Chapter 1. Introduction. The Role and Importance of Groups.

The first section of this chapter critiques what is termed a realist ontology of the group. This is a particular way of looking at the group as a solid monolithic block that is externally bounded. The second section goes on to look at the ways in which the judicial system created by the British in India institutionalized such an idea of the group. The third section is an attempt to explain the method that is employed in this study to understand the theoretical foundations of group rights. There is a reliance on Quentin Skinner's method of reading a text and this method is used to explain why the writings of Edmund Burke and Jeremy Bentham, are consulted to understand the theoretical foundations of group rights. The fourth section looks at various kinds of group claims that have been made and locates the multicultural case for the group. The fifth section looks at the proliferation of minority groups claims in the aftermath of the British Empire. It finds empires generally, and more so the British empire, as being conducive to the expression of group differences. The section also looks at the ways in which issues of groups and constructions of groups like nations are closely linked with the break up, crumbling and dissolution of empires. The sixth and final section looks at the construction of group identities and the reification of groups.

I. The Importance of the Group in the Rights Discourse in India.

This study will attempt to understand the theoretical underpinnings or foundations of the rights discourse in India to gain a clearer insight into some of the problems of group membership that it has frequently given rise to. One of the most problematic has been the tendency to view individuals as falling into or belonging to the supposedly mutually exclusive and internally homogeneous monolithic blocks that groups are viewed to be under the rights discourse. This particular problem forms the central point of analysis of this study and it is argued here that this particular tendency of viewing Indian society as being constituted by solid, internally homogeneous, well demarcated, monolithic blocks arises from a particular colonial view of India.¹ Such a view of groups that has been

¹ On the colonial view and construction of India see Ronald Inden (1986). The object of Inden's critique in this particular essay is what he refers to as the 'Orientalist discourse' which is responsible for producing
criticized as a ‘realist ontology of groups and groupness’ and which constitutes an important part of currently fashionable ideas like multiculturalism. To make this point a little strongly, realism as a particular social ontology of viewing the group is simplistic and patently false. As multicultural theory is informed by this particular realist ontology of viewing the group, it ends up providing an extremely simplistic and misleading picture of groups, their relationship to the individuals constituting them, and to other groups.

This study takes a more critical view of groups, not by denying the existence and validity of groups and group life in the country, but by taking a more complex view of groups that sees them as internally heterogeneous, with their boundaries being subject to change and remaining in a state of constant flux, rather than being fixed and permanent entities that are socially ‘given’. Such an uncritical view of groups inevitably commits one to take them for granted, as more or less enduring features of social composition. The study will therefore look at groups as being contingent and constructed rather than as being fixed and given.

distorted accounts of India. Inden makes it clear at the very outset of his essay that his concern is not to reveal the vast gap or remove that exists between these Orientalist accounts and the ‘facts’ of Indian history. Rather, he wants to make the point that the facts themselves have been produced by a particular ‘episteme’ which relies on a representational view of knowledge and which claims that it accurately represents the social reality of Indian life. Such an objective claim to knowledge aims then to put the issue beyond political debate and contestation. Indological discourse assumes that the essence of Indian civilization is the exact opposite of the West and identified the ‘irrational’ institution of caste as the essential institution of the country. Inden further observes that this particular fixation with caste has ‘committed Indology, largely descended from British empiricism and utilitarianism, to a curious and contradictory mixture of societalism, in which Indian actions are attributed to social groups – caste, village, linguistic region, religion, and joint family – because there are no individuals in India, and individualism, in which Indians’ acts are attributed to bad motives’ (Inden 1986: 403). This makes it obvious that it was the colonial construction of India that saw it as consisting of discrete communal groupings with little or no agentiality being attributed to individuals who merely belonged to these groups. This is again obvious in the rights discourse with the overbearing influence that it gave to the group vis-à-vis the individual. Inden’s purpose is ‘to produce a knowledge of India that helps restore’ individual power and agency and that ‘focuses on the problematic of formulating and using a theory of human agency which avoids the pitfalls of the representational theory of knowledge’. He further feels that those working in the discipline will have to free themselves of the ‘incoherent combination of societalism and individualism that prevails in the study of South Asia (ibid.: 403). It is in particular societalism, the view that reduces religion, politics, and economics, to the social, that has made caste into the true agent of the actions of Indians (ibid.: 441). Inden has focused on the Orientalist construction of the institution of caste with Hinduism, the religion considered to be the justification of caste being characterized as essentially idealistic i.e. apolitical. For an argument on the manner in which European perceptions of Islam underwent a qualitative shift in the late 19th and early 20th century through a study of T.W. Arnold a ‘scholar and activist’ located very much in the ‘imperial and orientalist matrices’ see Katherine Watt (2002). See also Peter Heehs, ‘Shades of Orientalism: Paradoxes and Problems in Indian Historiography,’ History and Theory, 42, May 2003, pp. 169-195.
Design of the Study. Before proceeding further, the structure of the study needs to be outlined. This study of the theoretical foundations of group rights in India will be conducted by placing it within a triangular theoretical framework. The first two vertices of the framework are constituted by the Burkean and Benthamite utilitarian perspectives. Both these perspectives have consciously rejected the natural rights tradition. As a result of this conscious rejection, both perspectives are weighted more in favour of the group and against the individual. It is argued here that the rights discourse in India is preponderantly weighted in favour of the group, precisely because of the influence of these two streams of political thought. Much of this study is concerned with constructions of Indian society and notions of its ‘groupness’ during colonial times. It is precisely for this reason that the study relies to a great extent on a reading of Burke and Bentham on India. Both these perspectives, it is argued, are vital for an understanding of the manner in which Indian society was viewed by the British and hence the manner in which it was to be constructed. The privileging of the group above the individual, results from the particular manner in which a legal system with an emphasis on groups and their traditional native laws was crafted by British jurists and legal experts. The privileging of the group over the individual, it will be argued during the course of this study, results from the particular central position that is bestowed upon the group by the Burkean and Benthamite utilitarian perspectives.

In the case of Burke it arises in the form of a certain romanticization and uncritical valorization of traditional groups and communities which he felt were endangered and threatened by British rule. In the case of the Utilitarians it arose from the creation of a modern legal system which was apparently individualistic. However, Bentham’s dismissal of individual natural rights as being little more than ‘nonsense upon

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2 The Rudolphs pose the important question of what made the British East India Company adopt a policy of cultural pluralism. ‘Why did they decide to apply “the laws of the Koran with respect to Mohammedans and that of the Shaster with respect to Hindus”? Why did Jones [Sir William Jones] construct a world composed of Hindus and Muslims? Why and how did he construct the categories “Hindu” and “Muslim”, categories that, in changing guises and with changing meaning and consequences, are present today at the close of the twentieth century?’ The Rudolphs have the following answer to offer in explanation: ‘A post-colonial perspective leads to reading nineteenth- and twentieth-century categories and outcomes into the mentalities and intentions of eighteenth century actors. The motive becomes imperial power, the tactic religious division. Power becomes as unsubtle a determinant of thought as is control of the means of production’ (Rudolph and Rudolph, 2001: 38-39). See also Akeel Bilgrami ‘What is a Muslim? Fundamental Commitment and Cultural Identity’ and Gyanendra Pandey (ed.) ‘Which of Us Are Hindus?’ both in Gyanendra Pandey (ed.) Hindus and Others, Viking New Delhi, 1993.
stilts’ and the emphasis in utilitarian thought on the collective, ended up in a roundabout way privileging the group. In Burke and Bentham, there is a vehement denunciation of natural rights. This is contained in Burke’s *Reflections on the Revolution in France* and Bentham’s essay ‘Anarchical F’allacies’, both characterized by their passionate prose that reflects the extent and depth of their opposition.³

The first two vertices help in providing us with an understanding of the way in which the rights discourse was institutionalized in India during British colonial times. The third vertex, constituted by contractarianism, is an attempt to understand the ways in which the rights discourse has evolved in more recent times under the influence of contemporary liberal political thinking. The fourth chapter of this study is on contemporary liberal theory and an attempt is made here to move beyond the contractarian tradition, while at the same time affirming the importance of a rights based liberalism.

This is a study in the history of ideas, of the ways in which a rights discourse was institutionalized and developed over the years. It takes as its starting point, the last decades of the 18th century, when Edmund Burke was at his prolific best with regard to his writings on India and when he wrote what was to be an impassioned plea against the French revolution – his famous *Reflections on the Revolution in France*. The study stretches into contemporary times when the rights discourse in India has developed and evolved over all these years and further resulted in the overriding of the right of the individual by the group.

**Natural Rights.**

The idea of natural rights is not being upheld here. What is being suggested is that in the vehemence with which Burke and Bentham opposed the idea of individual natural rights, are to be found the roots of the predominance that groups enjoy over and above the individual in the rights discourse in India. There is also an inherent imperialism to be found in the system of natural rights. Jeremy Waldron (1987: 169) has put the point rather provocatively by openly conceding that ‘our’ (western) local mores are

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³ On the opposition that is to be found in both Burke and Bentham to the issue of natural rights see Jeremy Waldron (ed.) (1987) *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man*.  

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‘intrinsically imperialistic’ and that any attempt to limit that imperialism would be doing an injustice and violence to such Western mores.

The question of the imperialism inherent in the idea of natural rights has been dealt with in a more sustained manner by Anthony Pagden (2003) in a recent article ‘Human Rights, Natural Rights, and Europe’s Imperial Legacy’. Pagden is clear that natural rights, especially as they have come to be understood in a modern form evolved in the context provided by European colonial expansion and the attempt to legitimate these overseas territorial acquisitions. Taking note of the criticisms coming from various quarters like the Islamic world and Asian leaders like Singapore’s Lee Kuan Yew, to the idea of human rights, Pagden writes: ‘What all of these criticisms have in common is their clear recognition of – and objection to – the fact that “rights” are cultural artefacts masquerading as universal, immutable values’ (Pagden 2003: 172). Pagden also exhibits a blithe acceptance of the specifically Western European provenance of rights and feels that such a free and unembarrassed acknowledgement is a first step towards universalizing the idea of human rights. Pagden’s position is of course less brazen and provocative than Waldron’s. However, the problem of the Western origins of natural rights remains an acute one for those of us living in the non-western part of the world, where such a blithe acceptance can be extremely difficult.

The manner in which colonial writers on India like Edmund Burke, Jeremy Bentham, James Mill, John Stuart Mill etc. visualized India was heavily influenced by colonial assumptions. However, in the case of Burke and Bentham, there is a further commonality, apart from the opposition to the natural rights tradition already noted, which is a further reason for taking their perspectives to constitute the first two vertices of the theoretical framework of this study. This is the ambivalent attitude that they held towards the British Empire. Apart from Burke who was noted for his sympathetic attitudes towards the colonies and the disruptive effects on the lives of natives that colonial penetration and intervention had, there can be found in Bentham, as well, a similar sympathy towards the colonies (see Pitts 2003; Boralevi 1984). An interesting question that can be raised here is whether these attitudes of sympathy towards the colonies, held by Burke and Bentham, had any connection to their rejection of natural rights, which are inherently imperialistic.
More interestingly, if there was any connection, we find Burkean ideas and Benthamite utilitarianism, leading to the colonial institutionalization of a rights discourse characterized by a preponderant weightage being given to the group, resulting in a 'representational mode of governance'. This ruled out the possibility of a direct relationship between individual and state, the colonial state preferring instead such a representational mode that was based sociologically on discrete communities, with particular individuals representing those interests (Freitag 1990: 191-92). The point is that Burke and Bentham may have opposed individualist natural rights and had ambivalent, sympathetic attitudes to the Empire. Their ideas did however, lead to the strengthening of the imperial presence in India by contributing to an indirect 'representational mode of governance'.

II. The Colonial Judicial System.

British jurists and legal experts created a judicial system that apart from the influence of British common law also recognized certain elements of native Indian law. There arose a process of 'discovery' of native law with large numbers of pandits and moulvis being employed by the British to assist in this process of discovery (Dhavan, 1997: xiv). This very process of discovery in fact led to a transformation in native law with Hindus and Muslims being made subject to new personal laws which can be termed Anglo-Hindu or Anglo-Muslim law respectively (Dhavan 1997: xiv). 4 The names that stand out in this transformation, codification and adaptation of Indian law are those of Macaulay, Maine, Fitzjames Stephens, amongst others.

Flavia Agnes (2001) points out that to understand fully the judicial structure of modern India there is a need to look at the Presidencies of Calcutta, Bombay and Madras during the eighteenth and nineteenth centuries, specifically the process of colonization in

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4 For an account of the manner in which Islamic law was codified and transmuted see Scott Alan Kugle's interestingly titled article 'Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia' (2001). Kugle argues that the codification of Islamic law by the British resulted in the creation of a 'hybrid and oxymoronic' Anglo-Muhammadan law that was definitely not Islamic. The gap that was created between Islamic fiqh (law) and Anglo Muhammadan law arose as a result of codification and translation that 'subtly shaped Islamic jurisprudence to fit the needs of a modernizing, centralizing state'. Through various judicial processes Kugle argues that the Shar'iah became a 'reified and static entity'. He further observes : 'The shar'iah was largely codified by the British act of act of wresting political power away from Muslims, while later Muslims sought to regain political power through rhetoric justified by this exact "colonized" shar'iah' (258-259).
these presidencies during this period. Agnes notes that it is the Calcutta Presidency in particular that needs to be studied carefully as it had experienced the presence of the East India Company from the early part of the 18th century. An important aspect of the institutionalization of a modern legal system by the British that Agnes points out is the manner in which it suppressed customary law that existed at a local level. Such customary laws often proved to be a major irritant to the British largely owing to their opacity to British administrators on legal questions. The result was an attempt on the part of the British to resort to original sources of the law by translating the ancient texts. This became the basis of Anglo-Hindu and Anglo-Muhammadan law in India (Agnes 2001: 44).

To come back to the point made earlier about Indian society understood as constituted by discrete and mutually exclusive groups, Marc Galanter argues that such a notion of Indian society is a ‘carryover from the area of personal law’ (Galanter 1997: 114). Scott Alan Kugle observes that in its attempt to administer the Diwan of Bengal the East India Company ‘needed a comprehensive ideology through which to rule; therefore its officers turned to law. They assumed that ‘India was inhabited by communities which were ancient and discrete; furthermore, these discrete communities rigidly and ritualistically followed their own law in all matters of social custom, religious duty, and commercial transaction’. In the ‘Shar‘iah’ and the ‘Shaster’ were found the necessary codes by the Orientalist educated members of the Company. A further assumption that the British made according to Kugle is that ‘all Indians acted out of inherent religiosity and orthodoxy, so the codes of religious law were sufficient to adjudicate all their crises’ (Kugle 2001: 270).

Such a recognition and preservation of native law that formed a central part of colonial British practices in various sites of the Empire was often upheld in terms of an enlightened deference towards native customs. Yet Kugle citing the 1772 Regulations of Warren Hastings suggests that while the wording ‘seems to preserve the law of different communities, yet it subtly introduces a new legal fulcrum, around which the ancient indigenous laws would have to pivot’ (ibid.: 262). Agnes seems to be indicating something very similar to Kugle’s view when the latter says that the colonial intervention in the area of jurisprudence while seemingly upholding and preserving the
law of different communities actually ‘subtly introduces a new legal fulcrum’. She thus argues:

The translated codes, backed by the authority of British courts, began to make alterations in custom. In their attempt to make the shastric injunctions precise and definite, to suit the structure of the Anglicized courts, the British forced it towards a straight-jacketed mould which led to a loss of complexities and localized contexts and also provided the scope for the biases of the English scholars to creep into the translated texts (Agnes 2001: 45).

Agnes argues that colonial intervention in the area of jurisprudence significantly undermined the plurality, complexity and variety of existing local customs. The reason for this undermining, according to her, lay in the adoption for the centralized administration of British India, the model of adjudication prevalent in the Calcutta Presidency. The Calcutta Presidency under the administration of Hastings itself adopted the Roman model of differentiating between the Canon and Civil law. This ‘adaptation of the canonical mould overriding the common law norm’ led to the suppression of customary law. In contrast to the model of adjudication in Calcutta Presidency, the one accepted in Bombay Presidency under the administration of Elphinstone adopted the English model of King’s law and the Common Law which was more conducive to the continued existence of customary law (ibid.: 41). Elphinstone himself was influenced by the English jurist Jeremy Bentham and he believed that the Bengal model of categorizing law as ‘Canon’ and ‘Civil’ would not work in the Bombay Presidency. Therefore in his scheme there was a need to codify the Common Law to serve as a guide to the European judges in their administration of the native law. The Common Law therefore had to be based on the customary practices of the people rather than relying on ‘archaic religious texts’ (ibid.: 45).

The system of viewing India in terms of discrete and mutually exclusive communities with their own religious laws and customs, far from being an act of colonial benevolence, respect, or even tolerance of indigenous norms, was actually calculated at achieving a certain stability and eventual position of preeminence and domination by the colonizers. An important point that Susan Moller Okin has made is that the British colonizers codified traditional family law in various sites of the British Empire for the
simple reason that they were then able to enforce their own laws that they considered more important. These were laws that pertained to contract and crime. In other words, the laws pertaining to contract and crime, which gave the British the leverage and necessary capability to control the colonies, were their very own. At the same time, laws pertaining to marriage, divorce, inheritance and other such matters were allowed to be retained. This gave the impression that the British in an act of colonial benevolence were allowing the natives to retain their own laws relating to certain cherished aspects of life. Such provisions that the British colonizers allowed to be retained form a part of contemporary multicultural practice.

To round up the debate so far, it would be useful to point out, to the detriment of multiculturalism, that it has two sordid colonial legacies that continue to plague it. The first is the colonial construction of the group and the second are the specific provisions for the protection of minority groups in former colonies like India, which mostly pertain to religious and traditional family law. Present multicultural attempts to protect minority groups, which may often be well meaning attempts, end up locking vulnerable groups within the traditional and patriarchal structures of oppressive groups, to result in what Ayelet Shachar would term ‘the paradox of multicultural vulnerability’ (see Okin 2005).

To actually look for the sources of conservatism that, it is argued, are an inherent part of the legal system the British bequeathed to India, one has to take a closer look at what David Washbrook calls the ‘conundrum of colonial India from the angle of law’ (Washbrook 1981: 650). Washbrook attempts to look ‘constantly at the relationship between the law and its historical milieu’, an effort that he feels will facilitate a better understanding not only of the effects of law on society but also conversely allow an understanding of the forces in society which moulded the law (ibid.: 651). In such an analysis the laws pertaining to property become very important especially the ‘rule of property for Bengal’ that was developed in the late 18th century. An analysis of the social implications of the colonial legal system as it developed subsequent to the conquest of Bengal in the late 18th century reveal some of the conservatism that it favoured and thereby reinforced.

While the question of the new ‘rule of property’ for Bengal will be taken up more fully and elaborately in the second chapter, especially in conjunction with the
conservatism of Burke, here it will be sufficient to merely indicate the conservative bias in the legal system as it was drawn up by the British. While the public law consisted in the guaranteeing of property rights and the encouragement given to acquiring and accumulating property through the market, the private law was characterized by its overbearing and obnoxious conservatism that extended to a reliance on the scriptures. The reliance on the traditional interpreters of the scriptures, the pandits, ensured that a Brahminical view of the social structure considered as inflexible and immutable was reinforced. Thus, under such an influence the personal law recognised and validated the caste system and the varna theory of social order; it applied a theological definition of the concept of family and the relations that operate within it; and Hindu law expanded into those sections of society where it had been previously unknown (ibid.: 653). Washbrook has very pertinently pointed out that an investigation of the personal side of the law reveal the ‘subtle conservative implications for the development of society’ (ibid.: 653). He notes that right from the beginning the Anglo-Indian legal system was Janus faced, resting on two contradictory social principles in the public and private domains. He rightly notes:

Whereas the public law had the intention of enlarging and safeguarding the freedoms of the individual in the market place, and was to be made by statute and the courts in the light of equity and policy, the personal law was meant to limit the sphere of “free” activity by prescribing the moral and community obligations to which the individual was subject, and was to be made by the “discovery” of existing customary and religious norms. Its purpose was to keep society in the structure of relations in which the colonial had found it and to construe the moral problems of the present against standards taken directly from the past (ibid.: 652).

An analysis of the legal system in India itself reveals a strong affirmation of the idea of the group and group membership. Rajeev Dhavan observes that contemporary India is an example ‘par excellence’ of a society where a modern legal system exists in close contact and association with traditional society and indigenous methods of regulation. Dhavan observes that with the huge diversity of groups in the country
along with their complexity, which is further compounded by the whole range of socio-economic inequalities that affect them, it would be an extremely difficult task for political or legal sociology to fully understand and appreciate them. He further observes that as political exigencies rather than intellectual rigour have determined the answers to these questions, there has been a tendency to falsify the nature of these groups as well as the nature of government plans in relation to them.

Galanter enthusiastically endorses what is called a ‘pragmatic approach’ to traditional group life. This enthusiastic affirmation of groups and membership in groups, along with his rather optimistic view with regard to groups and their ability to be reformed, and hence move towards greater egalitarianism, stems from Galanter’s own ‘passionate belief in a voluntaristic pluralistic society in which all kinds of group life can co-exist alongside each other’ (Dhavan 1997: lii).5

Galanter’s view is sharply opposed to a modern approach which is extremely critical of all traditional groups and their practices. Such a modern view would advocate a total abandonment of traditional groups for new associational ties.6 Dhavan further observes that Galanters’s views on group life stand opposed to more radical understandings of class which see mobilization along these lines in order to redress economic exploitation (ibid.: liii).

A brief look at the manner in which the Indian judiciary has grappled with some of the problems that group membership has frequently given rise to, reveals according to Galanter, some of the explicit and implicit assumptions about the structure of Indian society which guide the courts (Galanter 1997: 104). An important case in terms of consideration of group membership was the Supreme Court’s ruling in Vithaldas Jasani

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5 Nivedita Menon is sharply critical of the modern legal system in India owing to the tendency of the law to fix meaning. She cites the work of Marc Galanter who is also critical of this tendency. As a result of this imparting of fixity to the law, she sees ‘individuals as members of one group only, and therefore, as having only the rights which that group is entitled to. Thus, for example, one who attains caste status loses tribal affiliation as far as the law is concerned. The empirical approach, on the other hand, does not attempt to resolve the blurring and overlap between categories and accepts multiple affiliations. It addresses itself to the particular legislation involved and tries to determine which affiliation is acceptable in the particular context’ (see Menon 1999: 277).

6 Galanter’s views on the group and group membership are to be found in his book Law and Society in Modern India, Oxford University Press, New Delhi, 1997. The relevant chapter is chapter 6 ‘Group Membership and Group Preference in India’. Rajeev Dhawan has written an extensive introduction to this book in which he has also expressed his opposition to Galanter’s over optimistic liberal pluralism that whole-heartedly endorses the heterogeneity and variety of traditional Indian group life, which Dhawan feels has been the source of so much suffering and oppression in Indian society (xlviii-lvi).
v. Moreshwar Parashram. In this case an Election Tribunal had rejected the nomination papers for a reserved seat submitted by an individual belonging to the Mahar caste who had joined the Mahanubhava Panth. The Supreme Court, while reversing the decision of the Tribunal, lay down three criteria to determine whether the individual in question remained a member of the Mahar caste. These three criteria were: first the reactions of the old body; second the intentions of the individual himself; and third the rules of the new order. The same three tests were applied in subsequent cases like Shymasundar v. Shankar Deo Udgar, Kartik Oraon v. David Munzni and Wilson Reade v. C.S. Booth. The important point that Galanter makes about these cases is that they permitted ‘overlapping and multiple group affiliations. The possibility that an individual might be accepted by a second group is not taken to automatically remove him from the first’ (Galanter 1997: 110).

While the Jasani line of cases allowed for the possibility of multiple, overlapping membership, this was not the view the Supreme Court took in V. V. Giri v. D. Suri Dora, where it ruled that it was not possible to be a member of the Moka Dora tribe while at the same time being an upper caste Kshatriya. Galanter comments that the source of this particular incompatibility and mutual exclusiveness seems to lie in the Supreme Court’s visualization of Indian society as a ranked and hierarchised one. This does not, of course, mean that the Supreme Court is upholding or endorsing such a view of Indian society. It only means that the Court is attempting to take into account existing Indian ground realities.7

7One of the most momentous cases considered by the Supreme Court was Mohd. Ahmad Khan v Shah Bano Begum better known for the political controversy that it gave rise to leading to the passing of the Muslim Women (Protection of Rights on Divorce) Bill in 1986. The acrimonious debate that arose over the judgment delivered by Chief Justice Chandrachud, the conservative Muslim outrage over the verdict, the subsequent passing of the Muslim Women’s Bill, and the political capital that has been made out of it by Hindutva forces, all go to show how greatly these events have shaped Indian politics. The Shah Bano Case is especially important as it forms a demarcating line for the end of this study - the year 1986. The Shah Bano controversy is taken as a terminating point as it manifests many of the significant characteristics of the rights discourse, like the problem of the suppression of individual rights as a result of group pressures (Shah Bano had to withdraw her claim for maintenance after the political events), and the reinforcement of conservative value systems. It also brings into focus the problematic issue of Muslim Personal Law and its permissibility in a liberal democratic set up (see Bhargava 1999).

The Shah Bano controversy has raised difficult issues, like the permissibility of personal laws for communities, especially when these laws have known illiberal results. The issue has to a great extent discredited the very idea of minority rights and minority protection as it was on the ostensible grounds of protecting minority rights that Rajiv Gandhi’s Congress government passed the Muslims Women (Protection of Rights On Divorce) Bill in May 1986 with the huge parliamentary majority that it
III. Theoretical Framework.

This work is an attempt to understand what has been termed the rights discourse in India. Two specifications need to be made. The first is that the study will focus exclusively on group or minority rights, which it will be argued, arose as a consequence of the institutionalization of a modern system of rights in India under British colonial rule. Secondly, the nature of the study is in the form of an inquiry into what constitutes the theoretical foundations of the rights discourse. This attempt to uncover the theoretical underpinnings of the rights discourse, it is hoped, will provide an understanding of the surface or topographical features of the system of rights in India, which, it needs to be mentioned at the very outset, can often be skewed in favour of the group and against the individual. This crucial skewing in favour of the group results in the rights discourse decisively swinging to the advantage of the group and to the detriment of the individual.

This gives rise to the familiar and intense debate within liberalism of the clash between individual and group rights. While, the study will obviously draw upon and seek to benefit from the insights that such debates, internal to liberal political theory inevitably furnish one with, it will at the same time contend, that a specific understanding of the problem of group rights and the inevitable clashes with individual rights they give rise to, can only be understood within the specific context that they take place. Thus, theoretical debates on the issue, rigorous as they often are, can miss the specificities of issues, given their abstract theoretical character. It is for this very reason that this study emphasizes the ‘contextualization’ of the rights discourse.

There is another explanation that needs to be made about the study. The use of the word ‘discourse’ suggests that the existing system of rights, which obviously is the
commanded in those days. Worse, the debate surrounding the controversy took the form of an exchange of accusations and counter accusations between those opposed to the Bill and in favour of a Uniform Civil Code (UCC), who were therefore ‘modern, secular and rational’ and those opposed to the demand for a UCC who were deemed ‘orthodox, male chauvinist, communal and obscurantist’. Further as Flavia Agnes points out: ‘To be progressive, modern and secular was also to be a nationalist. By the same logic, the opposing camp was projected as against national integration, and hence anti-national’ (Agnes 1999: 102). Agnes laments that the controversy left no space for a middle ground which ‘pleaded for conciliation or compromise’ (ibid.: 103). Interestingly, the debate put the progressive proponents of the UCC on the same side as the communal reactionary Hindutva supporters of the UCC. Agnes notes: ‘As the controversy over the judgment escalated, the “Muslim” was defined as the “Other”, both of the nation and of the Hindus’ (ibid).
product of at least two centuries of development, beginning in the latter part of the eighteenth century, has over these two centuries, come to acquire a certain continuity that gives to it the quality of a discourse. There are different and divergent philosophical trends within it, which it is the purpose of this study to understand.

Having said this, the nature of the study needs to be further elaborated. As mentioned earlier, the study is an attempt to uncover the theoretical foundations of the rights discourse with special emphasis on group or minority rights. Therefore, it will consist of a textual reading of the important philosophical components of the rights discourse. While the study does involve going back in time to the writings of Edmund Burke in the latter half of the 18th century, this is not a historical study that will chronicle the evolution of the rights discourse. It is a work on the history of political ideas and discourse pertaining to group rights in India. Having made this important clarification regarding the nature of the study it is also important to make a crucial distinction between the terms ‘history of political thought’ and ‘history of political discourse’ (see Pocock 1985: 1).

The nature and method employed by the study lead one to the writings of Quentin Skinner. Skinner has pronounced that for a historian of political thought it is important that he/she is able to recover the intention of the author whose text is being read. Objections have been made to this proposal to the effect that it may be difficult to recover the author’s intentions from his text without becoming imprisoned in the ‘hermeneutic circle’. This objection has, rather than destroying the proposal itself, resulted in the need being felt to move beyond it. The possibility of recovering the author’s intention diminishes considerably when the historian has at hand nothing but the particular text in question. However, this is very rarely the case and there always exists evidence from the author’s other writings or his private correspondence. Such evidence can be suitably employed in the construction of hypotheses regarding the author’s intentions, which can then be applied to the text itself (Pocock 1985: 4).

This need to recover the author’s intentions from his various writings however, leads one to the fact that any author always inhabits a particular historically given world that can be apprehended only in the ways rendered available by a number of historically given languages; ‘the modes of speech available to him give him the intentions he can
have, by giving him the means he can have of performing them'. Here the question of langue as well as parole, of language context as well as speech act has been raised (Pocock 1985: 5). This necessitates placing the author within the universe of langue that gives meaning to the parole he performs within it. As a result of this, the history of political thought becomes a history of speech and discourse, of the interactions of langue and parole; the claim is made not only that its history is one of discourse, but that it has a history by virtue of becoming discourse.

The starting period for the study can be considered as the last two decades of the 18th century when Edmund Burke was at his prolific best in his disquisitions on the effects of colonial rule in the colonies (India for our purposes), and when he set forth his opposition to the idea of natural rights in his celebrated essay Reflections on the Revolution in France. The period of the study stretches into our own contemporary times when the rights discourse has evolved significantly and has had some of the effects that this study seeks to understand as arising from the theoretical foundations of the rights discourse.

What is being argued here is that the theoretical and philosophical arguments put forward by those responsible for contributing to the rights discourse, thinkers like Edmund Burke, Jeremy Bentham, James Mill, John Stuart Mill, James Fitzjames Stephens, to name the important ones, have had far reaching consequences. These have transcended the intentions that they may have had at the time of actual writing. This particular point about remote thinkers living in the 18th and 19th centuries exercising an influence on the modern day rights discourse as it exists in India today finds its roots in an argument made by Quentin Skinner (1978) who in his book The Foundations of Modern Political Thought said that if we are to have a history of political thought constructed on authentically historical principles we must be able to find a way of knowing what an author 'was doing' when he wrote or published a text (Pocock 1985: 5).

Pocock observes that the two words what the author 'was doing' at the time of writing or publishing a text make it possible to ask whether an actor was aware of the consequences of his writings or speech acts that he was performing. Pocock is hinting at the possibility of a gap between 'intention and effect', or between the 'consciousness of the effect and the effect itself'. The point is that the author's actions that were produced
in a specific context have wider ramifications that are produced in an open-ended series of effects. Pocock adds that it is theoretically, though somewhat figuratively conceivable, that the author has not 'finished doing things yet'. The point is that the author's work continues to exercise an influence far beyond his own time and well into the future. Precisely for this reason Quentin Skinner used an imperfect continuous tense. Pocock thus writes:

It is not clear whether an author's action is ever over and done with; but it is clear – and the use of the future conditional underlines it – that we have begun to concern ourselves with the author's indirect action, his posthumous action, his action mediated through a chain of subsequent actors. Such is the necessary consequence of admitting the context to parity with the action, the *langue* to parity with the *parole* (Pocock 1985: 6).

Skinner, in the method that he has outlined, is completely opposed to the view of considering a text as complete in itself for the purposes of analysis. He sees no great advantage in reading a text over and over again in order to analyse it and unearth some of the timeless truths to be found within it and which are relevant for the human predicament for all times to come. One of the first and most important articles that Skinner wrote on this particular methodology was 'Meaning and Understanding in the History of Ideas'.

Skinner, in his book *The Foundations of Modern Political Thought*, has mentioned one of the reasons for writing the book as being the need to exemplify a particular way of approaching the study and interpretation of historical texts. He contrasts his own approach of studying historical texts with the more 'traditional' approach of studying the history of political ideas, an example of which is Professor Mesnard's survey of the transition from medieval to modern political thought.

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8 See 'Meaning and Understanding in the History of Ideas' *History and Theory*, Vol VIII, No. 1 (1969), pp. 3-53. A useful bibliography of all of Skinner's works on this particular theme that have been published subsequent to the appearance of this article is to be found in Quentin Skinner, *The Foundations of Modern Political Thought*, 2 Vols, Cambridge University Press, Cambridge, 1978. See also Tully (1988).

9 Skinner in the preface mentions three reasons for writing the book. The first is simply to offer an outline account of the principal texts of late medieval and modern political thought. The second aim is to use the texts of the late medieval and early modern period in political theory to illuminate a process by which the modern concept of the state came to be formed. The third and last reason is that of presenting a particular way of approaching the study and interpretation of historical texts.
This particular work appeared four decades before the publication of Skinner's work and has been mentioned by him as being a kind of forerunner to his own. The fact that no such work appeared in the four decades that separated them is given by Skinner as being a consideration that prompted him to write this particular book (Skinner 1978: ix-x). To further bring out the contrast between his own approach and that of Professor Mesnard, he describes how the latter treats the subject essentially as a history of the so-called 'classic texts'. He thus produces successive chapters on the chief works of Machiavelli, Erasmus, More, Luther, Calvin and the other main figures. On the other hand, Skinner claims that he has concentrated not so much on the major figures but has instead focused on the general social and intellectual matrix out of which these works arose (ibid.: x). He argues that societies typically privilege a certain set of problems that the political theorist is compelled to engage with. In this manner certain issues become the leading subjects of debate. He categorically states that these ideological superstructures should not be treated as being straightforward outcomes of their social base (ibid.: xi). Skinner believes that the classic texts should be surrounded by their appropriate ideological contexts. In this manner it may be possible to build up a more realistic picture of how political thinking was conducted in earlier periods.

The traditional 'textualist' methods, he feels, have rarely been able to provide us with a genuine history of political theory and he feels that his own method will be able to do precisely this. An important consideration for Skinner seems to be the illumination of the links between political theory and practice. This will not be possible until historians of political theory continue to think of their main task as being the interpretation of a canon of classical texts. The way to bring out this crucial connection between political theory and actual practice will be possible, according to Skinner, once historians of political thought start thinking of themselves as students of ideologies. By studying ideologies, in this manner it would be possible to bring out the manner in which a particular historical agent is constrained and bound by the normative vocabulary that is available to him. Thus, any agent can only act in accordance with, and remain within the normative language that is available to him. This will go a long way in explaining the agent's behaviour, as the normative language that we are focusing upon is a powerful determinant of such behavior (ibid.: xii-xiii).
Skinner further points out, that a crucial advantage of this particular method or approach to studying texts, is that it enables us to return to the texts with a clearer prospect of understanding them. Thus, the study of the context of any major work of political philosophy is not merely about gaining additional background information about its production. It is also about gaining particularly vital and additional insights into the text and its author’s meaning and intentions, which no amount of reading a text ‘over and over again’, as proposed by the traditional ‘textualist’ approach, could furnish one with.

It would be a mistake to think that of the two methods of studying a text – the textualist and the other emphasizing the context, Skinner simply finds no use in the first textualist approach and supports the second one emphasizing the context. Skinner finds problems with both approaches and this is a point that he makes in one of his earlier and more important essays on the theme, ‘Meaning and Understanding in the History of Ideas’. In this essay Skinner describes both the two antagonistic approaches as being the prevailing orthodoxies to the question of how a historian of ideas should confront a work that he seeks to understand (Skinner 1969: 3). It is obvious that while Skinner does not really support one of these approaches against the other but, instead proposes a third alternative methodology, he is much closer to the second approach that emphasizes the context as being extremely important. Skinner also points out that of the two orthodox answers, it is the one which argues for the autonomous nature of the text and hence the self-sufficiency of the text that has the widest number of adherents. The other approach with its emphasis on the context is, he believes, slowly being adopted by a larger number of historians of ideas (ibid).

Each of these antagonistic orthodoxies considered the other to be engaged in a task that was a waste of intellectual energy and talent. Thus, the proponents of the textualist approach dismissed any attempt to reconstitute the ‘total context’ as ‘gratuitous and worse’. The proponents of the contextualist approach on the other hand, no doubt thought that their opponents were engaged in a futile task of devoting such painstaking attention to a text in order to recover priceless meanings lying within it. He describes a number of absurdities, anachronisms and myths that the first textualist approach and its flaws are bound to give rise to. He does however, hasten to add that it should not seem
from his scathing critique of the textualist approach, which he doubtlessly dismisses as being flawed, that he is wholly endorsing the other approach (Skinner 1969: 39).

In the first part of the article Skinner brings out in great detail how the first methodology, based on the claim that the text itself should form the ‘self sufficient object of enquiry and understanding’, gives rise to a number of mythologies. The methodology, Skinner points out is logically tied to the idea that studying past works of philosophy or literature is relevant on account of the presence in such works of ‘timeless elements’, ‘universal ideas’, a ‘dateless wisdom’, and a certain universal applicability. In fact, the very emphasis on such perennially relevant ideas and their supposedly universal applicability, brings out the fundamental contrast with the other contextualist approach. As Skinner himself points out:

For to suggest instead that a knowledge of the social context is a necessary condition for an understanding of the classic texts is equivalent to denying that they do contain any elements of timeless and perennial interest, and is thus equivalent to removing the whole point of studying what they said (Skinner 1969: 5).

Skinner proceeds to identify precisely this ‘essential belief’ in the perennial relevance of texts and their universal applicability as the ‘basic source of the confusions engendered by this approach to studying the history of either literary or philosophical ideas’ (ibid.). One of the first mythologies engendered by this methodology is the one that Skinner terms as the ‘mythology of doctrines’ which takes several forms. The first of these forms is when some scattered or incidental remarks by a classical theorist are taken (mistaken) to be the theorist’s doctrine on some theme that he may be elaborating upon in his writings. In the case of intellectual biography there is the danger of sheer anachronism, the crediting of a certain writer with an idea that he could not possibly have held on the grounds that there may be ‘some chance similarity of terminology, on some subject to which he cannot in principle have meant to contribute’ (ibid.: 8). An example of such anachronism that Skinner cites is the manner in which Marsilius of Padua has been credited by many commentators as being the precursor of the theory of the separation of powers. The sheer fallacy of this view should be obvious from the fact that
Marsilius of Padua could not possibly have meant to convey anything of this sort for the simple reason that the meaning was not available to him, as its historical origins lie two centuries after his death (Skinner 1969: 8).

Another form of the mythology of doctrines and the associated fallacy that it can give rise to can also be found when ideas and their morphology are traced through successive periods of time. The tendency here is to set out an ideal type of the given doctrine, thereby hypostatizing the doctrine into an entity, and speaking in terms of the idea being immanent in history. This is indeed an extremely ahistorical view to take. It reifies the idea and commits one to the view that the idea in question did not develop through the successive efforts of actual historical agents, but that the ideas themselves ‘do battle on their own behalf’ (ibid.: 11).

Skinner also discusses another variation of the mythology of doctrine, which is the converse, wherein a ‘classic theorist who fairly clearly does fail to come up with a recognizable doctrine on one of the mandatory themes is then criticized for his failure to do so’ (ibid.: 12). After his discussion of this mythology of doctrines and its variations, Skinner makes the crucial point that we are ‘left confronting the same essential and essentially begged question: the question whether any of these writers ever intended, or even could have intended, to do what they are thus castigated for not having done’ (ibid.: 16).

Skinner then moves on to the mythology of coherence in which the commentator or exegete is committed to find a certain coherence in the writings of a theorist that may in fact not be there. Here again, Skinner is led to the important, and for him central conclusion, that the mythology of coherence leads to a form of history that ‘can scarcely contain any genuinely historical reports about thoughts that were actually thought in the past’ (ibid.: 22).

Having discussed the first two mythologies, the mythology of doctrines and the mythology of coherence, both of which arise from the fact that the historian of ideas, in approaching a given writer will unavoidably be set in by some sense of the defining characteristics of the discipline to which the writer in question may be said to have contributed, Skinner moves on to the mythology of prolepsis. This particular mythology gives rise to the problem that in analyzing a certain text, the historian rather than focusing
on what the writer of the text himself may have had to say, ends up analyzing the significance of the text for himself. This will quite often arise when a historian may be legitimately interested in the retrospective significance of a certain historical work. According to Skinner one of the best examples of such a mythology of prolepsis is the charge leveled against Plato’s *The Republic*, that the ideas contained in the book foreshadow the rise of totalitarian regimes. The other example that Skinner mentions is similar to the complaint against Plato and is regarding Rousseau’s political views being responsible for and actually intending to give rise to totalitarianism. With regard to both cases Skinner observes: ‘an account which might be true of historical significance of the works becomes conflated with an account of what they were doing which could not in principle be true’ (Skinner 1969: 23). Skinner goes on to very pertinently observe, regarding the mythology of prolepsis, that it is ‘open to the crudest type of criticism that can be leveled against any teleological form of explanation: the action has to await the future to await its meaning’ (ibid.: 24). Finally, Skinner discusses the possibility of the historian of ideas incorrectly describing the sense and intended reference of a work, which he refers to as the mythology of parochialism. One important form of the myth of parochialism is that the historian may misuse his own vantage point in describing the sense of a work. In this manner he might end up misinterpreting an idea by attempting to understand its alien and inaccessible aspects by using his own familiar conceptual scheme.

Throughout Skinner’s essay, the centrality and importance of the political thinker’s intention is quite obvious. It is this intention that needs to be recovered to prevent confusions and misinterpretations of the kind that the various mythologies give rise to. This centrality that Skinner gives to the agent’s intentions is obvious from the following passage:

The relevant logical consideration is that no agent can eventually be said to have meant or done something which he could never be brought to accept as a correct description of what he had meant or done. This *special authority of an agent over his intentions* does not exclude, of course, the possibility that an observer might be in a position to give a fuller or more convincing account of the agent’s behaviour than he could give himself.
(Psychoanalysis is indeed founded on this possibility.) But it does exclude the possibility that an acceptable account of an agent's behaviour could ever survive the demonstration that it was itself dependent on the use of criteria of description and classification not available to the agent himself. (emphasis added; Skinner 1969: 28-29).

What should be obvious from the above passage is that there are two aspects to which Skinner is according a significant degree of centrality and importance. These are firstly, the special authority that an agent has over his intentions, and secondly, the limiting possibilities or circumstances that would seem to circumscribe, as it were the, options that might be available to an agent to act in the manner that he chooses, given those constraints. It would thus be wrong to ascribe or impute a particular motive to an agent, which the agent could not himself have been able to understand, for the simple reason that such a motive could not have any meaning at all for him, as it would not form a part of the range of limiting possibilities available to the agent.

Skinner feels that the contextualist approach has been 'very consciously resisted, in particular by historians of philosophy and by political scientists, both anxious to insist on the autonomy of textual study' (Skinner 1969: 39). After having discussed in considerable detail some of the difficulties that the first textual method gives rise to, he concedes that some of the dangers arising from this method can be avoided. In spite of this possibility, which Skinner has been at pains to point out is highly unlikely and very difficult, he proceeds to attack the 'underlying assumption of this whole approach' which is that one should focus merely and exclusively on the text. He adds that this methodology must remain a 'wholly inadequate' one for the conduct of the history of ideas (ibid.: 31). Skinner, again exhibiting his marked preference for this approach over the textual one, believes that a knowledge of the social context helps in avoiding some of the 'anachronistic mythologies' that he has discussed.

In spite of the overall favourable opinion that Skinner has of the contextualist approach, he does make the following observation which reveals where his differences with this method begin:
Despite the possibility, therefore, that a study of the social context may help in the understanding of a text, which I have conceded, the fundamental assumption of the contextual methodology, that the ideas of a given text should be understood in terms of its social context, can be shown to be mistaken, and to serve in consequence not as the guide to understanding, but as the source of further very prevalent confusions in the history of ideas' (Skinner 1969: 42-43).

A significant drawback of the contextualist approach that Skinner identifies is the tendency to view the context as in some way forming a set of antecedent causal conditions. Thus Skinner feels that ‘the hypothesis that the context of a text can be used to explain its content may be said to illustrate, but also to gain strength from, the more general and increasingly accepted hypothesis that actions performed at will are to be accounted for by the ordinary process of causal explanation’ (ibid.: 43). Of the two methods dealt with in this essay, the textual and the contextual, Skinner is closer to the latter contextual one. This does not, however, preclude a rigorous and sharp attack on this method, especially two misconceptions that seem to dog the method, a consideration of which, according to Skinner, ‘will serve to discredit the notion that a study of the contextual conditions of making statements can in any sense be regarded as a sufficient or even appropriate methodology for the understanding of statements made’ (ibid.: 44). These two misconceptions that underlie the contextualist method are, first that intentions are contingently connected with actions and second, that meaning and understanding are not strictly correlative terms.

The misconception with regard to intention lies basically in mistakenly assuming that every intention is antecedent and contingently connected to an action in the sense that it may or may not lead to an actual action taking place. However, Skinner points to the likelihood of an intention being proffered, subsequent to the action having actually taken place. ‘The distinction, in short, is between an intention to do x which may never successfully issue in an action – though it is not made clear what we should say if such prior statements of intention never issued in actions – and an intention in doing x, which not merely presupposed the occurrence of the relevant action, but is logically connected
with it in the sense that it serves to characterize its point'. The discussion of the misconception related to intentions brings out neatly the emphasis that Skinner is to subsequently make about the recovery of the author's intention in an understanding of a text. He goes on to say: 'The significance of this claim for my present argument will now be clear. Every statement made or other action performed must presuppose an intention to have done it, which cannot be a cause, but which must be grasped if the action itself is to be correctly characterized and so understood' (Skinner 1969: 45).

Coming to the second misconception, the consideration of meaning and understanding as being strictly correlative terms, Skinner opines with regard to the contextual method 'that an unavoidable lacuna remains: even if the study of the social context of texts could serve to explain them, this would not amount to the same as providing the means to understand them (ibid.: 47).

Skinner is thus moving beyond this method when he is trying to delineate his own alternative methodology which he also claims to establish 'not as a suggestion, an aesthetic preference, or a piece of academic imperialism, but as a matter of conceptual propriety, a matter of seeing what the necessary conditions are for the understanding of utterances' (ibid.: 49). The formulation of this alternative methodology rests on the crucial distinction that Skinner makes between meaning and understanding. It is on the distinction between meaning and understanding that Skinner tries to bring out the limitations and inadequacy of the contextual approach. Skinner thus observes that if we concede that a study of the social context is able to provide us with an explanation of the text, this would not be the same thing as understanding it (ibid.: 46). Skinner feels that the social context can furnish us with the antecedent conditions which caused a certain act to take place. However he is doubtful 'whether a knowledge of the causes of an action is really equivalent to an understanding of the action itself' (ibid.: 44). It is at this point that Skinner brings in the issue of intentions and the need to recover the intentions of the author of a historical text, a task that the contextual approach is obviously not up to. Skinner feels that this particular methodology (the contextual) rests on a mistaken assumption which is that 'meaning' and 'understanding' are strictly correlative terms.

Skinner’s alternative methodology points the way towards a consideration of the whole linguistic context in which the author made his utterances, as it is through a
consideration of this linguistic context that the author’s intention can be recovered and ‘decoded’ (Skinner 1969: 49). Skinner has thus shifted the focus in the understanding of texts in a decisively linguistic direction. He feels that as part of this methodology the study of all the facts about the social context of the given text can then take its place as a part of this linguistic enterprise. He feels that the emphasis on the context, while definitely not misplaced in the case of the contextual approach, mistakenly gets treated as the determinant of what is said. On the contrary the context needs to be treated as an ‘ultimate framework’ that acted as a range of limiting possibilities that a particular society had to offer to a particular actor and in which the actor made his utterances. The meaning of any utterance can only be understood within this range of possibilities. By tracing the relations between the author’s utterances and the wider linguistic context in which they were made, one would then be able to succeed in ‘decoding the actual intention of the given writer’ (ibid.: 49).

After this first positive conclusion regarding the alternative methodology that Skinner is attempting to delineate in this article, the second general and positive conclusion that he makes ‘concerns the value of studying the history of ideas’ (ibid). For Skinner the most exciting and interesting prospect that this gives rise to is the possibility of a dialogue between philosophical discussion and historical evidence.\(^\text{10}\)

IV. Different Group Claims.
While this study focuses on the manner in which the rights discourse in India, specifically related to groups, has evolved and developed, it also needs to be informed about the kinds of group rights claims that have been privileged and looked upon with sympathy and often hostility by political thinkers. Quite often, the groups concerned have been extremely ‘variegated’ in terms of the human identities that they have represented. A broad view of the kind of group claims that have arisen since the early part of the 20\(^{th}\) century, reveal that they have varied from the ‘voluntary’ associations which constituted an important consideration for political thinkers in the early part of the century to ethnocultural and national groups, many of which bestow an ascriptive identity on their individual members. More recently, towards the end of the twentieth century, specifically

\(^{10}\) See also Richard Rorty, J.B. Schneewind and Quentin Skinner (1984).
in the last quarter of the century, groups have come to be defined increasingly in terms of cultural and linguistic disadvantage and oppression (Stapleton 1995: x). It should be obvious that the crucial group rights claims that have been upheld as part of the upsurge of multiculturalism in the last quarter of the 20th century have had a more cultural content to them and easily fall within this category. Quite often the groups have been defined and constituted in terms of a threat to their cultural existence and continuity, and a loss of identity for their individual members.

Attitudes towards the group in liberal political theory have been characterized by neglect or overlooking of the group. There has thus been a denial of the very existence of the group as a viable entity in itself. It is precisely this kind of attitude that Vernon van Dyke (1977) opposes when he critiques what he terms the ‘two level theory of rights’ in liberal political theory. Here one level is constituted by the state, with its right to self determination, and the other level by the individual. Such a two level theory of rights fails to take cognizance of the existence of ethnic groups that exist at the intermediate level between state and individual.

Before proceeding further with this discussion, it would be useful to delineate three different perspectives towards the kinds of groups that have been acknowledged as existing at the intermediate level by political theory. The most prominent of these, American pluralism, has influenced understanding of the ways in which interest and pressure groups relate to the state and influence state policies; the second, constituted by the English pluralists is characterized by its critique of state sovereignty and support for the idea that groups have a life of their own; the third form is loosely termed here as ‘cultural pluralism’ and is an acknowledgment of the cultural diversity existing in any society.

The first perspective, American pluralism, has no connection with contemporary multiculturalism. English Pluralism needs to be distinguished from this American Pluralism that existed in the 1960s at the height of the behavioural revolution. The latter, American Pluralism was mainly interested in the modern voluntary associations that are entered into by individuals, with the existence of a variety of such groups and associations seen as a guarantee against the centralization of political power, such groups ensuring that power has been diffused throughout society (see Hirst 1989: 3-4).
There is a further, very sharp distinction between cultural pluralism and multiculturalism that Gurpreet Mahajan has pointed out, which is that cultural pluralism has been a hallmark of most societies, while multiculturalism is a more self conscious effort to acknowledge such diversity in the public arena by ensuring that the different groups are guaranteed equality in this public arena. Thus Gurpreet Mahajan argues that cultural pluralism is not a modern phenomenon. Such co-presence of different communities within the same polity is not a new occurrence and this does not betoken the presence of multiculturalism (Mahajan 2002: 11-12).

In an acknowledgment of the group and its construction in a certain manner there is a danger. This is the danger of the group becoming authoritarian and overbearing. This is especially likely in the manner in which the group is constructed and conceptualized in the multicultural discourse. A more detailed discussion of this will be found in a subsequent section of this chapter. It would suffice here to say that the dangers inherent in groups have been understood from quite early on, and it is precisely as a result of this understanding that there has been a reluctance to acknowledge the existence of groups (see Barker 1985).

The denial of the existence of groups is itself a theoretically incorrect position as is the uncritical endorsement of groups. One could thus visualize a scale with absolute group denial constituting one extreme and absolute group affirmation the other. This study argues for conceptualising groups in a way that these two incorrect extremes are avoided. It would thus argue that absolute denial of the existence of groups is an incorrect position. Examples of positions close to such an extreme would be liberal individualism and methodological individualism. Examples of absolute affirmation of the group would be primordialism and other such views that accept realism as a social ontology of the group. This study with its preferred constructivist argument with regard to the group would be somewhere in the middle.

Groups having been acknowledged should also remain under the purview of the processes of democratization. This is to say that the internal structures of groups should remain amenable to the forces of democratization. To say this is an extremely contentious point as any attempt to intervene in the affairs of minority groups, especially on the part of the state or the larger society, will be viewed with suspicion and resentment. A further
point that needs to be made is that groups have often been considered to be outside the ambit of the process of democratization.\textsuperscript{11}

\textit{The English Pluralists.}

The English pluralists like F.W. Maitland, G.D.H. Cole and J.N. Figgis, who wrote in the early part of the 20\textsuperscript{th} century, were extremely critical of the manner in which social and political theory failed to take into account what they felt to be the reality of a multiplicity of groups existing in society with a ‘life of their own’. All these writers were extremely critical of the state’s overbearing, almost absolute powers that stemmed from the Austinian idea of sovereignty. Such overbearing powers that the state enjoyed, in their view, resulted in precluding the possibility of ensuring the vibrant nature of associational life and groups in society. They felt that this idea eroded the existence of the richness, variety and vibrancy of group and associational life in society. The state had therefore to be limited, and one of the important ways to do this, was by way of an affirmation of the existence of a multiplicity and heterogeneity of groups. Before taking a detailed view of the English pluralists one needs to mention at the very outset itself, that the foremost thinker among them, who exercised a good deal of influence, especially on Figgis, was

\textsuperscript{11} On the theme of democratization of groups see F.M. Barnard and R.A. Vernon ‘Pluralism, Participation, and Politics: Reflections on the Intermediate Group’, \textit{Political Theory}, Vol. 3, No. 2, May, 1975. Barnard and Vernon refer to the ‘direct participationist’ model of pluralism where ‘groups are valued not as instruments of external pressure but as arenas for internal individual participation in the attainment of common ends’. Barnard and Vernon further observe that the ‘participationists’ as a result of their emphasis on participation within the group depart from the tradition of American pluralism, while at the same time reverting to the tradition of the English pluralists (p. 180). Barnard and Vernon have also made a distinction between this participationist model and the commonly thought pluralism in which ‘intermediate groups are presented as instruments for bringing particularist pressures to bear, positively or negatively, in the shaping of public policy’. It may be added here that this common understanding of pluralism is closer to, indeed, almost congruent with American pluralism. Barnard and Vernon go on to make two further crucial points about groups. The first is the fact of their being intermediate. They observe that this intermediacy does not provide us with a warrant for attributing mediating propensities to them. The aspect of groups as entities that mediate is the second point that is made. We thus have the group being attributed an intermediate position and a further role of mediation. They go on to observe that the mediating properties of groups play a crucial and indeed ‘protean’ role: while mass-society theorists view them as \textit{insulating} devices for the social and the political, and interest group theorists see them as articulating or \textit{linking} agencies, participationists envisage them as politicizing media for socioeconomic pursuits. It goes without saying that the type of mediation that is assumed in these three conceptions is radically different. But it is clear enough that some sort of mediation has to be demonstrated; for the point of pluralism is not merely that diversity exists, but that diversity is compatible with unity, or even sustains it. The intermediate group, therefore, must bridge the hiatus between the particular and the general (p. 189).
the legal scholar F.W. Maitland. Maitland himself was greatly influenced by the German Otto Von Gierke who applied the ideas of German Romanticism to the sphere of law (see Gierke 1900).

There has always been a certain wariness and hostility displayed towards the idea of groups. One of the earliest forms of this hostility was identified by J.N. Figgis as the ‘concession theory of corporate life’, a theory which he believed was premised on the assumption that various associations and communal groupings within society did not have a ‘life of their own’, but derived their existence through state endorsement. Figgis goes into the origins of the concession theory, which take him back to the Middle Ages in Europe when the debate between church and state had started raging. Figgis believes that the concession theory is ‘not really congruous with the facts of life’, that it is not a modern theory, and that its provenance lies much earlier making it ‘in some way an inheritance from the past’ (Figgis 1995: 40).

Figgis’s whole point is that from our own standpoint in modern times we tend to read back into the middle ages a sharp distinction between church and state, existing as two distinct societies. This was not the case and instead the church and the state formed ‘two official hierarchies’ or ‘two departments’, the Court and the Curia, the kings officials and the popes’ (ibid.: 44). Developments subsequent to the middle ages led to the modern concept of sovereignty as enunciated by Austin. The point to note, however, is that the Austinian doctrine of sovereignty cannot be applied to the Middle Ages and it was only developments after the Reformation that facilitated such an idea (ibid.: 47). Towards the end of his article Figgis identifies the theory of sovereignty as being responsible for the devaluation and undermining of communal life outside the state that he believes the modern period has fostered:

The theory of sovereignty, whether proclaimed by John Austin or Justinian, or shouted in conflict by Pope Innocent or Thomas Hobbes, is in reality no more than a venerable superstition. It is only true to the facts in a cosy, small and compact State, although by a certain amount of strained language and the use of the maxim, “whatever the sovereign permits he commands,” it can be made not logically untenable for any conditions of stable civilization. As a fact it is a series of groups that our social life
presents itself, all having some of the qualities of public law and most of them
showing clear signs of a life of their own, inherent and not derived from the
concession of the State.' (emphasis added; Figgis 1985: 59).

Figgis goes on to argue that the law has been fostered for the past millennium in an
atmosphere, that apart from the Teutonic and feudal influences, has been in favour of the
doctrine which recognizes only two social entities. These are the individual on the one
hand and the State on the other. Figgis complains that with this conception of law,
political reality becomes out of touch with reality itself. Further, political philosophy
which is ‘always dependent’ on law, ‘oscillates between an unreal individualism and a
wildly impossible socialistic ideal’ (ibid.: 59).

Figgis, after this rather long historical excursus into the Middle Ages is led to the
conclusion that the modern theory of sovereignty that arose as a result of developments in
the Middle Ages, is hostile to the expression of the multiplicity and variation of group life
in society. His further conclusion of the law recognizing only two entities – the state and
the individual – is exactly the same as the criticism that Vernon van Dyke levels against
liberal political theory and what he calls its ‘two-level theory of rights’.

In what can be considered a later version of the concession theory, which Vernon
van Dyke (1977) has identified, one can arrive at a realization of the more recent form
that this opposition has taken. The issue of group rights is inextricably bound up with the
state and its relationship with individual citizens. Vernon Van Dyke has been one of the
important theorists particularly critical of liberalism’s ‘two level theory of rights’ that
recognizes and legitimizes rights only at the level of the state, and secondly at the level of
the individual. Such a two-level theory of rights, according to van Dyke, fails to take into
account and do justice to the numerous associations and groups that exist at an
intermediate level between the individual and the state.

More specifically, it is the conception of ‘complete State Sovereignty’ that has
been identified by the English pluralist G.D.H. Cole as being an important reason for the
suspicious manner in which group rights have been viewed. Such a conception of
‘complete State Sovereignty’ has ruled out the possibility of allegiance to associations
and groupings that exist below the state. It has in turn demanded absolute, and
unconditional allegiance to the state. Cole is particularly critical of Rousseau’s idea of the
general will in this regard, as providing the philosophical justification for such an
overarching and demanding political association. Cole thus observes that owing to the
political preoccupations of the time, Rousseau and his successors, instead of creating a
philosophical theory of society created a philosophical theory of State, in which ‘other
associations found only a position of sufferance, if at all’ (Cole 1985: 102).

Cole further delineates three reasons for the triumph of the theory of State
Sovereignty. Two of these reasons are theoretical and one practical. The theoretical
reasons are that firstly thinkers have always sought to identify some ultimate sovereign
authority; and secondly, they have been led to regard all associations as potentially
subversive and hence a threat to the state. The third and more practical reason is that the
political upheavals of the 18th and 19th century have tended to concentrate mostly on the
state, making all theories of social action chiefly theories of State action (ibid.: 102).

There has to be a certain degree of circumspection involved when one is
considering group claims. Ernest Barker is one such thinker who exhibited such
circumspection. Among the English Pluralists, one extreme was represented by Cole’s
view which felt that groups should be sovereign within the sphere that they were
concerned with, be it the sphere of industry, religion or education. In response to such a
pluralist view Barker, while adopting an overall sympathetic attitude to pluralist ideas,
rejected the idea of group rights as a whole. He felt that this would lead to the danger of
prioritizing groups to the detriment and disadvantage of the state. Barker of course was in
total disagreement with Otto Von Gierke and F.W. Maitland’s ideas that would ascribe to
the group the character of a person with a will of its own. As against such ideas, he
remained the staunch individualist and he thus took a view of the group as a voluntary
association that was willingly entered into by individuals. This position was meant to
obviate the concession theory of groups on the one hand and the possibility of intra-group
factionalism and inter-group feuding that he felt would inevitably result from the
‘realism’ of the Gierke-Maitland concept on the other (Stapleton 1985: xix-xx).

Indeed this wariness and circumspection towards groups can be found in the very
title of Barker’s essays ‘The Eruption of the Group’. The concern that drove Barker to
write this essay was provided by the context of the early part of the 20th century which
witnessed an upsurge of totalitarianism in the form of fascism in Europe and communism
in the Soviet Union. He was obviously concerned at the manner in which the group had become an object of worship and he believed that both the 'unspent tide of national unification' and also a 'new and rising tide of class consciousness and class solidarity' were responsible for the eruption and worship of the group. Barker rightly points to the manner in which the group transcends the individual and exerts a complete and totalizing power over him. In a passage which seems to presage what Bourdieu says regarding the mysticism involved in a group and the power that an individual leader claiming to represent the group exercises, Barker writes:

But it is true, none the less, that the mysticism of the group is a welcome ally to the personalism of the leader. It consecrates him, and it consecrates his party – no party in the ordinary sense of a section of the electorate, but a body of chosen believers in the unity, the reality, and the transcendency of the group (Barker 1985: 124).¹²

Barker put forth his views regarding the group and the dangers that he thought an uncritical endorsement of the group could give rise to when the idea was very gradually losing its importance. As Kymlicka has pointed, out the immediate aftermath of the First World War did foreground the importance of the group. This is seen in the many provisions for minority protection that the League of Nations advanced. However, the experiences of various national groups and the displacement of national minorities that took place as a result of the crumbling and break up of empires were often bitter. All these experiences, and most notably Hitler’s misuse of minority provisions to protect the German minority in Czechoslovakia before the onset of the Second World War, led to a

¹² Compare some of these ideas with the ideas of Bourdieu in his essay ‘Social Space and the Genesis of Groups’ which is discussed in detail in a subsequent section of the chapter. Of striking similarity is the following passage from Bourdieu:

The mystery of the process of transubstantiation whereby the spokesperson becomes the group that he or she expresses can only be understood through a historical analysis of the genesis and functioning of representation, through which the representative makes the group that is represented. The spokesperson endowed with full power to speak and act in the name of the group, and first of all to act the group through the magic of the slogan, the password (mot d’ordre) is the substitute of the group that exists only through this surrogacy. Personifying a fictitious person, a social fiction, he raises those whom he represents from the state of separate individuals, enabling them to act and speak, through him, as one man. In exchange, he receives the right to take himself for the group, to speak and act as if he were the group made man. (Bourdieu 1985: 740)
discrediting of the idea of group and minority rights. The extent of this discrediting can be seen in the complete neglect and circumvention of provisions towards minority protection in the League of Nation's successor body, the United Nations, and the definitive individualist slant found in the Universal Declaration of Human Rights (UDHR).

The issue of group rights was to remain neglected until the last quarter of the 20th century when multicultural claims for minority recognition were foregrounded and the 'realist' ontology of the group was to again be given prominence. In a subsequent section of the chapter there is a discussion of the critique of the realist ontology of the nation and ethnic groups advanced by Rogers Brubaker (1996; 1998). A further discussion of the realist view and its rival critique challenging such a view of groupism will be found there.

A reading of the English Pluralists would seem to suggest that they were interested in groups that were mainly 'voluntary, spontaneous associations for the pursuit of recreational, devotional, occupational, local and business ends' (Stapleton 1985: xxiii). It would seem that the kinds of groups that they took into consideration were different from the ascriptive ethnic, cultural and religious groups that have more recently become the centre of attention for contemporary multiculturalists. The groups that concerned the English Pluralists were, of course, also very different from the national, ethnic, and racial groups that set the agenda for political thinking and political action during the inter-war period. As a result of this difference it would appear that the insights to be gained from a reading of the English pluralists like Maitland, Figgis and Cole are of little relevance when it comes to a consideration of multicultural group claims for recognition.

It is argued, however, that there a number of insights to be had from a reading of the English Pluralists. For one, they were not solely concerned with mere voluntary associations that individuals joined, formed and often left at their will, with the group consequently exercising little by way of an influence, that could in any sense be called profound, upon its members. Maitland when he was drawing upon the work and ideas of Otto Von Gierke obviously took into account traditional communal associations that formed a vital part of his romanticized view of a German past full of vital, vibrant, communal associations. These associations were in no way akin to the modern and strictly voluntary associations that are entered into by 'rational' individual members on
the basis of mere interests. The reason for the formation of these groups was not a conscious voluntary decision on the part of the individual members. They sprung up more often than not spontaneously, and this spontaneity would be viewed by a pluralist like Maitland as an expression of the vitality and vibrancy of a particular society.

It is easy to detect the heavy influence that Gierke exercised on Maitland here. Thus, for Gierke the key to understanding Germany’s rich associational life lay in the Gemeinde (local community) and Genossenschaft (Fellowship) which provided the cement of German society and which had survived into the Middle Ages before the reception of Roman Law at around 1500. As Stapleton observes: ‘It was this spectacle of free communities, originating in a tribal spirit, which captured Maitland’s imagination. An avid Germanophile, Maitland brought Gierke’s reconstruction of the flourishing group life of Germany’s past to the attention of English readers in 1900 in his translation of Gierke’s *Political Theories of the Middle Ages*’ (Stapleton 1985: xii; see also Gierke 1900).

In his long article ‘Trust and Corporation’, Maitland (1985) is mostly concerned with the role of the English Trust which has saved the country’s rich associational life from the ravaging effects that Roman law and its theory of groups usually had, owing to its manner of viewing groups as a mere ‘fiction’ created by a ‘concession’ of the sovereign and thus having no independent existence of its own. There is little about traditional communal associations, except towards the end of his article when he admits that he has said very little of those Communalverbande (communal associations). He feels that an unincorporated body like the Communalverband (communal association) is not an isolated phenomenon that can be studied by itself but that it is ‘a member of a great genus’ that has been an important part of English life. He refers to the technical machinery of English law, which he appreciates as being ‘a clumsy whole’, but in spite of which ‘every part is closely connected with every other part’. It is this peculiarity which he feels makes the ‘existence of “unincorporated bodies” of many kinds possible and even comfortable’ (Maitland 1985: 35).

Further, the writings of especially J.N. Figgis were profoundly influenced by the manner in which the state dealt with religious groups like churches and this particular manner of dealing with religious groups had enormous implications for the practice of
secularism: 'and we may learn from the attitude of the American courts to such problems as those of the free development of religious bodies' (Figgis 1985: 122). Figgis, himself an Anglican priest, referring to the Scotch Church Case, was extremely critical of the manner in which the modern state, while considering any matter related to the church, had the tendency to view it not for what it was i.e. the church as a religious body, but as a trust. The almost ridiculous extent to which this went for Figgis could be seen in how Lord Halsbury, in the very same case, stopped one of the advocates in his use of the word Church, as he felt that the Court could only question the case as one concerning a trust. He thus complains:

In other words, with a religious society as such they could not deal, but only with a trust or a registered company. This is only one instance of a fact exhibited in the whole of that case: namely, the refusal of the legal mind of our day to consider even the possibility of societies possessing an inherent, self-developing life apart from such definite powers as the State, or the individuals founding the body under State authority, have conferred upon them explicitly (Figgis 1985: 38).

Figgis displays his opposition to the French Republican tradition and its antipathy towards any form of recognition of groups. He was extremely critical of the Frenchman M. Emile Combes as he considered in him to be in some ways rabidly anti-Christian. He

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13 While considering the writings of the English Pluralists it is important to be informed about two particular cases that were especially influential and which prompted the pluralist turn in English political thought (Stapleton 1985: xiv). These were the Free Church of Scotland Case in 1904 and the Taff Vale Case of 1901. In the Free Church of Scotland Case, the House of Lords decided that the majority 643 members who had voted to merge with the United Presbyterian Church were not entitled to take the property of the Church with them as their act was ultra vires to the Church’s original trust and that therefore the minority of 27 dissenting voters were entitled to the property. What needs to be noted in this case is that the court in the process of deciding what the church’s constitution meant was actually deciding upon and getting itself involved in questions of Calvinist theology and the appropriate doctrines of religious government. This was an irony that was not lost upon Figgis. Later, an Act of Parliament was passed which distributed the property of the Church fairly between its two contending parties. In the second Taff Vale Case, a trade union was held liable for damages arising from a strike in spite of the fact that it was an unincorporated body and recognized so by the Trades Disputes Act of 1876. In treating the union as a legal person, subject to liabilities as well as rights, the courts further blurred the distinction between corporateness and unincorporateness in English law. Here again an act of Parliament – the Trades Disputes Act was passed which gave trade unions immunity from certain consequences of their actions. Both these cases brought out the lack of clarity that prevailed in matters concerning trusts and corporations in English law.
is opposed to secularization which, he feels is on the whole, corrosive and harmful to the existence, growth and continued vitality of groups.

Maitland, Figgis and Cole were all willing to look favourably upon and encourage traditional communal groups, religious bodies like the Church, and also trade unions. They were thus proponents of the ‘realist’ view of groups which saw them as an existing reality of society and had therefore to be acknowledged. The writings of the English Pluralists at the beginning of the 20th century represent a swinging of the balance in favour of viewing groups as an important reality of society and hence, the need to acknowledge them as having a life of their own. The groups that they talked about were mostly in the nature of voluntary spontaneous associations. The groups that they dealt with were different from the kinds of ethnic, racial and cultural group claims to self-determination that were made in the inter-war period.

Among the English Pluralists there is the possibility of a certain romanticization of group and communal life which seems to be an influence derived from the German Otto Von Gierke. It was this particular romanticization of the group that led many thinkers to be wary of group claims made in the inter-war period. This devotion to the group and the ‘worship’ of the group that it entailed formed the basis of totalitarianism and was rooted in German Romanticism (Stapleton 1985: xxiv). Barker, with all his scepticism and wariness of group claims, represents a theorist who tried to ‘steer a middle way’ between the concession theory of the state which formed the object of so much attack from the side of the English Pluralists and the equally dangerous ‘realist’ alternative to the understanding of groups that they put forward (ibid.: xxvi).

The swinging of the balance in favour of the realist view of groups would seem to follow from centuries of domination exercised by the concession theory, which Figgis felt was now ‘not so universally accepted as was once the case’. However, existing circumstances still showed ‘how great are the obstacles still to be encountered by that theory of realism which, is for most of us associated with the name of Gierke, and was popularized by Maitland’ (Figgis 1985: 38-39). This favourable view towards the group and rights for the group, remained dominant during the years of the First World War and well into the inter-war period. There were a number of claims made by ethnic and cultural minorities in favour of national self-determination. The First World War and its
aftermath, especially the crumbling and break up of large multinational empires in Europe like the Habsburg, the Romanov and the Ottoman, along with the displacement of large numbers of national minorities that this involved, gave rise to a different kind of group altogether. The kinds of groups which became important in the inter-war period were national, ethnic and racial groups (Stapleton 1995: xxiii).

M.G. Smith (1974) takes a look at pluralism and groups as they exist in formerly colonized societies. According to Smith, conditions of institutional homogeneity that characterize simple societies, represent the ‘polar opposite’ of the systematic institutional diversity that marks pluralism. He further opines that the most highly developed industrial societies ‘stand midway between these two polar extremes (Smith 1974: 206). Smith citing the colonial phase of Africa observes that all the states on the continent that have attained independence have been plural societies and that they remain plural even after they have become independent. Smith further observes: ‘Thus, pluralism and colonialism are not homologous. Colonialism is merely one mode of pluralism, characteristically instituted in the form of a plural society’. The challenge he feels for ‘emergent nations with a recent colonial past’ is to effect a transition from pluralism to the heterogeneity needed to form cohesive national units (ibid.: 207).

In Smith’s observation the important point to note is the encouragement that colonialism provides to pluralism in the sense that it institutionally grounds it. This particular view of the encouragement that colonialism gives to pluralism in the colonies by means of institutional devices is what Kymlicka refers to when he mentions the various devices for minority protection institutionalized in the various parts of the British Empire (Kymlicka 1995: 55). However, unlike the enthusiastic multiculturalism that Kymlicka upholds, Smith feels that it is actually an important requisite of modernity that pluralism is reduced and replaced by a heterogeneity that is conducive to aspects of modernity like industrial development and national cohesion.

Smith makes two important pairs of distinctions that will be important for the discussion of group rights in this study. The first pair of distinctions that he makes is between institutionally distinct minorities living in territorially discrete enclaves and numerous plural communities mingling with each other without any ‘corporate closure’. The two examples that Smith cites with regard to communities occupying a discrete, well
demarcated territorial area are the Indians living on reservations in the United States and the Indians of Chiapas and other areas of Mexico. Smith observes that in ‘such cases the heterogeneous society merely contains a number of plural enclaves whose members form dependent minorities’. Coming to the next type of territorially dispersed communities, with a number of them mingling with each other, Smith points to the Southern United States as a good example of such pluralism. He observes that such plural communities ‘lacking political and cultural distinctness and autonomy, they remain dependent and subordinate local segments of a wider society; and lacking the corporate closure with which institutional distinctness provides societies, they are continuously subject to the various pressures and influences developed within the society that surrounds them (Smith 1974: 213). From the distinction that Smith has made, it can be pointed out, that in the first case, it is easier to provide protection to such groups that live in a discrete territory and with ‘corporate closure’. This is often done in the form of asymmetrical federalism. It is the second case that is more difficult as things are made more complicated by the fact that a particular group is dispersed throughout a territory and shares a certain area, resources and public facilities with a number of other different groups. It is in the act of sharing public space and resources that groups come into conflict with each other.

The second pair of distinctions that Smith makes is between the private and the public domains. In fact, the distinction that he initially makes is borrowed from Meyer Forte who distinguished the kinship and politico-jural domains of social organization which Smith feels may be generalized ‘to distinguish the familial or private domain and the collective or public domain’ (ibid.: 216). This particular distinction pointed out by Smith, and also by a number of other scholars like David Washbrook, writing on the effects that the colonial legal system had, in the form of creating distinct private and public domains, will prove especially useful in the discussion of the actual operation of group rights in this study.

Smith provides us with an understanding of the separation of groups and the reinforcement of such divisions between groups to make them discrete and mutually exclusive entities. This has already been pointed out as being a significant problem of the rights discourse and stems from what has been termed a ‘realist ontology’ of the group. Smith opines: In effect, any institutional development or systematic organization in the
collective domains of either section in a context of pluralism tends to reinforce the already existing divisions and separatism of the sections as mutually exclusive, internally autonomous, contraposed corporations. Such structural developments proceed independently of cultural continuities or assimilation across sectional boundaries’ (Smith 1974: 230).

V. Minority Rights in the Aftermath of Empires.
In an overall view of the general acceptance of group rights there is to be found an initial period lasting for around the first half of the 20th century which was in general favourable to group claims. This is also the period at the beginning of the century when the English Pluralists were putting forward their views on the state and groups. It coincides with the period immediately after the First World War and the inter-war period, which witnessed a profusion of ethnic-cultural group claims to national self-determination. The system of minority and group representation was also well institutionalised in an international forum like the League of Nations. However, the discrediting of the system of guarantees for group rights with the onset of the Second World War, the decline of the British Empire and the rise to dominance of the United States, in the post-War era ensured that group and minority rights went into eclipse (Kymlicka 1989).

It is a contention of this study that the whole question of minority and sub-national groups needs to be understood in relation to nationalism and the formation of the nation itself as a supra group encompassing the smaller groups within it and often marginalizing and obliterating them altogether. This marginalization and possible obliteration leads to demands for minority protection in the form of group rights. The formation of the nation itself through the phenomenon of nationalism has to be seen especially in the backdrop of the crumbling and breakup of large multinational empires. The reason for this is that empires have generally been more hospitable to many different and varying groups, while in the case of nationalism there has been, inherent in the logic of nationalism, the need to homogenize and obliterate smaller minority and sub-national groups.

Thus, the crumbling and breaking up of empires which encompassed numerous national, racial and ethnic groups is an important and profitable area of study for political
scientists and historians interested in the questions of group rights and minorities. The breaking up of the Habsburg Empire in Central Europe gave rise to massive displacement and movement of populations across national boundaries. Similarly, the dissolution of the British Empire and the numerous treaties and agreements that it was to formalize and conclude during the period of its expansion and consolidation have been recognized by Kymlicka as constituting an important and rich source of enquiry for all of those interested in questions of minority rights and multiculturalism (Kymlicka 1995: 55).

Another empire which fell around the same time as the Habsburg Empire after the First World War as a result of the conclusion of the Treaty of Sevres, was that of the Ottomans. The system of management of the various religious minorities that existed within the Ottoman Empire, known as the millet system also constitutes a profitable area of study. In fact the interesting point to note in a consideration of the Ottoman and the

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14 In the Ottoman Empire the major difference or boundary between groups was religious rather than racial, linguistic or economic. The system of granting recognition to the different 'milles'; as the different religious communities were called under the Ottoman Empire, had actually preserved and granted legitimacy and recognition to such differences. While the Empire was itself governed by Muslims and based on the religious law of Islam, it provided a certain degree of autonomy to Jewish and Christian communities. This particular 'mosaic' system had proved effective in the management of religious differences under the Ottoman Empire for well over four centuries. The semi-autonomy of the Jewish and Christian millet did not however mean that there was equality among all the subjects of the Empire, the reality being that Christians were looked down upon both by the government and the people as second-class citizens. In fact the concept or practice of citizenship involving equal rights and duties did not exist in the Ottoman Empire before the 19th century. However, from the beginning of the 19th century there can be discerned a movement towards the granting of equality to all religious groups. The first such movements in this direction were made by Sultan Mahmud II (1808-39) who frequently proclaimed that in his view all his subjects regardless of their creed were equal. The most significant era is the Tanzimat period from 1839-76. This era was inaugurated by the imperial edict of reforms, the Hatt-i Sherif of Gulhane on 3 November 1839. While having an overall Muslim influence in it, what made it remarkable was the declaration of equality extending to all subjects irrespective of religion or sect that was made by Abdul Medjid. The movement in the direction of equality was further consolidated in a more extensive Hatt-i Humayun of 1856, which declared equality in more specific areas like educational opportunity, appointment to government posts, the administration of justice, and in taxation and military service. Further an anti-defamation clause was added which forbade any distinction tending to undermine a group on account of its religion, language or race. This movement was to culminate in the promulgation of the first written constitution in December 1876 which affirmed the equality of all subjects who were now to be known as Osmanli before the law. The Tanzimat period in question needs to be assessed in the light of the Ottoman Empire's attempts at modernization, reform and westernization. It was also the result of the pressures that the Ottoman Empire faced from western great power diplomacy. More importantly, it needs to be understood in the light of a multinational empire struggling to control nascent nationalist tendencies in its many far-flung provinces (ibid.: 65). These were tendencies that had not troubled the empire for about four centuries and which explains the relative stability of the system. However, what the statesmen of the Tanzimat period do not seem to have understood is the new nationalism that animated the Greeks, Serbs, and Rumanians of the empire, a sentiment that was slowly spreading among the Bulgars and the Armenians (ibid.: 68). This made them completely dismissive of any sort of corporate equality within the empire (ibid.: 69).
British Empires is that in the former the millet system institutionalized separate communal units with their own self-sufficient laws regulating the lives and conduct of their members. However, the Ottoman Empire, especially with the Constitutional reforms that were decreed in the year 1876 was to phase out such a communal system of organising society with its various religious, ethnic and national groups and move towards a wider notion of equality and citizenship with all individuals, irrespective of religious faith being looked upon as Ottomans. This movement also involved a secularization of religious laws, especially of the shariah. We thus find a movement towards secularization and away from religious Islamic law in the Ottoman Empire while, on the other hand, there was a movement towards a reinforcement of traditional religious law based on the authority of ancient religious texts in the various sites of the British Empire. Thus the British Empire with its stated aim of respecting local customs and religious beliefs was to actually reinforce and strengthen the hold of religious laws like the Shari'ah in various sites of the British Empire like northern Nigeria and the Indian subcontinent.

Hugh Seton Watson’s Nations and States (1976) consistently looks at nations and states as emerging against the backdrop of empires. Seton Watson in his book makes a crucial distinction between ‘old’ and ‘new’ nations. The old nations are those which acquired national identity or national consciousness before the formulation of the doctrine of nationalism. The new nations are those for whom the two processes of the formation of national consciousness and the creation of national movements proceeded simultaneously. Both processes were carried out by small educated political elites (Seton Watson 1976: 7). The process of the formation of national consciousness among the old nations was slow and painstaking. It did not involve any external agency in the form of political elites who were vital in the development of the new nations and was thus ‘a spontaneous process, not willed by any one, though there were great events which in certain cases clearly accelerated it’ (ibid.: 8). The new nations developed a national consciousness over a much shorter period of time. The process is also more accessible to the understanding and less obscure than that of the old nations as it has been documented adequately.
In his discussion of the development of the ‘old continuous nations’, the two most important and prominent for Seton Watson being the English and the French, he locates the origins of such European sovereign states in the collapse of the Roman Empire (Seton-Watson 1976: 15). Similarly, when he is discussing the formation of the new nations in Europe like the Hungarians, the Slovaks, the Romanians and the Ukrainians, he takes into consideration the Multi-National Empires of Europe, the three great empires of the Habsburgs, the Russian and the Ottoman, which encompassed within them for many centuries, subjects from many different religious communities and language groups. In the 19th century there began to emerge within these various groups, some form of national consciousness and at this point these empires became multi-national ‘and the question arose whether they could accommodate within their borders the new claims to recognition of different nations, or whether the leaders of the movements could be contented only with sovereign territorial independence’ (ibid.: 143).

In his discussion of the regions of East Asia (meaning South Asia, China and South East Asia), Seton Watson again mentions the European empires as being extremely important in providing the European concept of nationalism, which combined with indigenous political traditions to give rise to national movements and the emergence of new states (ibid.: 273). In the case of Africa, the European empires created willing allies to their rule from among the traditional political and religious elites. Soon, there developed through the effects of European colonial rule, new cultural elites. These new elites in combination with the older elites were to lead the struggle for decolonisation (ibid.: 328). While the old and new elites were united in their opposition to European rule, there was also an element of mutual distrust between them. However, Seton Watson notes that in general African nationalism met with less resistance from European rulers and achieved its aim of independence more rapidly than Asian national movements (ibid.: 329).

Rogers Brubaker (1996) also captures the importance of viewing nationalism in the backdrop of empires. He says: ‘that nationalism was not only a cause but also a consequence of the break-up of old empires and the creation of new nation-states’ (Brubaker 1998: 276). The further advantage with Brubaker’s (1996) book Nationalism Reframed: Nationhood and the National Question in the New Europe is his criticism of
the realist ontology of the nation as a group and his preferred way of viewing groups as constructed, contingent and freely floating. Brubaker relies on the analysis of Pierre Bourdieu to reach this particular understanding of a group. Brubaker’s book tries to understand the issue of actually existing nationalisms of a particularly volatile region. This is the swathe of land in Central and Eastern Europe and Eurasia that along with parts of Northern Africa was occupied in the 19th century by the Habsburg, Ottoman and Romanov Empires. This particular region was characterized by the fact that it was polyethnic, polyreligious, and polylinguistic, contrasted with the more compact, consolidated and integrated states of Northern and Western Europe (Brubaker 1996: 3). 

Brubaker is mainly concerned with the nationalization of political space that took place, subsequent to the crumbling of the former imperial realms in these regions and the drawing of political boundaries on national lines. He thus tries to understand the distinct ‘forms’ and ‘dynamics’ of the latter nationalisms that emerged in the wake of the nationalization of political space (ibid.: 4). He makes the interesting observation that by creating a political roof over large multinational populations, empires tended to promote the mixing of peoples. Thus, a great deal of the world’s ethnic heterogeneity and many of its separatist conflicts are traceable to movement of peoples under imperial regimes. However, while empires were largely responsible for promoting the mixing of peoples, nation states, with their reduced political space, tend to do just the opposite, their unmixing (ibid.: 9-10).

The question of group rights invariably involves the issue of reification, which will be dealt with in some detail throughout this study and finds separate mention in the next section of this chapter. Quite often, critics of the idea of group rights have rightly raised this particular problem. The problem has been raised by Brubaker vis-à-vis the nation. He mentions the shift from a broadly ‘structuralist’ variety to a more ‘constructivist’ theoretical position as leading to a challenging of the realist ontology of

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15 Brubaker makes a particularly relevant distinction between his own study of nationalism and that of other recent theorists like Ernest Gellner, Benedict Anderson, Anthony Smith and Eric Hobsbawm. All of these ‘developmentalist’ theorists have engaged with the phenomenon of nationalism in terms of a slow and gradual development of nations or nationness over centuries. They have looked at the long term political, economic, and cultural changes that led to the development of nationalism. Brubaker’s study by contrast has looked at nations and nationness as something that happens. His study has in contrast to the developmentalist approach an ‘eventful’ perspective. He feels that there is a lack of literature that deals with theoretical sophistication eventful analyses of nationness and nationalism (Brubaker, 1996: 19).
the nation. Such views of the nation as a real and substantial collectivity are widely held not just by primordialist accounts that emphasize the deep roots, ancientness and emotive attachment of nationalism, but by even less celebratory and more sober accounts (Brubaker 1996: 14). A particular advantage of this shift from a ‘structuralist’ to a more ‘constructivist’ theoretical position is that the former viewed groups as enduring, fairly stable components of the social structure. The latter constructivist approach, on the other hand, tends to view groupness as constructed, contingent and floating (ibid.: 13).

In fact, Brubaker mentions three other developments in social theory over the last decade, apart from the shift from the broadly structuralist to a more constructivist theoretical stance, and which he feels have combined to undermine the treatment of groups as real, substantial entities. These other developments are the increasing interest in network forms and the overall growth of network theory; the challenge posed by theories of rational choice with their associated methodological individualism to the realist idea of groupness; and thirdly the rise of postmodernist theory with its emphasis on the fragmentary and the ephemeral leading to a questioning of groups with fixed and clear cut boundaries (Brubaker 1996: chapter 1; Brubaker 1998: 292).

Valid as much as Brubaker’s critique of the realist ontology of the group and groupness may be, he does not locate the historically deep rooted nature of the divide between the contending viewpoints on groups that either see them as fixed and pre-given (realist) or which view them as existing at the behest of the state (the concession theory). The ideas of J.N. Figgis have already been discussed and he locates the origins of the concession theory of group or corporate life in the medieval divide between church and state. A reading of Figiss’s essay reveals that the ‘realism’ associated with the views of Gierke and Maitland initially met with stiff resistance from the concession theory of corporate life, which prefers viewing groups not as entities with a life and personality of their own but existing at the behest or concession of the state (Figgis 1985: 38-39).

VI. The Construction of Group Identities and the Reification of Groups.
Most debates regarding group rights claims in liberal political theory take the existence of the group for granted. Those averse to group right claims such as staunch liberal individualists dismiss the possibility of considering the group as legitimate bearers of
rights and typically focus on the individual as the ontological bearer of rights. There is thus a certain metaphysical abstraction involved when it comes to deciding who or what is a legitimate bearer of a right in liberal political theory. Very often, the individual has been privileged as the sole legitimate bearer of rights. This study argues that groups can also legitimately be considered bearers of rights. However, before ascribing rights to groups one must be careful about the manner in which the group is conceptualised. To repeat, this study takes a contingent view of groups that views groupness as constructed, contingent, floating and fluctuating. This is termed by Brubaker as a more ‘constructivist’ theoretical stance. Such a theoretical stance would be in contrast to the more ‘structuralist’ variety that prefers to view groups as enduring, almost fixed and constant components of the social structure (see Brubaker 1996: 13).

Brubaker has pointed out how most analyses of nationalism, even those that are less celebratory and more sober when it comes to dealing with the often frenzied phenomenon that nationalism can be, are informed by a realist ontology of nations. Thus, Brubaker is clear that the treatment of nations as real entities and substantial collectivities is not just confined to primordialist accounts that tend to harp on the fiction of the deep roots and ancientness of nations. He goes on to add that an analysis of nationalism should be able to account for the process of reification that creates the fiction of the nation as an entity that has existed from some immemorial past and is thus able to exert an external and powerful emotive appeal on individuals (Brubaker 1996: 14).

It is thus important to focus on the symbolic dimensions of group identity. Such symbolic dimensions of group identity and group formation, whether it is that of the majority nationality or other smaller minority groups or sub-nationalities within the nation, has been an important component of the politics of multiculturalism in recent times. This study, to reiterate, will focus on the particular view of groups that has informed multicultural theories. A ‘substantialist’ view of groups that views them as solid monolithic entities, with clearly demarcated boundaries is an extremely problematic and erroneous way of looking at groups. Further, a lot of the literature on multiculturalism dwells on the importance of group symbols and how the symbols of the nation state are problematic in terms of identifying with them for individuals belonging to minority
groups. Such literature also talks about the additional devaluation and marginalisation of the symbols of such minority groups.

This rather superficial symbolism inherent in multiculturalism has been subjected to a considerable degree of critique, especially from scholars open to Marxist influences who have noticed that multiculturalism in its obsession with issues of symbolic significance has tended to completely neglect more substantive issues of material redistribution. In fact, a lot of Marxist theorizing would point to the actual role that multiculturalism has effectively played as an ideological cover up and obfuscation for the withdrawal of welfare redistribution that economic neo-liberalism has carried out. Multiculturalism being the 'cultural analogue' of the liberal welfare state would thus be considered to be a cultural symbolic compensation for the loss in welfare redistribution that was entailed by the advance of economic neo-liberalism beginning with the onset of the Reagan and Thatcher administrations (see Fraser 1995). While such Marxist interpretation with all their emphasis on matters of material redistribution may have been extremely perceptive in terms of their analysis of multiculturalism, they missed out on appreciating the symbolic dimensions that have made multiculturalism so important in the last two decades of the 20th century.

It is the French social theorist Pierre Bourdieu who is able to appreciate the significance of the symbolic for the simple reason that he critiques Marxist theories for reducing the social world to the field of the merely economic, while at the same time including in his own theorizing, different fields and sub-fields which facilitate an understanding of cultural reproduction and symbolic representation. He thus observes: 'Politics is the site par excellence of symbolic efficacy, the action that is performed through signs capable of producing social things, and, in particular, groups' (Bourdieu 1985: 741).

It is in kind of understanding that an article written by Pierre Bourdieu entitled 'The Social Space and the Genesis of Groups' becomes extremely useful. There are two particular merits in this article that need to be stated: The first is its analysis of the formation and genesis of groups and the second is its privileging of the symbolic representations that form an important component of group formation and identity. In this particular article, Bourdieu as in all his other works, at the very point of departure signals
a 'series of breaks with Marxist theory' (Bourdieu 1985: 723). There are three ruptures that he mentions. The first is the 'tendency to privilege substances' meaning, in this context, real groups that are defined concretely in terms of their numbers, limits and members, at the expense of relationships and further, the 'intellectualist illusion' that leads one to consider the theoretical class as an effectively mobilized group. Second, is the economism of Marxist theory that tends to reduce the multi-dimensional social field to solely the economic field, thereby making the relations of economic production as the determining coordinates of social position. The third and final one is the break with objectivism which along with intellectualism leads to an ignoring of the symbolic struggles that take place in different fields (ibid.: 723).

The merit of Bourdieu's article is that it allows for an understanding of group mobilization and subsequent identity and group formation. It is more sophisticated and nuanced than Marxist theories of class as it is able to move beyond the economic field which Marxist theories tend to reduce the social world into. It thereby takes into account other fields and sub-fields, particularly in the relations of cultural production (ibid.: 736). It is this ability to capture and theoretically encapsulate the processes of cultural production and the mobilization of groups, with the inevitable symbolic representation attending it, that lends strength to Bourdieu's ideas. His ideas become especially useful in an understanding of multicultural politics and the upholding of group interests that is entailed by such politics.

Bourdieu is able, through his analysis, to portray how a particular group is constructed by the mandated representative or leader who it seems 'receives from the group the power to make the group' (ibid.: 739). It is here that Bourdieu talks about the mystery that is involved in this process: 'The mystery of the process of transubstantiation, whereby the spokesperson becomes the group that he or she expresses, can only be understood through a historical analysis of the genesis and functioning of representation, through which the representative makes the group that is represented' (ibid.: 740). The spokesperson who could in this manner act extremely unscrupulously, through his power to speak on behalf of the group 'is the substitute of the group that exists only through this surrogacy' (ibid). Bourdieu's analysis of group formation through the 'mystery of the ministry' (taken from the historians of law Kantorowitz, Post and others) is able to bring
out the ‘social magic’ that is involved in which a thing becomes something that it is not. In this manner a person (a government minister, a bishop, a delegate, a member of parliament, a general secretary, etc.) ‘can identify, and be identified with, a set of persons, the People, the Workers etc. or a social entity, the Nation, the State, the Church, the Party’ (Bourdieu 1985: 740).

Bourdieu has very effectively outlined the process of the reification of the group and how this arises. He observes: ‘The circle is then complete: the group is made by the person who speaks in its name, who thus appears as the source of the power which he or she exerts on those who are its real source’ (ibid). It would follow that political alienation results from this reification of the group. Bourdieu further explains that ‘political fetishism lies precisely in the fact that the value of the hypostatized individual, a product of the human brain, appears as charisma, a mysterious objective property of the person, an impalpable charm, an unnameable mystery. The minister – a minister of religion or a Minister of State – is related metonymically to the group; a part of the group, the minister functions as a sign in place of the whole of the group’ (ibid).

It is interesting that Bourdieu should use here, in his discussion, the idea of the completion of the circle when the leader or spokesperson of the group appears as the source of power. Further, his reference to the Minister being ‘related metonymically to the group’ with the Minister functioning ‘as a sign in place of the whole group’ leads to an analysis of Bourdieu’s ideas on the creation and construction of a working class through trade union movements and other such representatives. Such views on the construction of a working class especially in relation to Lukacs’s essay ‘Reification and the Consciousness of the Proletariat’ make for extremely interesting reading. Firstly there is a similarity between the two writings, in the sense that Bourdieu brings in an idea akin to the hermeneutic circle that is involved through the relationship of the part to the whole. In the case of Lukacs this part whole relationship arises with his critique of bourgeois modes of thinking and the intractability of the given thing-in-itself to such modes of thought, leading thereby to the problem of totality (Lucaks 1993: 151). In the case of Bourdieu, this part whole relationship arises between the individual leader who is actually able to speak for the group and thus comes to be identified with the group as a whole (Bourdieu 1985: 740).
The first contrast that needs to be brought out between Bourdieu’s analysis and the analysis of Lukacs, is the different idea of reification that is contained in both. For Lukacs, reification is a thoroughly economic process arising with the economic processes of commodity exchange being further exacerbated under capitalism with the phenomenon of commodity fetishism. Reification is thus inextricably bound up with commodity fetishism. This is obviously not the case with Bourdieu who prefers to speak of ‘political alienation’ and feels that ‘political fetishism lies precisely in the fact that the value of the hypostatized individual, a product of the human brain, appear as charisma, a mysterious objective property of the person, an impalpable charm, an unnameable mystery’. The reification of the group can inevitably lead the group to exert an external and obviously oppressive influence over the individual. This is a good way of understanding the manner in which an entity such as a group can often be a source of oppression for the individual. Further, the bestowal of group rights that would belong to the group as a collectivity, and which are not reducible to the individual, can become an additional source of oppression.

There is further in Lukacs, a privileging of the standpoint of the proletariat: ‘The self-understanding of the proletariat is therefore simultaneously the objective understanding of the nature of society. When the proletariat furthers its own class-aims it simultaneously achieves the conscious realization of the – objective – aims of society, aims which would inevitably remain abstract possibilities and objective frontiers but for this conscious intervention’ (Lucaks 1993: 149). Bourdieu does not credit the working class with any such special standpoint. He calls the mode of existence of the working class as ‘entirely paradoxical’. For Bourdieu, the working class exists in the thoughts of the vast majority of workers and those representatives and trade union leaders delegated to speak on behalf of the interests of workers. It is thus created in exactly the same mystical manner that any group is mobilized and formed by a leader or a spokesperson (Bourdieu 1985: 741-42).

Having discussed Bourdieu’s views on the working class in relation to Lukacs privileging of the standpoint of the proletariat, it is relevant to look at the manner in which the discrediting of the realist ontology of the group has led to the dissolution of particularly one collectivity of group as an object of serious analysis, which is the category of class, and more strictly the Marxist category of the proletariat or the working
class. Brubaker makes the interesting observation that the movement away from the realism of the group has been ‘uneven’ and has resulted in the dissolution of class and more specifically the working class, understood as a real entity or substantial community as an object of analysis.

In contrast to classes no longer being viewed as real and enduring entities, one finds the continued understanding of nationalities and ethnic groups as being informed by the realist ontology and the consequent reification of such groups, which are conceived in terms of a Modigliani painting as if they were solid monochromes, internally homogeneous, bounded and rigid entities (see Gellner 1983). It is exactly such a reified view of minority groups as homogeneous cultural blocs and as rigid, bounded entities that informs much of the theorizing on multiculturalism in a ‘post-socialist’ age when class seems to have lost its analytical importance and has consequently been replaced by such ethnic groups (Fraser 1995).

Brubaker, himself critical of what he terms multicultural pieties, feels that the ‘multicultural landscapes of late modernity are themselves usually represented in Modiglianesque terms, in terms, that is, of juxtaposed, well-defined, monochrome blocs’. Further he feels that this newer ‘postnational’ or post-nation-state version of the Modigliani map is ‘as problematic as the older, classically “nation-statist” version’ (Brubaker 1998: 294). Brubaker very correctly points out that the Modiglianist map is very much ‘groupist’ and that it sees the population as consisting and being made up of ‘definable, bounded, internally homogeneous blocs (for example, African Americans, Native Americans, Latinos, Asian Americans, and Euro Americans, in the “pentagonal” multiculturalist account of America)’. Thus for Brubaker to ‘challenge the Modigliani map, one must directly challenge the underlying ‘groupist’ social ontology that informs most discussions of multiculturalism in North America (and indeed most discussions of ethnicity and nationalism throughout the world)’ (ibid.: 295). Brubaker argues that the forces sustaining groupist social ontology and groupist social analysis have been much stronger in Eastern Europe than in North America.

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Conclusion.

Having noted some of the naivete behind what Brubaker calls ‘multicultural pieties’ and Brian Barry (2001) in equally disparaging terms would call the ‘muddles of multiculturalism’, it is nonetheless, important to realize the significance of multiple identities and hence multicultural citizenship. Alfred Stepan citing evidence from the Basque Country and Catalonia in Spain reaches three conclusions: First that political identities are not permanent but can be highly changeable and are socially constructed; second, that human beings are capable of multiple and complementary identities; and third, that people can simultaneously identify with and give loyalty to different types of complementary political sovereignties. Citing evidence from Catalonia Stepan shows how citizens identified with the region as a national sub-unit of the federation, with Spain as a whole, and further with a potential supra-national confederation, the European Union, that still had the possibility of coming into existence (Stepan 1998: 233).

The conclusion that Stepan draws is the need to transcend the individual versus group rights conflict that is so familiar in liberal political theory and where he also takes to task the tendency of liberal thinkers to view the slightest hint of group rights as being a deviation from individualism and universalism. Stepan himself is extremely critical of the manner in which thinkers associated with the liberal tradition have been ‘sceptical of group rights, and thus at least implicitly, of many of the “consociational practices”’ that thinkers like himself and Arend Lijphart believe could be effectively used to craft democracy in a multinational polity.

Stepan lays down four observations regarding what he feels could be and actually have been democratic ‘group specific rights’. First that individuals are the ‘primary bearers of rights and no group should violate individual rights in a democratic polity’. This would entail for Stepan a constitutional bill of individual rights that would be enforceable by the federal government. Secondly, pointing to concrete historical examples, he argues that while individual rights are universal, it is ‘simply bad history to argue that in actual democracies all rights have been universal’. The historical instances he cites to prove his point are the group specific rights accorded to the Maori in New Zealand, to Spanish speakers in Puerto Rico, to religious and language councils in Belgium and to Muslim family courts in India.
Stepan adds that the 'key point' is the obligation of the democratic state to ensure that no group specific rights violate universal individual rights. He further adds that as long as this condition obtains there is no contradiction between individual and group specific rights. The third observation that Stepan makes is the familiar one regarding individuals being only able to exercise effective choice within the secure cultural context provided by their membership in a group. The fourth and final observation that Stepan makes is that the types of group specific rights that he talks about may not be consistent with 'some nineteenth-century tenets of Anglo-Saxon liberal democracy, or the French idea of citizenship in a nation state, but they are consistent with a polity in which group rights do not violate individual rights and where effective democratic citizenship and loyalty is broadened' (Stepan 1998: 236).

This chapter has attempted to provide a very qualified affirmation of groups and hence the validity behind claims to group rights. Such a view stands in opposition to staunch liberal-individualist positions that oppose any manifestation of group claims. There is a need to balance individual rights and the rights of groups. In many cases, like the tenets of 19th century Anglo-Saxon liberal democracy and the tradition of French Republicanism, there is a vehement opposition to the idea of group rights. This is one extreme of the picture. There are also instances, like the rights discourse in India, where there is a weighting in favour of the group, often resulting in an overriding of group claims. The challenge before proponents of group rights is to steer a difficult middle path between these two extremes.

This is an exceedingly difficult task and inevitably involves a sensible balancing between individual claims on the one hand, and claims of the group or community, on the other. This, it is argued will involve a sensitivity to varying contexts. In an environment where there is an overall hostility to the rights of groups and an excessive emphasis on abstractions like individualism and universalism, the importance of group membership and affiliation needs to be understood. Similarly, in a political environment in which the group is considered and given importance, or is gradually being taken into account, there is a need to prevent a visualization of the sub-national group in excessively abstract terms, or in ways that have the possibility of reifying the group. If such a process happens then the sub-national group will do nothing more than reproduce the oppressive structures
of the nation-state at the lower level of the community, thereby spelling continued oppression for individuals within them. One of the useful suggestions that Stepan has made is the need to transcend the traditional liberal dichotomy that has arisen as a result of the problem of individual and group claims as necessarily being antagonistic, or posed in terms of a ‘zero-sum game’ (Eisenberg and Spinner-Halev 2005). In contexts where this can, and often does happen, as in India, there is a need to introduce the advantages that stem from an individualistic assertion of rights. Such an introduction of the advantages of individualism would set the balance right in a context in which the rights discourse is disproportionately weighted against the individual.