Chapter 4. Beyond Contractarianism.

This chapter, which follows the one on Jeremy Bentham and the utilitarians, is about contemporary liberal political theory. It focuses mainly on the transition within contemporary liberalism from utilitarianism to contractarianism. However, deriving insight from the working of the rights discourse in India, it argues for a movement beyond contractarianism, while at the same time securing and affirming the importance of a rights based liberalism. It further argues in favour of a constructivist account of rights that are contextual, rather than being coined in rigid abstract terms. It also expresses discontent with what is termed the narrowness of the moral foundations of liberal political theory and argues for a richer, more substantive account of morality in place of the very denuded and formalistic account of morality contained in mainstream liberalism.

I. Introduction.

This chapter deals with contemporary liberal theory, as compared to previous chapters that were concerned with earlier thinkers and their relationship to the liberal tradition. As the focus of this chapter is on contemporary liberalism, there will be an attempt to frame present day Indian problems within liberal theory. This is bound to invite a great deal of criticism from those opposed to such a framework who would question the applicability and appropriateness of liberal political theory in an understanding of Indian realities. Having mentioned that the focus of the present chapter is contemporary liberalism, one needs also to bear in mind that contemporary liberalism is characterized by an overwhelming emphasis on rights based thinking. The issue of liberalism and its associated rights is one aspect of liberal democracy in India. Another question that again relates to a further aspect of India as a liberal democracy is the whole question of secularism and a secularized public sphere that will be more fully taken up in the next chapter. The fourth and fifth chapters of this study can in this way be considered linked as each of them touches upon these two aspects of liberal democracy in India. The issues that will be touched upon in the remaining part of this study, as should be obvious, lie in intensely contested terrain.

As this chapter focuses on contemporary liberal theory there will be found a significant discussion of contractarian social thought. Contractarianism, as pointed out earlier in the study, forms the third vertex of the triangular theoretical framework which forms the architecture of this study. The reason why contractarianism has been
incorporated as one of the theoretical vertices is its hospitality to ideas like rights and justice. These are concepts that were missing or significantly devalued by Benthamite utilitarianism. Further, there has been a movement within contemporary liberalism away from utilitarianism and towards contractarianism. Contractarianism as the third and last theoretical vertex of the study facilitates an understanding of the ways in which the rights discourse in India has been influenced by contemporary currents within liberalism.

This chapter looks at the relevance of a strong rights based liberalism in India and how such a rights based liberalism may be useful in helping to solve the problems of individual rights and group based identities. Different positions have been taken by contemporary academic commentators on the Indian scene, some for example who argue for the assertion of a rights based liberalism (see Mahajan, 1998; 2003); others who argue for circumventing secularism and premising the idea of minority rights not in the problematic and contested terrain that secularism has become of late in Indian political life, but in the idea of equality (see Chandhoke, 1999).

The chapter also delves into an area of contemporary liberal theory in which the dominance of an individualistic rights based liberalism has been questioned in an extremely intelligent and refreshing manner by a theorist like Joseph Raz (1986). It might be useful to add that a confinement to, or an over-emphasis on, a rights based liberalism, to the extent that rights are seen to be the only basis of morality, is a gross impoverishment of the moral resources of liberalism. To that extent it prevents the possibility of liberalism as a political morality from facing situations of deep difference and cultural pluralism. This is a particular task that liberal multiculturalism contends with in a rather ham-handed manner.

Before proceeding with a discussion of the various aspects of Indian liberal democracy, a note needs to be added on the relevance of the communitarian debate that has raged in the west (Chatterjee, 1998) and the position of this study vis-à-vis communitarianism. The reason why this note is added here is that many of the ideas contained in this chapter, like the argument in favour of a contextualist understanding of rights, the differences with the Kantian self and the formalistic renderings of morality by contractarianism and deontological variants of liberalism, may be perceived to be veering dangerously close to Hegelian ideas and the modern communitarian critiques of
liberalism that they have inspired (see Smith, 1989; Haddock, 1994). It studiously stays away from an affirmation of any form of communitarianism as this is believed to possess the inherent danger of exacerbating the whole question of group identities if such a position is approached, much less affirmed. All that is being argued in this chapter is that contractarianism is woefully lacking on account of its reluctance to understand the social situatedness of the self. To that extent contemporary liberalism has done well to heed the communitarian critique of liberalism (Walzer, 1990).

It is argued here that liberal theorists will inevitably be forced to 'tone down the abstractness of their ideas to make them more contextual by bringing in more empirical referents. The reason for this is that there seems to be a reluctance on the part of liberals to approach ethical arguments about the nature of community as a moral source. This may sound like an extremely communitarian argument, but the crucial issue as Kelly has pointed out, is that communitarians uncritically accept 'the received inheritance of a shared culture'. What liberals, on the other hand, can do is to begin from these communitarian suppositions regarding the community as a source and grounding of morality and then apply to them a constructivist moral argument. Kelly summing up the differences between liberals and communitarians and arguing for a 'post-contractarian liberalism' has the following remark to make: 'In either case we cannot avoid ethical argument about the nature of community as a moral source nor constructive argument about the nature of the good life' (Kelly, 1994: 242). In other words liberal theorists must revise their conception of morality to get rid of its present narrowness. This is a task that will involve appreciating the multiple contexts and social backgrounds from which moral structures emerge (see Seidler, 1987).

From the discussion in the previous chapters and the argument stated at the beginning of the study in the form of the hypothesis that the rights discourse in India is weighted against the individual and consequently skewed in favour of the group, it might seem to suggest that the study is heading to a wholesale endorsement of a rights based liberalism. The purpose of the present chapter is to investigate the appropriateness of endorsing such a strong assertive rights based liberal ethic. It looks at rights based thinking, especially rights based theories which assert that only rights can form a viable basis of morality. This particular assertion forms an important nodal point of the debate
as the chapter draws to a close. It needs mentioning that the opposition to this assertion viz. the idea that morality is not just rights based but may include a number of other strands is also an important conclusion and contention of this study itself. It is this insistence on confining the moral foundations of liberalism to merely rights and nothing else that has a particularly restrictive, limiting and narrowing influence upon liberal theory as a whole.¹

II. Three differing levels of commitment to rights.
To continue with this discussion, three traditions needs to be outlined and their relationship to rights based thinking needs to be noted. The three traditions in question are (i) the natural rights tradition, (ii) contractarianism and (iii) utilitarianism. The natural rights tradition contains the strongest affirmation of rights and rights based thinking. Indeed, the tradition itself is completely congruent with and wholly defined by an appeal to rights based thinking. As against this, in the contractarian tradition one finds a strong affirmation of rights, albeit one that is weaker in comparison to the natural rights tradition. Finally, utilitarianism contains the weakest assertion of rights, one where there may be an acceptance of rights based thinking, but an acceptance that has the possibility of lapsing into a denial or rejection of rights, if they happen to clash with the principle of utility. To paraphrase the title of Dworkin’s famous book here, we can say that the natural rights tradition takes rights seriously the most; that contractarian social theory takes rights seriously, but not as much as the natural rights tradition; finally, the utilitarian tradition is the least likely to take rights seriously.² A cursory look at the schema outlined will show clearly that we have a descending order of commitment to and affirmation of rights based thinking.

¹ On the narrowness of liberalism see Bhikhu Parekh (1994). On the limited possibility of cultural pluralism within ‘liberal limits’ see Riley (2002).
² It is interesting that in this descending schema of which tradition takes rights seriously the most, the utilitarian tradition comes last, implying as mentioned earlier that it contains the weakest affirmation of rights that may lapse into a denial of rights if they may so happen to clash with the central principle of utility. It is ironical that after the movement away from utilitarianism heralded by the publication of John Rawls’s book A Theory of Justice, Ronald Dworkin who of course firmly believes in taking rights seriously can accept utilitarianism as a background justification and yet continue to talk about how seriously rights should be taken.
III. The Starkness of Natural Rights Theory.

It is important to take note of the sheer starkness of natural rights, the fact that they take a certain 'anthropological minimum' as an underlying basis that is assumed to be true and common for all human beings. This is a misleading assumption to begin with and one theorist in particular who could be accused of making such a simplistic assumption is John Locke (Thompson, 1994). The problem with natural rights, their starkness and inability to take into account a thick set of contextual criteria that may be vital for the operation of any set of rights is eliminated precisely because of this concern to strip away the differing contexts that may vitally characterize the conditions of life of different individuals. This stripping away of the differing contexts to reach an underlying common basis that is assumed true for all human beings, it has been rightly pointed out, is nothing short of an ethnocentric bias. This bias has been effectively pointed out as lying at the very heart of liberalism's universalist appeal. This is an appeal that in spite of all its stated claims to universality results in a vast litany of liberal exclusions (see Mehta, 1999; also Parekh, 1999).

In this discussion it is important to keep the distinction between natural rights and contractarian rights in mind. There is a further type of rights, consequentialist rights associated with utilitarian ideas that also needs to be kept in mind (see Sumner, 1987). These three different sets of rights that have differing moral underpinnings when placed in a descending order of an affirmation of rights yield three different levels of commitment to rights. Thus, there is the natural rights tradition with its strong, complete and absolute affirmation of rights. Secondly, there is the contractarian tradition again with a strong affirmation of rights. It is the strong accent upon rights found in the contractarian tradition, which is today the dominant strand within contemporary liberal theory, which explains the centrality that rights are accorded in contemporary liberalism. In sharp contrast, the influence of Burke and Bentham with their strong opposition to the natural rights tradition, along with the weaker form of an affirmation of rights in Burke and especially in Bentham is understood to have imparted to the rights discourse in India, less of an emphasis on an assertive individualistic rights based liberalism (see chapters 2 and 3).
This study argues that in between two positions, viz. the rights discourse in India and its attenuated commitment to an individualistic rights based ethic on the one hand, and an individualistic rights based ethic that takes morality itself to be wholly defined by rights and nothing else, on the other, is to be found a theoretical position that is much more enriching. It has the potential of contributing greatly to the debate within liberal theory about individual and group rights. It is the purpose of this chapter to locate this theoretical position. In this task the arguments of Joseph Raz (1986) have been used as they are found to be theoretically much more refreshing than the rather austere and restrictive assertions of contemporary mainstream liberalism. Note that on the one hand there is the starkness of the natural rights tradition mentioned earlier. At the same time contractarianism is also characterized by what is termed here as ‘austere abstractions’ that fail to incorporate in their theorization the rich set of contexts which form the background conditions in the light of which moral choosing and decision making are done.

Now to return to the ‘anthropological minimum’ that is found in much of liberal political theory and especially in the ideas of John Locke. Jeremy Waldron in his essay ‘John Locke: Social Contract versus political anthropology’ argues that in his Second Treatise, Locke is telling two stories about the development of politics and civil society. The first story according to Waldron will sound familiar to all of us and it is about the way in which the social contract acts as the great watershed that divides the earlier state of nature in which men lived together as free and equal individuals without deferring to any political authority and being governed only by the rules and principles of natural law. In the second modern era on this later side of the great watershed that divides nature or the state of nature from political and civil society, men live and conduct themselves in the framework of and with reference to political institutions – ‘legislatures, courts, socially sanctioned property arrangements, and so on – institutions which articulate the natural rules and principles in the clear and determinate form of positive law’ (Waldron 1994: 52).

According to Waldron, when it comes to the other story, it has ‘an utterly different shape’ and is based on ‘Locke’s speculations in political anthropology’. It is the story of the growth of modern political institutions, typically modern political problems and a modern political consciousness growing out of the simple tribal group. Modern
political institutions and procedures with all the authority that they command over citizens derive from the authority of the patriarch in the simple tribal group. According to Waldron the main reason for the growth of political authority was economic and not military and was related to the growing complexity of a society that was slowly evolving out of a simple tribal group. This left many individuals mystified and confused as they could not fully understand the changes that were unfolding.

Waldron comments that the two stories stand in stark contrast to each other. In the first, the government is explicitly conventional and its institutions are the result of deliberate and conscious political decisions taken by individuals. In the second account the development is largely unconscious and develops according to ‘an insensible change’ in Locke’s own words (Waldron 1994: 53). According to Waldron it is this second gradualist, anthropological account of the development of the state and civil society that is more plausible and does not seem to be beset by some of the major objections to the first account like its historical veracity. Waldron thus comments: ‘The gradualist idea of a shift from ‘inchoate patriarchal authority to formal political institutionalization offers a much better account of the anthropological data than the idea of a dramatic shift from a pre-political state of nature to an explicitly political civil society’ (Waldron 1994: 56).

Having considered the ways in which the anthropological story is superior to social contract theory, Waldron further observes that this puts Locke in a particular difficulty as it is the social contract theory that ‘packs the normative punch of his political philosophy’. This is the story that gives us the theory of rights, representation, separation of powers, justified resistance etc. Waldron commenting on the difficulty that these two different stories put Locke into observes: ‘It seems, therefore, that the story Locke needs (for his moral and political purposes) he cannot have (for historical reasons), and the story that is consistent with and historically plausible is not the one that gets him anywhere near the normative conclusions he desires’ (ibid.: 57).

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3 An account of contemporary liberalism must of necessity begin with or bear some significant reference to John Locke. This is not only on account of Locke’s rather problematic defence of property rights that has found a resonance in a modern theorist like Robert Nozick. This particularly problematic defence of what can only be termed as unlimited property rights becomes especially problematic, indeed the problem becomes compounded and mystifying when it is considered in conjunction with his egalitarian assertion with respect to political rights. Richard Ashcraft has posed the problem of contemporary liberalism well when he asserts:
Sumner has rightly pointed out that the natural rights tradition itself has not been able to furnish us with a satisfactory answer to the question of what a natural right is. The existence of natural rights has been affirmed both in political rhetoric and political theory (Sumner 1987: 93). Rhetorical assertions of such rights have usually taken the form of declarations or manifestoes in the service of some political cause. These documents are not remembered chiefly for the depth of their philosophical reflection. Declarations and manifestoes seldom offer a grounding for their catalogue of rights, and they never offer an account of what makes a right a natural right (Sumner 1987: 94). It was precisely for the reason that the French Declaration of the Rights of Man made the stirring use of such language to say that the rights of man were self-evident, that they were ridiculed so much first by Burke and subsequently by Bentham.

Sumner has divided the natural rights tradition into a classical and a modern period. He believes that the heyday of the classical period was the 17th century which featured the great treatises by Grotius, Pufendorf and Locke. These writers, and especially Locke, are generally regarded as having laid the theoretical foundations for the revolutionary rights rhetoric which characterized the last quarter of the 18th century. The tradition’s classic period had come to an end by the end of the 19th century when natural rights theories were eclipsed in their British homeland by the rise of utilitarianism on the one hand and idealism on the other. Interest in natural rights then remained relatively dormant until after the second world war, after which it was marked by a revival, at least in Anglo-American philosophy and politics (Sumner 1987: 94).

Neither the classical nor the modern period of the natural rights tradition have yielded an agreed and considered account of the exact nature of natural rights. While the classical theories appear to share a tacit understanding of what it is for a right (or a duty or a law) to be natural, this understanding remains too undeveloped to serve our purposes. The modern era by contrast features a great many philosophical explorations of natural rights but yields no consensus. Despite all the discussion there is no agreement on such

I suggest that these two dimensions of Locke’s thought provide the key for understanding the intellectual framework for liberal as a political theory. That is, liberalism embodies, on the one hand, a radical moral egalitarianism rooted in the assumptions of theology and philosophy, and, on the other, a conservative defence of social-economic inequality, grounded in the presuppositions of an epistemology based upon experience, history, and the requirements of practical necessity (see Ashcraft, 1987: 10).
basic issues as whether natural rights are alienable, prescriptable, forfeitable, defeasible or self-evident (Sumner, 1987: 94). Sumner poses the crucial question of what constitutes a natural rights theory. This is a consideration that leads him to arrive at an understanding of the exact nature of a natural right in such a tradition. Sumner thus argues that we just have to construct one on our own (Sumner, 1987: 94). One of his primary aims is to determine what is to count as a natural rights theory after which he attempts to characterize natural rights in terms of the role that they play in such a theory. Sumner lays down the following four criteria for determining whether a moral theory is to count as a natural rights theory. These are (1) that contains some moral rights, which (2) it ties to the possession of some natural property, and which it treats as (3) basic and (4) objective.

The first criterion lays down that a natural rights theory must affirm the existence of some moral rights and thus necessarily employ some conception of a right. Sumner himself states that this seems to be a self-evident point that a natural rights theory must of necessity be a rights theory. However, he goes on to say that the reason why he has mentioned this as the first criterion has to do with a conceptual distinction that is made in theories of rights between choice theories of rights and benefit theories of rights:

The point of stating it separately is to focus attention on a conceptual issue which we have thus far side-stepped. We have in play two different models of rights centred respectively on interests and on choices. On each of these conceptions the function of a right is to protect some value on the part of the right-holder, and it is this function which unifies what would otherwise be disparate Hohfeldian atoms into a cohesive molecular structure. However, because the value to be protected differs on the two conceptions (welfare on the one hand, autonomy on the other), what the two conceptions will count as rights will correspondingly differ. (Sumner 1987: 95-96).

Sumner in continuation of his argument regarding the various criteria that can be used to mark out or differentiate natural rights theory and with special reference to the first criterion accepts that ‘the requirement that such theories contain some conception of a right is trivial’ yet the selection of a particular conception may not be so trivial. The two
conceptions of rights are useful here because they yield different maps of the conceptual terrain and it is the choice theory according to Sumner that yields more meaningful and significant theoretical boundaries. It is for this reason that he prefers the choice theory of rights over the benefit theory:

Now it seems to me that the map generated by the choice conception does identify more important theoretical boundaries and that we would do well to treat these as the boundaries between rights theories and their rivals. If this is so then we have a good theoretical reason for favouring the choice conception. (Sumner, 1987:97)

The point that needs to be noted here is the use that Sumner makes of the choice and benefit theories of rights. Both differ significantly in their implications and the moral personalities upon which they are premised. In the case of the choice conception the idea is to maximize or enhance the autonomy of the individual. On the other hand, the benefit conception aims to maximize or ensure the flow of welfare benefits to the individual. The choice conception is premised on the individual bearer of the right being an active choosing individual concerned with maintaining and enhancing his sphere of autonomy, one of the ways by which to do this is by exercising an active, individual choice. On the other hand, the benefit theory is premised upon the idea of the person being a passive recipient of benefits (Waldron 1984). The further important point is that the benefit theory of rights with the obviously lesser emphasis that it places upon the individualistic act of exercising an active choice is a conception that finds a home in utilitarianism, which is concerned less with maintaining and enhancing individual autonomy and more with ensuring a flow of benefits. It is the choice theory that is more favourable to an individualistic rights based liberalism. It is for this reason that Sumner favours such a strong conception of rights in his attempt to lay down the criterion for determining what natural rights are. The choice theory of rights with its strong assertion of individual autonomy is closer to the strongest assertion of rights to be found in the natural rights tradition and the strong assertion of rights to be found in contractarian social theory.

Going back to the four conditions that Sumner laid out, the first condition lays down that the theory contains rights only if it accepts the model of protected choices.
This condition does not however specify the content of rights that makes them natural. It is the second condition that takes one step further in this regard to actually spell out what is the content of natural rights. Thus, Sumner comments that if these rights are to be capable of performing their theoretical function then they will need to possess a ‘reasonably determinate content, scope and strength’ (Sumner, 1987: 101). Natural rights would then be conferred, according to the theory, on all those possessing certain common minimally defined attributes that are considered in some way basic. Thus, Sumner notes that in the natural rights tradition, moral rights have standardly been assumed to be human rights, and thus membership in the species of human beings has been considered the most popular criterion for being a right holder (ibid.: 102). The rights that form a part of the natural rights tradition differ then, from rights found in the contractarian and consequentialist tradition (ibid.: 103). Having considered the first two conditions, Sumner lays down the third condition which is simply that a natural rights theory must be one that is rights based.

The fourth condition relates to what Sumner himself admits may rather pompously be called ‘the ontological status claimed for a theory’s basic rights’. He makes a distinction between rights claims which may be either part of the ‘constructivist’ model or those that may be part of the ‘realist’ model. Subjectivist claims involve the element of human agency or subjectivity in the construction of such rights or values. On the other hand, objectivist views would claim that rights or other such values are pre-given and that they are merely discovered by humans rather than being constructed or invented. If rights are subjectivist, i.e., they involve the active creation and invention of rights then they can be considered to be a part of the constructivist model. On the other, hand if rights are objective and merely discovered without thereby involving the element of human agency in any sort of construction or invention, then they can be considered to be a part of the realist model (Sumner 1987: 107). He further comments that some types of moral theory like the consequentialist are compatible with either of these methodological models. However, natural rights theories are committed to the realist model and its concomitant claim of the objectivity of rights (ibid.: 108).

In this manner we have a fairly strong claim being made by the natural rights tradition. There are also fairly clear cut conditions that emerge when it comes to deciding
the criteria for determining natural rights. Sumner thus goes back to the four conditions that were outlined above and says that a natural rights theory is any moral theory that '(1) employs the model of rights as protected choices, (2) assigns some set of rights to some set of individuals on the basis of some natural criterion, (3) treats these rights (and nothing else) as morally basic, and (4) claims that they are objective' (Sumner, 1987: 108). On the basis of these four conditions that he has discussed, Sumner points out that consequentialist theories, because they are goal-based fail the third condition. On the other hand contractarian theories, because they involve a significant element of constructivism fail the fourth criterion (ibid.: 108).

There exists a significant continuity between the natural rights tradition and the contractarian tradition. This continuity is reflected in the strong assertion of rights that is to be found in both traditions. The break between the two really comes in regarding what can be termed the 'ontological status of rights'. The natural rights tradition claims that rights are objective while the contractarian tradition takes a subjectivist and constructivist view. This may also be a useful point to link up the constructivist view of rights to be found in the contractarian tradition with the constructivist view of the group that was taken in the very first chapter of the study itself. Thus, the study with its triangular theoretical framework has been moving in the direction of contractarianism as this particular theoretical vertex is more hospitable to rights compared to the first two vertices discussed earlier, viz. Burkean and Benthamite utilitarianism. Apart from the element of hospitability of the contractarian theoretical vertex, there can also be found the possibility of a correspondence between the ontological status of rights claimed by contractarianism and the ontological status of groups that has been affirmed at the beginning of the study. Both the ontological status of rights claimed by contractarian thought and the ontological status of groups defended in this study being constructivist positions, there is a possibility of varying the group right according to the character of the group which depends upon the way in which it has been constructed. There is thus a possibility of flexibility and varying the right according to the construction and configuration of the group.

There are then strengths and immense benefits to be derived from a rights based liberalism. This study affirms the importance of a rights based liberalism but argues for the need to go beyond contractarian social thought in such a way that the moral
foundations of liberalism are confined not merely to rights but include much else besides. However, as a prelude to this argument, a word on some of the dangers that need to be guarded against, especially with the kind of fetishization of rights that is taking place currently in liberal democracies. Contractarian social theory with its favoured choice theory of rights makes rights a bit like currency that can be used and exchanged on the market. Indeed such a choice theory of rights with all the advantages that it has above the benevolent theory of rights associated with utilitarianism can make rights talk akin to going to the supermarket (see Steiner 1994: 55).

Having made the analogy between rights and the purchasing power of money, theorists have been concerned with the proliferation of rights and rights based arguments. It has been argued that the proliferation of rights demands has threatened to severely erode the argumentative power and capacity of rights to ensure for the rights holders the object that the rights grant them, in exactly the same way as inflation severely curtails the purchasing power of currency notes. Such a proliferation of the concept of rights not only renders rights ineffective and incapable of attaining for the rights holder what it guarantees, it also threatens to drain the vitality of the concept itself. Thus, Sumner has rightly pointed out the dangers inherent in such a proliferation: ‘As a concept is stretched far and further beyond its proper domain it is also emptied of more and more of its distinctive content. Thus the increasing versatility of rights has been purchased at the cost of their increasing vacuity’ (see Sumner 1987: 15). Having seen the harmful consequences of a proliferation of rights in terms of the corresponding decline in purchasing power of rights, efforts have been made in thinking along the lines of controlling or reducing rights, to make them more scarce and thereby enhance their value (see Sumner 1987; Steiner 1994).

IV. Immanuel Kant, Contractarianism and Respect for Individuals.

This chapter, to repeat, is concerned with contemporary liberalism and its associated concern of maintaining and upholding the separateness, dignity, autonomy and choice

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4 Much the same seems to have happened in the case of a concept like civil society. Neera Chandhoke (2003) has pointed out that the concept of civil society has become a consensus term, one that evokes all round agreement. However, she warns that when a concept becomes a consensus term, this is not a cause for celebration as it has lost the capacity for contestation. The concept of civil society which connotes a realm of contestation, and resistance to an overpowering, overbearing and obtruding state is especially a casualty of this ‘flattening out’ that the concept has been made to suffer.
exercizing capability of the individual. This particular preoccupation is found especially in the contractarian tradition of liberalism. John Rawls in his self conscious contractarian liberal theory with its equally strong concern to distance itself from utilitarianism complained that utilitarianism ‘does not take seriously the separateness of individuals’. More specifically the preoccupation with the autonomy and self-respect of the individual can be found in one of the most important contributors to contractarianism, Immanuel Kant (see Lessnoff, 1990; Williams, 1994).

The almost sacrosanct status that is given to the individual by Kant explains the position that is often taken by many contemporary liberals when it comes to a clash between the individual and the group. There is an easy and logical extension of the Kantian categorical imperative that directs one never to treat an individual as a means but always as an end in himself. This extension is that on no account and under no circumstances, can a group right be allowed to override an individual right.

Liberal theory through its insistence on the respect to be granted to individuals, ends up merely making exaggerated claims with regard to such respect (Seidler 1986). Any discussion of contractarianism and its profound commitment to the dignity of the individual inevitably begins with Kant. Not only is Kant an important contributor to the tradition, but he is also an important influence when it comes to contemporary liberal theorists like John Rawls, Robert Nozick and Ronald Dworkin. This influence is especially seen in the Rawlsian conception of the self, which is definitely influenced by Kant’s idea of the transcendental self. However, there is a significant difference between the Kantian understanding or conception of the self and the Rawlsian conception. This difference lies in the more transcendental metaphysical conceptualization of the self that is to be found in Kant. In the case of Rawls and his strongly rooted Anglo-Saxon philosophy, the metaphysical and transcendental characteristics of the self have been done away with. There is then, in the strongly Anglo-Saxon philosophy of Rawls, a significant lessening of the German idealist influence of Kant. Rawls’s conceptualization of the self is more empirically rooted in the context of a particular historical period and even a precise geographical location. In contrast to Kant’s conceptualization, the Rawlsian self has not been stripped away of its time and space elements. The Rawlsian self, while being definitely influenced by the Kantian transcendental self has been shorn
of the 'wooly' German idealism of the latter. It is also important to point out that the Rawlsian self is a conceptualization of the self that is specifically rooted in the context of a late 20th century advanced capitalist society, Rawls's own society of the United States (Gray 1990; see also Sandel 1984).

There is in the Kantian conception of the self no possibility of contingency being important in shaping and giving rise to the self. Moral worth is thus detached completely from contingency. Further, Seidler cites Bernard Williams to show us the price that Kant has to pay, as the 'detachment of moral worth from all contingencies is achieved only by making man's characteristic as a moral or rational agent a transcendental characteristic; man's capacity to will freely as a rational agent is not dependent on any empirical capacities he may have' (emphasis added). Williams further reinforces the point when he adds that 'the respect owed equally to each man as a member of the Kingdom of Ends is not owed to him in respect of any empirical characteristics that he may possess, but solely in respect of the transcendental characteristics of being a free and rational will' (emphasis added; cited in Seidler 1987: 6).

Having raised a number of issues and questions above like the idea of respect for the individual that is found in liberal theory, a crucial point that this chapter makes needs to be flagged once again. This is the extent to which a liberal moral theory, in particular a variant of liberalism that is underpinned by contractarianism, is actually able to provide respect and dignity to the individual. The argument of this study is that liberal political

5 Given the spatial and temporal location of the Rawlsian self, where again it needs to be contrasted with the transcendental Kantian self, stripped of all time and space elements, the relevance of Rawlsian principles may be called into serious question. Rawlsian liberalism seems to suffer from a particular myopia of viewing American society of the late 20th century and the levels of material affluence and comfort attained by it and the relatively 'stable' constitutional and political system of the country as being in some sense the best form of liberal democracy that there can possibly be available. For an interesting though rather unsatisfactory and unconvincing attempt to apply Rawlsian principles to India see Nalini Rajan (1998). The same myopia of viewing American liberal democracy as the best available option in the late 20th century that plagues Rawlsian liberalism can also be found in the writings of Richard Rorty. Rorty's view of American democracy as being in some ways the best that we can hope for becomes all the more pronounced as a result of his philosophical pragmatism and his rather unabashed apologetics for liberal democracy itself as being simply the best option that we have (see Richard Rorty, Contingency, Irony and Solidarity). For a spirited critique Rorty's position and his ethno-centrism see Chandhoke (1999: 169-178). See also Michael Billig (‘Nationalism and Richard Rorty: The Text as a Flag for Pax Americana', New Left Review, no. 202, November/December). Rorty's 'contingency of the self' can also be usefully contrasted with the Rawlsian minimally contextual self and the Kantian transcendental self. It is interesting to note that inspite of the emphasis on contingency in Rorty's writings especially in his idea of the self, this rather flexible position is unable to appreciate other historical contingencies and ends up uncritically valorizing a certain Pax Americana.
theory merely provides an exaggerated account of the respect and dignity that the individual commands. Thus, while there may be a great deal that is mentioned with regard to the respect and dignity due to the individual at a rather rhetorical level, this fails to provide what is intended in more substantive terms. Why does this happen?

This problem stems from the particular manner in which the self is conceptualized. Curiously enough this particular conceptualization fails to provide the individual the respect and dignity that it attempts to affirm in such an assertive and forceful manner. Such a conceptualization of the self with its emphasis on abstract rights, individualism, and morality itself being rights based, fails to capture the complexity of morality itself. By simplistically asserting that morality can only be rights based, it degrades in a number of ways the dignity of the self. It takes the dignity of the self to exist in the assertion only of rights, with a denial of those rights being construed as a lack of such dignity that should accrue to the individual self.

Indeed there is to be found in the argument that the only morality that we can have is a rights based one, an implicit self-centredness that has the possibility of lapsing into outright selfishness. This self-centredness or to use C.B. Macpherson's famous term 'possessive individualism', can be argued is an outcome of the contractarian tradition with its calculations of self interest. The point that is being made here is that the dignity of the individual arises not from the mere assertion of rights and the exercising of active choice and hence only the activation of human agency. It may sometimes also arise in doing more than one is by right or duty supposed to do. Joseph Raz talks very centrally about the whole idea of 'supererogation', a concept that would simply be overlooked by contemporary liberal theory. Further, contemporary liberal theory suffers from a major blindspot that prevents it from appreciating the many foundations of morality apart from rights.

To proceed with the argument, it needs to be stated that while the contractarian tradition has attempted to ensure the dignity of the individual and to guarantee the system of rights for the continued well being and respect of the individual, it has often failed in this attempt precisely on account of the very task that it was setting for itself. In other words, in its attempt to guarantee the respect, dignity and autonomy of the individual, the
contractarian tradition was loud on rhetoric but wanting in terms of a substantive guarantee of such respect.

One of the important reasons why the contractarian tradition has been unable to guarantee fully the kind of respect that it tries to extend to the individual is, to reiterate, its excessive focus on the ontological separateness of the individual. This results in divorcing the individual from the social and moral context of which he/she may be a part. More specifically the contractarian tradition focuses excessively on the ideal of moral freedom or autonomy which has in different forms been upheld by theorists like Locke, Kant and J.S. Mill. It has not focused so much attention on an ideal of a social order and social morality, that is supported by reason because they serve the common good. This is an ideal that has been inherited from the Greeks.

Both these ideals which, it needs to be mentioned, are frequently viewed as being in conflict with each other are part of ‘our moral heritage’, according to B.J. Diggs (1990). Diggs differentiates between these two ideals in his article ‘A Contractarian View of Respect for Persons’. The central concern of Digg’s article is to argue that these two supposedly antagonistic ideals are reconcilable and then to look at the ‘most basic features of a moral contractarianism that results from assuming that the two ideals, in forms in which they would receive wide support, are reconcilable’ (Diggs 1990: 214).

The differentiation that Diggs makes between the two supposedly antagonistic ideals is extremely useful as it helps answer the question of why exactly contractarianism fails to guarantee the respect that it seeks to extend to individuals in a rather exaggerated manner. Indeed it seems to make a fetish of individual dignity, self respect and autonomy. The answer, it seems, lies in its excessive focus on the ideal of moral freedom or autonomy, while neglecting the ideal inherited from the Greeks with its ideas of perfectionism relating to a social morality that serves the common good and commands the support of reason.

Contractarianism with the deep imprint that has been left on it by Kant focuses exclusive attention on the ideal of moral freedom and the autonomy of the individual, the first of the two ideals discussed here. It seeks to guarantee the moral freedom and autonomy of the individual without bothering to look at the common social and moral context in which that autonomy is exercised. Contractarianism with its excessive focus on
the ideal of moral freedom and autonomy will even go to the extent of viewing the
surrounding social and moral context of which the individual is a part, as necessarily
limiting, compromising or overturning the moral freedom and autonomy of the
individual. The argument made by Diggs of reconciling the two ideals is then an
attractive one:

The problem is rather to find or to invent a set of restrictions that it
would be reasonable for each person to include in the morality by which he
governs himself if almost all were willing to accept these restrictions – or, to
put social morality in a more positive light, the problem is to determine
articles of morality that it would be reasonable for all persons together freely
to subscribe to. If this problem could be solved, then the moral freedom of
individuals would be protected, as much as people could reasonably wish it to
be, and at the same time these moral restrictions or articles could be defended
as reasonable to all who live under them. The two ideals could then be
reconciled apparently as well as they can be (Diggs 1990: 216-17).

From this it becomes clear that in guaranteeing respect for the individual it is not
enough to merely focus on the moral freedom and autonomy of the individual but also the
surrounding social and moral context. This surrounding social and moral context can
often act as a restriction and limitation on the autonomy of the individual. The challenge
is to guarantee the autonomy of the individual, not by neglecting the social and moral
context, but by taking it into active consideration and making it conducive to the
exercising of autonomy and promotion of freedom. The surrounding context is then
important and will engage more of the attention of this chapter. The contractarian idea of
rights as it has been conceived operates to actually create a further schism and
antagonism between the individual and his social milieu. In some senses then, the
background conditions do become important. The contractarian tradition with its rather
strong assertion of rights secures the individual from the tyranny and oppression of his
social milieu. This shows the manner in which the contractarian tradition provides the
basis for a strong assertive and individualistic rights based ethic that protects the
individual and provides to him the autonomy and respect that is rightfully due to him.
This is however to neglect the surrounding social and moral context.
The reconciliation that Diggs proposes then of the two ideals is "pragmatic" and "contextual". The social and moral context would inevitably involve some kind of restriction or limitation which contractarian social theory might hasten to conclude was a limitation on the autonomy of the individual. However, Diggs clarifies that the 'contextualism proposed does not abandon the ideal of freedom; it insists that whatever restrictions are allowed as moral must be able to be accepted for good reasons by each person as articles of his own personal morality, which provides freedom at just the right place' (Diggs 1990: 217). From a consideration of Diggs views it should be obvious that what emerges is the importance of some kind of a 'moral community' that acts as the surrounding context and it is within this context that the individual needs to be guaranteed respect and dignity.

V. Utility and Rights.
The discussion up to this point in the chapter may have given the impression that it is only contractarianism that can provide a strong affirmation of rights. This impression may have been reinforced by the schematic outline given at the beginning of the chapter in which a descending order of commitment to rights was laid out and in which utilitarianism was considered to contain the weakest commitment to rights. So weak was this commitment that it had the likelihood of lapsing into a rejection of rights, if they so happened to clash with the fundamental principle of utility. It could also be argued that in spite of its apparently egalitarian thrust encapsulated in the utilitarian maxim 'everybody to count for one, nobody for more than one,' utilitarianism has also the possibility of denying equality when external preferences are factored in and the question of double counting is considered (see Dworkin 1984: 155-59). We thus have a picture of utilitarian principles significantly devaluing central theoretical concepts of contemporary liberal theory like rights, liberty, justice and even equality (see chapter 3).

However, the question that this section of the chapter addresses is the extent to which utilitarianism actually endorses or affirms rights. Can utilitarianism be accused of showing too little respect for rights? To begin with it might be useful to take note of two notions that David Lyons considers in his article 'Utility and Rights'. These two notions are concerned with the relation of rights to utilitarianism that are widely accepted, by
both utilitarians and their critics. The first is that utilitarianism is hostile to the idea of moral rights. The second is that utilitarianism is capable of providing a normative theory of legal and other institutional rights. The 'upshot' of Lyons's article as he himself states it is that 'utilitarianism has a great deal of trouble accommodating rights' (Lyons 1984: 110). To facilitate his argument Lyons distinguishes between 'moral rights' and 'legal rights'. Moral rights are those that exist independent of social recognition and enforcement. They are the rights that are sometimes called 'natural' or 'human', but are not limited to them. Natural rights or human rights are possessed by each and every individual irrespective of the circumstances into which he/she may have been born. Utilitarians are widely considered to be hostile to the idea of moral rights and this particular hostility is termed by Lyons as 'The Moral Rights Exclusion Thesis'. However, utilitarians have no problem accommodating legal rights. This easy accommodation of legal rights is termed by Lyons as 'The Legal Rights Inclusion Thesis'.

Earlier it was noted how contractarian theory has not focused adequate attention on the aspect of the surrounding social and moral context in which individuals lead their lives. In its concern to secure the respect and dignity of the individual, contractarian theory has relied on the ideal of the moral freedom and autonomy of the individual. This exclusive and excessive concern with the ideal of the moral freedom and autonomy of the individual has neglected the surrounding moral context or moral community that is a part of the individual’s social world. It is such a surrounding moral context that Dworkin talks about when he argues that utilitarianism can provide a background justification in which rights can still be taken seriously. What makes Dworkin’s view interesting is that, contrary to recent thinking in liberalism which would aver that it is only with the movement away from utilitarianism and towards contractarianism that there is a possibility of rights being taken seriously, Dworkin asserts that rights can be taken seriously by accepting and endorsing utilitarianism as a ‘background justification’.

Dworkin’s views need to be taken into account in more detail not merely because he is a very important liberal theorist but also because he has something interesting to say.

6 It might be useful to recall here Bentham's opposition to moral and natural rights which are in other words extra-legal. Thus a right could not exist apart from the law. Bentham makes the point in the following manner: 'Rights are the fruits of law and of the law alone; there are no rights without law — no rights contrary to law — no rights anterior to the law' (cited in Hart, 1982: 82).
about the surrounding moral context which contractarian theory, with its excessive emphasis on the ideal of moral freedom and autonomy of the individual simply fails to take into account. Before exploring Dworkin’s ideas in detail it might be important to make one observation. Given Dworkin’s endorsement of utilitarianism as a background justification, we could also quite possibly envisage endorsing another kind of moral context and moral community as a background justification and still talk about the importance of taking rights seriously. This possibility of considering some other set of background conditions especially in non-Western societies is implied by Dworkin himself when he talks about utilitarianism being ‘the most influential background justification, at least in the informal way in which it presently figures in politics in Western democracies’ (emphasis added; Dworkin 1984: 153).

Even though Dworkin does endorse the value of utilitarianism as a background justification, thereby not significantly distancing himself from utilitarianism as a set of moral and political ideas, there is a significant overturning or undermining of utilitarianism when it comes to the question of taking rights seriously. Dworkin is aware of the dangers that utilitarianism may lead to ‘if utilitarianism in practice is not checked by something like the right of moral independence (and by other allied rights)’. The danger is that it will ‘disintegrate’ into a version that will fail to treat equally the rights of all. This particular aspect of the overturning or undermining of utilitarianism is enough to reveal the lack of favour that rights find in utilitarian theory in general.

Firstly, while Dworkin endorses utilitarianism as a background condition, he is no utilitarian in the sense that he would dismiss a la Bentham that moral rights are mere ‘nonsense upon stilts’. Dworkin believes that individuals have moral rights and that these moral rights are often exercised against the government. The point that Dworkin is not a utilitarian needs to be emphasized as his acceptance of utilitarianism as a ‘background justification’ is a very qualified endorsement which should not be taken as a wholesale one, a point that Dworkin himself makes in the following words:

But it does not follow from this investigation that I must endorse (as I am sometimes said to endorse) the package of utilitarianism together with the rights that utilitarianism requires as the best package that can be constructed. In fact I do not. Though rights are relative to packages, one package must still
be chosen over others as better, and I doubt that in the end any package based
on any familiar form of utilitarianism will turn out to be best (Dworkin, 1984:
165).

Thus the government has to take the moral rights of individuals seriously. It
cannot override them, even though it may be in the larger interests of society that a
particular moral right is not respected. What needs to be noted is the manner in which
Dworkin considers rights to be a kind of impediment in the way of some of the general
tasks that the government may have set for itself in the interests of society at large. Such
an impediment that a right places in the way of the government involves an extra cost or
expense that the government will now have to incur. This may seem like a drag on the
efficiency of the government, but the price or the cost that this incurs is worth the
expense.

Not respecting the rights of individuals would have meant a grave injustice and
denial of equality and self respect to an individual. According to Dworkin: ‘So if rights
make sense at all, then the invasion of a relatively important right must be a very serious
matter. It means treating a man as less than a man, or as less worthy of concern than other
men. The institution of rights rests on the conviction that this is a grave injustice, and that
it is worth paying the incremental cost in social policy or efficiency that is necessary to
prevent it’ (Dworkin 1977: 199). This grave injustice cannot be measured in terms of
costs. This is the way in which individual rights override or trump the utilitarian
calculations of the government and why rights need to be taken seriously. What we have
then is a picture of profound respect for the individual. To override the rights of the
individual and thereby to not take rights seriously, even if doing so was in the larger
interests of society, would imply a denial of respect to the individual. Thus, the profound
respect and dignity of the individual that is derived in liberal theory from Kant’s
categorical imperative, is secured here in the ideas of Dworkin and set against the
background condition and moral context of utilitarianism.

The problem with utilitarianism here according to John Gray seems to be that its
‘defining value’ which is pleasure, happiness or welfare contains no mention of the
dignity or autonomy of human beings. Even then ‘it is this value which utilitarianism in
its standard forms invokes as the criterion of right action'. Further, Gray notes that what is worse is that 'insofar as utilitarian policy must have as its goal the maximization of welfare conceived as an aggregate summed over the utilities of everyone affected, legal and political utilitarianism seems bound to have a collectivist bias, trading on the dangerous fiction of a social entity and ignoring the distinctness of separate selves with their several incommensurable claims' (Gray 1984: 73).

In the previous chapter and again in this chapter the argument made is that utilitarian principles have a tendency of devaluing normative concepts in liberal theory like rights and justice. Gray is able to capture this particular devaluation well and the reasons for this, when he argues that 'common sense' and 'intuition' show us clearly that maximizing of welfare demands the infliction of losses on individuals which cannot be sanctioned by considerations of justice. He goes on to argue that this is 'only a consequence of the disparity between utility as an aggregative principle and the distributive character of principles about rights and justice'. At its deepest and most fundamental level, according to Gray, 'this disparity expresses a most fundamental divergence in the force of moral principles; a divergence between those goal-based or teleological principles which enjoin us to promote some value, and those rights-based or duty-based principles which impose deontological constraints on the promotion of values'. There seems to be then a basic and fundamental incompatibility between rights and utilitarianism understood as a consequentialist goal based theory. Having effectively captured the most fundamental reason that causes utilitarianism to devalue central normative concepts of liberal theory like rights and justice, Gray concludes that the impossibility of a utilitarian derivation of fundamental rights stems from this fundamental distinction that he has made (Gray 1984: 74).

However, the more important point that Gray makes is that a variant of utilitarianism, indirect utilitarianism, which he is careful to distinguish from act utilitarianism and rule utilitarianism, is capable of giving rise to fundamental rights. The point that Gray is making is that direct utilitarianism is counterproductive as it may paradoxically, lead to an undermining of the aim of maximization of utility. If this is the case and direct utilitarianism is counterproductive, there may be a need to impose practical constraints on it and Gray argues that 'there is nothing to say that these will not
include the distributive constraints imposed by principles conferring weighty moral rights on individuals' (Gray 1984: 85).

There is then a possibility of reconciling utilitarianism with rights as we have seen in the views of Dworkin and Gray. This will however involve significant qualifications and adjustments within utilitarianism. There seems to be then a certain crudity associated with utilitarianism as a moral and political theory. This stems from its clumsiness in the central goal that it sets for itself, which is the maximization of utility. Utilitarianism can only be reconciled with rights and prevented from stepping onto the interests of individuals in the form of the more sophisticated variant that Gray terms ‘indirect utilitarianism’.

**Different Moral Structures.**

The purpose of this section has been two fold. The first is to look at the relationship between utilitarianism and rights. The second is to now look at the different kinds of moral structures that the three different theoretical traditions give rise to. Sumner observes that a contractarian theory may exhibit any of the following four possible moral structures: (1) it may contain no rights whatsoever; (2) it may contain rights but treat none of them as basic; (3) it may treat rights as basic along with some other items; (4) it may treat nothing but rights as basic. Sumner himself points out that the likelihood that a contractarian theory would contain no rights at all is remote. It is the third and fourth possibilities that Sumner himself says need to be taken into consideration (Sumner 1987: 129).

Thus the third consideration is a mixed theory in which rights along with other items are considered as basic, while the fourth is a rights based theory. To reiterate, these are the possibilities that will be of significant interest to this study. As this study is opposed to the idea that morality can only be rights based, the fourth possibility is eliminated leaving the third one. It provides the option of enhancing liberal morality and not restricting it to merely rights, which it will be argued subsequently is a gross impoverishment of the moral resources of liberalism.

Before proceeding with a further consideration of rights as one among many other components of a liberal moral structure, an important distinction needs to be made
between the way that rights are understood in the natural rights tradition and the manner in which they are conceived in the contractarian tradition. The contractarian tradition adopts a constructivist methodology when it comes to rights and unlike the natural rights tradition, which treats them as in some way basic and fundamental that are merely discovered by rationality, the contractarian tradition would treat ‘their basic rights not as natural facts which we are capable of discovering but as artifacts which we are capable of inventing’ (Sumner 1987: 130). At the risk of some repetition, it might be said that the natural rights tradition treats rights as basic, fundamental, natural and most importantly objective. On the other hand contractarian theories by virtue of their constructivist methodology would treat them not as objective, but subjective, as artifacts that can be constructed by human agency. The contractarian tradition thus provides more room for maneuver and flexibility when it comes to a consideration of rights. Unlike the natural rights tradition in which a commitment to the objectivity of rights may entail what may be termed a certain rights fundamentalism, there is greater leeway when it comes to rights in the contractarian tradition.

Having seen the greater degree of flexibility that contractarian theories allow, it is indeed curious that contractarian theories should be so rigid and inflexible about confining a liberal moral structure to only rights. The point being made here is that contractarian theories with their constructivist methodologies, their view of rights as being subjective, and their strong, indeed basic commitment to rights, can also accommodate along with rights other components in a moral structure which underlines the third possibility that Sumner had pointed to. To put this point a little more strongly, it is indeed curious that in spite of the greater flexibility that contractarian theories enjoy when it comes to a consideration of rights, they become so inflexible and rigid especially when they confine the moral structure to only rights and argue that morality can only be rights based. Interestingly if we are to view morality itself in a constructivist manner, there is no reason why the moral foundations of liberal political theory should just be right based, and why they cannot be widened to include other elements, apart from rights.

A distinction is being made here between two models of morality. The first is a ‘natural’ model which believes that theories of morality merely reflect the natural moral order. In other words theories of morality are coherent with a natural moral order which
is objective and which human beings merely discover but cannot create. The second constructive model 'treats intuitions of justice not as clues to the existence of independent principles, but rather as stipulated features of a general theory to be constructed, as if a sculptor set himself to carve the animal that best fits a pile of bones he happened to find together'. Importantly, the constructive model does not assume in the manner of the natural model 'that principles of justice have some fixed, objective existence, so that descriptions of these principles must be true or false in some standard way' (Dworkin, 1977: 160). There is a further distinct advantage that the constructive model has to offer when it comes to groups and Dworkin further observes: 'It is well suited to group consideration of problems of justice, that is, to developing a theory that can be said to be the theory of a community rather than of particular individuals, and this is an enterprise that is important, for example, in adjudication' (Dworkin 1977: 163).

Having made the point about the contractarian tradition taking a subjectivist-constructivist understanding of rights, it needs to be added here that the way to deal with group rights is by attaching rights to groups that are considered not as objective, fixed and pre-given entities of social composition, but as constructed, contingent and freely floating entities that keep changing. Thus, a subjectivist account of rights that is opposed to a realist ontology of rights needs to be attached to a constructed and historically contingent account of groups that negates the realist ontological view of rights. It makes sense to tie such an account of rights to a similar, parallel and corresponding account of groups as this will provide a more flexible understanding of group rights that prevents the possibility of the group becoming tyrannical and overbearing by overstepping its limits and infringing the rights of the individual.

But is such an eclectic liberalism which insists on including within the foundations of liberal morality not just rights, but also duties and goals possible at all? The reason why this point about eclecticism is being made with such confidence hinges on an understanding of morality that is constructivist. If such is the case, and all that is required to enhance the foundations of liberal morality is the human will and agency to construct such a diverse morality, then what prevents this from happening? The answer could well be that the very eclecticism being visualized would be the stumbling block, as the various components of our foundation might at loggerheads. Such a state of affairs
would compromise the strength and viability of the moral foundation that is sought to be created. There is a possibility then that the very eclecticism that is being visualized as a source of strength turns out to be the weakness and the stumbling block. Thus, there is every likelihood of a clash between rights and duties if these are both included in our moral foundation. This is a point that Dworkin makes when he observes, ‘Political theories will differ from one another, therefore, not simply in the particular goals, rights, and duties each sets out, but also in the way each connects the goals, rights and duties it employs’. Dworkin further observes that one can reasonably suppose that any particular theory will give ultimate pride of place to just one of these concepts. One of these concepts will be given overriding importance and the other concepts will have to accept a position of insubordination to this central concept (Dworkin 1977: 171).

The point that Dworkin is making is extremely valid and is also one that needs to be taken into account here as an attempt is being made to widen and expand the foundations of liberal morality by insisting that it be confined not just to rights but must include other elements like duties, goals and the pursuit of excellence. However, Dworkin’s argument seems to rule out this suggestion. This study, to reiterate is endorsing a rights based liberalism but is at the same time arguing for not keeping liberal morality confined to just merely rights. It is further suggesting that there is a need to go beyond contractarianism. But how is this to be done; keeping in mind what Dworkin has just argued.

To get out of this dilemma it might help to consider the classification of political theories that Dworkin offers and which are produced from the constructive model: ‘Such a theory might be goal-based, in which case it would take some goal, like improving the general welfare, as fundamental; it might be right-based, taking some right, like the right of all men to the greatest possible overall liberty, as fundamental; or it might be duty-based, taking some duty, like the duty to obey God’s will as set forth in the Ten Commandments, as fundamental’ (Dworkin 1977: 171). The predicament facing the eclectic moral foundations of liberalism that is being suggested by this study is simply this: which element in the moral foundation to privilege?

Goal based theories take as their starting point the social collectivity. Thus, totalitarian goal based theories, like fascism take the larger interest of political
organization as fundamental. This is 'also true of the various forms of utilitarianism, because, though they count up the impact of political decisions on distinct individuals, and are in this way concerned with individual welfare, they merge these impacts into overall totals or averages and take the improvement of these totals or averages as desirable quite apart from the decision of any individual that it is'. Dworkin adds that this is also the case with perfectionist theories like Aristotle's that impose an ideal of excellence upon the individual and strive to foster such a culture of excellence within the polity. On the other hand right and duty based theories begin with the individual, placing him/her at the centre of consideration (Dworkin 1977: 172).

To clear some of the doubts about the viability of the suggestions being put forward, a few points of clarification need to be made. A further development of the argument is contained in the next section. The arguments in this chapter do not favour any theory that is premised upon the collectivity and its well being. If the arguments endorse individualist theories, then the question that could be pertinently raised is why the need to move beyond contractarianism as being suggested? The answer is that this study seeks to interrogate the dominant liberal individualism that occupies a hegemonic status in contemporary mainstream liberalism. It does not reject the importance if individualism per se, in fact it is endorsing the value of individualism. It only rejects the idea of the disembodied self and its Kantian underpinnings that have influenced contractarianism and in turn the dominant form of liberalism. Further, this study rejects the formalistic understandings of morality, that again form an important component of contemporary liberalism and which again are inspired by Kant. In its place it argues for a more substantive understanding of morality and a liberal theory that is more sensitive to the contexts in which moral structures emerge and are produced.

VI. Discontent with a Narrow Liberal Morality. Beyond Contractarianism?
An important argument of this chapter is the need to go beyond contractarianism. There are specifically two reasons why this need to go beyond contractarianism is warranted. One of these is the discontent with liberal morality that is critiqued as being too narrow and the second is the inability of contractarian thought with its associated individualism to account for group rights. Before going on to look at such complaints of liberal morality
being narrow, it is important to take into account, a defense of existing contractarian morality found in T.M. Scanlon's article, 'Contractarianism and Utilitarianism'. Scanlon begins by observing how utilitarianism occupies a central place in the moral philosophy of our time. Scanlon notes that in spite of the fact that it is not the view that most people hold, yet 'for a much wider range of people it is the view towards which they find themselves pressed when they try to give a theoretical account of their moral beliefs'. Scanlon believes that '[W]ithin moral philosophy utilitarianism represents a position one must struggle against if one wishes to avoid it'. He has noted a certain strength within utilitarianism which makes it persist as a popular option within moral philosophy. He however feels that a successful replacement like contractarianism needs to 'sap this source of strength by providing a clear account of the foundations of non-utilitarian moral reasoning' (Scanlon 1999: 103). It is the kind of contractarian moral foundation that Scanlon provides which it will be the task of this section of the chapter to critique and oppose and thereby move 'beyond contractarianism'.

Scanlon argues that while 'contractualism' has been offered as an alternative to utilitarianism earlier, yet the appeal of 'contractualism' as a 'foundational view' has been underrated. It offers a very plausible account of moral motivation and Scanlon believes that his own account is able to bring out the contrast with utilitarianism more effectively. Scanlon, outlining the normative content of his contractual moral philosophy argues that the source of motivation triggered by the belief that an action is wrong is the 'desire to be able to justify one's actions to others on grounds they could not reasonably reject' (Scanlon 1999: 116).

As against Scanlon's endorsement of contractualist morality, an interesting account of discontent expressed at the manner in which an unduly narrow and restrictivist morality has been conceived in contemporary liberalism is found in Victor Seidler's book Kant, Respect and Injustice. Seidler in this book focuses on the ethical writings of Kant as they are 'central to an understanding of the formation of our liberal moral consciousness' (Seidler 1987: 5). One of the major causes for complaint that Seidler has

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7 Scanlon's essay is included in the volume edited by Amartya Sen and Bernard Williams (1999) entitled Utilitarianism and Beyond. The suggestion in this chapter to the effect that there is a need in contemporary liberal thinking to move beyond contractarianism is, as should be obvious, taken from the title of this particular book.
with Kantian morality is what he terms the 'autonomy of morality'. The autonomy of morality is guaranteed by the fact that individuals as rational agents have the capacity to make moral choices. Thus Seidler complains: 'Kant tended to assume that individuals were free to work out their individual relationships, regardless of their positions of power and subordination within social life' (Seidler 1987: 7). Seidler's argument is that this idea of the 'autonomy of morality' is at best naïve as it fails to take into account the inequalities of life and the fact of insubordination. Such prevailing inequalities in society prevent individuals from acting independently, thereby undermining the whole idea of the autonomy of morality. Seidler goes on to argue that the way in which morality is conceived makes it a realm that is totally detached from the social world. It makes morality a very individualistic affair as each individual through his rationality has 'access to a realm completely independent of our everyday lives in society' (ibid.: 5). Thus, morality becomes a rather private affair between a person and his conscience, which Seidler notes is one aspect of the universalism of morality within the moral culture and consciousness of a liberal society (Seidler 1987: 9).

Seidler's objection is with the way morality is conceived in this all-encompassing and universalistic manner. Such a conception fails to recognize that morality may be inextricably bound with and spring from narrower traditions. As against the Kantian understanding of morality that has so powerfully influenced contemporary liberal ethics, Seidler argues that we need a more historically sensitive account that 'stays in touch with our everyday understandings' (Seidler 1987: 2). Seidler is clear that the implications of what he is arguing for, i.e., an understanding of morality that is historically sensitive, will also necessitate a look at the relationship between moral philosophy and social philosophy. It will involve looking at the ways in which moral traditions can be contradictory. It will also involve issues of social organization as, according to Seidler, morality has structures and is integrally part of what is social. Seidler raises the well known view that sees liberal morality as being 'continuous with, as well as in tension with, aspects of a Christian inheritance'. He further notes that Kant is of 'particular importance in giving a transformed secular definition to some of these (Christian) moral conceptions within a broadly conceived liberal moral culture' (Seidler 1987: 2-3).
'Know Thyself'.

Seidler cites the Italian Marxist Antonio Gramsci to assert that there is a need to 'know thyself', which will involve an historical understanding that must go hand in hand with a psychological awareness. In attempting to know ourselves and our relationships with others, we are inevitably influenced by the moral culture of which we are a part and which we take for granted. A part of the passage that Seidler cites from Gramsci's *The Prison Notebooks*, is interesting and merits consideration: 'The starting-point of critical elaboration is the consciousness of what one really is, and is “knowing thyself” as the product of the historical process to date which has deposited in you an infinity of traces, without leaving an inventory' (cited in Seidler 1987: 3).8

The idea of 'knowing thyself' also arises in a consideration of Hegel's account of rights. Hegel is known for his opposition to Kantian morality on the grounds that it was too abstract and anti-historical. Hegel responded to the abstract character of Kantian morality by stressing the history of moral duty and by further stressing that to conceive moral duty as something apart from social and political circumstances is to misconceive it (Smith 1989: 71). Hegel opposes the idea of natural rights which merely assumes that all men everywhere are entitled to rights. Instead Smith argues that the emergence of rights are regarded by Hegel as 'profoundly problematic' as they are not given but are part of a larger historical struggle by human beings to achieve recognition. Hegel rejected the state of nature and social contract theories of his predecessors. The origin of rights lies in the desire of two individuals, each seeking some sign of recognition from the other. The desire for recognition itself arises from the nature of self consciousness and this in turn brings in the question of 'knowing thyself'. As Smith explains:

The maxim "know thyself", inscribed on the Greek temple at Delphi, was adopted by several theorists of the modern age. Hobbes invoked it to

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8 A reference to the very same passage from Gramsci is made by Edward Said in his landmark book *Orientalism*. However, Said adds something to the passage cited and it might be interesting to quote Said here:

In his *Prison Notebooks* Gramsci says: "the starting point of critical elaboration is the consciousness of what one really is, and is “knowing thyself” as the product of the historical process to date, which has deposited in you an infinity of traces, without leaving an inventory". The only available English translation inexplicably leaves Gramsci's comment at that, whereas in fact Gramsci's Italian text concludes by adding, "therefore it is imperative at the outset to compile such an inventory" (Said, 1995: 25).
show that knowledge of the passions that lead to conflict is the most important kind of knowledge, and Rousseau recalled it as a motive to recover our origins before the accidents of history alienated us from our true selves. Hegel invokes self-knowledge as a way to ground his theory of rights. Self-knowledge is not only desirable in itself but is a critical condition without which no other knowledge can be securely based (Smith, 1989: 115).

Such an understanding rejects the idea that morality can be an autonomous realm as it is conceived by the Kantian framework which, to reiterate, has greatly influenced contemporary liberalism. The universalism that is claimed by such an understanding of liberal morality has been shown to be the far fetched claims of just another tradition. This argument about liberalism being just one tradition among many others is to be found in Alasdair MacIntyre's (1988) book Whose Justice? Which Rationality? MacIntyre (1998) in another book A Short History of Ethics has also forcefully rejected the idea that morality is transcendental and unconnected to history and particular historical and social formations: ‘Some philosophers have even written as if moral concepts were a timeless, limited, unchanging, determinate species of concept, necessarily having the same features throughout their history, so that there is a part of language waiting to be philosophically investigated which deserves the title “the language of morals” (with a definite article and a singular noun)’. MacIntyre further observes that ‘Moral concepts are embodied in and are partially constitutive of forms of social change’ (Macintyre 1998: 1&2).

The Problematic nature of the Self.

Seidler also makes an important point with respect to the conceptualization of the individual or the self, which has in many ways been considered extremely important in guaranteeing respect and dignity to the individual. Seidler’s argument is that the idea of the autonomy of morality found in Kant is itself responsible for undermining the imperative that individuals should be treated as ends in themselves and never as means towards the ends of others. He argues that Kant’s moral imperative to treat everyone as an end in him/herself is undermined by his rationalism and individualism as the denial of wants and feelings is also in some senses a denial of what is particular in people’s lives.
and because there are structures of power and morality that lie beyond that language of individualism. (Seidler 1987: 12).

The point that Seidler is making relates to the Kantian conceptualization of the self with its sharp, severe and rather austere division between the sensible world as the realm of nature, which is external to us in the sense of being affected by objects, and the intelligible world that relates to the inner and essential autonomy of the will. According to Kant, moral worth and the dignity of the individual essentially stem from this inner intelligible world (Seidler 1986: 21). The net effect of this rather austere separation is to divorce vital aspects of the human experience that stem from our everyday empirical lives. This outer realm of empirical experiences is consigned and relegated to a lower inferior domain. We have then a hierarchy of the person. Individuals command respect only as rational noumenal selves. At the same time the Kantian conception would exhort us to rise above our lower base phenomenal selves that are rooted in everyday empirical experiences. Taking this into account, it is difficult to understand how Scanlon’s account of contractarian morality with its emphasis on the need to provide irrefutable justifications for actions could possibly operate. The reason for this being that the Kantian underpinnings of contractarian morality would preclude taking into account the everyday empirical experiences of the individual.

We thus have a fragmented understanding of the self. Worse, there is subsequent to this fragmentation a complete denial of the value, worth or significance of the empirical experiences of the phenomenal self. The Kantian conception of the self is therefore an impoverished and ‘attenuated’ conception, according to Seidler, as it does not take into account one significant part of the self, that which pertains to the outer sensible world of everyday empirical experiences. Contrast this severe and rather restrictive conceptualization of the Kantian self to the thick descriptions of the story telling self conceived by MacIntyre. Note also the ahistorical nature of the Kantian self compared to Gramsci exhorting us to ‘know thyself’ as ‘a product of the historical process to date which has deposited in you an infinity of traces, without leaving an inventory’.

One of the aims of this study has been stated at the very outset as the contextualization of the rights discourse in India. What this means is to understand the
ways in which the possibility of speaking in terms of rights has been conceived and made historically possible. While the study does support the idea of a rights based liberalism, the rights that it seeks to uphold are not to be understood as the only components of the moral structure. The reason for this is that there are other components of the moral structure apart from rights. The contractarian tradition with its strong commitment to and affirmation of rights has the inherent tendency of including only rights as the fundamental component of the moral structure.

The aim of this study then, is to endorse a right-based liberalism, while at the same time conceptualizing a moral foundation that includes not just rights but which can accommodate a variety of other components like duties, goals, virtues etc. (Raz 1986: 193). It is to that extent a moral structure that is greatly enhanced and enriched by the inclusion of a number of other components.

Another problem with a rights-based liberalism as it has been traditionally conceived is that it assumes a certain moral personality. Such a moral personality and the respect and dignity that is to accrue to her/him is expressed in the language of rights. This manner of conceptualizing rights and dignity rules out the possibility of considering the concrete social relations and the particular contingencies in which moral choosing take place. In short, they miss out the vital social context in which rights are exercised. The general movement of this study has been in the direction of contractarian social theory, which forms the third vertex of the theoretical framework developed here. It has been argued earlier in this study that the rights discourse in India is skewed in favour of the group and against the individual, thereby undermining the interests of the individual. The movement in the direction of contractarianism, apart from mirroring the transition away from utilitarianism and towards contractarianism in contemporary liberalism, is in an effort to search for possibilities of guaranteeing the respect, dignity, rights and separateness of the individual that can be denied as a result of the distinctive features of the rights discourse in India. Thus, the weak link in the rights discourse in India, which is the denial of rights, respect, dignity and justice, as a result of the preponderant influence exercised by the group, is sought to be fortified and remedied by the possibilities provided by contractarianism.
However, this study attempts to move beyond contractarian social theory (see Kelly 1994: 241-243), which Seidler has already pointed out is plagued by its tendency to view morality as an autonomous realm and which he further argues fails to guarantee the respect and dignity of the individual to which it is so strongly committed. In addition to this tendency of viewing morality as an autonomous realm, it has the further tendency of conceptualizing rights, and the moral personality of the individual who exercises those rights in abstract and often in metaphysical and transcendental terms. This is a particularly deceptive approach as it is unable to take into account the thick set of background conditions, in other words, the context in which moral choices are made.

What is being proposed then is a rights discourse that speaks in a certain moral language with a vocabulary that is able to capture and evoke the thick set of social background conditions. By speaking in terms of a new moral language and vocabulary, we would, in effect, be getting rid of the overly abstract terms in which rights claims have been couched and the individual conceived\(^9\). This creation of a new and distinct moral language or vocabulary would be closely and organically entwined with everyday circumstances and struggles. Thus, in the very act of engaging with everyday issues of struggle, insubordination and oppression, the moral language that has been mentioned, would be renewed and the moral vocabulary of such a language would be expanded to capture and thereby grasp the new circumstances and contingencies that society comes face to face with. These are new circumstances and contingencies that the inflexible and fixed terms in which Kantian morality is framed, with its rigid a priori categories, would simply be unable to come to terms with.\(^{10}\)

\(^9\) Nivedita Menon in a paper that questions the efficacy of law, justice and rights claims for women observes that feminists 'have attempted to redefine rights in a manner which would enable them not to be understood as purely individualist, but which does not dissolve the possibility of autonomy within “the community”’. Menon goes on to observe that such feminist analyses which ‘attempt to rescue the emancipatory impulse of the rights discourse from its individualistic thrust, can only do so by introducing the dimension of morality’ (Menon, 1999: 269-70).

\(^{10}\) Many of the ideas contained in this chapter have been greatly influenced by a reading of the books of Joseph Raz and Victor Seidler. The influence of Seidler’s book should be particularly obvious at this stage of the chapter. I would like to cite an extensive quotation from Seidler’s book that will bring out the influence of his arguments on the arguments being made here:

\textit{We have to develop a moral language of needs which connects a sense of sense of autonomy and independence to the fulfilment of individual needs. In a society characterised by relationships of power and subordination we cannot assume, as liberal theory has wanted to, that it can be secured with the guarantee of equal legal and political rights. Rather we have to be concerned with the nature of the control people have in the different areas of their lives,}
Perhaps Seidler's most scathing attack on the whole Kantian framework is on the idea of the moral personality, the Kantian transcendental self that forms such a vital component of contemporary liberalism. Interestingly, Seidler argues that in this very attempt to secure the respect and dignity that the individual is to command, Kant ends up with a more 'attenuated conception of the individual', the reason for this being that respect for the rational self becomes respect for the moral law which the rational self exemplifies. (Seidler, 1986: 44). Seidler pertinently argues:

A Kantian tradition which stresses the impersonal character of morality and which stresses that reasons have to be universally appropriate if they are to be moral, often fails to illuminate the individuality of our moral experience, even though this may be one of its strengths. We find it harder to value the particularity of our experience as we do the cultural and historical experience we share with others (ibid.: 141).

What is lost in the Kantian tradition is not the aspect of individuality which the Kantian tradition is very strongly committed to upholding, but the aspect of the particularity or uniqueness of individual human experience that arises from the individual being situated and embedded in a particular background or social context. This is something that the Kantian 'noumenal' self simply fails to appreciate. Individual empirical experiences that are attained as a result of each individual being part of a particular history and cultural tradition are devalued by the Kantian self. Seidler further argues that Kant 'could never really substantiate the individualism he wanted to foster'. This particular argument about Kant not being able to 'substantiate the individualism he wanted to foster' provides a link to the opposition to the dominant liberal individualism that has been asserted in this study.

knowing that we can only exist as persons in our own right through the ways we express our individual and collective identities. It is part of challenging the fixity and abstraction of a liberal conception of self to realise that our autonomy and independence can no longer be simply theoretically substantiated. We renew the moral significance of a relation between theory and practice, as we recognise that our autonomy and independence have to be realised in our everyday activities and relationships. As we gradually learn that respect for our activities, needs, desires and emotional lives can be an integral part of defining our individuality and deepening our respect for others, we are renewing our moral language in critical relation with our inherited moral traditions. (Seidler, 1986: 14)
To reiterate, two significant sets of opposition to contemporary liberalism have been set out in this chapter and which form a part of the overall arguments of the study itself. These are the opposition to the dominant liberal individualism found in contemporary liberalism and secondly, the idea that morality is itself rights based.11 As opposed to this it has been argued here that morality can have multiple foundations rather than being simply and merely rights based.

What is significant about the two sets of opposition to contemporary mainstream liberalism is that they do not entail a complete and wholesale rejection of the ideas of individualism and rights based thinking per se. They only take issue with the manner in which individualism and rights based thinking have been incorporated in contemporary liberalism and given a hegemonic status. The study does endorse the value of individualism. It is only opposed to the dominant liberal individualism that is greatly influenced by the Kantian tradition. Similarly, it endorses the value of rights based thinking but is opposed to the dominant idea within contemporary liberalism that morality can only be rights based (see J.L. Mackie 1984).12

Mackie’s article poses the question whether there can be a rights based general moral theory, and if there were one, what would it look like (Mackie 1984: 168). The important point that Mackie makes and which this chapter is eager to refute is his argument ‘that not only can there be a rights based morality, there cannot be an

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11 Joseph Raz (1986) in his book *The Morality of Freedom* has the following to say about the important themes of his book: ‘the rejection of moral individualism, and a moral outlook resting on the twin ideas of the constitutive role of a common culture on the one hand, and of individual action on the other hand, in the shaping of the moral world’ (Raz, 1986: 193).
12 There are a number of strengths that are provided by liberal moral theory and Victor Seidler has pointed to these. He thus notes that these strengths have been imparted by Kant. They are essentially regarding the courageous liberal’s commitment to stand by certain principles inspite of the many odds that this may involve. He refers to the liberal in apartheid South Africa who may have refused to discriminate between blacks and whites or to the civil servant in the United Kingdom who refused to lie to parliament about the sinking of the General Belgrano during the Falklands War. Seidler notes that ‘If we have the moral strength we learn to stand up for our principles regardless of the consequences we suffer. We know that we are doing what we believe to be right. This gives strength and integrity to liberal theory and speaks to a sense of autonomy and independence that needs to be valued and nurtured.’ However, Seidler notes that it is not always possible to stand up for one’s principles and what one believes to be right in this manner. This ability may be crucially determined by one’s class position and status in society. Thus, the top civil servant in the case of the General Belgrano episode during the Falklands War may afford to do stand up to his moral principles if he has the moral strength. He may have to resign from his government position, but given the social capital that he commands by virtue of his being a civil servant the decision may not be so lamaging to his future prospects. Given his connections the media may highlight the moral position that he has taken and this may significantly add to his stature. This may not be possible in the case of the factory worker who could not stand up to his employer for fear of losing his job.
acceptable moral theory that is not rights based' (Mackie 1984: 176). The rejection of the idea that morality is rights based is found most forcefully in Joseph Raz who refuting both Ronald Dworkin and J.L. Mackie argues 'that neither morality nor political morality is right-based: that if morality has a foundation it includes duties, goals, virtues, etc.' (Raz 1986: 193). Further, Raz argues that right-based moralities are impoverished, that a right based morality is essentially a morality of rights and duties, and that there are moral views that presuppose that there is more to morality than merely rights and duties and precepts which can be derived from them (Raz 1986: 195). Raz makes three objections to right-based moralities which according to him bring out their inherent limitations and indicate the pitfalls of a reliance on them. The first limitation that Raz makes in this regard is that rights are always tied to duties and that reasons for ordinary acts, not tied to duties escape the notice of a right based morality. Secondly, right-based moralities simply fail to take into account the significance of acts of supererogation, which are acts that are done beyond the requirements or the call of duty. Thirdly, Raz believes that a right-based morality fails to take into account or understand the significance of acts that are done with a view to striving towards and cultivating of excellence (Raz 1986: 195-96).

The further advantage of Raz's arguments is that they facilitate the possibility of including collective or group rights. Raz has effectively shown that human autonomy is guaranteed not merely by the extension of individual rights. Such autonomy is also facilitated by the existence of collective goods in society. The absence of such conditions in any society would make it impossible to exercise the kind of autonomy that is cherished so much by mainstream liberalism. Thus the desirability of autonomy for individuals which is in line with Raz's stated humanism presupposes some collective goods that are intrinsically valuable. The intrinsic value of collective goods is something that would be vehemently rejected by the liberal individualist. Raz effectively attacks right based theories premised as they are on a certain moral individualism for failing to secure the autonomy that they are so committed to: 'I will suggest that some collective goods are intrinsically desirable if personal autonomy is intrinsically desirable. If this is so then right-based theories cannot account for the desirability of autonomy' (Raz 1986: 203).
Indeed, Raz effectively shows the hollowness of the right-based concern for autonomy by differentiating between autonomy as an achievement, and the capacity for autonomy that would actually be a precondition for it. For proponents of right-based liberalism, unviolated rights protect or create opportunities. In other words their mere existence is enough to guarantee the autonomy of the individual. Raz stresses that the possibility of leading an autonomous life and the actual exercising of autonomy requires the availability of a range of options that are acceptable. These acceptable options are vitally dependent upon the existence of certain social conditions. Thus Raz points out: ‘One cannot have an option to be a barrister, a surgeon, or a psychiatrist in a society where those professions, and the institutions their existence presupposes, do not exist’ (Raz 1986: 205). At least some of the social conditions which constitute such options are, according to Raz, collective goods.

The logical extension of Raz’s arguments regarding individual autonomy being possible only if there are a range of acceptable options available, is then that there are some intrinsically valuable collective goods. A further extension of this, according to Raz, is that there also exist collective rights and these rights to collective goods. Having made this argument he poses the critical and decisive question whether morality can be right-based, given that its foundation includes collective and not only individual rights. He further argues that a collective right exists when three conditions are met. These are that an aspect of the interests of human beings justifies holding some person(s) to be subject to a duty. Second, the interests in question are held by individuals by virtue of being members of a collectivity. Thirdly, the interest of no single member of the group or collectivity in the public good to which the collective right is a right to, is sufficient by itself to justify holding another person to be subject to a duty (Raz 1986: 208).

The first condition that Raz sets for the existence of a collective right is interesting as he says that it makes the collective right compatible with humanism. The right is ultimately in the interest of the individual member of the group. The advantage with Raz’s arguments here is that he is able to very effectively challenge the moral individualism that has dominated liberalism; he has further challenged the idea that morality is right-based; finally he has been able to argue that there are collective rights that arise from the existence of collective goods. This manner of argumentation ‘frees
rights discourse from its traditional association with moral individualism. But helpful as this is, it does not reinstate our shattered belief that morality is right-based' (Raz 1986: 209).

To conclude this section of the chapter the answer to the question of why the need to move beyond contractarianism needs to be given. There are two reasons. Firstly this chapter is arguing for ‘a substantive defense of right’ that is derived from Hegel and different from standard theories of rights in either their Hobbesian or Kantian form. Second a rejection of the formal/procedural accounts of rights derived from Kant and part of the current enthusiasm for rights, in favour of a more substantive account that is made possible by Hegel. (see Steinberger, 1990: 318).

VII. Negotiating the clash between individual and group rights.
Having considered the limitations of a liberal moral theory, it is now time to turn to an aspect of rights that has attracted a great deal of attention. The purpose of the present section, while being an attempt to take a fresh look at negotiating the clash between individual and group rights, is also to take issue with and express serious reservations about the manner in which the question of individual and group rights is often logically thought out, especially by analytical philosophy. It will be argued here that it is precisely the overly abstract nature of analytical philosophy that prevents an appreciation of the historical background conditions that may be vital in deciding issues like the clash between individual and group rights. Even a cursory reading of any of the writings in the tradition of analytical philosophy reveal the manner in which an individual is 'depersonalized'. Seidler has pointed out how the analytical tradition has been guilty of too readily accepting the individual as a 'rational person'. This can be seen in the favourite device of thinkers in the analytical tradition of accepting an individual as a rational agent by designating him/her as an X or Y and then proceeding to logically think out the various ways in which the rational agent is supposed to act. One of the central problems of the analytical tradition is then its great distance from historical insight. 13

13 For an attempt to forge links between the analytical tradition and history, see Haskell Fain’s interesting book Between Philosophy and History: The Resurrection of Speculative Philosophy of History Within the Analytic Tradition, Princeton University Press, Princeton, 1970.
The clash between individual and group rights as it has been debated within liberal political theory suffers then from a number of major flaws. One of these is the Kantian underpinning of the self which has led many liberal theorists to almost dogmatically assert that in the event of such a clash it is only the individual right that should prevail and that under no circumstances should the right of the individual be overridden by that of the group. While this particular suggestion may not in itself be such a bad idea, as the suppression of the rights of the individual by the collectivity is a serious problem of injustice, what is being objected to here is the theoretical basis upon which this conclusion is rather dogmatically drawn. As mentioned a little earlier this is derived from the Kantian moral imperative that treats the individual as in some way inviolable and an end in him/herself. The objection being raised here is neither against the Kantian categorical imperative nor from the conclusion derived from this principle that the group right should not override the individual right. The objection is to the larger Kantian conceptualization of the self which serves to ‘depersonalize’ our conception of others, whom we implicitly see as clusters of abilities, qualities or capacities. This has had far-reaching effects upon our sense of equal treatment for people. It becomes easy to assume that we relate to people equally if we treat them the same regardless of the differences in their circumstances’ (Seidler 1986: 52).

Another problem plaguing this supposed solution offered by liberal theorists arises from the failure to take into account the background social and historical conditions of the individual on account of the overly abstract conceptualization of the self that leaves no possibility of understanding the self as being empirically rooted. Thus, in the attempt to secure the inviolability of the individual the Kantian framework denies to the individual the thick set of historical and social background conditions that may have importantly contributed to the formation of that very individuality. It is here that multiculturalists like Will Kymlicka have intervened to argue that the context in which the individual does his choosing cannot and should not be denied to him/her as it is in such a secure cultural context that the individual is able to make meaningful choices. The intervention is no doubt important, but one of the reasons why this has not been, or will not be able to make a larger dent in the problem, is that it remains confined within the
larger theoretical framework of contemporary liberalism, defined as it is by the contractarian framework and its associated liberal individualism.

Some theorists, so committed are they, to the principle of liberal individualism, have outrightly rejected the idea of groups as being the bearers of rights (see Kukathas, 1992). There have been others who have endorsed the idea of group rights, but when confronted with the problem of individual rights clashing with group rights have asserted, as mentioned earlier, in a rather dogmatic fashion, the inviolability of the individual and hence the ruling out of the group right overriding the individual right. To put the argument a little more bluntly, this response by theorists like Kymlicka, is not exactly a very intelligent one, as like all dogmatic positions it reveals a rather hasty recourse to the Kantian moral imperative of the inviolability of the individual in the face of the problem of individual and group rights. To reiterate, the assertion of the greater pre-eminence that should be attached to the right of the individual is most of the times a perfectly sound argument. The objection that is being raised here is to the moral foundations from which this position is derived. Here the moral foundation is the Kantian categorical imperative. Associated with this kind of moral personality is the nature of the abstract right held by the individual. Such abstractly conceived rights fail to provide or are difficult to translate in many contexts into the social empowerment that they set out to achieve for the individual.

There is a further problem that has been highlighted by Avigail Eisenberg and Jeff Spinner Halev (2005) with this particular manner of approaching individual and group rights clashes, which is that it focuses ‘for the most part, on whether minorities were threatened by the individualism of the liberal majority’. A consequence of viewing the problem in this manner ‘as a competition between fundamental values of the majority and minority communities is that the complex relations within minority groups were largely ignored’. They further point out that most arguments took for granted the fact that individual rights were culturally alien to minority groups, or they argued that individual rights were a means by which the solidarity of the minorities was easily sabotaged. This point regarding individual rights sabotaging the solidarity of minority groups, they point out, was typical of many discussions of insular minorities such as the Amish, Hutterites or Doukabours. Finally, the more important point that they make is in a footnote to the
argument where they observe that most discussions in political theory of the Amish focus on the case of Wisconsin v. Yoder which helps to highlight the 'zero sum nature' of individual and collective interests.

To conclude then, the clash between individual and group rights has been debated intensively within liberal political theory. However, this debate is flawed on account of two reasons. The first is its tendency to view individual and group rights clashes in terms of a zero sum game. The second is the hasty liberal recourse to the rather dogmatic position derived from the Kantian categorical imperative that in the event of a clash between individual and group rights, it is the individual right that must prevail. The insistence that the individual right should in the majority of cases prevail is a perfectly legitimate solution. However, the dogmatic manner of arriving at the solution is being objected to here. As a result of these flaws the efficacy of liberal theory is sorely reduced in dealing with the intractable problems of individual and group right clashes. Liberals arrive on the scene of these clashes blissfully unaware of the background conditions and armed with certitudes of the kind mentioned above, offer solutions that are not very effective and helpful to the beleaguered individual whose rights are being overridden by the overbearing group.