutional Power”, in Atul Kohli and Amrita
Unlike in the 1960s and 1970s, the discourse in the 1980s and 1990s was centered on the vilification of Muslims, illegal Bangladeshi immigrants and Bangladeshi Muslim hawkers.\(^{238}\) This rhetoric helped the Shiv-Sena make inroads into other parts of Maharashtra outside the Mumbai-Thane area.\(^{239}\) This has meant the increased use of religion in its performative and ritualistic form, so far as to incite riots.\(^{240}\) This has been a phase where the Indian nation has moved from being ‘multicultural by accident to multicultural by design’.\(^{241}\) This one development has led to considerable theorizing on issues of group rights in India. The two main streams of thinking have coincided with western political philosophy using the discourse of multiculturalism, liberal as well as communitarian; although we may recall that western liberal and communitarian multiculturalism had developed largely in the context of rights of immigrant groups. Political theorists have critiqued the Indian practice concerning rights of minority groups over the last five decades using this framework. The concepts around which debates have focussed are those of secularism, cultural rights and autonomy of groups.

It has been argued that the ‘demand for cultural rights in India, at this historical moment, has come to be articulated in a context in which cultural symbols have been appropriated by the state which tries to establish a monopoly over ethical pronouncements’ and the smaller units feel threatened.\(^{242}\) The classic example of the consequence of this is the outcome of the Shah Bano judgement in 1985. Justice Chandrachud Singh of Supreme Court upheld the applicability of Section 125 of the Code of Criminal Procedure that pertains to the prevention of

\(^{238}\) Ibid., p. 222. The author calls this shift of ire from non-Marathis to Muslims as ‘a major discursive gyration’. (p. 229.) She also stresses the institutional organization of the Shiv Sena, the funds at its disposal, media clout, autocratic functioning of the party, well-managed shakhas for engaging youth. (pp. 230-234.)

\(^{239}\) Ibid., p. 219.

\(^{240}\) Ibid., pp. 221-230. The four pillars of the Hindutva rhetoric of the Shiv Sena are demonization of anti-national Muslims, militant Hindu nationalism, religious nationalism as patriotism and ritualistic religion of Hinduism. This as also meant a confrontation with the Dalits on issues like that of renaming the Marathwada University as Ambedkar University. (p. 229.)


vagrancy of destitute women in the interest of public order. In addition, he commented on several other issues that did not augur well with the leaders of the Muslim community. Some of his comments were on the unjust treatment of women in all religions, the need for evolving a common civil code and the relevant provisions in Shariat on providing maintenance to divorced wives, which, in turn, brought up larger issues such as the nature of secularism, the right of minorities and law as a means of securing justice. Moreover, the judgement was a complete denial of legal pluralism. Subsequently, under considerable pressures from the Muslim Personal Law Board and in opposition to the demands of Muslim Women’s groups, the Parliament adopted the Muslim Women (Prevention of Divorce) Act. The Act did not challenge the rights of courts to endorse these provisions. So it was not as if the community was challenging the authority of the state in these matters, but rather it reinforced the point that in areas of marriage and family, the community reserved the right to inform the state regarding the direction that laws must take.

The concern with autonomy of communities has produced vast literature on the process of state formation in India. Based on historical evidence some scholars have argued that contrary to claims of the Hindu-right, the pre-Islamic, so-called Hindu state interfered immensely in the day-to-day affairs of social communities. The Islamic state on the other hand allowed full autonomy to non-Islamic communities in matters pertaining to their customary law, similar to the Millet system of the Ottoman Empire. The colonial bureaucracy reflected a combination of conservative, romantic, liberal and utilitarian ideologies. Ignoring the Gandhian view of the ‘romantic’ and ‘organic’ modern state, the westernized elite of India did not dismantle the colonial state. ‘Instead, this elite

\[\text{Ibid., p. 311.} \]

\[\text{Ibid., p. 307.} \]

\[\text{Ibid., p. 311.} \]

\[\text{Ibid., p. 312.} \]

\[\text{Ravinder Kumar, “State Formation in India: Retrospect and Prospect”, in Doornbas and Kaviraj, op.cit., pp. 395-410 at pp. 401-402.} \]

\[\text{Ibid., p. 403.} \]
attempted to conjure into existence a discourse which would democratize the colonial state... (T)his (then) was the ideological inspiration behind the constitution of the Republic of India and its official policies in the 1950s and 1960s.\textsuperscript{249} The attempt was to build India as a nation state with an over-arching national identity, thus paying minimum heed to the diversities of her people.

There have also been several critical writings on India’s secularism. The leadership of the new nation had intended to preserve the cultural diversity of India and with this in mind they outlined the Indian version of secularism. The reasons for the uniqueness of Indian secularism were the unique socio-cultural factors in the Indian context, all of which point to the possibility of conflicts. They are the diversity of religious communities, the emphasis on practice of religion rather than belief that leads in turn to valorization of community practices, religious sanctity to oppressive practices that require the state to transform them and finally, the absence of organized Hinduism meant that the impetus for reform had to come from the state.\textsuperscript{250} Therefore one of the defining features of Indian secularism has been religious liberty, protected by Article 25 and Article 26 guarantee individual and collective freedom of religion.\textsuperscript{251} Another characteristic has been a recognition of equality of free citizenship vide Article 15 that prohibits discrimination on grounds of religion, Article 16 that guarantees equality of opportunity in public employment, Article 29(2) that prohibits discrimination in admission to educational institutions on grounds of religion, Article 325 that forbids the creation of separate electorates and requires the state to maintain principled distance from religion, Article 27, which prohibits levy of special taxes for promotion of religion and Article 28, which forbids providing religious instruction in state-run educational institutions.\textsuperscript{252} The only exceptions made are regarding the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{249} Ibid., p. 407.
\item \textsuperscript{251} Ibid. According to D.E. Smith, this is the libertarian ingredient of secularism, p. 113.
\item \textsuperscript{252} Ibid. This is Smith’s egalitarian component of secularism. Smith argues that since equality some times requires special protections and rights, special rights of minorities are justified. In the context of the partition however, the idea of political rights for religious communities was rejected, only that of culture and education were recognized. For details on the CA debates on separate electorates, see pp. 118-123. Smith’s third principle is of mutual exclusion of state and religion, which, as stated above would not be possible due to the socio-cultural characteristics of the state and society in India. For a defense of the argument of state intervention in the reform of the Hindu Code Bill. ( pp. 115-117.)
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right of Scheduled Castes and Scheduled Tribes, an issue to which the discussion returns a little later.

The growth of communal violence has led many a thinker to denounce the very ideal of secularism. Some of the strongest criticism of the Indian doctrine of secularism has come from the ‘communitarian’ thinkers in India. T.N. Madan and Ashis Nandy may be considered the foremost critics in this regard. Madan traces the origins of the idea of secularism to the Enlightenment view of religion as being irrational. However, this goes against the Indian experience of religion, which is integral to the life of people. So the modernist/scientific separation of the state and religion took away from the public sphere the voice of sanity that religions can provide, which in turn has led to increasing communal violence.

Along similar lines Ashis Nandy argues that modernity produces religion as an ideology, which is generally used from protecting political and socio-economic interests, rather than let it remain as faith, which allows for pluralism. The idea of secularism is also produced simultaneously to meet the challenge of this ideology and run the state along scientific lines. The public realm thus becomes an arena of conflict between religion and science. So secularism should be abandoned.

Partha Chatterjee on the other hand calls for rejection of secularism for the very idea of the separation of the state and religious can now be used by the resurgent Hindu-right to deny religious liberty to minorities. For Chatterjee, the best hope for minorities is in promoting the idea of toleration of religious diversity with considerable emphasis on internal democratic norms.

Sarah Joseph criticizes Madan, Nandy and Chatterjee for overemphasizing this distinction between the indigenous and west, since rationalism has existed with religion in India as well as in the west, and for not associating secularism with other enlightenment ideals of liberty and equality. According to Joseph, in addressing themselves to the issue of diversity, communitarians have begun by

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criticizing the homogenizing tendencies of the post-colonial state and argue that they are the product of the imposition of outside ideas by a westernized elite in India. She argues that the even the subaltern today is not rejecting elite nationalism but is trying to appropriate it and re-fashion it in their own terms.\(^{258}\)

Seeking to go beyond the contingency of minority rights guaranteed by the 'secular' Indian State, some liberal philosophers have made a case for grounding minority rights in the democratic right to substantial equality.\(^{259}\) Making a distinction between core rights and conditional rights, Neera Chandhoke says that the collective rights of communities that enable them to exist and flourish are the condition for the realization of the individual's right culture, the philosophical defense for which is the right to equality. So the individual's right is contingent upon the collective right.\(^{260}\) This, she argues, is based on Indian traditional and historical thinking (which the Congress reversed in the CA debates). She provides three instances of the presence of this thought in writings of Bipin Chandra Pal, Lajpat Rai and Balgangadhar Tilak and says that these were inversions of the western notion of rights. Pal argued that Swaraj not only meant external freedom but also internal freedom, which he called self-regulation or self-determination. Lajpat Rai argued that sovereignty rested with the people. Finally there were those who traced the origin of rights from Vedanta and along this line of thought, Tilak argued that rights existed independently of the colonial power.\(^{261}\) The underlying thought here is that individual rights were contingent on the grant of political freedom to a community.

Contemporary Indian thinking on the rights of religious groups takes place in the language of secularism, individual versus group rights in liberal democracy,

\(^{258}\) Ibid., p. 158. She further argues, '(N)ot only does contemporary politics in India make us question the notion of the silent subaltern, it also make (sic) us think again about the depiction of the subaltern as the repository of authentic culture. Subaltern movements themselves might question this depiction since it does not recognize their demand for change in the culture and it is difficult to ignore the struggle over cultural symbols and representations which subaltern movements, like the Dalit movement, are conducting today. Moreover, an undifferentiated identity of the subaltern seems to make little sense in the face of the numerous divisions that have emerged within subaltern movements.'


\(^{260}\) Ibid., p. 206 and p. 225. Thus she adopts a middle ground between the individualists and communitarian positions and speaks of the 'contextualized individual' or the 'individual-in-community'. (p. 271.) She also argues that such rights should be granted only to minorities since they are the ones threatened by the majoritarian ethos.

\(^{261}\) Ibid., pp. 222-223.
communitarianism and liberal multiculturalism, all of which have been given a nuanced interpretation in the Indian context. In the context of secularism, such an explanation has been provided by Bhargava and has been discussed above. Gurpreet Mahajan provides a good argument for the problem generated by the protection given to rights of various groups in the Indian constitution. Based on an analysis of jurisprudence relating to the autonomy of cultural/religious groups, she argues that the context in which such protections were included the Indian Constitution has been detrimental to the rights of individuals. Since many of these provisions were provided to ensure inter-group equality, the whole issue of intra-group equality, more so, gender equality, was totally ignored. This is in contrast to the West where the issue of group rights vis-a-vis other groups has come up when the issue of rights due to every individual in a liberal democracy had already been resolved. She also argues that the discourse on affirmative action has changed from one aimed at overcoming exclusion (of the untouchables) to that of under-representation of these groups, religious minorities and women. In other words, there is move from inclusion to adequate representation. She also argues that the idea of group rights, which was intended to be used in favour of disadvantaged/discriminated communities, is now being used by the majority to demand similar rights as those of the minorities.

Making a distinction between western communitarians and their Indian counterparts, Joseph argues that while the two are similar in their concern for diversity and community identity and their critique of modernity, Indian communitarians would differ from their western counterparts 'in their insistence that colonialism, imperialism and racism were also constitutive of modernity.' Thus the 'political project' of the western communitarians is aimed at overcoming the alienation and individualism of modern life by rebuilding the networks in the community and creating a shared moral universe. Indian communitarians aim

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262 Smith contrasts India's secularism with the American version.
264 Ibid., p.155. Also see Neera Chandhoke, who draws in Kymlicka's idea of the intrinsic value of culture, and then goes on to make a case for special rights for minority groups based on historical Indian thinking on it.
266 Ibid. Joseph bases her characterization of the western communitarianism on the writings of Charles Taylor and Alasdair MacIntyre mainly in the American and Canadian contexts.
their thinking at justifying the politics of difference, reinstating communities as political actors and giving a voice to the subaltern.\textsuperscript{267}

In a later work, Mahajan appears to have backtracked on her earlier assertions. Commenting on contemporary western liberal thinking on multiculturalism, Sheth and Mahajan argue that since the demand for minority rights is coming primarily from immigrant groups and indigenous peoples, it is their concerns that find place in these writings.\textsuperscript{268} They assert quite incorrectly that since these communities are adequately represented in the social and political arenas, they are merely asserting their right to their culture that is being devalued and marginalized by the majority/national culture. In the Indian context, however, the struggle is not limited to cultural rights and is therefore the situation is far more complex. They also feel therefore, that the western understanding of the issue of marginalization and concerns of minorities is limited in the following manner: the focus is mainly on cultural devaluation, it ignores the construction of national hegemonies within the state and does not conceive of the nation-state as a plural entity, and finally it believes that the preservation of minority cultures would solve all their problems.\textsuperscript{269} It may be stated here that some of these assertions will be questioned in this thesis.

Vinit Haksar tries to find a middle ground between classical liberal defense of individual rights based on the morality of the individual and communitarian defense of collective rights on the basis of the morality of the collective and engages in the philosophical debate on the primacy of individual versus group rights. For Haksar, following liberals, groups are goods in themselves, but they are not ends in themselves the way individuals are. 'What is crucial about ends-in-themselves is that they are sacred in the sense that they are owed respect and are irreplaceable.'\textsuperscript{270} Thus for Haksar, individuals are sacred in the primary sense while groups are sacred in the derivative sense.\textsuperscript{271} Further he argues that the 'view

\textsuperscript{267} Ibid.
\textsuperscript{268} Sheth and Mahajan, op.cit., Introduction, p. 1. Their characterization of liberal multicultural thought is based on the work of Will Kymlicka, Bhikhu Parekh and Joseph Carens.
\textsuperscript{269} Ibid., pp. 8-9.
\textsuperscript{270} Vinit Haksar, Rights, Communities and Disobedience: Liberalism and Gandhi, New Delhi: Oxford University Press, 2001, pp. 48-49.
\textsuperscript{271} Ibid., p. 50. The reason he gives for this is that the consciousness of the group is reducible to the consciousness of its members. A group is not a unitary conscious being. Also because, their
that the group has a right to a particular culture is very different from saying that the culture has a right to survive and flourish. 272

Thus in this phase, international law began to mirror some of the propositions of those advocating group rights. For instance, The Declaration on Race and Racial Prejudice prepared a defense of preserving minority cultures since, like communitarians, it considered every community as being valuable in itself and for its contribution to diversity of life. It is significant as the first ever declaration on religious discrimination and on the rights of persons belonging to minorities. However, the declaration on religious intolerance and discrimination is qualified by the requirement of world peace and social justice. The declaration on rights of minorities is granted in the interest of international peace. The variety of philosophical defenses of minority rights does not find an echo in them. In India, religious minorities were granted statutory protections on par with the Scheduled Castes. India was increasingly characterized as a nation consisting of multiple ethnic identities that challenged centralized governance and made demands for greater autonomy, devolution of powers, self-government and in few cases, of self-determination/secession. This phase also marks the beginning of Indian theorizing on group rights in the language of western theory, with suitable changes to make it applicable to the Indian context and clearly stating the similarities and differences in the western and Indian contexts. For the first time in the century, political philosophers are attempting to provide a philosophical defense of rights of minorities. The rise in communal violence over the last two decades in which minorities have been persecuted have finally been perceived as acts of genocide.

Minority Groups in Interaction with the Human Rights and Indian judicial discourse

Several surveys have been undertaken to assess the impact of UN human rights treaties at the domestic level. In one such survey, the authors have studied the impact of the ICERD (1965), ICESCR (1966), ICCPR (1966) and its Optional Protocol I, Convention on Elimination of Discrimination Against Women (CEDAW,1979), Convention against Torture (CAT,1984) and the Child Rights

\footnote{worth is in their utility for the individual. Of course they may be preserved to preserve diversity but that then is not an issue of fairness for Haksar. (p. 52.)}

\footnote{Ibid., p. 56.}
Convention (CRC, 1989) in five regions and twenty countries of the world. The categories they develop for the evaluation of this impact are level of awareness, constitutional recognition of treaty norms, legislative reform, impact on judicial decisions, development of policy, use of the treaty by domestic NGOs, domestic academic publications on international human rights, availability of the texts of these treaties in local languages, and influence of membership in expert Committees of these conventions.\(^{273}\) This impact is conditional on the enforceability of international agreements/treaties in domestic law, the decision regarding which is a prerogative of every nation-state.

International Conventions have to be legislated upon in order to give them justiciability in domestic law. In cases when they have lacked the status of domestic law, NGOs have played a significant role in converting their aspirations to enforceable legislation.\(^{274}\) In cases where human rights advocates found the treaties to be too overbearing for their convenience or where they preferred some other kinds of provisions, they invoked other instruments. Good examples of this are to be found in the European countries, 18 of which formulated a Convention on Human Rights that became a part of their domestic laws.\(^{275}\) In a recent study of the impact of the Convention on the jurisprudence of English courts, the authors argue that the Convention is likely to have a differential impact with respect to different rights, but is likely to have more impact in addressing individual petitions than the International Covenant on Civil and Political Rights since it allows the individual the right to petition, a right that is not available to British citizens under the ICCPR since England has not ratified the Optional Protocol embodying this right. Moreover, the impact of the Convention improved since the adoption of the Human Rights Act in England.\(^{276}\)


\(^{275}\) Ibid., p. 83. According to the author, similar considerations led to the adoption of regional mechanisms of human rights in Latin America.

\(^{276}\) For the impact of the Convention and other UN treaties on right not to be subject to torture or inhuman or degrading treatment, freedom from slavery, servitude and forced labour, freedom of thought, conscience and religion, freedom of expression and the right to education, see Richard Clayton and Hugh Tomlinson, The Law of Human Rights, Volume I, Oxford: Oxford University Press, 2000.
Given the features of the human rights law, very few groups have been able to approach the Committees that have been set up to monitor the implementation of the various Conventions for redress of their grievances. It will be interesting to look at their experience with these quasi-judicial bodies. The Human Rights Committee of the ICCPR is an independent 18-member body consisting of experts, which has the mandate to examine complaints of individual human rights violations from nationals of those states that have ratified the ICCPR and have also acceded to Optional Protocol I of the ICCPR. The Committee has approached the issue of minority rights from the perspective of non-discrimination (Article 26 of ICCPR) and from the perspective of the individual’s right to identity.277

The cases that have been submitted to the Committee have come from indigenous peoples claiming minority protection and by linguistic minorities. The Committee considered case No. 24/1977, Sandra Lovelace v. Canada in which the aggrieved had filed suit that she had lost her status as a Maliseet Indian (living on the Tobique Reserve) due to the provisions of the Indian Act, which stipulated that once married to a non-Indian Canadian, she could not regain that status following a divorce. The Committee found this in violation of Article 27 of the CCPR, which, as interpreted by the Committee, guarantees to the right to native culture and language to ‘persons belonging to the minority community’. As a result of the Committee’s views, Canada amended the Indian Act and restored the right of Sandra Lovelace to reside on the Reserve.278 In another case concerning Canadian Indians, No.167/1984, Chief Ominayak and the Lubicon Lake Band v. Canada, the Committee was asked to give its views on the traditional indigenous rights to fishing and hunting as well as the issue of self-determination under Article 1 of the Covenant. In this case, the Committee refused to comment on the question of whether the Lubicon Lake Band could be considered as a ‘people’ with the right to self-determination since the petition had been submitted under Article 27 of the Covenant while the relevant provisions in the Covenant were Articles 6-27.279 However, the Committee did find that the modern ways of

278 Ibid., pp. 5-6.
279 Ibid., pp. 6.
development adopted by the State in this region threatened the way of life and
culture of the Band (of which hunting and fishing are an integral part) and found
the State party in violation of Article 27 of the Covenant.\textsuperscript{280}

In a controversial case of concerning the Mikmaq Indians of Canada,
\textit{Mikmaq Tribal Society v. Canada}, No.205/1986, the Mikmaq tribal society had
approached the Committee to redress the violation of its rights under Article 25 of
the Covenant pertaining to participation in public affairs as it had no representatives on the Indian Committee which was negotiating with the Canadian Government regarding Constitutional reform in Canada. Mikmaq leaders had submitted their communication in two capacities – ‘as individuals claiming to be victims of human rights violations and as trustees protecting the welfare and the rights of the Mikmaq people.’\textsuperscript{281} They alleged that Canada’s constitutional reform discussion process, held from March 1984-87, were in violation of Article 1 of the ICCPR granting the right to self-determination to peoples as they were excluded from participating in those discussions despite sending specific requests to the Canadian Government in this connection. The Canadian Government had argued that in this process, they had negotiated with the Assembly of First Nations and that it was not possible for them to negotiate with every Indian band.\textsuperscript{282} And yet again the Committee ruled that alleged violations of Article 1 were not within the purview of the Committee as outlined in the Optional Protocol, and considered this as a case under Article 25 pertaining to the right to participation in public life. And even then, it found Canada not to be in violation of Article 25.\textsuperscript{283}

In \textit{Ivan Kitok v. Sweden}, No.197/1985, the Committee was approached in
defense of the rights of the Sami regarding reindeer herding. The Committee did
not find sufficient reason to term this as a violation of Article 27, but in this context, it elaborated the scope of the Article. It stated that ‘(T)he regulation of an economic activity is normally a matter for the state alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under the Article 27 of the Covenant.’ Thus it

\textsuperscript{280} Ibid.
\textsuperscript{282} Ibid., p. 585.
\textsuperscript{283} Ibid., p. 596.
affirmed that a traditional economic activity and way of life such as reindeer husbandry falls within the scope of protection of Article 27, since it belongs to the culture of the Sami.  

French citizens of Breton ethnicity have submitted many cases under Article 27 to the Committee. However, since the French Government denied the existence of minorities in France, these cases were then considered under alternate provisions of the Covenant such as the right to fair trial (Article 14) and non-discrimination (Article 26).

Similarly, the expert Committee of the Convention on Elimination of all forms of Racial Discrimination has received complaints from minorities. In *Yilmaz-Dogan v. The Netherlands*, No.1/1984, concerning a Turkish employee in the Netherlands, the Committee found the employer guilty of racial discrimination in terminating her contract. Another case, *Demba Talibe Diop v. France*, No.2/1989, reveals a weakness of the Convention which provides no protection against discrimination to those who are not citizens of the concerned State Party.

Japanese and Korean human rights activists sent information to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Human Rights Committee to investigate the discrimination against Korean Nations who we subject to fingerprinting during their periodic re-registration as aliens. In 1981, the Committee criticized the Japanese government for its failure to recognize the existence of minorities within the meaning of CCPR, and this pressured the Japanese Government into amending the fingerprinting law, and making it less humiliating.

The Arbitration Commission set up by the Conference on Security and Cooperation in Europe (CSCE) to oversee the independence of the federating republics of Yugoslavia applied the principle of a negotiated *uti possidetis* in determining the boundaries of the succeeding republics. Along similar lines on the
question of right to self-determination of the Serbs of Croatia and Bosnia-Herzegovina, it asserted that ‘the principle of uti possidetis juris trumped the irredentist claims based on the right to self-determination, holding that borders existing at the moment of independence were not subject to alteration to satisfy the requirements of self-determination except where the states involved so agreed.’

Thus strict adherence to the principle of legitimacy of existing borders may no longer be tenable.

While corresponding case-law in India should perhaps take cognizance of grievances brought to the attention of the statutory bodies with powers of civil courts, it is the enforcement of fundamental rights and rights of minorities by courts that are the defining feature of liberal democracies. Therefore, following is a brief survey of jurisprudence relating to the two groups that will be the focus of this thesis, namely, the Dalits and the Religious Minorities.

The Indian judicial discourse on the rights of groups, Dalits and religious minorities reveals the complexities of a context in which some of these rights have constitutional protection. The courts have been seized of various cases relating to the preferential treatment given to members of scheduled castes and other backward classes and have been asked to make decisions regarding the reasonable limit of such reservations. The main concern in these cases have been Article 15(4) and Article 16(4) of the Constitution which make exceptions to the fundamental right against non-discrimination on ground of race, religion, caste or sex in any field (Article 15) and in matters of employment (Article 16). The concern is also regarding such provisions violating the general fundamental right to equality (Article 14). As early as 1951, when Article 15(4) was not yet a part of the Constitution, in Champakam Dorairajan v. State of Madras, the Supreme Court struck down a Governmental Order providing for reservation on the basis of caste in educational institutions as violative of the general Article 15 (1) on non-discrimination and Article 29(2), prohibiting discrimination solely on grounds of

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290 Kingsbury, op.cit., pp. 505-508 at p. 507.
291 Only those cases which have not been resolved to the satisfaction of the minorities will be examined since my aim is to highlight the ‘contingency’ in the interpretation and elaboration of constitutional law. I give one example of each issue salient to the protection of group rights in India. This is however not the most comprehensive survey.
religion. As a result of this, the Constitution was amended to include in it Article 15(4) as an exception to Article 15(1). A similar exceptional provision to Article 16(1) with regard to public employment already existed in the form of Article 16(4). The courts have ruled however that privileged treatment of Scheduled Castes, Tribes and socially and educationally backward classes under Article 15(4) and 16(4) are not fundamental rights, they are merely based on discretionary powers of the Government. This meant that non-provision of reservations is not justiciable in courts, but reservations and the criteria for reservations could be challenged as violative of particular fundamental rights. So most cases relating to this aspect of affirmative action/reservations.

The criteria for reservation have also been frequently contested and gradually enlarged to include the Other Backward Classes (OBC). In M.R. Balaji v. State of Mysore, the court struck down an order of the Karnataka government for reservation of the Backward Classes, since it had used caste as the sole criteria for determining groups that would fall in the category of backward classes. The court ruled that in selecting the backward classes for the purpose of reservations, caste should neither be the only, nor the dominant criterion of consideration. It also struck down as unreasonable the State Government’s order by which the total percentage of reservation in the State had gone up to sixty eight per cent and laid down a limit of fifty per cent reserved seats in total. It argued that the State government’s order was a fraud on the Constitutional power conferred to it under Article 15(4). In another prominent case regarding the caste/class criteria for reservation, Indira Sawhney v. Union of India, the court ruled that the economic criteria cannot be the only criterion for identifying backwardness, it may only supplement social and occupation-cum-income based backwardness. Further that Article 16(4) does not contemplate reservation in promotion and that this issue

293 Ibid., p. 557.
295 M.J. Anthony, Dalit Rights: Landmark Judgements on SC/ST/ Backward Classes, New Delhi: Indian Social Institute, 1997, pp. 2-3. It is interesting to note, however, that in the same judgement, the court rejected classifying Muslims as backward classes, see footnote 94 of chapter 6 in Galanter, op.cit., p. 129.
must be decided with a combined reading of Article 16(4) and Article 335 regarding maintenance of efficiency in administration. It also said that although reservations for backward classes is not against merit, such reservations cannot be made in posts where merit alone counts such as in the defense services, technical posts, airline pilots or super specialties in medicine and engineering.

The Constitution of India forbids the practice of ‘untouchability’ in any form vide Article 17. However, castes have been allowed a degree of autonomy since they have been treated as religious denominations and so certain exclusions not clearly identifiable as practices of untouchability had been upheld. In Sri Venkataramana Devaru v. State of Mysore the court found evidence that the Gowd Saraswat Brahmin (GSB) community were indeed a religious denomination and therefore could restrict entry of all non-GSBs on special occasions or during special ceremonies, but could not restrict temple entry, which was forbidden expressly by Article 25 of the Constitution granting freedom of religion. Moreover, ‘untouchability’ was forbidden only among Hindu castes. In Devarajiah v. Padmanna and State v. Puranchand exclusion of ‘untouchables’ by Jains was not forbidden. Quoting eminent sociologist M.N. Srinivas, Galanter argues that:

the new legal view caste furnishes recognition and protection for the new social forms through which caste concerns may be expressed: caste associations, educational societies, political parties, religious societies, unions, etc. It offers scope not only to the

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297 Ibid., p. 176. He argues that Article 26 of the Constitution guarantees to every ‘religious denomination or section thereof’ the right to establish and maintain religious and charitable institutions, to own and administer property and to “manage its own affairs in matters of religion.” So “once a caste is recognized as a religious denomination, then as a religious group it is presumably a “minority ...based on religion” and as such enjoys a constitutional right under Article 30 (1) to establish and administer educational institutions of (its) choice.” Article 30 (2) provides that, in granting aid to educational institutions, the state shall not ‘discriminate against any educational institutions on the ground that it is under the management of a minority, whether based on religion or language.’


299 Ibid., p. 176. He argues that Article 26 of the Constitution guarantees to every ‘religious denomination or section thereof’ the right to establish and maintain religious and charitable institutions, to own and administer property and to “manage its own affairs in matters of religion.” So “once a caste is recognized as a religious denomination, then as a religious group it is presumably a “minority ...based on religion” and as such enjoys a constitutional right under Article 30 (1) to establish and administer educational institutions of (its) choice.” Article 30 (2) provides that, in granting aid to educational institutions, the state shall not ‘discriminate against any educational institutions on the ground that it is under the management of a minority, whether based on religion or language.’

endogamous *jati* but to 'to caste-like units which are so active in politics and administration in modern India.\(^{301}\)

S.P. Sathe concludes that these are consequences of legal positivism in the reasoning of the Court and that 'the reading of fundamental rights as an integrated code would have enabled the court to arrive at socially more desirable results.'\(^{302}\)

In the case of religious minorities, firstly, there is the very controversial jurisprudence relating to essential practices of religious groups since this is an aspect that has effected both the majority and minority religious groups in India. It has been more detrimental to the minorities. The courts have had a free hand in interpreting the limitation of public order, morality or health on the right to freedom of religion under Article 25 of the Constitution. Some of the earlier cases in the courts reveal a reasonable understanding of the limiting provisos. The essential/non-essential dichotomy was read into Article 25 in *Hanif Quareshi v. State of Bihar* or what is known as the Cow Slaughter Case.\(^{303}\) In this case, the courts having read the relevant sections in the Quran, found that sacrificing a cow was an optional rather than essential practice to the celebration of Bakr-Id since alternative sacrificial animals such as the goat or the camel had been mentioned in the holy book.\(^{304}\) This was also a case in which the court found a discrepancy between a Directive Principle of State Policy enshrined in Article 48 of the Constitution that the:

\[(S)ta\text{e shall endeavour to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for pursuing and improving the breeds, and prohibiting slaughter of cows and calves and other milch and draught cattle and the fundamental right of a citizen under Article 19(1)(g) to pursue an occupation of her choice without state}\]

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301 Ibid., p. 181.
304 Gurpreet Mahajan, op.cit., p. 54. Also see H.M Seervai, op.cit., Volume II, p. 1261. According to Seervai, this decision of the court is probably correct based on the evidence the court had access to, but we ought to keep in mind the fact that a religious practice need not be universal, and a religious practice is not negativized because it is shown to be limited to certain religious denominations.
restriction. Therefore the court did not impose a total ban on cow-slaughter, rather the slaughter of such cattle that had ceased to be capable of yielding milk or working as draught animals was held permissible.305

This is one of the few cases in which a minority right was upheld in accordance with its own reasoning. This may be contrasted with the case of Rev. Stainislaus,306 in which the Supreme Court ruled that the right to propagate religion as granted under Article 25 did not imply the right to convert people from one faith to another. This judgement overlooked the fact that propagation is essential to both Islam (dawah or tabligh) and Christianity (evangelism), and that the more important corollary to this right was the right to freedom of conscience of the concerned person or group.307 According to Gurpreet Mahajan, 'while seeking to protect religious practices the Supreme Court has appropriated for itself the right and the responsibility of determining what are the essential, as distinct from optional, religious practices of a community.'308

A second issue relating to religious minorities has been the exclusivity if their rights under Article 30(1) of setting up educational institutions. Article 29(2) of the Constitution, which states that no citizen shall be denied admission in any educational institution maintained wholly or partly out of state funds only on grounds of religion, race, caste, language etc. has been used to challenge the right of the minority to admit students from its own community under Article 30(1) that grants the minority the right to establish and administer its institutions as it deems fit.

The test of excellence of minority educational institutions has been used to curtail the autonomy of this minority right. In Siddhrajhbhai v. State of Bombay, the court held that Article 30(1) was absolute, but that those regulations, which made the minority institution an 'effective vehicle for education of the minority',

305 Seervai, op. cit., Volume I, pp. 834-836. Chief Justice Das also tried to balance this with state responsibility vide other Directive Principles such as the responsibility of free primary education. So in this case, a fundamental right was upheld over one directive principle in the interest of safeguarding other directive principles.


307 Ibid. This essay gives a detailed analysis of the history, politics and personal law implications of anti-conversion laws in India.

308 Gurpreet Mahajan, op. cit., pp. 64-65. Mahajan concludes that on the whole, the courts have affirmed religious freedom of all communities.
were allowed to be imposed.\(^{309}\) Thus such measures as would contribute to excellence in the area of instruction, discipline, health, morality, public order and the like would be permissible. The most recent case in this series was **T.M.A Pai Foundation v. State of Karnataka** in which Supreme Court took away the ‘absolute’ right of state aided minority educational institutions and said that the rights conferred under Article 29 and 30 should be read in consonance with Article 14, 19, 25, 26 and 28, whereby the rights of individuals within the community are protected.\(^{310}\)

A third issue relating to caste and religion has been the Presidential Order of 1950, which decided the content of the Scheduled Castes and Scheduled Tribes List for the purpose of receiving preferential treatment, confined the list to those who were Hindu. By an amendment to this order, some Sikh castes were included in this list in 1956 and as late as 1989, the provision was broadened to include Scheduled Caste converts to Buddhism. The converts to Christianity and Islam have been denied these benefits on the ground that there is no caste division in Christianity and Islam. There have been some cases in which such preferential treatment on religious grounds has been questioned as being violative of the fundamental right of citizen against discrimination by the state on grounds of religion. The provision of the Scheduled Caste Order of 1950 which limited the benefit of reservation to those who professed Hindu religion was also challenged in **Soosai v. Union of India.**\(^{311}\) The plaintiff complained that since he had converted to Christianity, the Tamil Nadu Khadi and Village Industries Board had not allotted him a free bunker as it had to the other cobblers in the area. He challenged the limiting of privileges to Hindu and Sikh Scheduled Castes as violating the right to equality under Article 14, the right to non-discrimination under Article 15 of the Constitution and the right to freedom of religion under Article 25. The Supreme Court dismissed his petition on the ground that in this case, there wasn’t sufficient proof that converted Scheduled Castes suffered from comparable depth of social,


\(^{311}\) AIR 1986 SC 733, cited in S. P. Sathe, op.cit. The author argues that this contradicts the principle of secularism. He argues though, that backward classes have been identified on a secular basis, though caste is one of the criterion of consideration and therefore, even Muslim and Christian groups have been included within categories of the backward classes. Some of the jurisprudence I have cited in this paper proves otherwise.
cultural and educational backwardness, which was not sufficiently proved in this case.

There is yet another category of cases relating to the powers of Hindu charitable endowments and powers of the Commissioners for Hindu Religious Endowments at the State-level in regulating these trusts which shows that rights of Hindu endowments have been held to be sacrosanct in matters of religion. In this regard, the Supreme Court in Commissioner of Madras, H.R.E., v. L.T. Swamiar said that although the Commissioner had the power to regulate the secular aspects such as the administration and finances of the Madras Hindu Religious and Charitable Endowments, this power could not be used to interfere in the religious functioning of the Institution, nor the spiritual power of the mahant including that of administering trust property. These and other cases have implications for the fundamental right to freedom of religion under Article 25 (1) of the Constitution. Mahajan argues that there are discernable trends in the manner in which the Supreme Court has dealt with this aspect of religious freedom. Thus:

while state legislatures and the Parliament have initiated and passed laws for the purpose of social reform, the Supreme Court has curtailed executive intervention in religious practices. That is, the Supreme Court has repeatedly maintained that the Constitution protects not merely the right to religious belief and worship, but also the right to observe the practices associated with religion. Second, the tendency to uphold freedom of religious practice and autonomy in matters of religion, has been so pronounced in the judgements of the Supreme Court that it has often given the impression of being socially conservative.

The right of religious and linguistic minorities to establish educational institutions under Article 30 of the Constitution has been given a very novel interpretation by the courts in some cases as a result of which denominations within the Hindu religions have been granted similar rights. The Supreme Court in D. A. V. College Jullundhar v. State of Punjab ruled that this Arya Samaj institution should be treated as an institution of the Hindi-speaking linguistic

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312 SCR 1954 895-922, cited in Gurpreet Mahajan, op.cit, pp. 57-58. For similar rulings in case of other Hindu Endowments as also the Waqf Boards, see pp. 57-63.

313 Gurpreet Mahajan, op.cit., p. 64.
minority in the state of Punjab.\footnote{A.I.R. 1971 SC 1737, cited in Altaf Hussain Ahangar “Beneficiaries of Article 29-30- the Majority is Usurping Rights meant for the Minorities” in Tahir Mahmood, op. cit., pp. 82-91 at p. 89.} This in effect meant that the Hindi-speaking Hindu Punjabi community would get benefits accorded to minority institutions. According to one scholar, this has meant the usurpation of this minority right by the majority.\footnote{Ibid., pp. 82-91.}

**Conclusion**

While theoretical arguments for or against group rights have been based on the (a) the moral primacy of the individual/group, (b) value of culture for the identity of a person, (c) value of cultural diversity and (d) the notions of equality, justice, freedom of thought and association, the real concern of the states as reflected in international law is with accepting limits to their sovereignty. Groups claiming special rights are non-state actors and conceding to their demands therefore takes away from sovereign authority of the states. There are other issues such as the more practical problems that may be faced in the form of preserving the territorial integrity of the state and correcting historic injustices by territorial readjustment or monetary compensations. Benedict Kingsbury argues that there are five discourses relating to non-state actors at the international level, and states have countered each of these in the interest of preserving their integrity.\footnote{Maivan Clech Lam, op cit. For the preoccupation of international law with individuals and states see Rodolfo Stavenhagen, “Human Rights and Peoples’ Rights-The Question of Minorities”, Interculture, Vol. XXII, No.2, Spring 1989, pp. 3-18.} Claims to self-determination have been subordinated to the principle of *uti possidetis juris* (meaning the sanctity of existing boundaries).\footnote{Benedict Kingsbury, “Claims by Non-State Groups”, Cornell International Law Journal, Vol. 25, No. 481, 1992, pp. 481-513 at pp. 486-488.} Minority rights claims are sought to be addressed through equality and nondiscrimination provisions of the CCPR, notably Article 27.\footnote{Ibid., pp. 488-494. In addition, special provisions have been developed on a bilateral level and some general declarations for specific minority groups have been proclaimed} Most group rights claims are treated as human rights problems,\footnote{Ibid., pp. 494-495.} thereby making them individualistic. Claims of indigeneity based on prior occupation have made considerable progress at the international level, but
traditionally their issues have been discussed in the Human Rights Committee. Claims to historical sovereignty, of former colonial possessions or irredentist claims are yet another instance of non-state claims, and they have not been entertained as such by the international law of human rights.

It has also been argued that claims of non-state groups, which are usually demands for corrective justice based on historical injustices, are not amenable to solution in international law because of the jurisprudential nature of the international legal system. ‘International law is not well suited to promoting corrective justice because it works primarily through incentives rather than sanctions. The fact that international law cannot provide corrective justice affects the claims of non-state groups because non-state groups are largely defined by their histories.' Examples of such claims are demands for the right to secession, demands of the Palestinians or of the indigenous peoples. The question this raises is if they are amenable to solution in domestic law. Based on the Indian experience we may conclude that at the domestic level, the argument becomes more complex, for then there arise issues of inter-group and intra-group equality and the right of the individual vis-à-vis his community, all of which are subject to power politics.

Given the separation of the domestic (municipal) and international spheres, how do marginalized groups seek to secure their rights? What and when do they learn from the international discourse and how do they participate in it? How does this transform the international and domestic discourses? The following chapters seek to address these issues based on the experience of the Dalits and religious minorities in India.

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320 Ibid., pp. 495-496.
321 Ibid., pp. 496-497.
323 Ibid., p. 556.