

**COLLECTIVE RIGHTS AND
COMMON SECURITY:
A NORMATIVE EXAMINATION**

**SANJAY G. REDDY
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I. INTRODUCTION.

The global explosion of particularisms -- national, ethnic, linguistic, religious, sexual etc. -- has been identified by a large number of different observers as a phenomenon of central significance in contemporary history at large, and in the history of the last two decades in particular.¹ This phenomenon of profound significance has affected the developed and developing worlds alike. The comfortable view of "modernization theory" which held sway from the end of the Second World War through the late 1960s, that such "primordial" affective identities as were expressed by different groups within the boundaries of emergent nation states would give way to clean and singular identification with the new nation-state idea, has proved unfounded. Within the advanced industrial and post-industrial world, new forms of collective identity have emerged and old ones have in many cases been given newly vigorous and even violent expression. In many instances, conflicts between sectors of society over the collective control of resources, and over cultural expression and its regulation have led to open struggles, between states and new

¹ I am indebted to all of the following for their generous intellectual stimulation or criticism, which has enabled me, directly or indirectly, in developing or reworking the argument of this paper: Dr. Emma Rothschild, Prof. Stephen A. Marglin, Prof. Amartya Sen, Dr. Keith Hart, Prof. E.Valentine Daniel, Dr. V.K. Ramachandran, Dr. Madhura Swaminathan, Dr. Arthur Applbaum, Dr. Sudhir Anand, Shankar Ramaswami, Sunil Agnani, Pramod and Sheela Menon. I am extremely grateful to the World Institute for Development Economics Research and to the Common Security Forum for providing essential support. Needless to say, none of the institutions or individuals named should be held in any way responsible for the deficiencies of this paper.

and existent social movements, or amongst such movements themselves. Meanwhile, worldwide processes of marketization and of the economic and cultural globalization of dominant cultures have proceeded rapidly apace. Aboriginal and tribal peoples, as well as many peasant societies, have been beset as never before by pressures (and opportunities) to accommodate to new economic and social arrangements.

These developments have led to increasing concern with the problem of managing and mediating between diverse collective interests. A number of observers, approaching this question from a variety of perspectives, have argued in recent years that, in view of a new and heightened degree of global interdependence, any meaningful approach to common or collective security requires that this problem, of the mediation of diverse collective interests, be placed at its centre.¹ As a practical matter, an explicit recognition of the importance of collectively perceived interests, whatever the strategy ultimately chosen to deal with them, is necessitated both by their pervasivity and intensity. The question of whether such interests deserve normative recognition, as well as what form such recognition should take, is however a more controversial one.

At the level of practical policy, a variety of approaches have been suggested with which to approach the problem of mediating

¹ See for example, Cullen (1992, 1993).

collective conflict and of meeting widely divergent collective aspirations. There has developed for example an articulate constituency in favour of decentralizing political structures and of creating loose federalisms.¹ Others have simply called for a higher degree of responsiveness on the part of existing social and political structures to the claims of collectivities.

This paper is not directly concerned with exploring the developments in contemporary history related above, nor with directly exploring the comparative viability of competing approaches to the resolution of the problems they pose, but of exploring the meaning and significance of one particular concept which these developments have spawned and strengthened. This is the concept of "collective" or "group" rights, which has emerged in the context of the worldwide developments related above.

There is little doubt that this concept has erupted into the field of consideration of political and social philosophers, who had earlier taken little note of it, as a direct result of the struggles of ordinary people, and in particular of aboriginal peoples who have gained over the last decade a new and powerful global self-consciousness and political voice.² While widely

¹ See, for example, Rajni Kothari (1974, 1988).

² For example, Kymlicka (1989a, 1989b), Taylor (1992), and Sanders (1991) all make this connection explicitly. The concept of "group rights" had also, infamously, been developed and used by the erstwhile racist regime in South Africa in defence of apartheid (see for example, South African Law Commission (1989, 1991), Blaauw (1986)). While serving to caution us as to

invoked in recent years, in the course of actual political contention, and even explicitly called upon in some recent legal judgments by national and international bodies, this term has been subjected to little close analysis as to its conceptual content, with some notable exceptions (Sanders (1991), Kymlicka (1989a,1989b,1992)). The purpose of this paper is to put forward a plausible definition of the concept of "collective rights", and to examine this concept for its meaning, implications, and potential relevance to the analysis of pressing contemporary social problems.

the potential uses of the collective rights concept, this does not appear to much relate to, or touch upon, the current discussion of it; which seems rather to draw from the sources of inspiration identified above.

II. THE PLACE OF RIGHTS.

The notion of rights belongs to the domain of ethics. It has an inextricably normative foundation. Questions regarding rights are questions regarding the claims which individuals may rightly make in respect of one another. Common notions as to what rights may reasonably be held by individuals have evolved considerably and continue to evolve [for example, see T.H. Marshall (1950), and Patterson (1991) on this historical evolution]. In some rights theories, certain rights are "fundamental" in the sense that they may not be in any way or under any circumstances abridged without violating a necessary condition for a society to be viewed as just. Even in such theories, however, not all recognized rights need be viewed as being "fundamental". The existence of particular rights may, for example, be seen as being contingent upon the undertaking of particular actions by the individual claimant (for example, the right to vote might be linked to legal obligations such as military service) or on other social or individual states of affairs (as famously ruled by the U.S. Supreme Court, the right to shout "fire!" may be restricted by the fact that one happens to be in a crowded theatre). It may also be held reasonable to balance such rights against or subordinate them to other "more fundamental" rights in the event

that a conflict between them is perceived to exist.¹ It is also conceivable that an ethical theory with a multidimensional informational basis might wish to make room for the possibility of balancing rights against non-rights considerations such as positive freedoms (as defined by Berlin (1958)) or individual welfare. Whether rights are viewed as "fundamental" or not, they ultimately concern the claims which individuals may "rightly" make against one another, whether in the form of requirements that others should not undertake particular actions or classes of actions, or to the contrary, that they should do so [for an interesting formalization of rights in terms of restrictions of the first variety, see for example Pattanaik and Suzumura (1993)].

It is against the background of these principles that we will speak of "rights" in that which follows. We will not so much explicitly defend the normative basis of the rights concept we will define as suggest its normative basis by developing it as an extension of one widely influential and otherwise persuasive egalitarian moral framework (namely the "capability" framework of Prof. Amartya Sen). It is likely that, even if we accept concepts of collective rights, we would wish to view them as being "non-fundamental", when interpreting the relationship and

¹ See Sen (1981) on the possibility, and indeed cogency, of undertaking such "trade-offs" within a rights-respecting ethical theory, through the device of comparing rights-fulfilment "consequences".

possible conflict between collective rights as we define them and traditionally understood individual rights. It would seem plausible that most conventionally understood individual rights may have a "prior" character in relation to any acknowledged collective "rights" (both in terms of the moral intuitions of contemporary liberals and, as we shall argue, in terms of the roles they are likely to play in practical politics). As we shall proceed to argue, meaningful practical recognition of concepts of collective rights is likely to require that their limits and contours be defined through processes of political discussion and consensus seeking, and within the context of significant respect for the requirements of already established (individual) rights concepts, against which we may well wish to assign them a secondary priority, while also recognizing their inherent significance.

III. POSITIVE FREEDOMS, AND RIGHTS, WITHIN THE CAPABILITY FRAMEWORK.

In defining collective rights we shall make use of Prof. Amartya Sen's "capability" framework for taking account of and characterizing well-being and freedoms. Collective rights will appear as an extension and analogue to more conventionally recognizable rights and egalitarian claims which may be accounted for within the capability framework. In this section, we introduce the capability framework and explain how it may be related (though Sen himself does not make this extension) to rights claims in general. Prof. Sen defines "capabilities" and "functionings" as follows:

The well-being of a person can be seen in terms of the quality (the "well-ness" as it were) of the person's being. Living may be seen as consisting of a set of interrelated "beings and doings" which we may generically call "functionings". A person's achievement in this respect can be seen as the vector of her functionings. The relevant functionings can vary from such elementary things as being adequately nourished, being in good health, avoiding escapable morbidity and premature mortality, etc., to more complex achievements such as being happy, having self-respect, taking part in the life of the community, and so on. The claim is that functionings are constitutive of a person's being, and an evaluation of well-being has to take the form of an assessment of these constituent elements. Closely related to the notion of functionings is that of the capability to function. It represents the various combinations of functionings (beings and doings) that the person can achieve. Capability is, thus, a set of vectors of functionings, reflecting a person's freedom to lead one type of life or another. Just as the so-called "budget set" in the commodity space represents a person's freedom to buy commodity bundles (a menu of bundles from which she can pick one), the "capability set" in the functioning space reflects the person's freedom to choose from possible livings (a menu of feasible beings and doings from which she can choose one). [Sen, 1992].

The framework of capabilities and functionings can be used to account for well-being as well as freedoms. Sen writes, "the natural interpretation of the traditional view of positive freedoms is in terms of capabilities to function. They specify what a person can or cannot do, or can or cannot be...The category of capabilities is the natural candidate for reflecting the idea of freedom to do" ["Rights and Capabilities", (Sen(1985))].

Sen has not expressly utilized the capability framework as a framework within which to undertake the recognition of rights, but it is not difficult to see how it could be used to do so. As Sen also writes, "Rights can take very many different forms. In terms of actual legal rights against the state, they sometimes take the form of a substantive claim to, say, minimal health care, unemployment benefit, poverty relief, etc." [ibid]. Such rights are rights to the means of attaining particular positive freedoms, best represented as particular capabilities. The providing by the state of food stamps to needy individuals is for example an instrument toward the fulfilment of a deemed right of individuals to have the positive freedom (or capability) to be reasonably well nutritioned. Not all rights are easily accounted for within the capability framework. Recognition of traditional "negative" rights requires that we modify or step outside of it.¹

¹ "Negative rights are not concerned with my actual capability of doing this or that, but my freedom to do them

Prof. Sen has argued extensively that equality of capabilities (or rather, "basic capability equality") is a relevant goal of social policy, in preference to attempts to seek equality of utilities, equality of formal (eg. Nozickian) property rights, or equality in the ownership of particular (eg. Rawlsian or Dworkinian) resources [See Sen(1979), Sen(1992), etc.]. To be able to compare the capability sets of different individuals requires, however, that we weight different functionings (of which there may be infinitely many varieties), according to our perception of their relative importance, if we are to have a basis for at least partial comparison, which must be a prerequisite to the pursuit of equality. Such a procedure, if it did not provide an index for universal comparison, might at least be expected to provide the basis for a partial or incomplete ordering of capabilities across individuals, which we might hope would be sufficient for many purposes. Sen writes:

"Some functionings are very elementary, such as being adequately nourished, being in good health, etc., and these may be strongly valued by all, for obvious reasons. Others may be more complex, but still widely valued, such as achieving self-respect, or being socially integrated. Individuals may, however, differ a good deal from each other in the weights they attach to these different functionings -- valuable though they may all be -- and

without let or hindrance. It binds others negatively -- they must not interfere -- but they are under no obligation to help me to exercise these rights" [ibid]. One way to modify the capability framework so as to account for negative freedoms would be to define a counterfactual-inclusive capability set, which included within it bundles of functionings which we would have available to us if we were not restrained by others from acting in ways consistent with our possessing all of our negative freedoms. In this case, a necessary and sufficient condition for rights fulfilment would be the equality of counterfactual-inclusive and standard capability sets.

the assessment of individual and social advantages must be alive to these variations. In the context of some types of social analysis, e.g. in dealing with extreme poverty in developing economies, we may be able to go a fairly long distance with a relatively small number of centrally important functionings and the corresponding basic capabilities (e.g. the ability to be well-nourished and well-sheltered, the capability of escaping avoidable morbidity and premature mortality, and so forth). In other contexts, including more general problems of economic development, the list may have to be much longer and much more diverse.

Choices have to be faced in the delineation of the relevant functionings. The format always permits additional "achievements" to be defined and included. Many functionings are of no great interest to the person (e.g. using a particular washing powder, much like other washing powders). There is no escape from the problem of evaluation in selecting a class of functionings in the description and appraisal of capabilities. The focus has to be related to the underlying concerns and values, in terms of which some definable functionings may be important and others quite trivial and negligible. The need for selection and discrimination is neither an embarrassment, nor a unique difficulty, for the conceptualization of functionings and capability" ["Capability and Well-Being", Sen(1992)].

In short, in making evaluations about extents of well-being and freedom¹, we must make at least a few judgments as to the relative extent to which we hold valuable particular dimensions of human life, and it is entirely possible that these judgments will vary to a great degree from individual to individual and society to society.

The assertion of the existence of rights such as the right to "basic health care", or the right to "poverty relief" involves the judgment that the particular functionings they represent are

¹ And hence about "positive rights", or rights to assistance in the attainment of certain positive freedoms, e.g. the right to adequate nourishment.

of a particularly special character which potentially justifies and legitimates claims upon others to assist in maintaining their presence within individuals' capability sets. This assertion of a "special character" can be based on considerations such as, for example, the indispensable nature of the functioning in question for physical or emotional well-being, and in turn from the value we place upon such well-being. The justification for any assertion of a "right" to be adequately nourished, for example, is likely to be of this nature. It is plausible that we might wish to define such "rights" in relation to a number of other significant functionings. The determination that it is an individual's right to a certain degree of assistance, should it be necessary, in the maintenance of a particular functioning involves an antecedent exercise in evaluation and selection. Such a determination requires a judgment that the functioning in question is a vital requirement for the fulfilment of some extremely significant social or individual value, such as some very important or necessary variety of individual welfare or freedom, as well as that it is within the capacities of others to assure its presence. Such a judgment could conceivably take numerous forms. It might be held valuable that individuals should have certain functionings within their capability set in order that they might lead "full and worthy" lives¹. If it were perceived that a particular functioning was vitally

¹ Sen ascribes to Aristotle a view of the human good, (which values "life in the sense of activity"), consistent with this position. See Sen (1992a and 1992b).

necessary for the maintenance of individual integrity, in the sense of dignity, psychological well-being, or wholeness of personality, then a case might be made that it is a social responsibility to assist in its maintenance, or at any rate not to interfere in its implementation. Similarly, if a particular functioning was viewed as being a vital prerequisite to the full participation of an individual in highly valued social processes, it might be possible to argue that there are rights attached to this functioning which necessitate a social effort in favour of the protection and expansion of its presence within individual capabilities. For example, it would be quite natural to view the ability to appear in public without shame as, in addition to being valuable in itself, being instrumentally valuable as a prerequisite to being able to stand for election to public office. As such, a society which values the potential for each of its members to participate fully in its civic and democratic life may find it incumbent upon itself to ensure that its members have the ability to appear in public without shame. The opportunity for individuals to participate in such particular social processes might in turn be valued either for the significance of such participation to individual participants themselves, or for its value to others, intrinsically or instrumentally. These are some of the many grounds upon which it might be possible to defend the significance of protecting and extending particular capabilities, and in principle, of defining rights in respect of them.

IV. INDIVIDUAL, CORPORATE, AND COLLECTIVE RIGHTS.

How can we define "collective" rights? The reader may have already guessed, from the discussion of rights in general above, that we will put forward a conception of "collective" rights which associates rights with particular individual functionings which have a shared social or "collective" dimension, in instances in which such functionings are deemed to be of deep and integral importance to the individuals concerned. The "collective" dimension will draw from the social, rather than individual, character of the functioning in question. In all other respects, "collective" rights will be entirely analogous to, and indeed a sub-instance of rights in general as already considered. In using the terminology of "collective" rights we will not intend to suggest that it is collectivities that are the holders of rights. To the contrary, we will insist throughout in this formulation that it is individuals who are the bearers of all rights, including "collective" rights. The collective dimension will be in the shared character or origination of the functioning of ultimate interest, and hence in the necessity for collective approaches to its sustenance. In light of this summary, let us proceed to a more detailed treatment of the problem.

We first provide an informal definition, based on a comparison with other rights concepts. "Individual rights" are the rights

concept which has been most clearly articulated in the Western liberal tradition, and has gained widespread acceptance, if, in many instances, only in principle. They traditionally include such claims as rights to free speech, freedom of conscience, freedom of movement, freedom of assembly and association, rights to due process and equal consideration under the law, rights of individual participation in the instruments of democracy, freedom from involuntary servitude, etc. All of the traditional "civil and political rights" are individual rights as we are speaking of them. Almost all of the rights cited in the most comprehensive and influential global rights document, the Universal Declaration of Human Rights, are of this type. More recently, such positive claims as the right to free and universal elementary education, the right to a minimal standard of medical treatment, the right to social assistance to prevent involuntary starvation, etc., have come to be accepted by many (though by no means universally) as rights¹. Each of these individual rights is characterized by their independence from any ascriptive criterion of identity. An individual is deemed to possess any of the above rights simply by virtue of their status as an individual member of society. Of course, some individual rights, such as the right to equal consideration under the law, or to freedom from discrimination in housing or employment on the basis of race, gender, age, or other criteria, may be found to have unequal relevance to members of

¹ Marshall (1950) is again the classic account of the emergence of such "positive" rights concepts.

particular social groups because of their unequal tendencies to face discrimination. The emphasis, in any event, is on individual transcendence of the limitations of group identity: "discrimination almost always occurs because the individual is part of a group with fixed characteristics not unique to single individuals or the result of individual achievement... In so far as the individual fighting discrimination for having any of these characteristics is seeking to be judged on individual criteria, and not for sharing such characteristics with other members of these groups, equality is an individual right" [Sanders, 1991].

The appeal in the invocation of individual rights is to an individual's status as a human being and equal social participant and to her furtherance as a lone individual, and not to her membership in any particular group, except insofar as the latter may be of instrumental relevance to the former. For example, an individual's right to poverty relief gains active significance only if she is a member of the poor, and the right to universal elementary education is likely to only actively apply to children. Some rights are positional in their factual relevance: they may apply only to members of certain social groups. The emphasis, nonetheless, is on individual protection and improvement. It is immaterial to whether the right of a particular person to be relieved of hunger was fulfilled that his next door neighbour was or was not relieved of his hunger. The right of an individual (who belongs to racial group X) to be not discriminated against on the basis of race by his employer is not

prejudiced by the fact that another member of group X in another workplace is being thus discriminated against. We may refer to this characteristic of individual rights, which we suggest applies to "individual" rights in general, whether of a positional or non-positional character, as their interpersonal separability [See Appendix 1 for a formal statement of this concept].

The preceding discussion allows us to define another variety of rights, which we shall describe as "corporate rights" (in the original sense of the word "corporate" as pertaining to a "unified body of individuals").¹ In certain situations of shared identity there may develop an acknowledgement that particular groups of individuals sharing such an identity have legitimate "institutional" rights or claims, which flow out of and can ultimately be reduced to, but are not identical with, the individual rights of their members. For example, labour unions, which are groups of workers with shared interests, are recognized in many societies, under the name of "collective bargaining" rights, to enjoy certain privileges and guarantees. These privileges and guarantees derive from the delegation by individuals grouped together in the union of aspects of their individual rights (in this instance the right to sell and withdraw their own labour power). In the course of this

¹ See Webster's Ninth New Collegiate Dictionary. Sanders (1991) provides an initial, although partial, formulation of corporate rights as we define them here.

delegation, the powers and privileges of the union as a whole come to be more than, and different from, those of individual workers. Nonetheless, the "rights" of the union are ultimately traceable to the originally socially recognized individual rights of its individual members. Another example concerns members of an underprivileged minority in a society who may also wish to mobilize collectively so as to push forward their (individual) claims (considered collectively) for the attainment of equality with individuals belonging to other groups through "affirmative action" programmes or other instrumental measures. Here, once again, the ultimate target is the equality of individuals in an individualistic sense, but the chosen method of individuals who share characteristics of exclusion is to mobilize collectively so as to demand group entitlements (in the sense of benefits which accrue to each member of the group as a result of their membership in the group). "Affirmative action" programmes such as exist in the United States, India and elsewhere, to the extent that their ultimate goals (the space in which equality is ultimately sought) are individualistic and economic rather than collective and cultural, are of this type. What is characteristic of "corporate" rights, (as opposed to "collective" rights, which will be described below) is that they predominantly reflect the common interests of members of the group in their own personal individual-rights-fulfilment, or more generally, personal advancement, for which the corporate body, or more generally, the collective action of the group as a whole, may

serve as an active vehicle.¹

The idea of "corporate" rights can contain two different aspects. On the one hand, "corporate" rights are nothing more than the sum (or in logical terms, the union) of the salient individual rights of individual members of the group considered separately (for example, when we speak of an underprivileged minority group as a whole as having a "right" to social equality, we most often mean that individual members of this group have a "right" to social equality with individual members of other groups). It is important to note that this "summation" is made possible by the "interpersonal separability" of individual rights claims identified above. It means that corporate rights consist in nothing more than the individual rights of members considered collectively. In its second aspect, corporate rights concern the social protections granted to the organizations or institutions to which individuals delegate their rights collectively (i.e. to the relevant "corporate" bodies), in order that their common individual interests may be coordinated and advanced. It is this aspect of corporate rights which is in view when we speak of the collective bargaining "rights" of unions. Even in this aspect, it may be argued that corporate rights flow purely from the delegated individual rights of their members.

¹ Tambiah (1988) notes the tremendous worldwide growth in organisations and movements of this kind, essentially intended to better advance individual interests, but employing the rhetoric and structure of group (particularly ethnic) solidarity in order to achieve these ends.

In speaking of "corporate" rights (above) or "collective" rights (below) we do not intend to suggest that the holders of rights are not ultimately individuals. Our use of either term is only to engage in a manner of speaking, which we choose for its advantages of directness. The assertion of rights in this context may be viewed as a pragmatic linguistic designation, designed as a pointer to "actual" underlying rights held by individuals, of varying character according to the particular term employed. Given a suitable appreciation for metaphor, the position being enunciated here is fully consistent with methodological individualism.¹

We are now in a position to describe "collective" or "group" rights. We first describe the characteristics they are likely to have in our formulation and then present a formal definition. Collective rights, as we define them, concern claims which may be made by or on behalf of members of a social group in regard to the production and reproduction of social circumstances which affect the possession or expression of their particular and specific collective identity (i.e. the identity of individual members of the group as group members). Collective rights consist in rights of non-interference with, or potentially, assistance in the maintenance of, specified significant aspects of the group's collective status or functioning, except where

¹ I note this not because I am necessarily committed to this perspective, but because many today are.

consideration for such rights is found to conflict unacceptably with more "fundamental" rights or moral claims. Collective rights may be distinguished from individual rights in that the emphasis is not, as in the latter, on "individual transcendence of group identity" but in fact upon the sustenance of such identity. Unlike the case with individual rights, an individual's claim to shared possession of particular collective rights stems specifically from their affiliation to a particular group. Moreover, the furtherance of an individual group member's interests in the sense of the fulfilment of these collective rights is in general inextricable from the furtherance of the similar interests of other individual members of the group. It is characteristic of collective rights, in other words, that there is no "interpersonal separability" in the criteria for rights-fulfilment, such as applies to conventional individual rights. Collective rights may also be distinguished from corporate rights in that, whereas the latter relates to the individual (and interpersonally separable) rights of group members collectively considered (as, for example, with the demands of women in the industrial world for "comparable worth" or "pay equity"), and to the guarantees extended to derivative social institutions working towards their fulfilment (as in the case of labour unions), collective rights are concerned, beyond the fulfilment of individual rights (as we have defined them) with the enhancement of aspects of shared identity.

In the next section, we describe how the concept of collective rights as we have defined it above may be accommodated within the framework of capabilities and functionings, and discuss the implications of this formulation. We will proceed to discuss the practical relevance as well as potential pitfalls of the collective rights idea in policy and in politics, and in the final substantive section of the paper examine its applicability in various empirical instances.

V. COLLECTIVE RIGHTS AND INSEPARABLE FUNCTIONINGS.

As outlined earlier, an individual human life may be viewed as being partially saliently defined, for normative purposes, by the capability set possessed by the individual in question. Some functionings may be viewed to be of such significance for the individual or social good that there exists a positive requirement that a just society must endeavour to at least protect the place of such functionings within individuals' capabilities where they so exist if not to extend them. As argued earlier, in such circumstances we may speak of rights surrounding these functionings. Indeed, whenever we speak of "rights" we are of necessity nominating some particular functionings (the capacity to achieve particular states of being or doing) to which these rights pertain. Such "negative" rights as the right against involuntary servitude, the right to free speech, and the right to assemble freely for peaceful purposes are related to functionings in this way. "Positive" rights such as the right to hunger relief and the right to accessible elementary school education are also similarly related to corresponding specific functionings.

The rights of this kind which are conventionally accepted are generally individual rights, as we have defined them. This is to say that we can account for the existence or non-existence within an individual's capability set of the functionings to which they refer individually, separately, and in abstraction from other

members of the community (functionings for which this is the case may be called, akin to the analogous examples earlier in this essay, separable functionings (see Appendix 1 for a formal definition)). Individuals, however, are involved in, identify with, and are in significant degree constituted by their social relationships. Individual attitudes, preferences, and values are most often profoundly social in origin.¹ As a direct result, many of the functionings which individuals have (and moreover, can reasonably be expected to value) relate to these social relationships.

Some, but not necessarily all, such functionings may be separable. The functioning of being able to speak freely is an example of a "separable" functioning which may be valued for the particular social relationships it makes possible. There are many more examples of functionings related to social relationships which are "non-separable", however. An individual may, for example, easily be imagined to value living in a society which has certain features (such as for example, a particular mode of governance, a particular method of meting out justice, a particular degree of diversity of political ideas, or a particular degree of mutual religious tolerance). Whether or not an individual has the capability of living in a society with any of these features (which represents the capacity to enter into a

¹ These points have been made forcefully by a number of "communitarian" authors such as Michael Sandel and Charles Taylor, and in our context, Will Kymlicka (1989a, 1989b).

certain state of being rather than of doing), may, to the extent that he or we value the functionings concerned, be relevant to an evaluation of his individual good. An individual may even value the functioning of living in a situation in which other individuals around him have certain specified capabilities or indeed in which they choose certain specified functionings from amongst these, without his having them or doing so himself. Clearly, the functionings described in these last instances are inseparable. What is significant and characteristic is that, to account for their presence or absence within any individual capability set requires the evaluation of others' capability sets as well, and in general of the social state of affairs.

We declared earlier that to speak of any form of rights at all demands that we have in mind some specific functionings to which these rights pertain. What form of functionings do collective rights, as we have defined them above, potentially pertain to? Without claiming to exhaustively describe the range of such functionings, we can identify certain categories of functionings, which, if they are to be enshrined as rights, are clearly of this nature. Collective rights most often pertain to those functionings which through their possession by individuals either define, or play an important role in the perpetuation of, group character and identity. Collective rights refer in this paradigmatic instance (which is the instance we shall be primarily concerned with for the remainder of this paper) to the

right of members of such a group to the protection or potentially even the enhancement, of such functionings amongst their capabilities, amongst as many members of the group as may be necessary to achieve the desired ends of definition or perpetuation of group character or identity. It thus may not be necessary that every member of the group possess the functioning in question in order for the collective right to be satisfied. This requires only that sufficiently many members of the group possess the relevant functionings that the group's character or identity are "protected" in the salient respects, whatever they may be. For "rights" to be recognized to exist in relation to these functionings requires, as argued earlier, that such functionings be viewed to be of such significance for the individual or social good that there exists a positive requirement that a just society must endeavour to at least protect such capabilities where they exist if not to extend them. Clearly, rights pertaining to identity of the kind described above are by necessity inseparable, and therefore "collective" in character. By their nature, to evaluate their fulfilment requires that we should evaluate whether the relevant functionings are possessed by more than one member of the group (in fact by sufficiently many members of the group to ensure that the ends of definition or perpetuation of group character or identity are attained). The essentially open and consensual (some would say subjective and political) nature of any attempt to define particular collective rights will be clear. It

requires that particular individual functionings, which characterize group identity as experienced in individual lives, be believed to be sufficiently important to the sustenance of that identity (and that identity in turn sufficiently important to sustain) to create a positive requirement that social institutions must act at the least to protect these functionings where they are already available to individuals. In any given instance, either or both of the above requirements (of the importance of particular functionings for the sustenance of group identity, as well as of the importance of group identity) may well be controversial. But we may recall and extend A.Sen's declaration that "The need for selection and discrimination is neither an embarrassment, nor a unique difficulty, for the conceptualization of functioning and capability". To the extent that we value capabilities in general, we would certainly be wise to include all varieties of functionings which may be valuable to people, in any evaluation and selection exercise, including matters of a collective character such as "cultural integrity". If the answer to A.Sen's famous question "Equality of What?" is "Equality of Capabilities" (See "Equality of What?" (Sen(1979), Sen. (1992)), then in making choices as to which functionings will be viewed as relevant in the comparison of different individuals' capability sets, we would be wise to evaluate all classes of functionings, again including inseparable functionings, for their potential role in this process. As argued earlier, if we are of the strong view that some such functionings are sufficiently

important that they not only merit consideration as one component in the calculation of social equality, but also justify our speaking of the existence of a positive requirement that they be protected or extended in a just society, then we may speak of the existence of rights (whether group or individual, the exact identification of which will depend upon the particular functionings to which they refer). It will be clear from the concept of rights we have elucidated above that exercises in evaluation and selection would be necessary at a number of stages in the implementation of this concept. In the first instance, the delineation of rights requires that particular functionings be identified as being of sufficient importance for the protection of individual well-being or freedom to merit a positive requirement that society (others) should act to protect or extend these. In general, if our purpose is the relative evaluation of individual capabilities, whether to take account of individual well-being or freedom, then it will be necessary to engage in an exercise of evaluation and selection (see Sen(1992a)). As noted earlier, even when rights have been identified, it may be possible (indeed necessary) to attach differing importance to the various rights which have been delineated. In instances where these various rights come into conflict with one another, it can then be possible to make choices in favour of the protection or extension of particular rights over others. In particular, such a procedure can enable us to reconcile the sometimes competing claims of traditional

individual rights and of collective rights. In each of these instances of evaluation and selection, a subjective and inherently political process of decision-making is involved. "Who decides?" is of course a central question, which highlights many dangers. If the process of decision-making involved is not participatory and democratic in character (or indeed, even if it is, but carries insufficient safeguards as to the rights of outvoted minorities)¹ one can imagine large scale violations of rights taking place in the very name of rights [there have indeed been many instances in contemporary history where this has already occurred]. To face this danger requires in part that we remain conscious of the need to give weight and priority to the most important classes of conventionally understood individual rights. It also requires however that we examine cases where individual rights have been scrupulously protected with a view to determining whether some relevant collective rights have not been overlooked. We may wish to leave this task, in the absence of an *a priori* method of adjudicating such conflicts, to the process of balancing and contention in a constitutional and democratic polity.

¹ See on this possibility, Guinier (1994).

VI. THE PLACE OF COLLECTIVE RIGHTS: CONCEPTS AND CRITICISMS.

In this section, we will (i) provide some further justification for the usefulness of the concept of collective rights, (ii) address some of the conceptual and practical dangers of the concept of collective rights, In the next section (VII) we will explore a number of practical examples in order to explore what collective rights are and are not, and so as to give flesh to the idea.

(i) The links between individual rights and collective rights are clearly many and complex. It might seem, on the surface, that to protect collective rights, it might be sufficient to protect individual rights. For example, to protect the right of a linguistic minority to an environment in which it is feasible to continue their language (assuming of course, that such a right is acknowledged), it might plausibly be held sufficient to protect the individual rights of members of this minority to free speech. Alternatively, to protect the rights of a religious group to conditions under which it is feasible to continue their faith, it might seem sufficient to protect the rights of individual group members to free assembly, and to free speech. In other words, even to the extent that we do recognize collective rights, relating to specific functionings of a social character, we may in some instances find that there is no need to create group-specific policies in order to protect and advance

such rights. In many, if not most, instances, protection of conventional individual rights may be sufficient to protect collective rights, as we have defined them. This is, in fact, the classical liberal position in respect of minority and collective rights.¹ There can be little doubt that the protection of individual rights can in fact be a most significant component of the protection of collective rights as we have defined them above. There is not, however, any reason to believe that the former amounts in general to the latter. It can be argued that there are many instances in which the protection of individual rights is not sufficient to protect collective rights, (and, clearly, vice versa). Many minority groups throughout the world complain that in the absence of measures specifically intended to strengthen their position, the conditions of participation in a larger culture and political economy are such as to, under conditions of "free" individual interaction, decimate their collective identity and institutions, formal and informal. Lord Durham, in his famous report in the aftermath of rebellions in Upper and Lower Canada in 1837, is reported to have "prescribed a healthy dose of 'benign neglect' for French-Canadians, to allow a natural course of assimilation to proceed" [Sanders (1991)]. To this day, French-Canadian leaders are deeply concerned that, in the absence of measures specifically designed to promote French-Canadian identity, their people are bound,

¹ See on this Kymlicka (1989b), and especially, his contrast between weak and strong versions of communitarian objections to liberalism.

under processes of incorporation within the Canadian and international marketplace and culture, to lose their specificity. Why should we be concerned that a people may lose its specificity? We should be concerned about it only to the extent that members of a group are concerned about this question themselves, and seek to protect and advance their position, as expressed in culture and identity. To the extent that collective identity provides an aspect of people's lives and experiences which they value, a social decision maker must be prepared to consider valuing it as well. Kymlicka (1989a,1989b,1992), and Taylor (1992), among others, detail some of the variety of arguments which can be made in favour of valuing cultural diversity and continuity, as a condition of individual and social flourishing. Why is the protection of individual rights sometimes insufficient to ensure the protection of collective rights? One simple explanation is in terms of the economist's concept of the externality. Culture, it may be observed, is a public good. Even to the extent that people are conscious of and capable of mobilizing to achieve their ends of maintenance of group identity or institutions, the amount of effort which individual persons expend in this process may be insufficient from their own points of view, in the sense that if each individual took account of the beneficial effects of their activity on others, each individual would be better off from the point of view of the attainment of their own objectives. In such circumstances, ~~there~~ is a clear rationale for the supportive

intervention of government, which, indeed, has underlain government subsidy of the arts and culture in many countries. Negative externalities and collective action problems (of prisoner's dilemma type) may be observed widely in this context. To return to our example, the decision of a Quebecois family to send their children to an English language school may not take sufficient account of the effects of this decision on the French-language school system in Quebec, on other children and parents thereby, and ultimately on the continuance of French-Canadian culture and its participants. A government policy designed to encourage French-Canadian parents to send their children to French language schools might benefit even those who would otherwise not have chosen to do so.

Another issue concerns the character of the state and the central organizing institutions of society. In contrast to liberal political theory, one might assert that the state and such institutions, by their nature, necessarily uphold and strengthen a dominant culture, if only by upholding its values and norms implicitly in the means of their functioning [on this, see Kymlicka (1989a), Moore (1991), Balibar (1990)]. Majority culture, by virtue of its control of the state and its institutions, is in a position to dominate the whole process of cultural reproduction, as it affects majorities and minorities alike¹. Under such conditions, alternative cultural standpoints

¹ For some interesting comments in this regard consult Balibar (1990).

are necessarily marginalized. The protection of individual rights without the active support of minority identity in such circumstances only protects the conditions of their continued appropriation and marginalization.

(ii)

The concept of collective rights may be argued to be likely to be in the rough and tumble of actual political practice a dangerous one. This does not in itself mean that it does not have value. Much recent scholarship on nationalism, ethnic, religious and other identity has been concerned with exposing the instability and fictitiousness of notions of identity as traditionally conceived. In historiography, this new understanding has been linked with such movements as that to uncover the "invention of tradition" [evinced most famously by Hobsbawm and Ranger (1992)], and in contemporary literary and cultural studies with efforts such as that to expose the "narration of the nation" [See for example, , Bhabha (1989), Spivak (1990), Anderson (1983) etc.]. In anthropological and sociological studies, as well, the attack on essentialisms (imputations of "essential" characteristics to categories of race, gender, ethnicity and nationality, etc.) has left a profound imprint and, indeed, continues to be revolutionary in its implications [see especially Marcus and Fischer (1986), Clifford and Marcus (1986), Clifford (1988)]. These developments in various disciplines of the human sciences

have been linked with post-structuralist theorizing, but have also in many instances had independent origins and directions. At the same historical moment that notions of group identity have come under increasing scrutiny and scepticism, there has been a worldwide explosion (as noted in (I)), of popular expressions of identity of this kind, which has not been confined to any region of the world, or to developed or developing countries. It is also unequivocally the case, however, that traditional societies, particularly marginalized tribal and peasant societies, have come to be under threat from acculturation and economic and political transformation as never before. The terminology of collective rights can potentially be fruitfully applied to illuminate and defend the situation of such marginalized elements. There is, however, simultaneously a danger that it can be used to support claims of group identity which are essentialist, exclusivist, fictional, and tyrannical. Protestations of collective rights may be used by majorities or minorities to support restrictive cultural, political, or economic policies which in effect deny worthy individual liberties (as it has been, as noted above, as a tool with which to justify apartheid). Many have argued that this danger is overwhelming.¹ A particularly dangerous possibility is that the terminology of collective rights should become part and parcel of a machinery for installing and continuing a simplified and fetishized version of present identity and past history. Human history is a process of

¹ See for example Neier (1993).

gradual or radical cultural transformation through manifold processes such as trespass, giving, and exchange. There has been no separate current in human history. Every strand has interacted with every other, most profoundly in the last century, and indeed, in the last fifty years. At times this has taken place under conditions of radically unequal power. It is in such situations that the concept of collective rights is intended to be able to intervene. It is also, however, necessary to make room for "natural" processes of cultural exchange and evolution, which have enriched every human society, and which today, for the first time, holds out the positive prospect of the creation of a world culture.¹ What is at stake is who will contribute to that emergent world culture, and under what conditions it will emerge. Salman Rushdie wrote about this process of profound cultural change on a world scale, "For a long time now we have been slowly bleeding into one another. Some say let it stop. I say let it continue" [Rushdie, 1991]. What we must seek is not to create pathways of "separate development" (which have never been and can never be possible, nor are in the least desirable) but in some way to safeguard the possibility for marginal social groups to evolve autonomously and independently and by processes of their own self determination into what they will, and not only because

¹ The difficult dividing line between giving lifeblood to endangered cultures, and thereby to a dimension of life of great individual value, and arresting the process of "natural" evolution is admirably examined by Kymlicka (1989a, 1989b). A critique of Kymlicka in terms of the danger of essentializing and creating falsely static and falsely distinguishable definitions of cultural wholes is provided by Rorty (1994).

of conditions of radically unequal power. We will continue to "bleed" into one another, and this may be all to the good, but it will transform the justness of our social world to do so under conditions of relative equality.

We have spoken naively of the existence of "groups". As suggested above, the very notion of the "group" is suspect, for it assumes that the scope and boundaries of such a category are clear. In fact, it is a fact of social history that both the scope and boundaries of group identity are the subject of continual conflict. The notion of group identity is inherently, by some arguments, an instance of "reification".

Who decides what a group's identity is? (For example, who decides who belongs to it?).¹ Who decides what a group's needs and claims are?² It will be evident that there cannot be any easy solution

¹ A controversy has raged in Canada, for example, over whether children of female native Canadians and male non-natives should be considered to be members of their respective native communities for the purposes of communal and institutional privileges extended by these communities and by the Government of Canada. Traditional native Canadian practice traditionally excludes such descendants from consideration as full members of the community (a status which it accords to children of male members and female non-members). It is not difficult to think of many more such cases, such as for example, the controversies in Israel over the validity of certain groups and individuals' (such as the Ethiopian Jews and certain Jews of mixed parentage) claims to Jewishness.

² A group, even to the extent that it is well defined, can be expected to fracture internally on such lines as class and gender, if not on other bases, in its determination of its own needs. A significant amount of anthropological literature has documented such cleavages. An interesting contemporary example,

to these problems. In many instances the costs of acknowledging and wading through the minefield of group identity may be greater than the potential benefits. In other instances, it will be found valuable to seek some form of practical compromise with the complexities of such issues, which may or may not result in "viable second best" solutions¹.

A concern of central importance in the contemporary era must be the practical danger that invocation of the discourse of group identity will only work, in actual political practice, to regenerate and continue inequalities and divisions, through keeping alive a psychology of group identity. Preferential policies which seem to "favour" particular groups can become causes for renewed targeting of the groups which are alleged to benefit from them². Mobilization on the basis of group identity

among the innumerable examples which could be marshalled, is that of the Shah Bano case, in India, in which a divorced Muslim woman's claims to her rights to alimony under the general civil law, which conflicted with the Muslim personal law applicable to Muslims in India, led to a civil conflict between proponents of women's rights both within and outside Muslim communities, and defenders of the value and primacy of Muslim law.

¹ Walzer (1992) for example, defends the cogency of choosing a set of conventional individualist liberal procedures for social action and adjudication, even after acknowledging the ethical validity and significance of claims to collective identity.

² As an example, recent anti-scheduled caste and tribe riots in India provide piling evidence of this phenomenon. Rudolph and Rudolph (1986) and Dirks (1992) discuss (in a historical context) this issue, of the reproduction, through government attempts to take note of caste identity, of caste inequality and tension. Coate and Loury (1993) provide a formal economic model of how affirmative action policies can have such an effect. On this see also Sowell (1990).

can elicit and even demand similar mobilization by other groups, with potentially retrograde political effects, in particular the exacerbation rather than relieving of tensions [on this see Tambiah(1988), Rudolph and Rudolph (1985)]. What can be the rationale, in this context, for nonetheless inaugurating a discourse of "collective rights"? A central reason can be a belief that the denial of full possibilities for the expression of already existent collective identity, and the suppression of existent "collective rights", as we have defined them, is a more serious cause of discontent and social tension, not to mention of the less than full attainment of human possibilities, than would be the negative mobilizations around group identity which might result from policies to create a collectively more equal social world.

VII. COLLECTIVE RIGHTS IN POLICY AND PRACTICE: FURTHER EXAMPLES.

Let us now consider in turn a number of concrete situations in which the concept of collective rights might be considered to have potential relevance, in order to gain a more accurate understanding of its content and limitations.

Collective Rights in National and International Law:

Sanders (1991) in his survey of the treatment of collective rights in national and international law, writes "important recent decisions made by Australia, Canada, India, the United States, and the U.N. Human Rights Committee indicate a pattern of acceptance of collective rights. Most of the decisions do not clearly articulate the basic principles involved; many do not even refer to 'group rights' or 'collective rights'. The lack of clear analysis reflects the newness of this debate and the lack of settled principles. The significance of these decisions is that collective rights are frequently upheld." It is fair to say that the early United Nations effort in regard to human rights was confined to individual rights. At least two rights which may be referred to as "collective" rights were recognized: the right to self-determination of peoples upheld in the Universal Declaration of Human Rights, and the right to physical survival of groups upheld in the Convention on Genocide. Member states were however very reluctant to acknowledge any additional rights of groups, as they continue to be [Sanders (1991), Thornberry

(1987, 1991)]. Another notable development, however, is that in 1966, Article 27 of the International Covenant on Civil and Political Rights was adopted by the General Assembly of the U.N. Article 27 reads: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." Some subsequent developments have occurred in the Sub-Commission on Prevention of Discrimination and Protection of Minorities and in the Conference on Security and Cooperation in Europe. Recognition of collective rights is also implicit in the International Labour Organisation's "Convention Concerning Indigenous and Tribal Peoples in Independent Countries", which entered into force (in newly amended form) in 1991, and most significantly, in the current debate over the adoption of a "Universal Declaration on the Rights of Indigenous Peoples". Let us consider some of these examples in turn:

(a) The right of "national, ethnical, racial or religious groups" to physical survival is stated in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide. It may be argued that the right acknowledged here is a collective right, rather than only a corporate right, as we have defined these terms. If it were not a collective right, then it would seem sufficient to proclaim the right to physical

survival of individuals, from which the right to physical survival of the groups to which they belong would follow. In other words, the right of groups to physical survival consists in something more than the sum of the rights of individual members of the group to physical survival. While the physical survival of the members of a group is an important aspect of the survival (physical or otherwise) of the group, it is not the only aspect. For example, attempts to "scatter" members of a group (an example of "ethnic cleansing", in relation to which the Convention on Genocide has recently been raised), while consistent with the individual physical survival of members, is not consistent with the physical survival of the group. A group's survival requires the possibility for the continuance of its collective life, and individual capabilities related thereto, which is precisely what the concept of collective rights seeks to focus upon. The significance of the fact that the right is phrased as the right of "groups" to physical survival is that the physical continuity of the group would seem to be an important aspect of the continuity of its collective identity, which cannot by itself be ensured by the acknowledgement of the individual rights to survival of individual members of the group.

(b) "The right of self-determination of peoples", recognized by the Universal Declaration of Human Rights, cannot be understood as anything other than an invocation of "group" rights. At issue are the capacities of individuals to participate in determining,

in mutual relationship with one another, and within the natural limits of social action, their common and collective future. The capabilities in question are, by their nature, inseparable. To determine whether the salient rights are fulfilled requires an evaluation of the capabilities of (sufficiently) many members of the group. The "right of self-determination" refers to the right of "peoples" to affirm and determine their common identity and destiny. In other words, this right falls precisely within the defined domain of "collective rights". It is untenable to argue that rights to "self-determination", if acknowledged, are nothing more than the logical outcome of considering collectively some set of "individual" (separable) rights. This is because such rights concern the expression and continuance of the distinctive (collective) selfhood of a group [See, for example, Anaya (1990), Buchanan (1992), Lapidoth (1992)].

(c) There are many examples of recent conflicts and legal decisions within the scope of Article 27 of the Covenant on Civil and Political Rights. For example, it has been argued in Norwegian judicial debate that Article 27 protects the traditional hunting and other rights of the Sami people. In both *Lovelace v. Canada* and *Kitok v. Sweden*, the U.N. Human Rights Committee upheld that exclusion of certain individuals (eg. children of mixed marriages, children who have lived away from the community for a long period of time) from privileges (reserve membership or reindeer herding rights) enjoyed by other members

of a tribal group can be justifiable in the interests of assisting tribal survival. Exemptions of particular religious groups from regulatory or statutory oversight of some of their activities, have been validated in Canada, the United States, Australia, and other countries. Withdrawal of children of particular minorities (the Amish, for example) from mandatory attendance of public schools, specifically in order that they may attain their goal of preserving their way of life, has been validated by the U.S. Supreme Court (the Yoder case). In 1990, the U.S. Supreme Court upheld a preference by the U.S. Federal Communications Commission for minority ownership of broadcasting licences, on the grounds that this promoted diversity of expression (Sanders (1991) surveys all of the above examples). In each of these cases the emphasis is on the preservation and sustenance of collective identity, in instances where that identity may be valued by members of the collectivity in question, even where the active protection of the above may lead to the infringement of particular conventionally recognized individual (eg. property) rights.

Other Examples:

a) Preferential Policies (to use the phrase employed by Thomas Sowell (1990) in employment, education, etc., designed to correct historical or contemporary inequalities by favouring members of particular ("disadvantaged") groups in specified circumstances,

are, in general (though not universally), designed not to fulfil "collective rights", as we have defined them, but rather "corporate rights". The objective of preferential policies (as, for example, apply to Scheduled Castes and Tribes in India, or certain racial minorities in the United States) is not in the first instance to uphold and continue the specific character of the group in question, but rather to enable and assist the full participation of its members in the life of the larger society, on a par with members of other "privileged" groups. As such, the aim of preferential policies is in the first instance to enhance the individual capabilities of members of a group which is disadvantaged in the sense that its members are disadvantaged as individuals. The capabilities in question are separable in the relevant sense that the functionings with which we are concerned within them relate entirely to a single individual's capacities - - there is no need in evaluating these for one individual to make reference to those of another. There may or may not be justification for preferential policies of this kind, in view of the particular aims which they have, but it is not the aim of this study to consider that question. It is sufficient to note that the motivation of preferential policies places them, in general, outside of the scope of policies designed explicitly to extend collective rights, as we have defined them. It can, of course, be the case, that preferential policies with the intent described above may also have the effect of making it possible for a particular group to uphold its specific institutions or

special defining character, to the extent that separable and individual functionings are of instrumental relevance for the attainment of these ends, and make it more possible for individual members of the group to act in ways which will advance these objectives. Indeed, they may also be justified on this ground. The discriminatory pro-"Bhumiputra" policy of Malaysia, which explicitly prefers Malaysian citizens of Malay ethnicity in employment, educational admission, etc., is an example of a policy which explicitly affirms these links. It is defended as a policy which enables the preservation and strengthening of distinctive Malay culture and identity, although its proximate effect and intention is to strengthen the economic position of some Malaysian citizens of Malay ethnicity.

(b) A compelling instance of the possible use of the concept of collective rights involves the example of mass adoptions. It is now well documented that from the 1940s through the 1970s, large numbers of native Canadian children from predominantly native communities who came into the care of state commissioned child welfare agencies either at birth or over the course of their childhoods as a result of their forcible removal by these agencies from their natural families on the grounds of their unsuitability¹, were systematically and preferentially turned

¹ It has been well established that the proportion of such removals from Native Canadian families far surpassed that from the general population as a whole.

over to families of non-Native origin, rather than to other native Canadian families, to be raised. In some cases, a significant proportion of the offspring of entire small native communities (in parts of Western Canada, especially) was treated in this fashion. Were the rights of anyone violated by this process? The rights of parents who may have had their children unjustly removed from their care may have been violated, but let us not consider this. Let us go so far as to assume that all of the removals of children were supportable and justifiable. The fact remains that these children were purposively turned over to families of non-Native origin and raised outside of their traditional culture. For children with a memory of their original families and community settings, this transition could have been traumatic. But let us go so far once again as to overlook such cases and consider only those children adopted away at birth. Can these adoptions be seen as involving any violation of rights? If it is assumed that the removals themselves were in the children's better interests, then why should we object, in the absence of further evidence, to the fact that they were adopted by non-native families? One might argue that the individual rights of the children were violated by these adoptions, in so far as the necessity of realizing their ethnic difference from the family and society around them, in a context of systematic discrimination might be expected in later life to cause a questioning, and potentially, a sense of uprootedness which they might not otherwise experience. But any such

proposition may be controversial and in any event need not occupy us here. Our concern is that it may be argued that a collective right of native Canadians (let us remain at this level of specificity, although we would do as well to speak more specifically, of for example, Mohawk, Ojibway, or Iroquois) was violated by this process, in the sense that the maintenance and continuance of native Canadian culture and community life, an object of considerable value and concern to all native Canadians, including those with no formal relationship to the children involved (as a people already engaged in an active struggle for cultural retention), was actively and unnecessarily undermined by it, (given the presumption that native households could have been but were not found for the children in question). The individual functionings in question in this instance involve the capacity to live in a vibrant and alive native community in Canada and in one's own local community, and to be able to pass this on to those who follow one. To the extent that functionings such as this are factually of deep importance to the people concerned, and to the extent that a sense of cultural identity and of security in such an identity may be an instrument of essential value in the attainment of a good life (Kymlicka(1988)), they merit consideration in any evaluation of ethically relevant dimensions of well-being, freedoms, and rights.

(c) The issue of the rights of indigenous peoples ("first" peoples or aboriginal peoples according to the preferred

terminology) to their traditional ways of life, including patterns of resource use, is, as will already be evident from the above, a central field for the application of the concept of collective rights. In India, Australia, the former Soviet Union, Brazil, Canada, and many other countries, hill, forest, tribal, and other indigenous peoples are today defending claims to traditional fishing, hunting, grazing, and other resource use rights which are contested by state, commercial and other development interests which represent other sections of a larger society. One way to view this struggle, in which indeed it has often been viewed, is simply as a struggle over property rights: one set of property rights claims is being contested by another. This characterization is true in part but it does not describe all of the relevant aspects of these situations. It is clear that in each of these instances there is much more at stake. The hunting rights of the Cree Indians in Northern Quebec, in Canada, provide not only a means of livelihood and of earning an income, but indeed the basis of an entire way of life, comprising political and cultural as well as economic components. We may or may not prize this in and for itself. But it is a fact that the Cree themselves do, and this is at least one of their motivations for their confrontations with the police and legal authorities of Quebec in their struggle against the James Bay hydroelectric development [on this see *Cultural Survival*, various issues]. We may speak of the collective rights of indigenous peoples being at stake in such situations, in the sense that their collective

sustenance and the continuance of their accustomed ways of life is at risk in such disputes. It is necessary in such situations, if we are to speak of such collective rights having been fulfilled, to ensure the continuance of traditional rights for sufficiently many members of the group as to ensure the continuance of the group's essential character and way of being. It may not be necessary to ensure that every member's relevant (possibly traditional) rights (as in hunting, or fishing, for example) are fulfilled in order for this to be the case (in such instances, individual rights may be violated without collective rights being violated, or neither may be violated). A relocation of indigenous people in the course of constructing a dam might, for example, remain broadly consistent with the fulfilment of relevant collective rights if sufficiently many of the individuals and communities concerned are moved to a terrain and ecological setting consistent with the activities previously central to their collective existence, as opposed to a setting entirely foreign and inimical to these essential activities. The current agitation in the Narmada valley in India, over a massive hydroelectric project which is expected to result in mass displacement (including the displacement from their traditional land of significant numbers of tribal people), as with innumerable other such instances across the world, is a case of this type. To speak of the existence of collective rights in instances such as the above is not necessarily to summarily condemn any "violation" of these rights. It is however to

require that any such violation be compensated or counterbalanced by sufficiently counterbalancing positive considerations, in the form either of welfare-enhancements or of the fulfilment of other competing rights, whether of those directly affected or (more problematically) of others. As before, any full judgment in a practical policy issue must be the product of careful consequentialist and deontological evaluation of all of the rights and welfare aspects of a problem, which may well involve the "trading-off" of various kinds of rights and welfare consequences. To speak of the existence of collective rights in instances such as the above is simply to introduce the consideration of collective rights into this evaluative process.

(d) Linguistic rights provide another central field for the implementation of collective rights concepts. The "externality" problems raised earlier are especially in evidence in this arena, and affect multilingual polities from Assam to Azerbaijan. The state and other central social institutions are of key importance in this domain in so far as their patterns of language use signal to the broader society a pattern of coordination in language use, and create real comparative costs in using different languages. In India, Indonesia, China, Belgium, Canada and elsewhere, language issues continue to be of central political or policy significance, primarily, but not exclusively, for minorities. Language carries deep emotional import for many not least because of its central role as a vehicle of culture. Once again, an

example from Canada is emblematic. The French speaking minority in Canada, concentrated primarily in Quebec, has long felt that its language is threatened by the exclusive use of English around it, in the United States and English speaking Canada, in mass communications and corporate life, and by the necessities of communication imposed by this dominance. In Quebec, successive provincial governments of all political stripes have taken positive measures to encourage or require the use of French in various settings [See Howard (1991) for a summary of this history]. Schoolchildren from non-English speaking backgrounds, one of whose parents was not educated in Quebec (i.e. including immigrants to Quebec from non-English speaking countries) have been required to attend French-language public schools. The provincial government has favoured and provided incentives to French-speaking, over non-French-speaking immigrants from the rest of the world. Most significantly, Quebec conducts all of its internal government operations and communications with the public in French, and requires of businesses, social service organizations, and other public institutions that they communicate with the public, in the first instance, in French. In the late 1970s, the government of Quebec enacted a law (Bill 101) which required that public and commercial signs in the province use French only, in order that a constant reminder of the French-speaking character of the province might be presented to inhabitants and visitors, and to encourage the widest possible use of French. This law was challenged by representatives of

the English-language minority in Quebec on the grounds that it denied individuals the freedom of expression guaranteed to them under the Canadian Charter of Rights and Freedoms. The Supreme Court of Canada, while acknowledging that the French language was threatened in North America and that compensatory measures were justifiable, ruled that the law was too stringent in that it excluded the use of any other language in addition to French, but that a law requiring that all public signs be at least bilingual (i.e. including a French language translation, of equal size, of any other language employed) would be legal and consistent with reasonable protection for individuals' freedom of expression under the Canadian Charter of Rights and Freedoms.¹ This example provides a resonant and signal instance of the potentially competing claims of various individual and collective rights, of the potential injustices which can arise, and of the ways in which the relative merits of such claims may be weighed and evaluated against one another, so as to produce a solution largely consistent with the most important demands of each. Once again, there can be no *a priori* judgment as to the general form which the outcome of such an evaluation will take, nor can there be a general methodology for undertaking such an evaluation. What is required and recommended is simply that political debate and moral judgment be alive to the necessarily broad

¹Although, the original law endures for technical reasons (the so-called "notwithstanding" clause), the Canadian Supreme Court's judgment as to the status of Bill 101 in relation to individual and collective rights remains in effect.

informational base of any reasoned decision in such a domain. The informational basis for such a decision must include some confrontation with the issues encapsulated by what we have referred to as "collective rights".

VIII. CONCLUSION.

Why collective rights? The concept of collective rights is necessary because conventional individual rights concepts do not satisfactorily account for or protect a great deal of what individuals view as central to the value and integrity of their personalities and their lives. The concept of collective rights, or something like it, is necessary to take sufficiently full account of the collective and social dimensions of human living, and indeed of their deep importance to individuals, which have been largely neglected by conventional liberal thought. It would not be out of place to say that for many individuals, ideas of cultural integrity approach notions of physical integrity in their personal importance.¹ It is surely the case that any open-eyed ethical theory must take full account of the existence of such (social) values. This is not, however, to say that an ethical theory must be hostage to it. It is, in fact, of the utmost importance that it must not be. A satisfactory ethical theory must take account of the full range of competing human values and aspirations, giving due place to each of these. What the "due place" is of such competing values is inextricably in large part a question of choice, and, some would say (including the author, though this is not an aspect of the argument) a

¹ In some instances, such as that of, for example, the use of circumcision as a cultural identifier, it may be argued that the former surpass the latter.

matter of subjective and, indeed, political, determination. However, this is not also to say that there cannot be an "objective" component to such inquiry [for an applicable argument in this regard, see Sen (1993)]. There is no escape from political choice and moral judgment, but this is, indeed, what creates the essentially human moment of ethical decision. It should be possible to take some account of collective rights claims and of conventional individual rights claims, and to satisfy each in some measure without sacrificing unacceptably much of any of the essential requirements of social justice.

Any acknowledgement of the claims of collectivities cannot but create some improvement in a landscape of social justice which today takes little or no account of such considerations, except to the extent that dominant power is able to legislate that it do so. The language of collective rights can be a dangerous one, as we have already acknowledged. It has been explicitly inducted historically in racist efforts to justify apartheid, and it is not also difficult to imagine its being invoked in attempts to justify discriminatory immigration policies and other racist or nativist measures. Nonetheless, the cost in terms of social justice of neglecting for this reason to take account of real concerns and values which are best expressed in the terminology of collective rights or a similar concept may be too high to bear. The best defence against distortive and extremist invocations of the concept of collective rights, which seek to

use it as a tool with which to trample the individual or collective rights of members of the group concerned or of others is a holistic understanding of the notion of collective rights which accepts its place as one value among many, subject to proportionate and comparative consideration in a careful consequentialist evaluation of all relevant rights, freedoms, and dimensions of human welfare. Its place is in a judicious debate over values and needs within a democratic setting.

Have we stretched Amartya Sen's capability framework unacceptably beyond its original intent and purpose by using it in the above context? [More impolitely rephrase, are we cheekily (and unsuccessfully) attempting to turn Prof. Sen on his head?]. The capability framework, as constructed by Sen, does not specifically exclude consideration of functionings of the kind we have proposed be focussed on above, including, in particular, various social states of being. As such, it seems permissible to turn the framework to the ends which we have. If in doing so, we have strained the ethical intuitions of those who would otherwise find in it a compelling egalitarian ethical framework, we may at least have contributed some insight as to its fault lines, and as to the necessity (as viewed from the perspective of conventional liberal individualists) to qualify and reformulate it if it is to be consistent with conventional liberal individualist intuitions and those intuitions only.

The importance of a concept such as collective rights in the contemporary moment arises from the fact of the increasing marginalization and indeed obsolescence, by virtue of unequal power and force of coercion rather than simply of the force of ideas, of the diversity of societies and cultures in our world. We need not value this diversity in itself (as does, for example, Marglin (1990)), in order to feel it necessary to call for a change. We may wish to do so simply out of a desire to create more equitable conditions for cultural transformation, and thereby a more procedurally egalitarian world culture. There is no desire here to uphold a static or nostalgic conception of the world. Transformation is possible and necessary, but what are at stake are the conditions of its occurrence. It would be wrong to assert that issues of collective rights are obviously subsidiary and secondary. Many of the world's poorest sweat and bleed today not only so as to overcome their rags and hunger, but as pressingly, intensely and committedly, so as to fight for their cultural survival [See for example (Menchu, 1984)].

Practical policy measures to implement and fulfil collective rights can take the form of measures such as decentralization, delegation, regional and group autonomy and self-government, and specific legal interventions such as those discussed above. It is not of immediate relevance what practical measures we will choose to achieve these ends, but it is of immediate relevance that we should acknowledge the existence of a great number of

valid claims in the arena of collective rights, which can be of enduring significance in the creation of a just world.

Appendix 1

In the following, we present the basic elements of a formal representation of some of the concepts defined in the essay.

Let $S = \{1, \dots, N\}$ represent a society of N members.

Consider $J \subseteq S$, a "group" within the society.

Define $C = \{\text{all possible functionings}\} =$ the "aggregate capability set".

Let $C_i = \{\text{functionings accessible to individual } i, i \in S\} =$ "individual i 's capability set".

Define $CP(S) = \{C_i \mid i \in S, C_i \subseteq C\} =$ the "counter-factual capability profile set" of society S .

Define $SNS(J) = \{f \in C \mid \forall P \in CP(S), \text{ if } f \in C_i \text{ for some } i, \text{ and } C_i \in P, \text{ then } f \in C_j \forall C_j \in P \text{ s.t. } j \in J\} =$ the set of "strongly J -nonseparable functionings".

Define $MNS(J) = \{f \in C \mid \forall P \in CP(S), \text{ if } f \in C_i \text{ for some } i, \text{ and } C_i \in P, \text{ then } f \in C_j (C_j \in P) \text{ for some } j \in J, j \neq i\} =$ the set of "minimally J -nonseparable functionings".

If $f \in SNS(S)$, then we say that f is "comprehensively non-separable".

If $f \notin MNS(J), \forall J \subseteq S$, then we say that f is "separable".

Clearly, if $f \notin MNS(S)$ then f is "separable".

If we have $J \subseteq S$ and $K \in N, K \leq \#J$, then we can

Define $MNS(J)_{\#K} = \{f \in C \mid \forall P \in CP(S), \text{ if } f \in C_i (C_i \in P) \text{ for some } i \in J, \text{ then } \exists T \subseteq J \text{ s.t. } f \in C_t (C_t \in P) \text{ for some } t \in T, t \neq i, \text{ and } \#T = K\}$
= The set of "minimally K -cardinal J -nonseparable functionings"

Similarly, we can

Define $SNS(J)_{\#K} = \{f \in C \mid \forall P \in CP(S), \text{ if } f \in C_i (C_i \in P) \text{ for some } i \in J, \text{ then } \exists T \subseteq J \text{ s.t. } f \in C_t (C_t \in P), \forall t \in T, \text{ and } \#T = K\}$
= The set of "strongly K -cardinal J -nonseparable functionings"

The last definition is meant to capture the idea that to fulfil "collective" rights, it may be sufficient to protect the relevant functioning of a "sufficient" number of individual members of a group. It is easy to see the various extensions and modifications to this idea which may be possible, such as requiring that the relevant functionings of the members of a particular fixed sub-section of the group be protected, if the rights of the group as a whole are to be protected.

We do not broach directly here the issue of how rights are themselves to be formalized. Any adequate formalization must come to terms with the procedural as well

as consequential demands of any adequate criterion of rights fulfilment. one approach may be to attempt to integrate concepts such as those identified above with the "rights-as-game-forms" approach advocated by Gaertner, Pattanaik, and Suzumura (1992). In the text, we suggested the equality of relevantly "counterfactual-inclusive" and actual capability sets as a criterion for the evaluation of rights-fulfilment in the context of conventional individual rights. Whether it is possible to extend this approach to the collective rights context is an open question, which may benefit from further investigation.

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