CHAPTER I: CULTURAL MINORITIES AND GROUP RIGHTS: CONTESTED CONCEPTS

1. INTRODUCTION

The rising interest in multiculturalism and group rights in law and political philosophy is, as indicated in the introduction, closely linked to the fact that many democratic countries are currently confronted with the rise of demands for accommodation by various types of historically marginalised socio-cultural minorities. As the groundbreaking work of scholars such as Will Kymlicka, Charles Taylor or Iris M. Young has helped to elucidate, such demands typically involve the recognition of some form of differentiated citizenship in order to acknowledge the legitimacy of the struggle of minorities against unidirectional modes of belonging to multicultural polities. In this view, “members of certain groups would be incorporated into the political community, not only as individuals, but also through the group, and their rights would depend, in part, on their group membership.”

To many, such difference-based approach is appealing because it provides a better account of identity conflicts and group inequalities as well as the grounds for a normative theory of minority rights. One of the main aims of this book is to assess this general claim. However, for the sake of analytical clarity, it is important to begin by examining the conceptual premises of that approach. As noted in the introduction, one of the key features of the recent literature on multiculturalism is its emphasis on the need of according group rights, as human rights, to minority groups. Yet, there is still considerable uncertainty over the meaning and implications of this shift in the prevalent discourse of liberal rights, which, as indicated before, conceives them as essentially individualistic and general in scope. This is partly due to the fact that the term “group rights” has been used with substantially different connotations, and hence the implications entailed in a proposition of the type “the group X has rights” are not straightforward. Furthermore, the notion of minority is vague as well and, as a result, the characteristics of the sort of collective that is of interest for the previous discussion remain unclear.

To a significant extent, these conceptual issues shape the different positions in the philosophical discussion about minority rights. Thus, on the one hand, criticism of the use of this very notion in the new international legal documents stems precisely from scepticism about whether it is at all possible to find satisfactory criteria to define “minority.” On the other hand, as far as the notion of group rights is concerned, collectivists and individualists disagree upon whether or not a minority—or any other social group—can be said to possess moral interests, as this is commonly regarded as

necessary to justify the attribution of human rights. This chapter addresses these questions, as assessing the substantive claims that have been advanced, and their corresponding critiques, requires, first of all, some common understanding of the concepts used. Yet the dispute over the conceptual premises is not merely terminological, as will become apparent throughout the following pages; as Steven Lukes says, words contain ideas and even theories, an observation that will prove especially significant for our discussion.

2. A PRELIMINARY ELUCIDATION OF THE CONCEPT OF MINORITY

The term “minority” is surrounded by a significant degree of vagueness, and this explains the lack of consensus on a legal—or metalegal—definition. In a broader description, we could say that the idea of minority refers to a group of individuals which, for a variety of circumstances, find themselves in a disadvantaged position compared to the larger group with which they contingently form a society. However, the elements that are invoked to ascertain such a position are rather mixed: number, ethnic traits, religion, inferiority regarding the enjoyment of rights and so forth. The difficulty of agreeing upon a conventional definition of this concept stems, partly, from this heterogeneity.

In the legal and political domains, the term “minority” is usually connected to that of “state.” Since the concept of minority has a relational component, this link indicates that the state is the political structure that is taken for granted as a framework for evaluating the inferiority or subordination of certain groups. Although we could imagine the existence of minorities beyond the state context or speak, in a plausible way, of “transnational minorities,” and even of “minority states” in international society, the minority question has been tackled primarily from a domestic perspective (a fact that merely reflects the way the world is politically organised). In any event, beyond these elements usually assumed in most proposed definitions of minority—the situation of inferiority or subordination of a given group and the state framework in which the imbalance is produced—progress towards a more precise delimitation of the concept is difficult to achieve. Already in the late 1970s, Special Rapporteur Francesco Capotorti illustrated its elusiveness in his well-known Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, prepared for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. In this study, Capotorti points to some of the more controversial questions, such as the need of requiring a minimum group size, the prerequisite of numerical inferiority, the interaction between objective and subjective criteria and the inclusion or exclusion of foreign immigrants. According to the definition he finally suggested, a minority is:

a group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

Hence, Capotorti regards the term “minority” as defined by two primordial components. The first refers to objective elements: a group defined by its ethnic, religious or linguistic traits, numerically inferior, with a non-dominant position in the state
whose citizenship members of the minority possess. The second component is of a subjective or voluntaristic nature: the willingness of the group to preserve its particular identity. Since this definition has proved widely influential in the literature and in international practice (especially in the elaboration and interpretation of international legal norms protecting minorities) it is important to examine its implications in more detail.

2.1. Objective Elements

The idea that the concept of minority relates to the numerical inferiority of a group in a given state might be criticised on various grounds. First of all, the quantitative element does not account for the common use of the term for oppressed or marginalised groups. This is the case, for example, of the black population in South Africa during the apartheid regime and of women in general. Here, the relative size of the group does not directly impinge on its dominant or subordinated position. Therefore, unless the connotations of the term “minority” are merely confined to purely numerical terms, this factor should not be seen as essential for its definition—even if, as Joseph Raz points out, numbers might be relevant in a particular conflict or for the assignment of resources.5

Secondly, the citizenship requirement excludes the group of aliens or resident immigrants that have not been officially granted nationality in their state of residence and, also, of narrower categories such as refugees or temporary migrant workers. Yet all these are sources of the multicultural character of contemporary societies. In view of the fact that, currently, immigration tends to be permanent rather than transient, involving the incorporation of new members into the society, a study on the minority question should also focus on the question of the human rights of aliens. In particular, if we take into account that, when the proportion of immigrants is large, their expectations towards the host state tend to be similar to those of other groups included under Capotorti’s definition of minority6—think, for instance, of demands aimed at preserving certain cultural and religious practices or other identity aspects—and hence generate similar controversies. In short, including the notion of citizenship into the definition of minority appears unwarranted, especially if the purpose is to assess the relevance of particular claims and normative schemes.7

Finally, Capotorti’s concept of minority highlights the relevance of linguistic, religious and ethnic features, which are prevalent in international norms on the protection of minorities, as, for example, in Article 27 of the ICCPR.8 Although the more specific expression “national minority” is occasionally mentioned, the relevant groups are often thought of in terms of such attributes.9 The debate on the morality of group or collective rights, on the other hand, is also primarily focussed on rights that are aimed at protecting communities with those characteristics. Prioritising their analysis is understandable, since the presence of this type of groups is often at the origin of violent conflicts and political instability.10 However, at the theoretical level, it is important to enquire to what extent these traits ought to possess a distinct weight—in contrast to other identity traits with which people also identify deeply. In this vein, some criticise the priority that is usually attached to ethnic, religious and linguistic elements in the debates about minorities. Gays,
women or even some non-religious ideological groups—such as hippies or vegans for instance—also have ways of living and values that often differ from, or even conflict with, the majority society. For this reason, some critics argue that a definition of minority based upon those features is inconsistent with the wider meaning of this term in ordinary language.\footnote{In sum, as can be seen, there is no consensus over the objective elements a group should possess so as to qualify as a minority. A conception along the lines suggested by Capotorti seems to be excessively restrictive as it entails an arbitrary exclusion of other identity groups that are relevant for our discussion because they are also a central source of cultural claims.}

What follows from this discrepancy? To tackle this question, it is important to realise that the goal of doctrinal efforts such as Capotorti’s is mainly to interpret a concept contained in a specific legal rule. Thus, his definition fulfilled the need, at the time, to define the scope of application of Article 27 of the ICCPR. Similarly, other attempts at clarifying the concept of minority have been related to particular international regulations or declarations on this issue.\footnote{In such endeavours, textual as well as political constraints play an important part. For instance, states have occasionally made their approval of international documents on minority protection conditional upon the explicit exclusion of certain categories of groups from minority status. Thus, Article 1 of the European Charter for Regional or Minority Languages emphasises that the expression “minority languages” shall not include the languages spoken by immigrants but only those traditionally used by national minorities.\footnote{This limitation was due to the reticence of various state representatives to recognise all minority languages in the territory; they basically feared the emergence of political tensions between the different groups as well as the obligation to fund instruction in those languages. In another example of political limitations, the above-mentioned Framework Convention for the Protection of National Minorities\footnote{does not include a definition of national minority because the states could not reach an agreement on this matter. As a result of this omission, some signatories of the agreement have added a reservation or declaration specifying that, according to what they understand by national minority, no such groups exist on their territory; or that the notion of “national minority” will be defined by the state.\footnote{In this sense, the obligations under the agreement remain largely at the discretion of the signing states; ultimately, they decide which sort of minorities might be entitled to protections. In sum, the recent trend in the international practice to guarantee certain protections to minorities has not been accompanied by clear and justified criteria for identifying the relevant groups. This is due to substantive—not merely formal or terminological—disagreements about what kind of groups deserve special protection and why this should be so. Once the political and pragmatic restrictions involved in the elaboration of definitions like that of Capotorti are put aside, the single objective element that underlies the ordinary use of the term “minority” is the subordinate or non-dominant position of a group of individuals. Ultimately, this is the element common to most definitions, although it is usually expressed in different terms: as a situation of disadvantage, inferiority, inequality, etc. In this sense, a better formula that refines Capotorti’s definition could be that proposed by Paolo Comanducci, according to whom minorities are:}}}}
groups of individuals that, without being necessarily less in number than others (think of women), are for historical, economic, political or other reasons in a position of disadvantage (of subordination, inferiority in power, etc.) compared to other groups of the same society.¹⁶

But, according to some critics, to resort only to the element of subordination to account for the meaning of “minority” leads to ambiguities that are equally unsatisfactory. As Prieto Sanchís ironically puts it, minorities worthy of protection under that criteria can be women, children, elderly, drug addicts, ethnic minorities, ex-convicts, the unemployed and so forth, so the alleged majority might actually become a negligible minority.¹⁷ This observation implies that, given the pervasiveness of inequality, understanding the notion of minority only in terms of disadvantage and subordination would include an overly heterogeneous array of social groups.

2.2. The Subjective Element

However, Capotorti’s report proposes a second element as constitutive of the idea of minority which might help to remedy the problem of overinclusiveness. Following his definition, the group should show a sense of solidarity, aimed at preserving its culture or traditions. This second component introduces a subjective or voluntaristic criterion that might help to circumvent the problems of specifying objective factors beyond the blurred element of relative subordination. For a group to qualify as a “minority” it needs to show, implicitly or explicitly, its willingness to preserve its distinctive identity.

It is interesting to note that the concept of group itself is usually associated with such a subjective element and is thus linked to the configuration of individual and collective identities. Articulating this view, Owen Fiss emphasises that a social group is something else than a mere aggregate of individuals reaching the same corner at a given time.¹⁸ A social group, he claims, should combine two specific characteristics. On the one hand, it is an “entity,” namely, it “has a distinct existence apart from its members, and also […] it has an identity.” Therefore, “it makes sense to talk about the group (at various points of time) and know you are talking about the same group”¹⁹ without referring to its particular individual members at any given moment. On the other hand, Fiss refers to what he dubs the “interdependence condition,” which means that

[i]t [the identity and well-being of the members of the group and the identity and well-being of the group are linked. Members of the group identify themselves – explain who they are – by reference to their membership in the group; and their well-being or status is in part determined by the well-being or status of the group.²⁰

More recently, the literature on minority rights has advanced considerations on the type of groups qualifying for the attribution of rights, but the central elements identified by Fiss remain basically the same. Thus, according to McDonald, a group of individuals constitutes a social group when they show “shared understandings.”²¹ Objective elements, such as shared heritage, language and ethnicity, only facilitate the basis for their emergence. What is truly unique about these groups, McDonald writes, is “a tendency of each group member to see herself as part of an us rather than just than
Along the same lines, J. Angelo Corlett examines the notion of social group through a taxonomy of geological connotations. By distinguishing between “aggregates” and “conglomerates,” he stresses that only the metaphor of conglomerates points to the relevant idea of totality, to the integration of the interests of group members, as distinct from the kind of collectives that Virginia Held calls mere collections—that is, casual groups of individuals that are not strongly related to one another.

This concept of group is thus closely linked to subjective elements, which allow distinguishing it from anonymous collections of individuals as well as from clubs or formal associations to which people choose to belong. The reference to the links between the group and the identity of its individual members is regarded as central, and relates this notion to that of “community.” Yet, some think that the subjective element is still too vague to delimit the concept of minority. In particular, it is the reference to quasi-psychological criteria that is criticised: if identity is not a static feature, if its formation is the fruit of a complex and dynamic process, involving an intense relationship between different groups that, in turn, are not internally homogeneous, to which extent is possible to speak about different collective identities and, hence, of different groups? In short, the assertion that some groups possess an identity that allows them to be identified as a “minority” remains contested. This point will be taken up in Chapter III.

3. MINORITIES AND GROUP RIGHTS: THE INADEQUACY OF THE DOMINANT APPROACH

As indicated, the scholarship on minority rights tends to focus first on defining the concept of minority and, as a second step, on the plausibility of assigning a catalogue of “group” or “collective” rights to the groups previously identified. Thus, it is common for contributors to think that it is necessary to clarify the type of group that should be regarded as a legitimate collective subject before approaching the problem of attributing them a number of rights. This is, so to speak, the dominant perspective in tackling the subject.

However, we have already seen the difficulties in clarifying the term “minority.” Stipulative definitions such as that suggested by Capotorti are criticised because they ultimately rely on vague criteria that seem to throw the discussion back onto its original imprecision. In order to avoid this sort of conceptual misfortune, as it were, some scholars simply seek to specify the sense in which they use the term; that is, they try to single out the groups to whom their observations are addressed. But these efforts at greater precision do not entirely succeed in avoiding the confusion since, under the label “minority rights,” we find allusions to a wide—and not necessarily connected—range of groups: from groups that are simply numerically inferior to marginalised social classes, national minorities, racial groups or the handicapped. According to a widespread opinion, the complexity of elucidating a comprehensive concept of minority represents a serious analytical pitfall, making it difficult to elaborate a theory of group rights as long as the issue of the potentially eligible groups remains contested. In particular, many explicitly reject the possibility of setting up a general legal framework for the attribution of group rights, since the heterogeneity of the proposed
criteria would inevitably lead to randomness in the selection of the relevant groups. The perils of arbitrariness and lack of legal certainty are, indeed, often emphasised. Even some group rights defenders share the conviction that the lack of consensus over the concept of minority is a major obstacle. Consider the following observation by Javier de Lucas:

\[ \text{The existence of an increasingly greater awareness of the importance of the problem of minorities does not necessarily imply conceptual clarity. This is reflected, for instance, in the difficulty of elaborating a concept of minority that satisfactorily encompasses the differences between different types of minorities, from cultural ones to national ones. It is also manifest in the relative failure of all attempts to solve the problem of ‘minority rights’, a question that, undoubtedly, is related to the conceptual difficulty just mentioned, as the doctrinal debate itself reveals.} \]

The concern behind these words is widely shared, and this explains the amount of energy that both defenders and critics of minority rights devote to discussing the feasibility of the variety of conceptions that have been suggested. Nevertheless, the perspective that underlies this concern (namely, the idea that the question of defining “minority” is analytically previous to elaborating a theory of group rights) is, in my view, inadequate. For it is based on implausible assumptions about both the correct way of approaching the issue of minority rights and the justification of group rights itself. In addition, the dominant approach produces two pernicious effects: first, it leads to envision arguments for or against group rights as taking a stance on more profound philosophical issues. And second, it has brought to dominance a discursive structure that frames the comparative relationship between individual and group rights in terms of absolute or incommensurable values. But let me start by spelling out the reasons why the standard perspective is inadequate in the first place.

3.1. The Problem of Defining “Minority” Revisited

Above all, it is worth emphasising—though it may seem trivial—that even if we could reach a consensus on the definition of minority, we would not have made much progress towards resolving the normative questions that surround the morality of group rights. For nobody claims that all minorities, by the mere fact of being so, should possess certain rights in the same way as individuals do merely by virtue of being persons. Rather, what advocates of group rights maintain is that these rights should be recognised to some minorities. Hence, in any event, we would still need to assess different types of demands raised by different kinds of minorities. In this sense, any attempt to identify the relevant groups on the basis of elements common to all groups, whatever they might be, appears incoherent. In other words, it would be implausible to argue that X enjoys a certain range of group rights on the grounds that “X is a group.” Consequently, the argument that certain groups should enjoy special protection requires additional reasoning.

Acknowledging this point is a first step to understanding the inadequacy of the dominant approach. This approach insists on the existence of two different problems. The first, semantic in nature, concerns the meaning of the term “minority.” The second refers to the justification of group rights. Solving the first problem is regarded as \textit{sine qua non} for tackling the second one. Assuming that the relation between words
and reality is conventionally established, we could say that, by inquiring into the meaning of a term—in this case, “minority”—we aim at exploring its use in a natural language. In this case, disagreements over the use of the term “minority” might be interpreted as symptoms of a lack of precision, which might be due to a problem of vagueness.

In general, vagueness is attributed to concepts that refer to one or various properties that are found in reality in different degrees, giving rise to instances where it is doubtful whether using the term at issue is accurate or appropriate. On this account, analysing the notion of minority should aim at reducing or eliminating this problem in the use of the term.

According to a common view, framing the issue in terms of vagueness implies that some objects fall squarely within the limits of the usual application of a given concept. The classification is only contested for other objects that remain at the margins of the ordinary scope of application, since it is not clear whether they meet the relevant properties to a sufficient degree. But such interpretation reflects the disputes over the concept of minority only partially. The core controversy does not just concern some marginal instances the properties of which do not entirely match those regarded as essential to the concept. Instead, the disagreements are more substantial. As seen in the earlier section, the term “minority” is also disputed with respect to various types of groups that are identified by different elements than those found in standard definitions. Precisely for this reason it is not only impossible to bring the controversy to an end through some stipulative definition, but we also face alternative, indeed competing, definitions. The problems around the definition of minority can thus be better understood through the lens of the debate about “contested concepts.” The peculiarity of these concepts basically lies in their evaluative dimension; following Jeremy Waldron, an expression $P$ is contestable if:

1. it is not implausible to regard both something is $P$ if it is $A$ and something is $P$ if it is $B$ as alternative explications of the meaning of $P$; and 2. there is also an element $e^*$ of evaluative or other normative force in the meaning of $P$; and 3. there is, as a consequence of (1) and (2), a history of using $P$ to embody rival standards or principles such as $A$ is $e^*$ and $B$ is $e^*$.

Waldron offers some examples of normative propositions that include contested concepts. When the U.S. Constitution forbids “cruel” and “unusual” punishments, it uses two expressions whose meanings are susceptible to different evaluations and may also differ over time. Yet this does not imply that in the process of interpretation value judgments can assume any content, since those terms incorporate a minimal descriptive meaning that sets limits to the specific scope of evaluation. Beyond this minimal agreement, Waldron remarks, “the meaning of ‘cruel’ remains indeterminate.”

Now, one could think that the semantic difficulties that the problem of defining “minority” poses are analogous. Allegedly, the term has a core meaning upon which there is consensus—succinctly speaking, the idea of non-domination. Yet such agreement is insufficient, since it is based on a notion whose evaluative dimension makes it extremely controversial. Thus, when it comes to specifying in detail which elements are relevant in order to assess the relative position of a given group, deep disagreements come to the surface. As explained earlier, whether the idea of subordination or
non-domination should be understood in the numerical sense or in relation to other subjective or objective elements remains highly disputed. Ultimately, these disagreements lead to different rivalling conceptions of “minority,” which, nevertheless, make sense and are a priori defensible. As a result, the important task is to discern the different reasons that justify these divergent conceptions.

If we raise this question, however, the debate over the definition of minority becomes closely linked to the issue of minority rights. Indeed, rather than exploring the meaning of the term “minority” per se, legal and political theorists are mainly interested in justifying the protection of some groups (identified by certain characteristics) over others. In this sense, by specifying certain elements as essential to the definition of minority they aim at delimiting the scope in which the normative debate over group rights should take place. In other words, in this context, the elucidation of the concept of minority beyond the abstract element of non-domination requires an additional explanation of some commonly held assumptions. The third element that, in Waldron’s view, characterises contested concepts points to this idea.

These assumptions strongly permeate the debate. For example, when some international legal scholars assert that the notion of people cannot be subsumed under the idea of minority and, therefore, the right to self-determination is not a “minority right,” they are not merely trying to formulate a terminological distinction. On the contrary, the underlying claim—which should thus be justified—is that the demands of self-government raised by certain groups are groundless or lack legitimacy. It is important to recall that definitions of minority such as the one proposed by Capotorti seek to influence the application of international legal norms. In this context, the distinction between “minority” and “people” is relevant in order to avoid the extension of the right to self-government to certain type of groups, despite they might eventually meet the relevant criteria. Likewise, the explicit exclusion of immigrants prevents these groups from claiming the rights under Article 27 of the UN ICCPR. By contrast, scholars that propose expanding, instead of restricting, the definition of minority normally defend the attribution of the special protection granted by minority rights to a wider range of groups. To this end, some even reject using the term “minority,” and suggest that the notion of group is more appropriate because it makes it possible to include tribes, nations, peoples and cultural or religious minorities.

However, the problem with these approaches is that they seem to place the accent on mere terminological considerations about the suitability of one word or another while the substantial object of the dispute remains somehow hidden. The central problem, instead, if to discern which type of arguments support a particular conception of minority that includes some groups (let us say, ethnic and linguistic groups) and excludes others (gays, immigrants, women). Or, alternatively, whether the special protection that group rights is supposed to provide is indeed necessary for all types of minority groups. In short, the main point here is that there is a significant link between the two questions that the dominant perspective tries to tackle separately. For the above-mentioned reasons, disentangling the definition of minority from the justification of minority rights is misleading.

Incidentally, this conclusion casts doubt on whether the pessimistic assessment often derived from the lack of agreement over one definition of minority is justified. In fact, the existing controversy on this point should not necessarily be seen in a
negative light. Certainly, vagueness tends to be a problem in the legal context since, ideally, the meaning of any term should be clear, and in the absence of clarity, efforts should be made to use an expression or word in a particular sense that is authoritatively or conventionally decided. Nevertheless disagreements over the concept of minority may play a positive role in the wider debate over minority rights. A way of capturing this intuition is to typify the term “minority” not only as a contested concept but also as an “essentially contested” one. According to Waldron’s interpretation of this notion, affirming that a concept is essentially controversial “is not merely to say that its meaning is very, very controversial. Nor is it to say merely that the disagreements which surround its meaning are intractable and irresolvable.” Strictly speaking, the predicate “essentially” indicates that disagreement (or contestedness) is a central part of what makes the expression at issue meaningful; namely, that the fundamental nature of the concept is to be contested, so that, as Waldron writes, “someone who does not realize that fact has not understood the way the word is used.”

Surely, whether to characterise a concept as “controversial” or as “essentially contested” is a matter of degree. The difference between both categories is, admittedly, obscure and hence disputed. Still, according to a widespread view, the adjective “essentially” mainly emphasises that the disagreement is somehow indispensable for the very usefulness and functionality of the term, in that the discussion over its meaning enhances the wider debate in which the contested concept is used. Participants in this debate, therefore, benefit from the controversy, even if each of them defends their own position and points of view. Essentially contested concepts are thus central, “not despite their contestedness, but because of it.” In this vein, Marisa Iglesias adds to the characterisation of essentially contested concepts the idea that they are argumentative or dialectic (since we are not simply facing a sequence of parallel discourses about different concepts, but, rather, contending discourses that generate a competitive attitude among the participants concerning which is the best way of characterising a certain institution) and functional as well (for these are concepts that demand an active engagement in the social and deliberative practice where they are elucidated and used).

The debate about contested concepts can help to illuminate the core of the dispute over the concept of minority. In particular, contrasting the different and conflicting arguments behind the competing definitions I have described might be crucial to the debate on what sort of groups, if any, might have legitimate claims to the special protection granted by rights. Similarly, from this perspective, opponents to group rights cannot justify their position merely by bringing forward the dispute over the definition of minority—just as those who oppose democracy cannot legitimately allege, as a reason against this political system, the conceptual disagreement surrounding the term. In short, the whole controversy around a contested concept, far from being undesirable, can help to guarantee a more transparent debate about the principles at stake.

3.2. What Conception of Group Rights?

The dominant approach to minority rights is also inadequate for a second reason—one tied to the notion of group rights that motivates the discussion. As explained before, the difficulty of reaching consensus on a satisfactory definition of minority
need not be seen as a major obstacle to theorising group rights. The concept of minority can be categorised as a contested concept, and the identification of the type of groups it refers to is fundamentally linked to the normative discussion over the need to protect certain communities. Therefore, both issues should be tackled together.

In fact, the considerable scholarly efforts directed at clarifying the meaning of “minority” are not entirely disentangled from the normative debate, since they tend to presuppose a particular concept of group rights, if only implicitly. In order to perceive this connection, it is worth recalling that analyses of the concept of minority are usually linked to more general conceptions of groups and communities. As pointed out, nearly all concepts of minority evoke some kind of unity among the members of a group that arises from subjective elements—hence, the idea of groups as entities whose members share an identity in common suggested by Fiss, or the notion of shared understandings that McDonald defends. However, as was also shown, these elements are difficult to pin down: it is unclear what should be the precise content of those shared ideas and common identities as well as the degree to which they should be respectively accepted or recognised. Moreover, discrepancies arise as to whether people’s belonging to a group is based on subjective convictions or rather on the external recognition of objective traits such as race or gender. Admittedly, although it would seem absurd to deny the existence of groups altogether, all attempts to specify their distinctive traits and trace boundaries between communities inevitably lead to paradoxes and contradictions that are difficult to resolve.43

There is no need to explore these problems further here, but I would like to draw attention to the reasons why this lack of precision gives rise to the significant scepticism about the possibility of theorising group rights mentioned earlier. These reasons only become apparent if we realise that group rights are most commonly defined as rights being held by a collective subject that is able to exercise moral agency.44 That is, a right is collective insofar as it is held collectively by the group as such, and not by each of its individual members. The emphasis on complex issues of collective identity in the debate on minority rights seems, therefore, entirely appropriate. If the relevant minority groups, as well as the criterion of belonging, were not reasonably demarcated through some general standards, the indeterminacy of the rights-holder would obviously make the recognition of group rights highly problematic.

So, in general, participants in this debate have taken for granted that group rights are held by a collective subject with its own interests. In addition, these rights tend to be justified in a way analogous to that of individual rights. Oversimplifying a complex argument: supporters of individual rights begin by characterising human beings as holders of certain goods (life, physical integrity, freedom, etc.) which are intrinsically valuable; this justifies each individual’s interest in their protection and respect by means of certain rules. Consequently, moral rights are assigned to them as a guarantee against the violation of those basic interests, thereby justifying the imposition of a number of duties on others.45 Advocates of group rights proceed in a similar way. They first try to clarify what they understand by a “group,” a “minority,” etc.; then, they identify some central interests which, allegedly, are essential to them—typically, the interest in preserving a culture, or in maintaining a distinct identity. Finally, they justify the legitimacy of such interests and argue that they constitute the core of
certain moral rights that are held collectively. Consequently, individual and group rights would be essentially distinguished by their respective holders. Consider the following accounts, which exemplify this stance:

With collective rights, a group is a rights-holder; hence, the group has standing in some larger moral context in which the group acts as a rights-holder in relation to various duty-bearers or obligants. With collective rights, a group is a rights-holder; hence, the group has standing in some larger moral context in which the group acts as a rights-holder in relation to various duty-bearers or obligants. Collective human rights are rights the bearers of which are collectivities, which are not reducible to, but consistent with individual human rights, and the basic justification of which is the same as the basic justification of individual human rights.

This notion of group or collective rights, generally assumed by both defenders and critics, strongly influences the discussion, typically leading to a debate between collectivists and individualists about the feasibility of reducing communal interests to individual ones. Indeed, defenders of group rights argue that some interests are essentially collective and can thus not be individualised, that is, reduced to the aggregate of group members' interests. Accordingly, it would make sense, for instance, to argue that a group has improved independently of the particular share in the global well-being that each individual member may have; or one could say that a group's interest in preserving a distinctive cultural heritage cannot be adequately grasped if it is reduced to an aggregation of individual interests.

Starting from this idea, to which we could refer as the non-reducibility or non-transferability thesis, many commentators conclude that group rights cannot be subsumed under the concept of individual rights. In this view, only groups can have features such as socialisation processes, structures of communication or the creation of common goods, which generate the kind of legitimate collective interests that group rights aim to preserve. As a result, so the argument goes, these rights should be assigned to the group as such. The proposition “the Asháninka people has the right to self-determination” would then be irreducible to the sum of individual rights to freedom of association of the Asháninka individuals. For one thing, according to the dominant view, group rights aim to protect interests that are not divisible into individual interests.

This model of justifying the attribution of rights to some groups, identified by the elements mentioned above, is also linked to their alleged capacity for moral agency. In this vein, Vernon Van Dyke argues that ethnic communities, like states or nations, meet the requirements for holding moral rights, and not merely of legal rights of the kind attributed to corporations and other interest groups. According to him, a group or a community is a “collective entity,” which means that “it comprises one unit, one whole, with a collective right of its own—a right that cannot be reduced to the rights of individuals.” Likewise, Van Dyke argues that these rights reflect moral claims based on interests that cannot be derived merely from individual interests.

Similar ways of presenting the non-reducibility thesis can be found in the literature on group rights, but hopefully enough has been said to clarify why this line of argument leads into difficult philosophical questions connected to the debate between communitarians and liberals. It leads, in particular, to a discussion of complex questions about group identity and groups' capacity for moral agency, and also to arguments about the relative priority of the individual or the community. For this
reason, as stressed in the introduction, it is common to assume that arguments for or against group rights are basically a function of the more general philosophical position that one is willing to adopt in those philosophical debates.\textsuperscript{54}

Indeed, with regard to moral agency, which is seen as a fundamental condition for being a rights-holder, liberal theorists normally oppose group rights as they relate them to a dubious ontology. The argument is quite simple: moral rights are assigned to those who have certain capacities; collectives lack minds and the capacity for rational thought or for assessing courses of action; consequently, they do not meet the basic requirements for the attribution of moral rights. Only individuals are able to reason, have values and make decisions, and the decisions and actions of a group are always dependent on individual actions and decision. As Carl Wellman claims, even the more organised and active groups lack moral agency and, therefore, it is impossible for them to be right-holders.\textsuperscript{55} Taylor eloquently describes the ultimate reason for the lack of credibility of the notion of collective moral agency in the individualist philosophical tradition and thus in all liberal theories:

To think that society consists of something else, over and above these individual choices and actions, is to invoke some strange, mystical entity, a ghostly spirit of the collectivity, which no sober or respectable science can have any truck with. It is to wander into the Hegelian mists where all travellers must end up lost forever to reason and science.\textsuperscript{56}

Thus, to assume the existence of collective moral agencies has far-reaching consequences for the notion of interest that grounds the idea of group rights. In order to illuminate this point, let us assume the concept of rights that Raz defends as “grounds of duties in others.”\textsuperscript{57} In order to maintain that groups have interests that are irreducible or non-transferable to those of their individual members, one must accept the possibility of those members having duties towards the group. Yet what exactly would that mean? On the one hand, it is clear that those who belong to a group may have duties towards other members. But this is not what those who argue that collectives have interests in themselves are trying to highlight. Precisely because these interests are inherent in the group and thus non-reducible, their protection through group rights would imply that members of the group could have duties towards the group as such. In other words, we should allow the possibility of groups having claims based on rights towards their members, thus raising the possibility that some, most or even all members of the group may have interests opposed to those of the group. Precisely because a coherent elucidation of this argument (and, in turn, of the irreducibility thesis upon which it is based) seems, at the very least, challenging, it is common for liberal scholars to regard the idea that collectives have moral group rights as a conceptual error.

Note that the link between methodological individualism and liberal theories of rights is evident in this dispute. The former basically means that the individual is the basic explanatory unit of social sciences. As a theory, it is firmly based on an atomist ontological tradition according to which it is always possible to account for social actions and structures in individual terms.\textsuperscript{58} For liberals, this theory is plausible because every collective, whatever its nature, is composed of individuals, and not the other way around. And even though individuals are social beings, this condition is also considered as explicable in terms of actions and individual relationships. In
accordance with this line of thought, liberals can only understand the allusion to collective interests as a way of speaking metaphorically. Ultimately, all collective interests derive from individual ones; individuals and not groups, have interests and are, strictly speaking, potential holders of moral rights. In this view, the category of group rights is either regarded as redundant or as incoherent. This well-established connection between liberalism and methodological individualism is brought out by J.L. Mackie, when, reflecting on his own views, he says:

It may be asked whether this theory is individualist, perhaps too individualist. It is indeed individualist in that individual persons are the primary bearers of rights, and the sole bearers of fundamental rights, and one of its chief merits is that, unlike the aggregate goal-based theories, it offers a persistent defence of some interests of each individual.

Yet the vigour of the liberal rejection of group rights stems not only from ontological considerations, but, principally, from fears concerning their political implications. Some argue that recognising group rights could place the group over and above the individual, thus giving preference to collective interests and, perhaps, undermining the position of the most vulnerable members of the community. Others reject the concept of collective human rights on the grounds that only individuals, as human beings, have rights and that, within the area defined by human rights, the individual has a priority over social interests. In short, the underlying concern is that the category of group rights poses a threat by somehow reifying the group without a clear understanding of where its independent moral value lies.

This point is particularly relevant. As Michael Hartney writes, even if we could conclude that, ontologically speaking, the existence of the group precedes that of its individual members, the normative question as to whether groups possess the sort of intrinsic moral value that justifies attributing duties (to its individual members or to other groups) would remain open. Certainly, as Hartney admits, notions like “good,” “benefit” or “interest” are meaningfully used with respect to an assumed goal or to a teleological scheme. That is, in the same way that we say “a tree has an interest in surviving,” we could say that a group has an interest in its continued existence. We may even say, in a meaningful manner, that it is “good” or “positive” that some minority linguistic groups are able to survive. But, in Hartney’s view, these are irrelevant statements from a moral point of view, for any value ascribed to groups is purely instrumental to the individual well-being of its members.

Many refer to this idea as value-individualism thesis, which is analogous to the humanistic principle, as endorsed by Raz—namely, the idea that “the explanation and justification of the goodness or badness of anything derives ultimately from its contribution, actual or possible, to human life and its quality.” Thus, even if there were some seed of truth in social holism, the humanistic principle would hardly be compatible with the justification of group rights on the grounds of the intrinsic moral value of collectivities. In this sense, the individualism inherent in liberal theories of rights establishes a clear preference for the individual over the community. That is why it is usually assumed that communitarianism offers a better framework for justifying group rights. The link seems indeed apparent, since a recurring topic of this tradition is the critique of the liberal view of the self. As noted, philosophers such as Sandel or McIntyre try to refute the essential traits of Kantian liberalism because, in
their view, it ignores the way in which the individual is placed in a community and influenced by social relationships and roles. In contrast, the communitarian anthropology builds on the assumption that the self is not prior to its ends but constituted by them. Certainly, this thesis allows for many nuances. Yet in its strongest version, it claims that individual identity is inescapably linked to belonging to one’s own community. Instead of being free agents, able to construct and revise their conceptions of the good life, human beings are strongly influenced by their belonging to particular historical communities.

Although this is a fairly simplistic way of depicting both versions of the self, the sharp contrast between them is apparent. The point is, in any event, that many think that only a small bridge mediates between communitarian view of the self and the justification of group rights. If the construction of personal identity essentially depends on the interaction with a certain group—insofar as the latter provides a context for identity-formation and mutual recognition—one might argue that communities have an intrinsic value and even a certain priority over the individual. Group rights could thus be justified on the grounds that preserving the specific character of the groups in which individual identity is constructed is a significant priority. This argument underlies the stance adopted by many of those who defend the intrinsic value of cultural groups and the irreducibility of group rights to individual rights. In contrast to the idea of “value-individualism,” the justification of group rights is based on a principle that some have dubbed “moral rights collectivism.”

To summarise, the debate over group rights seems to lead to a controversy among opposed philosophical theories of value, identity and moral agency. More specifically, the prevailing idea that a right is a “group right” because it belongs to a collective agent with interests that are irreducible to those of its individual members, provides a link with the more general debate between liberals and communitarians where substantial disagreements emerge. As a result of this link, the discourse leads to a competition between group and individual rights in terms of absolute or incommensurable values. Thus, in contrast to the universal and individual nature of human rights, critics object that group rights aimed at the preservation of cultural identity tend to have a particularistic character and to establish exclusions.

However, as the next chapter argues, both categories of rights need not be seen as conflicting in this way. Note, in addition, that this dispute is not merely academic, since the alleged incompatibility between individual and group rights has some central implications for our social and political life. Fundamentally, it would make it impossible to argue coherently that the foundations of a society should be grounded on both categories of rights. Analogously to the extreme pictures prevalent in the liberalism vs. communitarianism debate, we seem to face a choice between the model of a cosmopolitan, neutral and open society, which recognises the same rights for all individuals (regardless of whether they belong to a group), and the model of a society based on group rights of communities, which seems to succumb to a nostalgia for traditional communities grounded on rigid values where individuals maintain roles and traditions inherent in their identity—in other words, a picture of a communitarian society resisting the impulse of modernity, which regards the group as more important than the individual and is thus condemned as provincial, reactionary and even fundamentalist.
4. LIBERALISM VS. COMMUNITARIANISM: AN INADEQUATE FRAMEWORK

For the reasons mentioned above, a significant shortcoming of the standard approach to minority rights is the idea that the problem of defining “minority” can—and should—be disentangled from the question of whether or not it is justified to ascribe rights to certain groups. As we have also seen, the dispute about whether groups exist as collective moral agents is notably related to the way in which group rights are conceptualised. But in order to contribute to the debate over minority rights, we may not need to conclusively answer these complex questions or take a stance on the merits of the different theories of the construction of the self and the moral status of groups. Not only can group rights be conceptualised in a less controversial manner but also, as noted above, the liberal opposition to these rights is often more political than metaphysical.

The next chapter represents an attempt to develop alternative modes of understanding the notion of group rights. But first let me briefly outline what could be regarded as an external criticism of the dominant approach in this debate. It is unclear that the link between communitarianism and group rights, on the one hand, and between liberalism and individual rights, on the other, is able to account adequately for the core normative problems arising from multiculturalism. By and large, the reasons for this inadequacy have to do with the evolution of the wider debate between liberals and communitarians which, as noted, often lies behind the different positions on group rights. As pointed out, the analysis of these rights usually portrays both lines of thought as radically opposed. Yet over the last decade, the controversy has evolved remarkably, and such a picture of radical opposition is now widely seen as reductionist. On the one hand, as a body of thought, the communitarian tradition is more complex and diverse than usually described and some core communitarian critiques of liberalism also had a great impact on many liberal political theorists. On this background, the above-mentioned antagonism between the liberal and communitarian pictures—the equation of liberalism with individual rights and communitarianism with group rights—oversimplifies both theories and thereby trivialises the discussion.

A brief exploration of the contributions of some influential liberal critics might help to illustrate this point. Take Taylor’s view of his own work as rooted in the liberal democratic tradition. In fact, his critique of liberalism is not primarily focussed on any of the supposedly “communitarian” theses that appear so central in the conceptual debate over group rights. Instead, essays such as *The Ethics of Authenticity* (1991) seek to defend a certain way of understanding individualism that is linked to a moral ideal of authenticity (to which I will return in greater detail in Chapter V). Undoubtedly, Taylor objects to certain forms of individualism which prevail in modern societies: in particular to a sort of individualism that he relates to selfishness and social fragmentation, to the lack of moral horizons other than material affluence or to the prevalence of instrumental reasoning and cost-benefit analysis as primordial parameters of success. For Taylor, this leads to what he calls “soft relativism,” namely, a relativism that is not based on any refined epistemology, but rather on a pseudo-moral postulate of mutual respect such as “one ought not to challenge another’s values.”
So, rather than defending a rigid model of society based upon authoritative values, Taylor primarily aims at highlighting some dark sides of individualism, which may have deplorable effects for human well-being and community life (such as fragmentation, isolation, the tendency to value personal self-realisation only through professional achievements, lack of solidarity and so forth). But his reflection on what he calls “the malaises of modernity” is not a communitarian feature only. The current revival of the republican tradition is based, to a significant extent, on a similar concern with the perils of extreme individualism and the obliteration of civic virtues that, like solidarity, make democracy and welfare possible.

Now, these critiques of modern liberal societies do not necessarily romanticise traditional forms of living. Critics such as Taylor are not, as often depicted, a faction of anti-liberal collectivists who think that the community is more important than the individual and therefore freedom and individual rights should be suppressed in order to promote some sort of a cultural pre-modern revolution. On the contrary, for them the solution does not lie in abandoning ideals of individual freedom, but in discovering their social meaning beyond narcissistic or self-indulgent attitudes. This social view is thus closer to the republican tradition and its emphasis on the value of communities and associations. But, as even John Rawls claims, such an emphasis need not be seen as inherently incompatible with a liberal theory of justice as fairness, since the concept of freedom can be understood not merely in negative terms, but also in positive ones: as active participation in social life and self-government.

A similar reasoning applies to other so-called communitarian scholars such as Michael Walzer, who also try to offer a different interpretation of ideals of freedom and tolerance. Here, too, it would be wrong to interpret Walzer as a reactionary scholar arguing against individual human rights. Rather, his work can be seen as re-examining the political preconditions for the flourishing of freedom and individual rights. This model may indeed diverge from dominant conceptions of liberalism, but not from some central liberal ideals related to the value of the individual.

These ideas will be further explored later in this book. The main idea I wish to underline at this point is that, within the debate over group rights, the opposition between individualism and collectivism is, more often than not, overly simplistic. Although it is true that some genuine differences exist, many of the goals and perspectives are—much in contrast to what the debate might suggest—widely shared. Moreover, scholars of different traditions, such as Taylor, Raz, Walzer or Kymlicka, refer to rights like the right to self-government or the right to language as minority rights, and yet their general philosophical views about value do not fit the prevailing conceptual scheme set out above.

So far, the focus has been on the normative dimension of the debate. But what about the ontological discussion that forms the other pillar of the conceptual dispute over group rights? Here, some brief considerations might be enough to reveal the sort of misunderstandings certain assumptions may cause. As noted, what makes methodological individualism somehow self-evident is the fact that societies are composed of individuals. Thus, to argue that some collective entities can be the holders of moral rights seems to imply a personification of groups that is difficult to justify. For this reason, liberals usually reject the idea of group rights as a dubious category that,
ultimately, might only be used to legitimate the domination of some members of the group over others.

However, in contemporary political and legal theory it is rather rare to find an explicit defence of collective moral agency in this sense. Even though the debate between liberals and communitarians is usually portrayed as a discussion on radically opposed views of the self,84 the positions of most scholars are somewhere between the two extremes.85 As Walzer claims, neither the liberal nor the communitarian theory need adhere to such extreme views of the formation of the self. Like Taylor, he acknowledges that the disagreement is less pronounced than one might initially think:

Contemporary liberals are not committed to a presocial self, but only to a self capable of reflecting critically on the values that have governed its socialization; and communitarian critics, who are doing exactly that, can hardly go on to claim that socialization is everything.86

Indeed, as will become apparent in the following chapters, most contemporary liberal scholars accept that an interpretation of personal identity-formation as completely asocial exaggerates our ability to choose between different life plans and fails to acknowledge the relevance of shared social meanings.

On the other hand, even if our ontological assumptions will surely influence the value we attach to the community, this need not be linked to a belief in the existence of collective moral entities, as is often associated with communitarianism.87 As mentioned before, the idea of collective moral agency is connected with the existence of irreducible interests: an interest is always an interest of somebody. Consequently, if the interests that justify group rights cannot be reduced to the members of the group, they must be interests of the group. Yet for the reasons laid out above, this conclusion is very controversial. In any event, as the next chapter will argue, what scholars such as Taylor and Raz seem to have in mind when speaking about collective or group rights is the idea of an aggregate of individual interests in goods that cannot be individuated. If this interpretation is correct, then the discussion about the existence of collective moral entities becomes somehow superfluous.

Finally, the dominant approach to group rights can be criticised on more pragmatic grounds. This approach, as we have seen, tends to limit the discussion to the formal characteristics of the demands at stake. But insofar as the revitalisation of the idea of group or collective rights constitutes an attempt to solve problems generated by multiculturalism, the dispute about how to define this category of rights should not distract us from the justification of the substantive demands raised by minority groups, especially if, as in the present case, conceptual disagreements that give rise to a particular discussion (between liberals and communitarians) may not represent the nature of the claims posed by most minority groups in multicultural societies.88

5. CONCLUSION

The correlation between liberalism and individual rights and communitarianism and collective or group rights that is so prevalent in the debate on minority rights is highly misleading. This analogy is not only based on dubious theoretical premises, but it
also diverts our attention from the relevant normative questions. As we have seen, the fact that minorities express their demands in terms of collective or group rights precipitates an analysis that is mainly focussed on the formal problems implicit in this category of rights, leaving the substantial normative questions unexplored. But, as Kymlicka claims—in my opinion correctly—most debates about minority rights are not “debates between a liberal majority and communitarian minorities, but debates amongst liberals about the meaning of liberalism.”

That is, these are debates between different groups and individuals who disagree about the interpretation of liberal democratic principles in multiethnic and multicultural societies.

However, defenders of minority rights strongly emphasise the need to recognise group rights as a category of human rights. They also insist on the idea that these rights are held collectively—that they belong to the group, rather than to their members—and therefore criticise recent international conventions and declarations precisely because they fall short of ascribing minority rights to groups themselves. This emphasis is not gratuitous. It reflects the fact that the familiar catalogues of individual fundamental rights that we find in liberal democratic constitutions cannot adequately respond to the demands of minority groups. Yet, in my view, minority rights advocates are wrong in assuming that the difference between individual and group rights relates exclusively to the rights-holder. Because of the considerable attention paid to the distinction between both categories of rights, both theoretically and in the practice of human rights, the next chapter will focus on exploring an alternative, less controversial, way of conceptualising this distinction. It also examines the strengths and weaknesses of the thesis that the category of group rights is, in fact, unnecessary.

NOTES

2 Lukes (1973, p. 1).
4 Capotorti (1979, add. 1–7). Another attempt to give a precise content to this concept was the Proposal concerning a Definition of the term ‘Minority’, by Jules Deschenes (1985), a Canadian member of the same UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, who defined “minority” as: “A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law” (see UN Doc E/CN.4/Sub.2/1985/31/31/par. 181). This definition differs from that of Capotorti in minor aspects; yet, it introduces, together with the element of the will of the group to survive as a distinct group, the wish to achieve equality with the larger majority. Note, too, that Deschênes substitutes the ambiguous term “nationals” for that of “citizens.”
6 As Carens argues (1987, pp. 251–273) when the proportion of immigrants is small compared to that of national citizens, they are easily absorbed by the dominant culture. Controversies increase when the number of immigrants is significant enough to incite changes in the way of life and culture of the pre-existing community.
7 And, in fact, as will be seen in following chapters, practically all recent literature on minority rights examines the moral and political questions posed by the status of immigrants.
8 See supra Chapter I, note 28. These elements appear in other UN legal instruments, such as Article 13 of the 1966 International Covenant on Economic, Social and Cultural rights, which refers to the promotion of tolerance and mutual understanding between ethnic, religious or linguistic groups. Their relevance is also clear in the very title of the 1992 Declaration of the Rights of National, Ethnic, Religious and Linguistic minorities.

9 In the European context, the main international legal instruments adopted within the framework of the OSCE and the Council of Europe refers to “national minorities.” This term, however, is not seen as entailing a broader meaning, since it is widely interpreted as embracing the same categories of groups.

10 Kymlicka and Shapiro (1997, p. 10).


12 See, for instance, the definition included in the Recommendation 1201/93 (On an additional protocol on the rights of national minorities to the European Convention on Human Rights) of the Parliamentary Assembly of the Council of Europe which is aimed at influencing the interpretation of what still was, at the time, the draft of a European Convention for the Protection of Minorities.

13 See supra Introduction, note 24.

14 See supra Introduction, note 25.

15 See list of declarations made with respect to Treaty No. 157 in the instruments of ratification or in “notes verbales” at http://conventions.coe.int.


17 Prieto Sanchís (1995, p. 120).

18 Fiss (1976, p. 148).

19 Fiss (1976, p. 148). Van Dyke (1985, 16, pp. 134–135) makes a similar statement when he argues that groups are collective entities that exist as distinct units and not as mere aggregates of individuals.

20 Fiss (1976, p. 148).

21 McDonald (1991, p. 218). The same expression is used by Honoré (1987, pp. 3–4) who writes that “clearly a group is not a mere collection of individuals;” the distinctive feature of a group is a “a shared or common understanding, or a number of such understandings.”

22 McDonald (1991, p. 219).


25 Consequently, the answer to the question of determining an individual’s belonging to a group will basically depend on subjective elements. Although this issue will be taken up again later on in this book, first and foremost, membership has to do with people’s self-identification with the group. Moreover, as indicated, the very notion of group is linked to the idea of a collection of individuals who maintain strong bonds among themselves. In addition, membership to a group is also a matter of mutual recognition: I belong to a group when others recognise me as “one of them.” As Raz (1994, p. 132) puts it, to a great extent, membership in this kind of group we are exploring is “a matter of belonging” rather than one of achievement.

26 In this context, it is common to recall the difficulties that precedents analogous to the recognition of rights to collective subjects face, as is the case of the right of peoples to self-determination. For instance, Makinson (1989, p. 55) asserts that “the first and most obvious problem faced by r.u.p.’s (rights attributed universally to peoples) is that there is no reasonably clear and agreed account of what ‘peoples’ are. There is no accepted workable criterion that can serve to distinguish collectivities entitled to the epithet from others.” Makinson then goes on to examine the problems of indeterminacy and inconsistency arising in the interpretation and application of the norms that refer to “peoples.”


28 It could be argued that, in exploring a concept, in this case the concept of “minority,” we try to capture some kind of reality about a particular object or phenomenon. The aim, then, would be to offer a “real” definition of the term at hand. Yet an answer along these lines implies a commitment to the doctrine of verbal realism according to which words somehow determine their application to the objects they represent, so that the aim is to find out their “true” essence, that is, some sort of pre-existent meaning. For well-known reasons, though, this doctrine of Platonic connotations is hardly defensible. Most scholars nowadays would agree that exploring the concept of minority is not a matter of finding a category of groups that naturally fit this concept. I cannot explore here the difficulties of the
so-called “real definitions,” specially the confusion between the analysis of things and the nominal definitions of words. See only Robinson (1962).

29 The concept of vagueness is, in itself, ambiguous. The reference here is not to the idea of potential vagueness or, as it is commonly dubbed, to the problem of the “open texture” of language, which is unavoidable. For an accurate analysis of the different forms of indeterminacy that the idea of vagueness usually conceals, see Waldron (1994).

30 Thus, in general, vagueness is associated with a concept’s “zone of blurredness,” where we doubt about whether to include particular cases or instances. This area where conceptual application to a certain case is uncertain contrasts with those areas where it is clear that the concept either applies or not applies. See, Alchourrón and Bulygin (1993, pp. 61–65). Waldron (1994, 516–521), however, warns of the dangers of explaining, in the legal context, the notion of vagueness in terms of borderline, denoting properties that are present in different degrees.


32 Thus, Waldron argues that the idea of cruelty included in the XIII Amendment to the U.S. Constitution calls for an analysis that, rather than focussing on punishment in general, emphasises the degree or intensity of the suffering experienced by someone undergoing a specific punishment, and also, perhaps, on the disposition and attitude of those who inflict it. See Waldron (1994, pp. 526–529).


34 In the case of Capotorti, as mentioned, his study on the definition of minority was drawn up with reference to the application of Article 27 of the UN Covenant on Civil and Political Rights.

35 For this and other exclusions implicated in the adopted definition, Thornberry (1991, pp. 7–10).

36 See Lerner (1991, pp. 28–37), who proposes a “Decalogue of group rights” that should be applicable to all these groups.


41 Waldron (1994, p. 531). Illustrating this idea with concepts such as art and democracy, Waldron (1994, pp. 530–532) explains that different approaches generate rival paradigms as regards their core meaning. It is plausible to understand the meaning of the term “democracy” differently, as expressing competing political principles. For some, “democracy” refers to a system that, like in the ancient Greece, guarantees direct participation; for others, the paradigm of democracy is the modern representative system, whereas direct democracy is relegated to a mere historical step in the evolution of the concept. Some scholars seem to think that what qualifies a concept as “essentially contested” is the disagreement about its paradigmatic cases of application. However, this idea can lead to some confusion when it is understood, following Dworkin’s terminology (see supra note 33), as implying that we lack, in fact, of a concept, since there is no referent to which the different conceptions allude. The idea that the paradigmatic cases are contested can therefore be interpreted in different ways. But in the case of the term “minority,” and despite its vagueness, one could argue that there is a core uncontested meaning: namely, the idea of disadvantage and non-domination. The controversy is rather on determining the relevant cases to which the notion applies. Yet, interpreted this way, the distinction between contested and essentially contested concepts becomes blurred. For further discussion, see Iglesias (2000, pp. 77–104).


43 Obviously, the attribution of legal personality to certain political associations, particularly states, helps to clarify the criteria for individual belonging that shapes the background of the unity of the group. Nevertheless, problems arise even in these cases. Many states have experienced processes either of disintegration or unification that often lead to a revival of the interest for both the origin of the groups and the rules for belonging. The current process of European integration, which runs parallel to the questioning of the unity of some of its member states, is also an example. Some classical essays on the origin and functioning of groups can be found at Stapleton (1995).

44 Even though the problem of a group’s identity and that of the existence of a collective moral agency are different, both are often linked in the objections raised against group rights. Thus, one main source of scepticism is the belief that the difficulties in determining who the members of the group are with
some precision makes it extremely difficult to regard groups as agents capable of being subjects of rights. For an illuminating discussion on the question of group agency and group rights, see Nickel (1997, pp. 235–256).

This way of describing this process of justification implies endorsing a theory of rights based upon the idea of “interests,” instead of a more voluntaristic conception that emphasises the idea of “choice.” Very briefly, this option is justified because the latter has difficulties in fitting the ordinary use of the language of human rights, since it makes it difficult to speak about the rights of children, for example, insofar they lack the capacity to make choices or exercise their rights. Voluntaristic theories, in addition, often focus on legal rights as institutionalised rights and tend to place the accent on their guarantees as a condition of existence. Yet given that the rights discourse also operates in other normative discourses (typically, in moral and political ones) they have limitations to account for these uses. Interest theories, by contrast, allow us to avoid the problem of confining the meaning of interests to the role that rights play in protecting them. In general, these theories go beyond the Hohfeldian analysis, pointing out that interests justify rights and rights, subsequently, are grounds for duties. A version of this interest theory of rights has been theorised by Raz (1986, pp. 165–192). On the reasons to choose this type of theory, see MacCormick (1982, pp. 154–166). For a defence of the voluntaristic theory, see Sunner (1987).


See supra note 47.

The Asháninka is a people of the Central Rain Forest in Peru that has struggled for self-government and political organisation, after being a victim of a history of colonisation that has caused the continued loss of their traditional land and suffering from extreme violence from both the Sendero Luminoso guerrilla and the Peruvian military.


See, for instance, Van Dyke (1977, pp. 343–369; 1985, 24, 31).

Van Dyke (1985, p. 207).

Van Dyke (1985, p. 208).

For a discussion about conceptions of individual and group rights that takes place within this framework, see the works included in Kymlicka (1995b, part IV).


See Donnelly (1989, pp. 19–21, 143–146). Although Donnelly admits that individuals may have certain duties towards society, and also that society may legitimately restrict the exercise of some individual rights, he argues that the conflict should be seen as one between individual rights and duties.


Hartney (1991, p. 299); Kymlicka (1989a, p. 140) also claims that this thesis is one of the main reasons for the liberal opposition to collective rights.

Raz (1986, p. 194).

For a detailed discussion, see Nino (1989, pp. 129–142).


For general theories of what particular virtues, dispositions and attitudes responsible citizens of democratic societies should ideally possess, see Dagger (1997), Macedo (1990) and Galston (1991).
a general overview of the impact of the debate on citizenship for different views of liberalism, see Kymlicka (2002, pp. 284–326).

76 The common association between communitarianism and moral relativism is also unnecessary. Although this point cannot be analysed in detail, it is worth noting that a number of communitarian scholars assume that we can provide meaningful reasons in support of different moral ideals that can make a difference, thus rejecting radical subjectivism. See Taylor (1991, pp. 36–41), who also explicitly claims (1991, pp. 55–70) that we retain a significant degree of freedom to comprehend and revise the “moral sources of our civilisation,” thus rejecting the more radical idea that individual autonomy is not meaningful and that people's ends are somehow fixed and beyond transformation.

77 Rawls (1999, p. 469).

78 Note that in the republican tradition, from Rousseau to Arendt, the value of the community greatly resides in its role of enhancing the true dignity and freedom of citizens, since they only become autonomous through the participation in public affairs.

79 In his book On Toleration, Walzer (1997) explores different historical political regimes in the light of their fulfilment of the ideal of ‘tolerance, and argues that, in modern democracies, this ideal needs certain corrections to encourage the peaceful coexistence between different cultural groups. The presupposed link between communitarianism and conservatism is not always correct either. In fact, Walzer himself is a co-editor of Dissent, a prestigious journal of the American left.

80 For a similar conclusion, see Sandel (1996). In this work Sandel defends a version of the republican model that differs from what he sees as the predominant liberal conception based on rights and public neutrality. He then compares his model with the republican ideals that he regards as predominant in the earliest age of constitutionalism in America.

81 Although this problem will be further explored in following chapters, it is worth anticipating some central ideas: as outlined, the liberal doctrine to which they oppose might be called “neutrality liberalism,” as developed by Dworkin or Ackerman. Both Taylor and Sandel think, although for different reasons, that the emphasis of this doctrine on individual rights as trumps against the collective will hinders the debate over value and public goods. This, in turn, undermines the relevance of participation in institutions. From this perspective, public institutions are no longer identified with the role of promoting some shared conception of the common good, but, instead, become purely instrumental to the protection of individual liberties. Here, citizens’ role is primarily to claim their individual rights (rather than, for instance, deliberating on public issues of general interest). What these authors are questioning is, to put it briefly, the compatibility between this form of liberalism and the high degree of civic participation that a genuine democracy requires. So, there are indeed important differences between these theories. Still, to a great extent, the dispute focuses on the meaning of some commonly shared ideals. On the differences and similarities between republicanism and liberalism, Sunstein (1993), Pettit (1997, pp. 8–9), Habermas (1996, pp. 99–100).


83 While for the liberals the self precedes any ends, communitarians understand that such anthropology is sociologically naïve, as they think that the self is constituted by its ends. The idea is that there are ends that we do not choose but rather we discover as part of our own context. This thesis, which Sandel defended in the 1980s, remains perhaps as the most important objection to liberalism. See Sandel (1982, pp. 57–59, 150–151). In case we accept it, the role that liberals grant to freedom of choice would become unwarranted. However, this idea suffers from serious ambiguities. At times, communitarians refer to a self that is only partially constituted with fixed ends while, on other occasions, they argue that there is a genuine identity between the self and its ends. Kymlicka (1989a, pp. 47–73) has criticised —rightly, in my opinion—the most radical version of the communitarian argument as incoherent and concludes that the thin version of the communitarian argument is complementary with liberal positions.


85 Walzer (1990, p. 21).

87 I am not suggesting that the ontological view one endorses can support any normative claim. As Taylor (1995, pp. 182–185) remarks, the failure to distinguish the ontological and normative levels remains as an important source of obscurity in the debate between liberals and communitarians.

88 Kymlicka (2001a, p. 20) has recently put forward this argument. He argues that the widespread view that the debate over group rights is analogous to the dispute between liberals and communitarians...
is unfortunate. In his view, this framework is not well-suited to analysing the claims of most cul-
tural minorities, since only a few of these groups in liberal societies demand rights in order to remain
indifferent or untouched by modernity.

Kymlicka (2001a, p. 21).