Pragmatism, Rights, and Democracy

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Jean-Jacques Rousseau, John Stuart Mill, and Thomas Hill Green on Natural Rights

**Most discussions of human rights,** at least in the United States, take for granted the principles of natural rights theory as it emanated from the tradition of natural law and the writings of Hugo Grotius, Thomas Hobbes, and John Locke. These writers were not in complete agreement on all the relevant theses, and they were not always consistent in their doctrines, but the sediment of their views was handed down not only to Thomas Jefferson and the Founding Fathers of the United States, but also to later theorists to the present day. In the preceding pages, I discussed a number of contemporary theories of rights that diverge from this dominant school of thought. But these challenges to classical natural rights theory have significant antecedents. Preeminent among those whose theories contradict it are Jean-Jacques Rousseau, John Stuart Mill, and Thomas Hill Green, with whom this chapter will be concerned. While they all reject the concept of “natural rights” in the classical sense, Rousseau, Mill, and Green have given us theories of rights that are naturalistic, in the sense that they are grounded in these philosophers’ respective analyses of empirically observable human behavior and motivation.

To begin with, what is meant by “natural rights”? Those rights taken to be universal (as opposed to “special” rights relevant to specific circumstances) were held by the classical theorists to be natural in at least four interrelated senses. The first is that they are innate, not conventional or socially conferred. Whether these rights are said to be God-given or not, all humans, simply as human, are endowed with them. That is, rights are “natural to man” in the sense of being inseparable from our being, just in virtue of our humanity. (This is the view I call ‘essentialism’.) And
they are "natural" in the further sense of being knowable by rea-
son, a priori, just as reason discovers the natural law. In this sense,
traditional natural rights theories, even those of Hobbes and
Locke, are appropriately said to be rationalist.¹

Those who conceive rights in this way assume that we have
them, as we each possess human nature, not only as humans, but
as human individuals.² Even the American Declaration of Inde-
pendence, which starts by mentioning the necessity for a people to
"dissolve the political bands, which have connected them with
another," and to "assume . . . separate and equal status," justifies
this action by appeal to the "self-evident" truth, not that all peoples
"are created equal," but that all men are. Natural rights theories,
that is, are overwhelmingly individualist.³ Typically, their individ-
ualism takes a stronger form as well, the form characterized in
Chapter 1 as atomism. They hold rights to belong to individuals
taken independently rather than as members of society. This at-
omic view is logically connected to the essentialist notion that
we possess rights in virtue of our human nature, a nature that
each of us possesses as an individual. The same essentialist assump-
tion also entails the universalism of the natural rights view. En-
tailed by and inseparable from human nature, rights necessarily
belong to all humans. But partly because of the history of the
concept and theory of rights—rights were originally thought of
as protection against the arbitrary exercise of governmental
power—and partly because of the atomistic individualism in
terms of which the concept was framed, rights came to be
thought of in adversarial terms. Thus, individuals are said to have
rights against not only government, but other individuals. Each of
the theories I shall discuss departs from one or more of these
assumptions.

JEAN-JACQUES ROUSSEAU

Despite inconsistencies in his writings, the dominant thrust of
Rousseau's treatment of rights clearly runs counter to the theory
of natural rights as he encountered it. Neither law nor rights,
according to him, are natural in the sense of being either anteced-
ent to society or inherent in original human nature. In the intro-
ductive section of his *Discourse on the Origin of Inequality*, he states its objective: “Precisely what, then, is the subject of this discourse? To mark, in the progress of things, the moment when, right taking the place of violence, nature was subjected to the law.” Arguing, in his *Social Contract*, that “the social order is a sacred right which serves as a basis for all others,” he nevertheless maintains that even this right “does not come from nature; it is therefore based on conventions.” Rights, for him, neither are innate nor belong to individuals prior to or outside the framework of society. They arise and have their sphere of operation within society, and society itself is a human artifact, the product of a compact, although one that is sharply different from those posited by Hobbes and Locke.

Not only does he see rights to be products of society rather than inherent traits of human nature, but Rousseau also denies that human nature, at least as scholars had come to think of it, is innate. In the first version of the *Contract*, criticizing an article on natural law by Diderot (a critique excluded from the final draft), he writes, “we begin properly to become men only after we have become citizens.” But being human is not just a matter of becoming political beings. Man was long defined as rational, but, according to Rousseau, even reason, depending on language for its development, is not an innate human characteristic: “All the kinds of knowledge that demand reflection, all those acquired only by the concatenation of ideas and perfected only successively, appear to be utterly beyond the grasp of savage man, owing to the lack of communication with his fellow-men, that is to say, owing to the lack of the instrument which is used for that communication . . .” (DOI 74n6).

The contract that constitutes the social order—and turns “savage” men into humans as we know them—establishes the framework for rights and determines their nature and function. Accepting the proposition that survival of the human race is impossible in the natural state (in which each individual attempts to maintain himself), he contends that men require “a form of association which defends and protects with the whole force of the community the person and goods of every associate, and by means of which each, uniting with all, nevertheless obeys only himself and remains as free as before” (SC 14). As conceived by
Rousseau, the social contract does not, as the Hobbesian contract does, simply transfer all power and control to a sovereign ruler; it consists, instead, in the generation of a common will that has authority over all. As he himself puts it, the compact “reduces itself to the following terms: Each of us puts in common his person and his whole power under the supreme direction of the general will; and in return we receive in a body every member as an indivisible part of the whole” (SC 15). Sovereignty, which has to be understood as moral authority, is “only the exercise of the general will” (SC 23). Government is its agent.

By establishing sovereign authority, in principle identical with that of each of the citizens, the social contract establishes what Rousseau terms “moral society.” The existence of the general will makes it possible for society to legislate duties that every citizen, being their author—the source of their authority—as well as their subject, will take to be binding not only upon himself but also upon all the others. Not only is this principle the basis of morality; but, as we shall see, it is central to Rousseau’s portrayal of rights.

After the contract, Rousseau has said, we remain free as before. The freedom or liberty that has been retained, however, has undergone a transformation. No longer merely the power of action, it has now been authorized, legitimated. By the social contract man loses “his natural liberty” and gains “civil liberty,” and “we must clearly distinguish natural liberty, which is limited only by the force of the individual, from civil liberty, which is limited by the general will” (SC 18). “Limited” must be understood here, not in the sense of being bounded or restricted by external forces, but in the sense of being proportional to enabling conditions; we enjoy civil liberty insofar as it is guaranteed by civil authority rather than brute strength.

Property, like civil liberty, also comes into existence with civil society. By the social contract, Rousseau says, man loses “an unlimited right to anything which tempts him and which he is able to attain” and gains “the ownership of all that he possesses”; and he goes on to distinguish “possession, which is only the result of force or the right of the first occupant, from ownership which can only be based on a positive title” (SC 18–19). The phraseology here seems to imply the existence of a “natural” right, antecedent to civil society. In a previous paragraph, too, he has
characterized the contract in terms of “the total alienation of each associate, with all of his rights, to the whole community” (SC 14). Is Rousseau contradicting himself and accepting the existence of natural rights antecedent to society?

Other passages show that this is not his intent. At the start of Chapter 8 of Book I of the *Contract* he says, “This passage from the state of nature to the civil state produces in man a very remarkable change, by substituting in his conduct justice for instinct, and by giving his actions the morality that they previously lacked.” It is only then, he continues, that “right succeeds appetite” (SC 18). And in Chapter 3, “The Right of the Strongest,” he discusses the word ‘right’:

The strongest man is never strong enough to be always master unless he transforms his force into right, and obedience into duty. Hence the right of the strongest—a right assumed ironically in appearance, and really established in principle. But will this word never be explained to us? Force is a physical power; I do not see what morality can result from its effects. To yield to force is an act of necessity, not of will; it is at most an act of prudence. In what sense could it be a duty?

Let us suppose for a moment this pretended right. I say that nothing results from it but an inexplicable muddle. For as soon as force constitutes right, . . . every force which overcomes the first succeeds to its right [privilege]. . . . But what sort of a right perishes when force ceases [SC 7]?

The supposed natural rights of liberty and property, then, are only “pretended” rights, “rights” in quotation marks. Genuine rights, like duties, can exist only in moral society, and moral society is civil society—a social and political order into which human beings enter and which they create, not a preexisting “natural” order governed only by force.

As noted in the previous chapters, the American philosopher George Herbert Mead, discussing the background of nineteenth-century philosophical thought, called attention to the central feature of Rousseau’s analysis of rights and incorporated it into his own thinking. This is the principle that rights are reciprocal or mutual, a principle that rests directly on the way Rousseau portrays the social contract. As early as the *Discourse on Inequality*, Rousseau had linked “the true foundations of the body politic”
and “the reciprocal rights of its members” (DOI 14). In the Contract, he says, “The engagements which bind us to the social body are obligatory only because they are mutual, and their nature is such that in fulfilling them we cannot work for others without also working for ourselves” (SC 28). Rights are similarly mutual. In entering into the compact, “each, in giving himself to all, gives himself to nobody; and . . . there is not one associate over whom we do not acquire the same rights which we concede to him over ourselves . . . ” (SC 14). This mutuality is one with the principle of equal rights and the right of all citizens to equality as such. The contract creates a will that is general, not only in being the product of the wills of all who constitute it, but in its content: “the general will, to be truly such, must be just in its object as in its essence.” Not only must it “proceed from all,” and “be applicable to all,” but the general will must legislate universally: “it loses its natural rectitude when it is directed to some individual and determinate object, because in that case . . . we have no true principle of equity to guide us” (SC 28–29).

This is to say that, rather than serving a selected interest, the general will must express a common interest, one in which individual interests are equally realized. For this to be actualized in practice, as it is where all are understood to have rights and accept the duty to respect them, requires that the citizens perceive the relation. “Equality of rights and the notion of justice that it produces,” Rousseau tells us, “derive from the preference that each gives himself.” This is possible only if each of us understands that, all being similarly motivated, for anyone to have rights, all must respect the rights of each, and each the rights of all.

The model of rights, for Rousseau, is legal rights. For instance, at the close of Book I of the Contract, he states that “the fundamental pact . . . substitutes a moral and legitimate equality for the physical inequality which nature imposed upon men, so that, although unequal in strength or talent, they all become equal by convention and legal right” (SC 22–23). And in the section on the law in Book II, he says, “in the civil state . . . all the rights are fixed by the law” (SC 34). This is important not only because he holds the law to be a decree of “the whole people,” but also because it “considers the subjects in a body and the actions as abstract, never a man as an individual nor a particular action” (SC
Morality is general and transcends individual difference. This is the import of his statement, quoted above, that the general will "loses its natural rectitude when it is directed to some individual and determinate object, because in that case . . . we have no true principle of equity to guide us" (SC 28–29).

Summarizing his reading of Rousseau's thesis, Mead says: "rights exist only in so far as they are acknowledged, and only to the extent that those who claim them acknowledge them in the person of others. No man can claim a right who does not at the same time affirm his own obligation to respect that right in all others." This principle expresses the form of the general will. Rights such as those of liberty, property, and equality must be respected as well as held by all the citizens because each is at once legislating to and obeying himself as well as all the others. Being legislated or, as Rousseau says, based on "conventions," rights cannot be innate; and embodying the mutuality of the contract, rights are common and mutual, not private, possessions. That is, Rousseau rejects the thesis of atomistic individualism as well; and even though he occasionally speaks of rights "against" others, he makes it clear that if it is a genuine right, both (or all) parties must have it and must respect it in one another. Thus, in the sense that he sees us to hold them jointly rather than at one another's expense, he is denying that rights are adversarial. And as features of political society and the compact on which it rests, in opposition to the theses of essentialism and rationalism, rights are neither entailed by human nature nor knowable by reason a priori.

JOHN STUART MILL

It is in Utilitarianism that Mill discusses the nature and ground of rights, which he introduces in order to show the difference between morality in general and justice. His approach is empirical. Utilizing the then current terminology of "perfect" and "imperfect" obligation, Mill holds the difference to be that "duties of perfect obligation are those duties in virtue of which a correlative right resides in some person or persons," whereas "duties of imperfect obligation are those moral obligations which do not give
birth to any right.” The former define the sphere of justice. He goes on to define a right as follows:

When we call anything a person’s right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law or by that of education and opinion. If he has what we consider a sufficient claim, on whatever account, to have something guaranteed to him by society, we say that he has a right to it [U 52].

Rights, here, are not necessarily legal rights but include what we call moral rights. But even those that are not codified, rather than being innate or grounded in human nature, are determined by human judgment, by “what we consider a sufficient claim, on whatever account” (U 52). On what grounds do we judge that the claim is sufficient? What determines its validity? “To have a right . . . is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask why it ought, I can give him no other reason than general utility” (U 52).

If this is so, then what is the peculiar utility of that which we take to be a right as compared with any other obligation? Mill turns to psychology for the answer. The question is, what are the constituents of “the sentiment of justice”—what we today call the sense of justice—and why is it stronger than moral feelings in general? The answer will tell us why we take the obligation to respect a right to be so strong, stronger than other moral obligations—in the older language, to be a perfect rather than an imperfect obligation, or, as some say today, why rights are “trumps.”

The sentiment of justice, Mill tells us, has three components. He states them in several ways, but essentially they are our need for security, the thirst for retaliation when we have been harmed, and the feeling of sympathy with others who have been harmed. It is the social sympathies that convert the personal interest in security and desire for vengeance into a moral concern. What we mean when we speak of “the violation of a right” is that an injustice has been done; and what we mean by this is that we feel that a specific wrong to a particular person demands punishment: “a hurt to some assignable person or persons, on the one hand, and a demand for punishment on the other. An examination of our
own minds, I think, will show that these two things include all that we mean when we speak of the violation of a right” (U 52).

The reason we feel this way, and the reason we take the wrong to be not merely a hurt but one that society should punish and protect us from, are that the wrong in question threatens “the most vital” of all our interests, the interest in security, something that “no human being can possibly do without.”

Our notion, therefore, of the claim we have on our fellow creatures to join in making safe for us the very groundwork of our existence gathers feelings around it so much more intense than those concerned in any of the more common cases of utility that the difference in degree (as is often the case in psychology) becomes a real difference in kind. . . . The feelings concerned are so powerful, and we count so positively on finding a responsive feeling in others (all being alike interested), that ought and should grow into must, and recognized indispensability becomes a moral necessity . . . [U 53].

Rights, then, while they are not inherent in or entailed by human nature as such, are products of empirically discoverable psychological tendencies, including the interest of all in protection by society. “Now this most indispensable of all necessaries, after physical nutriment”—that is, security—“cannot be had unless the machinery for providing it is kept uninterruptedly in active play” (U 53). Apart from society, individuals cannot have rights.

Mill rejects the essentialist thesis along with those of innateness and atomicity, and, as an empiricist, he finds the rationalist approach and assumptions to be totally foreign. Concerning the view that laws governing human behavior are “self-evident and self-justifying,” he says in the introductory section of On Liberty, “This all but universal illusion is one of the examples of the magical influence of custom, which is not only, as the proverb says, a second nature but is continually mistaken for the first.” Rather than discoveries of reason, rights are established by people because they are found, in experience, to be necessary prerequisites of social life: “. . . the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct toward the rest. This conduct consists, first, in not injuring the interests of one another, or rather certain interests which, either
by express legal provision or by tacit understanding, ought to be considered as rights. . . .”¹⁴

**THOMAS HILL GREEN**

Writing toward the end of the nineteenth century, T. H. Green emphatically rejected the classical concept of natural rights. “‘Natural right,’” he said, “as = right in a state of nature which is not a state of society, is a contradiction.”¹⁵ Nevertheless, he was not willing to limit rights to those that are enforced by law. “[T]here are no rights antecedent to society,” he insists (PPO 47),

but it does not follow from this that there is not a true and important sense in which natural rights and obligations exist—the same sense as that in which duties exist, though unfulfilled. There is a system of rights and obligations which should be maintained by law, whether it is so or not, and which may properly be called ‘natural’, not in the sense in which the term ‘natural’ would imply that such a system ever did exist or could exist independently of force exercised by society over individuals, but ‘natural’ because necessary to the end which it is the vocation of human society to realise [PPO 33–34].

The end to whose achievement Green sees rights to be necessary is the “fulfilment . . . of a moral capacity without which a man would not be a man” (PPO 47). But it is not the bare fact of having this capacity—its being an essential trait of human nature—that accounts for rights, that establishes their “naturalness.” Green thought of human nature, not as an essence exemplified by all humans, but as the ideal fulfillment of the potentialities that typify the species, an idea he derived from Aristotle and Hegel.¹⁶ The moral capacity justifies certain rights because those rights are prerequisites of its exercise.

The capacity . . . on the part of the individual of conceiving a good as the same for himself and others, and of being determined to action by that conception, is the foundation of rights; and rights are the condition of that capacity being realized. No right is justifiable or should be a right except on the ground that directly or indirectly it serves this purpose. Conversely . . . society should secure to the
individual every power, that is necessary for realising this capacity [PPO 47].

That is, the capacity for identifying one’s own interest or good with that of others is a necessary condition of rights, which are, in turn, a necessary condition for that capacity to be operative in society. But what is the sufficient condition for the existence of rights?

To exist, rights must be recognized: “rights are made by recognition.” They exist in the consciousness of those who are ready to determine their behavior by that consciousness, this readiness “resting on the recognition . . . of each other as determined, or capable of being determined, by the conception of a common good” (PPO 140–141). And, he continues, “There is no right but thinking makes it so—none that is not derived from some idea that men have about each other. Nothing is more real than a right, yet its existence is purely ideal, if by ‘ideal’ is meant that which is not dependent on anything material but has its being solely in consciousness” (PPO 141).

For rights to exist, then, is for people not only to conceive them, but also to understand them to serve a common good that each conceives as his own and that each therefore acts to promote. “The capacity to conceive a common good as one’s own and to regulate the exercise of one’s powers by reference to a good which others recognise, carries with it the consciousness that powers should be so exercised; which means that there should be rights, that powers should be regulated by mutual recognition” (PPO 45). And again: “There can be no right without a consciousness of common interest on the part of members of a society. Without this there might be certain powers on the part of individuals, but no recognition of these powers by others as powers of which they allow the exercise, nor any claim to such recognition; and without this recognition or claim to recognition there can be no right” (PPO 48). 17

In short, to will the end is to will the means, and to understand this is both to understand that certain rights, such as the right to “free life,” that is, liberty, and to “the instruments of such life,” that is, property, ought to exist and to justify that existence (PPO 216–217). Members of society who conceive “an ideal good” that
is the same for all of them will regard any power whose exercise is a means to that good “as one which should be exercised.” And “the free exercise of his powers is secured to each member through the recognition by each of the others as entitled to the same freedom with himself” (PPO 44). This is to say that freedom to exercise any of the powers in question is assured only if it is a right; and it is made a right by mutual entitlement. The atomistic conception of rights as properties of independent individuals, antecedent to membership in society, is ruled out. Not only are rights dependent on social recognition; but, rather than being asserted by individuals, adversarially, in opposition to one another or society, they are understood by Green, much as they are by Rousseau, to be mutually conferred by the members of a society upon one another, and the connotation of a general will is deliberate: “It is only as within a society, as a relation between its members, though the society be that of all men, that there can be such a thing as a right; and the right to free life rests on the common will of the society, in the sense that each member of the society within which the right subsists in seeking to satisfy himself contributes to satisfy the others, and that each is aware that the other does so; whence there results a common interest in the free play of the powers of all” (PPO 216).

Green is asserting that rights are and must be products not only of society, but of a self-conscious society: of persons cognizant of a common interest and of sharing this awareness, and therefore willing, as well as able, jointly to regulate their behavior. He firmly denies that rights can be innate in the sense of inborn or that of being traits of an essential, antecedently “given” human nature. They are “innate,” he says, only in the “Aristotelian” sense that they “arise out of, and are necessary for the fulfillment of, a moral capacity without which a man would not be a man” (PPO 47). This capacity, which is the capacity to determine oneself by what one understands to be a common good, is what enables humans to be moral beings. While he has been influenced by Kant, as well as by Hegel, Green is not saying that rights are dictated or directly entailed by moral nature as such. He is saying that because we are potentially moral beings, because we can understand that in order to realize our own ideal end we must realize that of society, we can see the necessity and the importance of
rights and are consequently capable of establishing and respecting them. Exercise of this moral capacity, therefore, is both means and end: it is a necessary means for the realization of a common good; and, being the fulfillment of a distinctive human capacity, an ideal end for each of us as well as for society as a whole. “The moral capacity implies a consciousness on the part of the subject of the capacity that its realisation is an end desirable in itself, and rights are the condition of realising it. Only through the possession of rights can the power of the individual freely to make a common good his own have reality given to it” (PPO 45).

The realization that the moral capacity is an end desirable in itself is a realization that, the common good being part of and a necessary condition of our own, individual good, exercise of this capacity is part of and serves our own interest. “There ought to be rights, because the moral personality—the capacity on the part of an individual for making a common good his own—ought to be developed; and it is developed through rights; i.e., through the recognition by members of a society of powers in each other contributory to a common good and the regulation of those powers by that recognition” (PPO 45).

The Hegelian strain in Green’s thinking is strong here. We are motivated by a conscious ideal of ourselves, one that is inseparable from an ideal of society. “[R]ights are derived from the possession of personality as = a rational will (or the capacity which man possesses of being determined to action by the conception of such a perfection of his being as involves the perfection of a society in which he lives) . . .” (PPO 46). However, I do not think Green’s theory of rights stands or falls with the assertion that we have a conception of the “perfection” of our being, an assertion I do not find to be verifiable. The existence of a “rational” or moral will, in the sense of one that is motivated by “a consciousness of common interest on the part of members of a society” (PPO 48), is sufficient to show that we can see rights as serving that interest and, therefore, serving our own. This perception serves as the ground for the mutual recognition of rights by those who, if Green, Mill, and Rousseau are correct, must be seen as jointly conferring them.

2. Rights attributed to governments, to the state or sovereign, are not, strictly speaking, rights of individuals, but, as in Hobbes, the sovereign is treated as an individual, even if it is an assembly, and governments are said to have rights over individuals.

3. George H. Sabine summarizes Locke's individualism as follows: "Instead of a law enjoining the common good of a society, Locke set up a body of innate, indefeasible, individual rights which limit the competence of the community and stand as bars to prevent interference with the liberty and property of private persons" (A History of Political Theory [New York: Henry Holt, 1950], p. 529).


6. The only natural form of society, as Rousseau sees it, is the family, and it endures only as long as the children's dependence upon their father (SC 4).


8. The only "operations of the human soul" that seem to be prior to reason Rousseau identifies as those underlying self-interest or self-love (which, in the notes, he distinguishes from egocentrism), and what we would call sympathy (which he distinguishes from an instinct of sociality).

9. "... and consequently," he continues, "from man's nature . . ." (SC 28). In the Discourse on Inequality, however, he makes it plain that when he talks of "human nature" he does not mean human nature as
we encounter it, fully developed, in society. (See previous note and the discussion of reason below.)

10. George Herbert Mead, * Movements of Thought in the Nineteenth Century*, ed. Merritt H. Moore (Chicago: The University of Chicago Press, 1936), p. 13. Mead seems to suggest that this principle underlies, rather than rests on, the authority of the general will. For reasons already stated, I disagree with this, as well as with his assertion that Rousseau found the basis for the institutions of society in “man’s rational nature.”


12. Mill has been construed here as sharing the assumption of the natural rights theorists that people have at least some rights that are not dependent on society. See, for example, Rex Martin, * A System of Rights* (Oxford: Clarendon Press, 1993), p. 51 and note 3. I believe the additional passages I shall quote indicate otherwise.


17. I do not find Sir David Ross’s criticism of Green on the issue of recognition to be well taken: “Now it is plainly wrong to describe either legal or moral rights as depending for their existence on their recognition, for to recognize a thing (in the sense in which ‘recognize’ is here used) is to recognize it as existing already” (The Right and the Good [Oxford: Clarendon Press, 1930]), appendix to Chapter 2; repr. in *Readings in Ethical Theory*, ed. Wilfrid Sellars and John Hospers [New York: Appleton-Century-Crofts, 1952], p. 199). The sense of “recognition” here is not that in which we recognize an identity we already knew. It is recognition in the sense of sanctioning, closer to the sense in which one who is chairing a meeting “recognizes” someone who wishes to speak,
authorizing that person to do so. For the members of society to “recognize” an action as a right is for them to “allow” its exercise, to authorize it. Ross also errs in attributing to Green the view that the existence of a right depends upon the recognition of the “power” in question in the one supposed to have that right—a distortion and oversimplification of Green’s claim that the human capacity for awareness of a common interest is a necessary condition of the social recognition of rights.